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A Central Source for Federal Forfeiture Information

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Civil Forfeiture Enforcement and the Concurrent Jurisdiction Doctrine

By Harry S. Harbin, Assistant Chief, AFMLS, Criminal Division

A frequently litigated issue in federal civil *in rem* forfeiture enforcement involves the "concurrent jurisdiction doctrine." The gist of this doctrine is that when two courts seek to assert *in rem* or *quasi in rem* jurisdiction over the same property, at the same time, in essentially the same kind of action, the court first asserting jurisdiction over the property has the power to decide the case free of interference

See ***Doctrine****, page 6*

Legislation: Forfeiture "Reform" is Coming

By Stefan D. Cassella, Assistant Chief, AFMLS, Criminal Division

Forfeiture "reform" legislation is back on the agenda for the 105th Congress. Representative Henry Hyde (R-Ill.), Chairman of the House Judiciary Committee, has introduced a bill—H.R. 1835—that would substantially revise the civil forfeiture laws in ways that would undoubtedly make civil forfeitures more difficult to accomplish.

As in the past, Representative Hyde proposes to put the burden of proof in civil forfeiture cases on the Government, and to make the standard of proof "clear and convincing evidence." He also proposes to give courts the authority to appoint counsel to represent claimants in civil forfeiture cases (with the funds to come out of the Assets Forfeiture Fund) and to allow claimants to recover the possession of the seized property pending trial to avoid a "hardship."

The earlier versions of this bill were sponsored by Representative Hyde alone. However, this year's version is being co-sponsored by a coalition of House Members. In addition to Representative Hyde, the co-sponsors include Representatives John Conyers, Jr. (D-Mich.), Barney Frank (D-Mass.) and Bob Barr (R-Ga.). The "Dear Colleague" letter that Representatives Hyde, Conyers, Barr and Frank circulated to other House Members and the highlights of their bill appear on pages 10-11.

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Message from the Chief . . . Spreading the "Good News" about Forfeiture

By Gerald E. McDowell, Chief, AFMLS, Criminal Division

Last month we asked Assistant United States Attorneys throughout the country to send us their most recent "good news" so that we could include them in our testimony when hearings are held on the Hyde forfeiture reform bill. The response was overwhelming. The following stories are just some of the highlights that we would like to share with you.

Marijuana Grower's Land Becomes Retreat for "Kids Escaping Drugs"

(*Western District of New York*)—Carmen Farbo used 24 acres of forested land near Chautauqua Lake in Western New York to grow marijuana. Farbo was convicted by state authorities and the property was civilly forfeited to the United States. In April 1997, the property was transferred to "Kids Escaping Drugs," an organization that treats children addicted to drugs and alcohol in the City of Buffalo. The rural property provides a setting to be used as both a retreat for children who are successful in the first phase of their treatment and as a location to conduct parent/child workshops. A grand opening of the facility is planned for June.

Crack House Transferred to Gospel Rescue Ministries

(*District of Columbia*)—The Fulton Hotel in northwest Washington, DC was being operated as a crack house by a secretive and ruthless network of drug dealers. In 1994, the hotel was civilly forfeited to the United States, and on March 7, 1997, it was transferred to Gospel Rescue Ministries, a non-profit organization, to use as a no-cost residence for women undergoing drug treatment at a nearby drug treatment center. The converted hotel will provide housing for 16 women at a time.

Restitution to Victims of $318 Million Bank Fraud

(*Eastern District of Virginia*)—An individual perpetrated a $318 million bank fraud against a number of banks in Richmond, Virginia and around the world. Posing as an employee of Philip Morris Companies, the individual obtained loans from the banks to conduct "secret research" on cigarettes. In reality, he used most of the money to play the stock market and to acquire expensive properties including a condominium at the Trump Tower in New York. When the scheme came to light in 1996, the Government used the asset forfeiture laws to freeze the assets before they could be transferred overseas. The $225 million that was recovered will be turned over to the victim banks.

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Articles in the *Asset Forfeiture News* are intended to assist federal prosecutors and agents in enforcing the forfeiture laws by providing guidance, information, and references. Unless otherwise stated, they represent the views of the individual authors, and not necessarily the Department of Justice. Nothing contained herein creates or confers any rights, privileges, or benefits for or on any claimant, defendant, or petitioner. *United States v. Caceres*, 440 U.S. 741 (1979).

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Walls of a Drug House Come Tumbling Down

(*Western District of New York*)—The U.S. Marshals Service recently completed the demolition of a forfeited drug house in the City of Buffalo under the Weed and Seed Initiative. The demolition rid the community of property that was the site of numerous kilo-weight cocaine sales and had become a dangerous menace. The entire neighborhood looked on as National Guard bulldozers crashed into the home, and broke into cheers and applause as the walls came tumbling down. The vacant land will be transferred to the city.

Land Annexed to Federal Wildlife Refuge

(*Eastern District of Michigan*)—The children of wealthy parents inherited a mansion and land that are located across the Saginaw River from a federal wildlife refuge. When they used the land to grow marihuana and distribute cocaine, it was forfeited to the United States. The refuge then bought the land and annexed it to the pre-existing refuge, resulting in a significant increase in the total acreage of the preserve and a significant enhancement in the habitat value of the refuge.

Telemarketer's Money Used to Pay Restitution to Elderly Victims

(*Western District of New York*)—Rocco Guadagna was the owner and operator of one of the largest fraudulent telemarketing companies in the country. Using the civil forfeiture laws, the Government seized the bank accounts that were used to defraud mostly elderly victims, and held the money until Guadagna was convicted. The money was then criminally forfeited. When the case is complete, nearly $256,000 will be available to the victims as restitution. If it were not for the civil forfeiture provisions at the early stages of the investigations, the monies would not have been available for restitution by the time the defendant was indicted and convicted.

Drug Dealer's Property Becomes "Safe House" for Victims of Domestic Violence

(*Eastern District of California*)—In the hamlet of Volcano, California, the United States forfeited a three-bedroom house and forested acreage that was the center of a large marijuana cultivation operation. The property was transferred to the Amador County Sheriff's Office to use as a "safe house" for victims of domestic violence.

Land Preserved as Open Space on the Housatonic River

(*District of Connecticut*)—A parcel of land in Sherman, Connecticut was slated for a multimillion dollar development by the corrupt Bank of Credit and Commerce International (BCCI). When BCCI was convicted of racketeering, the land was forfeited to the United States. After paying the back taxes on the land to the Town of Sherman, the U.S. Marshals Service is negotiating a sale of the property to a land preservation group that has pledged to preserve it as open space along the scenic Housatonic River.

Forfeited Radio Station will Become Drug Treatment Center in Tucson

(*District of Arizona*)—The United States Attorney in Tucson, Arizona convicted a father and son of laundering drug money through a radio station that they owned. The radio station was forfeited in October 1996, and transferred to the Gateway Foundation, a private, non-profit organization that provides alcoholism and drug treatment services to indigent adult and adolescent men and women. Gateway will use the forfeited radio station facility to house their administrative offices and provide out-patient, counseling and training services. Gateway handles about 2,000 individuals a year in their detoxification and short term residential services and moves successful clients to independent productivity in the Tucson community.

"The Champagne Lady" is Forfeited

(*District of South Carolina*)—A corrupt federal employee stole hundreds of thousands of dollars from a Treasury agency in North Carolina and laundered the money by buying a yacht called "The Champagne Lady" for his girlfriend in Myrtle Beach. Using the civil forfeiture laws, the Government forfeited the yacht from the girlfriend and will sell it to reimburse American taxpayers for the loss.

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Spreading the "Good News" about Forfeiture

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$600,000 Taken from Iranian Arms Dealer Thwarts Chemical Warfare Scheme

(*District of Oregon*)—Manfred Felber, an Iranian arms dealer, traveled to the United States to purchase equipment to be used in chemical warfare. The scheme was quashed when the Government used the asset forfeiture laws to seize $605,000 that Felber transferred from banks in Germany, Austria and Switzerland to the United States to buy chemical agent monitors.

Fraud Proceeds Used to Reimburse Victims in Denver

(*District of Colorado*)—Geoffrey Chris Clement ran a fraud scheme in which he convinced victims that for an "advance fee" he would obtain financing for large loans and make high yield, low risk investments on behalf of his customers. He then used the money to buy property in the Denver area. When Clement was convicted of wire fraud in February 1997, the property—worth approximately $340,000—was forfeited and sold, with the proceeds used to reimburse the victims.

The United States and Foreign Governments Use Civil Forfeiture to Fight International Money Laundering

(*Eastern District of Texas*)—Two and a half million dollars in drug proceeds were laundered for members of the Cali Cartel by converting the proceeds of cocaine street sales into money orders that were shipped to banks in the Cayman Islands. The money was then wire transferred to Panama, Mexico, Columbia, Germany and England. When the money in England was frozen by the British government, the United States filed a civil forfeiture action to forfeit it under U.S. law. Criminal forfeiture was not possible because the defendant who owned the drug proceeds resides in Cali, Columbia and could not be extradited to face trial. The money will be shared with the United Kingdom and the Cayman Islands to foster future cooperation in the fight against international drug trafficking and money laundering.

Gold Bars Unearthed in Mother's Backyard

(*District of Rhode Island*)—In 1993, international money launderer Stephen Saccoccia was sentenced to a 660-year prison term and ordered to forfeit $136.3 million in drug money, but only a fraction of the money was recovered. Four years later, in 1997, federal agents using the discovery powers in the asset forfeiture laws found 83 gold bars buried in Saccoccia's mother's backyard and seized them.

Forfeiture of Money Concealed from Bankruptcy Court Leads to Reimbursement of Victims

(*District of Oregon*)—Eric Randolph concealed at least $1 million of assets from a bankruptcy court by transferring the assets to overseas accounts in Switzerland. When the scheme was discovered, the Government used the forfeiture laws to force Randolph to repatriate $225,000, which will be turned over to a bankruptcy trustee and restored to the victims of the bankruptcy fraud.

Civil Forfeiture Rids Motel of Drug Dealers and Prostitutes in Wichita

(*District of Kansas*)—Motel owners in Wichita rented their rooms to prostitutes and drug dealers, charging a fee based on the amount of traffic in and out of each room. For an additional charge, the owners would call the rooms and warn the occupants when the police came into the parking lot, making it impossible for the police to enforce the law despite being called to the scene 600 times in a two-year period. Finally, the case was referred to the United States Attorney who filed a civil forfeiture action that put an end to the illegal activity.

$170,000 Returned to Elderly Victims of Telemarketing Fraud

(*Northern District of New York*)—More than $170,000 has been seized and forfeited and is in the process of

being returned to two hundred victims, mostly elderly, of a telemarketing fraud scheme. The victims were told that they had won a large cash prize, but that in order to collect, they had first to pay a fee (usually described as a tax). Some victims were convinced to dip into their retirement savings, while others were induced to take cash advances on high interest rate credit cards. No one received any "prize money." The money was recovered under the civil forfeiture laws.

Neighborhood "Block Watch" Leads to Forfeiture of Crack house

(*Eastern District of Washington*)— Neighbors involved in a Block Watch Program in Spokane, Washington, observed that a residence in a high crime area was being used for the sale of crack cocaine. One neighbor expressed her reluctance to let her children out of the house because of gunfire coming from the property. In October 1996, the information provided by the neighbors was used by the United States Attorney to obtain a civil forfeiture order to shut down the drug operation and take control of the property.

Tavern Used for Drug Trafficking on Indian Land Becomes a Youth Center

(*Eastern District of Washington*)—The Government initiated civil forfeiture proceedings against a tavern located on the Colville Tribal Reservation in Washington State. The tavern had long been known as a location for drug transactions, with the knowledge and consent of the owner. The tavern was forfeited in April 1997 and is in the process of being transferred to the Colville Confederated Tribes for use as a youth center, pursuant to the Weed and Seed Initiative.

Restraint of Forfeitable Assets Leads to Capture of Fugitive

(*Northern District of Ohio*)—Perry Kiraly was the leader of a ring that burglarized large discount stores, such as Home Depot, Lowes, Sam's Club and many others in six states, with losses in excess of $1.5 million. After the Federal Bureau of Investigation discovered his identity and involvement in the crimes, Kiraly became a fugitive, but his bank accounts were restrained under the forfeiture laws. Kiraly was captured when he attempted to obtain access to his money. Kiraly's funds were eventually forfeited in his criminal case and the money was used to compensate the victims of his crimes.

Forfeiture Used to Recover Proceeds of Medicaid Fraud Scheme

(*District of New Jersey*)— A New Jersey pharmacist defrauded the Medicaid program by fraudulently obtaining Medicaid numbers and prescription slips, and then falsely billing federal and state medical assistance programs for prescription items that were never dispensed. Using the forfeiture procedures available in money laundering cases, the Government recovered $4.5 million in fraud proceeds that had been laundered through various bank and investment accounts.

Civil Forfeiture Used to Recover Proceeds of Medicaid Fraud from Fugitive Doctor

(*Western District of Louisiana*)—After being charged with Medicaid fraud, a psychiatrist in Lafayette, Louisiana, whose practice consisted almost entirely of Medicaid patients, wire transferred over $900,000 in fraud proceeds to a bank account in Amsterdam and fled to Iran, his native country. The psychiatrist remains a fugitive, but using the civil forfeiture laws, the Government recovered the fraud proceeds, including the funds in the Amsterdam account.

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from the other court. The seminal case in articulating this doctrine is *Penn General Casualty Co. v. Pennsylvania,* 294 U.S. 189, 195-96 (1935). The doctrine rests on principles of comity between state and federal courts—to avoid "unseemly and disastrous conflicts in the administration of our dual judicial system" and "to protect the judicial processes of the court first assuming jurisdiction."[1] The doctrine comes into play in the enforcement of federal civil forfeiture statutes because of the practice of "adoptive" forfeitures (*i.e.,* the "adoption" by a federal law enforcement agency of property seized by state or local law enforcement agents for the purpose of forfeiting the property pursuant to federal law).

The most common scenario for application of the doctrine involves property that has been subject to a forfeiture action under state law or that was seized pursuant to procedures contemplating forfeiture of the property pursuant to state law.[2] Dismissal of the state *in rem* or *quasi in rem* forfeiture action does not necessarily terminate the state court's jurisdiction where orders entered by the state court remain uncomplied with.[3] State statutes and procedural rules may be read as requiring that state or local authorities obtain a "turn-over" order from the state court before transferring seized property subject to such jurisdiction to a federal agency for purposes of forfeiture.[4] The state law in effect at the time the transfer is made is deemed to govern the propriety of the transfer.[5] Property seized for *purely evidentiary* purposes may be subject to adoption so long as it was not seized pursuant to state procedures governing the *in rem* or *quasi in rem* forfeiture of property.[6] Finally, property may freely be transferable from state to federal officials in the absence of a positive bar to such transfers in the state forfeiture statutes.[7]

The majority view is that mere seizure pursuant to a state or local warrant does not subject the property to the in rem jurisdiction of the state court.

Courts are split on whether the seizure of property by state and local authorities acting pursuant to a search warrant issued by a state or local judge of magistrate is alone sufficient to vest the state court with *in rem* or *quasi in rem* jurisdiction over the property. One federal circuit and a few district courts have held that it is, but the majority view is that mere seizure pursuant to a state or local warrant does not subject the property to the *in rem* jurisdiction of the state court.[8] So too, the majority rule appears to be that the filing of a motion in state court for return of the property seized pursuant to a state search warrant does not confer *in rem* jurisdiction upon the state court in which the motion is pending at least where the federal "adoption" predates the filing of the motion in state court.[9] Moreover, two federal district courts have suggested or held that the federal "adoption" *relates back* to the date of the seizure of the property by state and local law enforcement authorities and that federal *in rem* jurisdiction vested at the time of such seizure, thus rendering an order of the state court directing return of the property of no consequence even though the order predated the taking of custody over the property by the U.S. Marshals Service.[10]

The threshold issues to be resolved in any challenge to the exercise of federal *in rem* jurisdiction under the "concurrent jurisdiction doctrine" are whether *in rem* or *quasi in rem* jurisdiction has vested in the state or local courts and, if so, whether such jurisdiction vested prior to the assumption of federal jurisdiction over the property. The issue of whether a state or local court action concerning seized property confers *in rem* or *quasi in rem* jurisdiction over the property is one of state law.[11] However, where the jurisdictional issue has not been resolved by the state's highest court, it falls to the federal court, giving proper regard to any decisions of the state lower courts on point, to decide the state law issue as it believes the highest state court would decide it.[12] A court may raise the issue of jurisdiction on its own motion.[13]

The Supreme Court has noted that "[w]here the assertion of jurisdiction by the two courts is nearly simultaneous, it becomes important . . . to determine the precise time when the jurisdiction attaches."[14] If the two proceedings have substantially the same purpose and jurisdiction is concurrent, the Court has suggested that the filing of the bill of complaint in court is the time when jurisdiction attaches, at least where process issues in due course.[15] On the other hand, if the two suits do not have substantially the same purpose, the Court suggests that the time of acquiring actual possession "may perhaps be the decisive factor."[16]

In cases where the state or local court is found to have *in rem* or *quasi in rem* jurisdiction over the property at issue prior to the assertion of federal *in rem* jurisdiction, a number of options remain open to the Government. For one thing, the Government may seek a "turn-over" order from the state court relinquishing the property to federal court jurisdiction[17] or for an order dismissing the state forfeiture proceeding in favor of a federal proceeding.[18] If such an order is denied, the Government may wait for the state court to relinquish its jurisdiction over the property[19] and obtain an "anticipatory seizure warrant" to allow the Marshal to seize the property at that time.[20] One federal court has held that dismissal of the federal forfeiture action is not required and that the federal court, although "second in time," may proceed to judgment, assert a lien that will result in seizure of the asset only upon release of the asset from state jurisdiction, and but stay execution of the judgment until such time as federal jurisdiction has been perfected.[21] Finally, the federal authorities can simply wait until after the property has been returned by the state court to the person from whom it was seized, and then seize it anew pursuant to federal process.[22] In task force cases involving joint action by state/local and federal law enforcement authorities, any issue of concurrent jurisdiction may be entirely avoided through the simple expedient of using a federal search or seizure warrant and otherwise avoiding the commencement of a state *in rem* civil forfeiture action.

Federal authorities can simply wait until after the property has been returned by the state court to the person from whom it was seized, and then seize it anew pursuant to federal process.

Finally, it should be noted that courts have rejected an effort to impose civil liability on federal and state law enforcement agents because of an allegedly improper transfer of the property in an "adoptive" forfeiture.[23]

Endnotes

[1] *Penn General Casualty Co. v. Pennsylvania*, 294 U.S. at 195.

[2] *See, e.g., Madewell v. Downs*, 68 F.3d 1030 (8th Cir. 1995) ("only a state forfeiture action or comparable *in rem* proceeding for disposition of the property will preclude federal forfeiture jurisdiction"); *United States v. One 1979 Chevrolet C-20 Van*, 924 F.2d 120, 121-22 (7th Cir. 1991) (property seized pursuant to procedures contemplating forfeiture under state law, and requiring state court order prior to disposition thereof by state authorities, rests within the *in rem* jurisdiction of the state courts; although federal administrative forfeiture procedures were instituted prior to the filing of forfeiture complaint in state court, property remained under state court jurisdiction unless and until a "turn-over order" was obtained from state court or the state court's jurisdiction over the property was terminated); *United States v. One 1985 Cadillac Seville*, 866 F.2d 1142, 1144-45 (9th Cir. 1989) (currency subject to state *in rem* forfeiture proceeding at time of seizure by federal agency; federal court precluded from exercising *in rem* jurisdiction over the currency); *United States v. $79,123.49 in United States Cash and Currency*, 830 F.2d 94, 95-96 (7th Cir. 1987) (state forfeiture action dismissed and property ordered returned but this order had been stayed at the time the federal agency "adopted" the forfeiture; hence, property remained subject to *in rem* jurisdiction of state court). *See also United States v. One Parcel of Property Located at Lot 85*, 100 F.3d 740, 742-43 (10th Cir. 1996) (federal court properly exercised *in rem* jurisdiction over property where property was seized by federal authorities four days after state court action against property was dismissed); *United States v. Certain Real Property 566 Hendrickson Boulevard*, 986 F.2d 990, 993-95 (6th Cir. 1993) (although claimant received notice of seizure and intent to forfeit from state agency which seized property, this notice did not "commence" an *in rem* forfeiture in

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state court and no forfeiture complaint was ever filed in the state courts; hence, federal court was free to exercise *in rem* jurisdiction over the property); *United States v. Twelve Thousand, Three Hundred Ninety Dollars ($12,390.00)*, 956 F.2d 801, 805-06 (8th Cir. 1992) (federal court free to act where property had been seized pursuant to state search warrant but no state forfeiture action had been commenced prior to institution of federal administrative forfeiture procedures; post-"adoption" issuance of order to return property by state court did not adversely affect federal court jurisdiction since state court no longer had custody of property); *United States v. One 1986 Chevrolet Van*, 927 F.2d 39, 44-45 (1st Cir. 1991) (federal court free to exercise *in rem* jurisdiction where the only related proceeding in state court was the *in personam* criminal prosecution of the claimant; neither the fact that property had been seized pursuant to state warrant nor that motion for return of property had been filed in state court following federal "adoption" and seizure of property adversely affected federal *in rem* jurisdiction); *United States v. Winston-Salem/Forsyth County Board of Education*, 902 F.2d 267, 270-71 (4th Cir. 1990) (federal court free to exercise *in rem* jurisdiction where state forfeiture statute in question involved a criminal *in personam* proceeding).

[3] *United States v. $270,000, in United States Currency, Plus Interest*, 1 F.3d 1146, 1147-49 (11th Cir. 1993) (state court retained jurisdiction where appeal of order suppressing evidence and dismissing state forfeiture action was voluntarily dismissed but state court had not directed final disposition of property); *United States v. $22,155.00, More or Less, in United States Currency*, 821 F. Supp. 424 (S.D.W.Va. 1993) (state court retained jurisdiction where its dismissal order included directive to return currency to owner and this directive remained uncomplied with).

[4] *See, e.g., One 1979 Chevrolet C-20 Van*, 924 F.2d at 122-23.

[5] Hence, where a transfer has been made in violation of state law requiring a "turn-over" order, the transfer will be deemed invalid notwithstanding a later amendment to the state law permitting transfers without a "turn-over" order. *See United States v. One 1987 Mercedes Roadster 560 SEC*, 2 F.3d 241, 244 (7th Cir. 1993). Conversely, where a transfer was lawfully made under state law as it existed at the time the transfer was made and the state law is later amended to impose procedural prerequisites on such transfers (*e.g.*, obtaining a "turn-over" order), the transfer will be deemed proper nothwithstanding the "failure" to comply with the later-enacted procedural prerequisites. *See Madewell v. Downs*, 68 F.3d at 1043.

[6] *See United States v. $135,290 U.S. Currency*, 767 F. Supp. 1459, 1459-60 (N.D. Ill. 1991).

[7] *United States v. $119,000 in U.S. Currency*, 793 F. Supp. 246, 250 (D. Haw. 1992).

[8] *Compare Scarabin v. Drug Enforcement Administration*, 966 F.2d 989, 993-94 (5th Cir. 1992) (finding that property seized pursuant to search warrant issued under Louisiana law is subject to *in rem* jurisdiction of state court which issued warrant); *United States v. $490,920 in United States Currency*, 911 F. Supp. 720, 725-27 (S.D.N.Y. 1996) (interpreting New York state law); *United States v. One 1985 Porsche 944*, 775 F. Supp. 1573, 1573-74 (N.D. Ill. 1991) (same with respect to an apparently *warrantless* seizure by local police officers under Illinois law) *with Madewell v. Downs*, 68 F.3d at 1042; *Certain Real Property 566 Hendrickson Boulevard*, 986 F.2d at 994-95; *One 1986 Chevrolet Van*, 927 F.2d at 45; *United States v. $639,470.00 U.S. Currency*, 919 F. Supp. 1405, 1411-12 (C.D. Cal. 1996); *United States v. $135,290 U.S. Currency*, 767 F. Supp. at 1460. 1991) (seizure of property pursuant to state search warrant does not confer *in rem* jurisdiction on issuing court).

[9] *See Madewell v. Downs*, 68 F.3rd at 1043-44 (motion for return of property in state court does not divest federal jurisdiction); *One 1986 Chevrolet Van*, 927 F.2d at 45 (motion filed one month after claimant notified that van had been seized for federal forfeiture); *$119,000 in U.S. Currency*, 793 F. Supp. at 250 (motion for return of property under state law was an in personam proceeding and, in any event, motion was filed subsequent to the placement of property in custody of federal agency); *United States v. Certain Real Property Known as Lot B*, 755 F. Supp. 487, 490 (D.N.H. 1990) (state court proceedings, including order directing return of property to claimant, were in nature of in personam proceedings). *Contra United States v. $2,542 in U.S. Currency*, 754 F. Supp. 378, 379-83 (D. Vt. 1990) (motion for return of seized property commenced *quasi in rem* action in state court and federal agency, which took custody of the property after motion was filed in state court, precluded from exercising *in rem* jurisdiction over property).

[10] *See $119,000 in U.S. Currency*, 793 F. Supp. at 249; *Certain Real Property Known as Lot B*, 755 F. Supp. at 490; *United States v. Alston*, 717 F. Supp. 378, 380-81 (M.D.N.C. 1989), *aff'd sub nom. United States v. Winston-Salem/Forsyth County Board of Education*, 902 F.2d 267

(4th Cir. 1990). *But see $2,542 in U.S. Currency*, 754 F. Supp. at 383 (distinguishing *Certain Real Property Known as Lot B* as grounded on conclusion that state proceedings were *in personam* in nature).

[11] *See $2,452 in U.S. Currency*, 754 F. Supp. at 382 (citing *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 561 (1983)).

[12] *See $2542 in U.S. Currency*, 754 F. Supp. at 382-83 (citing *Commissioner v. Bosch*, 387 U.S. 456, 465 (1967)).

[13] *See Certain Real Property 566 Hendrickson Boulevard*, 986 F.2d at 993; *One 1985 Cadillac Seville*, 866 F.2d at 1145.

[14] *Penn General Casualty Co. v. Pennsylvania,* 294 U.S. at 196.

[15] *Id.*

[16] *Id.*

[17] *See One 1987 Mercedes Benz Roadster 560 SEC*, 2 F.3d at 243 and 245; *One 1979 Chevrolet C-20 Van*, 924 F.2d at 123; *$79,123.49 in Cash and Currency*, 830 F.2d at 98-99; *One 1985 Porsche 944*, 775 F. Supp. at 1573.

[18] *One Parcel Property Located at Lot 85*, 100 F.3d at 742-43.

[19] *See United States v. $490,920 in United States Currency*, 937 F. Supp. 249, 252-53 (S.D.N.Y. 1996).

[20] *See $490,920 in United States Currency*, 911 F. Supp. at 731-32.

[21] *United States v. $3,000,000 Obligation of Qatar National Bank*, 810 F. Supp. 116, 117-19 (S.D.N.Y. 1993). Another court, however, has opined that this rule is limited to cases in which the Government has not demonstrated "intentional" disregard of a state court order regarding possession and custody of the property. *$490,920 in United States Currency,* 911 F. Supp. at 731.

The opinion in *$3,000,000 Obligation of Qatar National Bank* seems entirely consistent with the Supreme Court's holding in *Penn General Casualty Co.* that the exclusive jurisdiction of the first-in-time court is exclusive "only so far as its exercise is necessary for the appropriate control and disposition of the property" and that the "other court does not thereby lose its power to make orders which do not conflict with the authority of the court having jurisdiction over the control and disposition of the property."

[22] *See United States (Drug Enforcement Administration) v. In re One 1987 Jeep Wrangler*, 972 F.2d 472, 477-78 (2d Cir. 1992); *$79,123.49 in United States Cash and Currency*, 830 F.2d at 99 (noting that nothing prevents reinstitution of federal forfeiture proceedings once the state action involving the same *res* has terminated).

[23] *See, e.g., Madewell v. Downs*, 68 F.3d at 1037-45.

People and Places . . .

. . . INS Welcomes Sue Czerwinski

The Immigration and Naturalization Service's (INS') Office of Asset Forfeiture is expanding its role and responsibilities in response to the increased authority to seize and forfeit property that resulted from several major legislative initiatives last year. INS was fortunate recently in attracting and hiring an experienced professional from another agency to help manage the foreseeable growth of the asset forfeiture program. On April 14, 1997, Susan T. Czerwinski came on board as the asset forfeiture program specialist reporting to the director.

Prior to joining INS, Ms. Czerwinski was the program manager for the asset forfeiture program at the U.S. Secret Service. She held that position for five years and was responsible for program operations, compliance and quality control, funding issues, and property disposition. Employed by the U.S. Secret Service for thirteen years, she initially worked in its Financial Management Division, where she worked with the Office of Protective Operations before moving to the Office of Investigations in 1991 to help develop its asset forfeiture program.

Under Ms. Czerwinski's leadership, the number of U.S. Secret Service seizures more than doubled from 1992 to 1995. In 1996, the U.S. Secret Service increased its deposits to the Treasury Forfeiture Fund by 62 percent while expenses reimbursed from the fund decreased by 25 percent. Ms. Czerwinski has received numerous awards in recognition of her contributions to the asset forfeiture program of the U.S. Secret Service. She was also recognized by the Secretary of the Treasury for her sustained superior performance. She is highly respected in the federal forfeiture community for her contributions to the forfeiture program of the Department of the Treasury and will play an important part in the expanding forfeiture program of INS.

Ms. Czerwinski joins INS at an opportune time. She will be able to lend her knowledge and experience to establishing a strategic plan for INS, which is being developed to ensure consideration of the asset forfeiture potential in every investigation of alien smuggling, document or immigration fraud, or worksite enforcement, where applicable under the law. In her new position, Ms. Czerwinski will be responsible for overseeing the development of a new asset forfeiture policy and procedures manual, promoting maximum utilization of INS' new statutory authorities, and conducting appropriate analyses to determine the fixture needs of the program. INS is fortunate to have such an experienced and dedicated professional join the team in the Office of Asset Forfeiture and welcomes her into the INS family.

Legislation: Forfeiture "Reform" is Coming

***Legislation**, from page 1*

U.S. House of Representatives

Committee on the Judiciary

One Hundred Fifth Congress

CO-SPONSOR BI-PARTISAN ASSET FORFEITURE REFORM

Dear Colleague:

Over the last decade, our two-century old civil asset forfeiture laws have been recruited in the war against crime. The Federal Government is taking in hundreds of millions of dollars a year in proceeds from cash and property used in criminal activities. Unfortunately, it has become all too apparent in recent years that these civil asset forfeiture laws are sometimes being used in terribly unjust ways depriving innocent citizens of their property without basic due process. Believe it or not, federal officials have the power to seize your home, your car, your business and your bank account -- all without indictment, hearing or trial.

Imagine this. You make the mistake of buying an airplane ticket with cash -- behavior that is deemed to fit a drug courier profile -- so you are detained and searched. No drugs are found, but the agents seize the cash in your wallet, saying they have "probable cause" to believe that the money was intended to buy drugs. You are allowed to leave and not charged with any crime, but the agents keep your property.

What recourse do you have to get your property back? Very little, because the law treats the property, rather than you, as the offending object. None of the Constitutional or procedural safeguards of the criminal law are available, because you are not being threatened with a deprivation of liberty. In fact, the law doesn't require that you ever be charged with a crime. Instead of the Government having to prove that it had "probable cause" to believe that your seized property was being used in connection with a crime, it is up to you to prove that it did not. Your only other hope is to prove that your property was "innocent" of its alleged connection with a crime. But the alleged criminal conduct needn't even involve you -- it could just as easily be a crime allegedly committed by the previous owner of your property, or by someone who, unbeknownst to you, is using your property in a criminal endeavor.

And if this weren't bad enough, you must provide a 10% bond for the privilege of even contesting the Government's seizure. Don't expect to have an attorney provided to help you if you are indigent, but familiarize yourself with legal procedure quickly -- you only have 10 days to file your claim. Even assuming you somehow prevail, the Government is not liable for any interest on your money, or in the case of seized property, any damage caused by its handling or storage.

As unbelievable as this all seems, this is now the law! And with the Government's interest in increasing available funds, there is little incentive for law enforcement officials to refrain voluntarily from vigorously exploiting this tool. It is incumbent on the Congress to reform the system, to make it consistent with the basic presumption in American law -- that you are innocent until proven guilty, and that you should not lose your property without due process of law.

To this end, we will soon be introducing the "Civil Asset Forfeiture Reform Act." It puts the burden of proof back where it belongs -- on the Government. And it requires the Government to prove its case by clear and convincing evidence. It also provides indigent defendants with appointed counsel, allows property owners who take reasonable steps to prevent others from using their property in criminal activity to get their property back, eliminates the cost bond requirement, provides compensation for damage caused to the property, extends the time for filing of a claim and sets a time certain for the Government to commence a judicial proceeding.

Civil asset forfeiture reform is supported by the National Association of Criminal Defense Lawyers, the Institute for Justice and the American Civil Liberties Union. If you would like to be a co-sponsor, or if you would like more information, please call Judiciary Committee counsel Diana Schacht at extension 53951.

/signed/

HENRY J. HYDE
Chairman, Judiciary Committee

/signed/

BOB BARR
Member, Judiciary Committee

/signed/

JOHN CONYERS, JR.
Ranking Member, Judiciary Committee

/signed/

BARNEY FRANK
Ranking Member, Subcommittee on Courts and Intellectual Property

Highlights of the Hyde Bill, H.R. 1835

The summary of the Hyde bill, circulated with the "Dear Colleague" letter, emphasizes the following issues:

- notice of an administrative forfeiture would have to be sent within 60 days of seizure, or within 60 days of the date the seizing agency became aware of the identity of an interested party;
- if the Government fails to provide written notice to "a person entitled" to such notice, the court would be required to "void the seizure";
- the claimant would be required to file a claim within 30 days of the receipt of actual notice, and would have to set forth the nature and extent of his interest in the property;
- no cost bond would be required; 19 U.S.C. § 1608 would be repealed;
- the United States Attorney would have 90 days from the filing of the claim to initiate a judicial forfeiture action, unless the time was extended for "good cause";
- the court could appoint counsel to represent any person filing a claim, if the claimant is "financially unable to obtain representation by counsel"; the cost of counsel would be paid out of the Assets Forfeiture Fund;
- the burden of proof would be on the Government by "clear and convincing evidence";
- there would be a uniform innocent owner defense without any bona fide purchaser requirement, thus allowing spouses, heirs and donees to file claims; and
- claimant could recover the use of his property pending trial to avoid a "substantial hardship."

Forfeiture Act of 1997

Meanwhile, on May 22, 1997, Representative Charles E. Schumer (D-N.Y.) introduced the Forfeiture Act of 1997, a pro-law enforcement forfeiture bill drafted by the Department of Justice in consultation with the Department of the Treasury and

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Legislation, from page 11

state and local law enforcement agencies. The bill number is H.R. 1745. This bill, like previous versions, is a comprehensive package of revisions to the civil and criminal forfeiture laws that addresses due process concerns with civil forfeiture, expands criminal forfeiture and regularizes the procedures, and makes the proceeds of all federal crimes subject to forfeiture.

The letter transmitting the Department of Justice's bill is reprinted below. Copies of the bill and the legislative analysis are available on the Asset Forfeiture Bulletin Board, from the Asset Forfeiture and Money Laundering Section, and at the Library of Congress' Internet web site (http://thomas.loc.gov/).

Department of Justice's Asset Forfeiture Bill

The Honorable Newt Gingrich
Speaker
United States House of Representatives
Washington, D.C. 20515

Dear Mr. Speaker:

Enclosed herewith is a draft bill entitled the Forfeiture Act of 1997 that contains comprehensive legislative proposals to improve the asset forfeiture program. It is the product of a four-year effort of state and federal law enforcement, working in conjunction with representatives of the organized bar, to address the concerns of all parties regarding the asset forfeiture laws.

The bill is designed to improve procedures to ensure fairness and due process to property owners, resolve inconsistencies and ambiguities that have developed in forfeiture law, and expand the forfeiture laws to cover additional categories of criminal activity. In addition, Title V of the bill focuses specifically on criminal forfeiture and is designed to enhance the ability of federal prosecutors to make greater use of this important tool as an alternative to civil forfeiture in appropriate cases.

Civil Forfeiture Reform

To enhance the due process protections of property owners, the Act would:

- enact a uniform innocent owner defense applicable to all civil forfeitures;
- place the burden of proof on the Government to prove, by a preponderance of the admissible evidence, that property is subject to forfeiture;
- give property owners additional time to file claims to seized property; and
- provide a remedy under the Tort Claims Act for property owners whose property has been damaged or destroyed while in government custody.

Uniformity and Simplicity

To simplify forfeiture procedures and make them as uniform as possible, the Act would:

- codify a single set of civil forfeiture procedures to govern motions practice, jury trials, and post-trial issues;
- create a single procedure for challenging administrative forfeiture actions in district court; and

- include uniform definitions of such frequently used terms as "owner" and "proceeds."

Forfeiture as a Law Enforcement Tool

To enhance the use of forfeiture as a law enforcement tool, the Act would:

- provide for the forfeiture of the proceeds of all federal crimes in the Criminal Code, as well as the proceeds of certain foreign crimes if the proceeds are found in the United States;
- authorize the Attorney General to restore forfeited proceeds to the victims of the criminal offense;
- authorize the forfeiture of the instrumentalities of crimes of violence and terrorism, as well as certain sophisticated offenses such as computer fraud, telemarketing fraud and counterfeiting.

Criminal Forfeiture Procedures

Criminal forfeiture is a relatively new concept in American law. Outside of RICO cases, it was unknown until 1984, and little used until the 1990's. Instead, most forfeitures were done as civil forfeitures. In fact, the overwhelming number of forfeiture statutes still authorize only civil forfeiture.

Since 1994, federal prosecutors have attempted to make greater use of criminal forfeiture, and such forfeitures now make up the majority of contested forfeiture cases. There are numerous obstacles, however, that have prevented prosecutors from realizing the full potential of criminal forfeiture.

Some of these obstacles are inherent in the nature of criminal forfeiture. Forfeiture in a criminal case is part of the defendant's sentence; hence, only the defendant's property may be forfeited. If the defendant uses a third party's property to commit an offense, the property cannot be forfeited criminally even if the third party was aware of, and consented to, the illegal use of his property. For that situation and others, civil forfeiture remains the only vehicle.

But other problems with the criminal forfeiture statutes can be remedied through legislation that addresses the problems that have been discovered as criminal forfeiture becomes more widely used. Title V of the Forfeiture Act of 1997 is intended to address these problems and thereby facilitate greater use of the criminal forfeiture statutes.

In particular, the Act would do the following:

- make criminal forfeiture available in all cases where civil forfeiture is already authorized;
- enact uniform procedures for criminal forfeiture to replace the inconsistent procedural statutes now in effect;
- authorize the pre-trial restraint of any assets subject to forfeiture to insure their availability at the end of the trial;
- clarify the rights of third parties to challenge criminal forfeiture orders;
- enhance the Government's ability to enforce criminal forfeiture judgments by adopting the procedures used to enforce restitution orders;
- give the courts clear authority to order the defendant to repatriate assets that have been placed abroad;
- create a procedure to allow the Government to recover forfeitable property transferred by the defendant to third parties who are not innocent, bona fide purchasers;
- clarify the ability of the Government to make property subject to forfeiture available for victim restitution.

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The purpose of this draft bill is to strengthen and improve the structure and operation of the Nation's asset forfeiture laws. It is not intended to be a revenue raising measure. The Omnibus Budget Reconciliation Act (OBRA) requires that all revenue and direct spending legislation meet a pay-as-you-go requirement. That is, no bill should result in an increase in the deficit, and if it does, it will trigger a sequester if it is not fully offset. In FY98, these forfeiture proposals would increase receipts by $31 million and direct spending by $29 million. The net effect would be to reduce the deficit by approximately $2 million. Considered alone, they meet the pay-as-you-go requirement of OBRA.

With respect to potential impacts on the criminal justice system, all of the criminal sanctions addressed by this legislation are economic in nature. It does not impose any new penalties involving incarceration, nor does it create any new offenses for which incarceration may be imposed.

It would be appreciated if you would lay this draft bill before the House of Representatives. An identical proposal has been transmitted to the President of the Senate.

The Office of Management and Budget has advised that there is no objection to the presentation of this proposal to the Congress from the standpoint of the Administration's program.

Sincerely,

/signed/

Andrew Fois
Assistant Attorney General

Government's Oral Testimony—June 11, 1997

On June 11, 1997, the House Judiciary Committee held a hearing on the Hyde bill. Four "victims" of forfeiture testified regarding the ways in which their rights had been abused by the Federal Government. Upon hearing the "victims" stories, most of the Members of the Committee in attendance pledged to support the Hyde bill. The Government's testimony in response is printed below.

Federal Government's Oral Testimony to the House Judiciary Committee on June 11, 1997

Thank you, Mr. Chairman.

Last year, when I appeared before the Committee, I talked about how forfeiture lets us take the profit out of crime, provide funding for the police, and restore property to crime victims. In our written testimony today, we list several pages of cases where we've used forfeiture to do good things for good people—cases where we turned a drug dealer's property into a shelter for battered women or a retreat for kids in drug rehab or

recovered property in telemarketing scams and returned it to elderly victims.

"We are proud of what we've accomplished in these and thousands of other cases. I say most emphatically. This is a program that works.

"It's true that forfeiture has been controversial. When you take laws designed to forfeit pirate ships and use them to forfeit houses, cars, businesses and bank accounts, there are a lot of things to sort out.

"How do we protect innocent owners?

"What procedures afford due process?

"When does forfeiture go too far or take too much?

"The federal courts have begun to answer those questions. There have been ten forfeiture cases in the Supreme Court in the past five years—an extraordinary amount of attention for one subject. But we have done our part too—by tightening regulations and guidelines, and training prosecutors and agents. Today, half of all contested cases are criminal forfeitures, and 80 percent of all forfeitures occur in conjunction with an arrest or prosecution.

"Indeed, some would say that the courts have gone too far in limiting forfeiture. There has been a 40 percent drop in forfeiture activity since 1994, and there was a $53 million decrease (that's 25 percent) in the amount of money distributed to local police last year. We need to remember this as we decide what further reforms are needed.

"Which brings me to H.R. 1835. I said last year that no matter how effective asset forfeiture may be as a law enforcement tool—and this is a very effective law enforcement program—"no program, no tool of law enforcement, however effective at fighting crime, can survive for long if the public thinks that it violates the basic principles of fairness and due process that lie at the core of the American system of justice." And so we have supported, and continue to support, reasonable changes to the forfeiture laws to guarantee that the laws are fair and are perceived as fair.

"I said before and say again that the burden of proof in forfeiture cases should be on the Government, that there should be a uniform innocent owner defense, that the time limits for filing claims should be extended to insure that everyone has his day in court, and that there should be relief for those whose property is damaged while in government custody.

"Both H.R. 1835 and H.R. 1745, the bill we drafted and Congressman Schumer introduced, address these issues. [In fact, Mr. Chairman, I would like to include our section-by-section analysis of the Schumer bill in the record, if I could.]

"But there are things in H.R. 1835 that cross the line between guaranteeing due process and giving unintended relief to drug dealers and other criminals. Let me give a few examples.

"H.R. 1835 contains an innocent owner defense. That's good. A person who does not know that her property is being used illegally, or who becomes aware of the illegal use but takes all reasonable steps to try to stop it, should be protected. But the bill also would allow criminals to protect their property from forfeiture by giving it to their wives, children and girlfriends.

"A drug dealer could take the money he made from selling cocaine and use it to set up a college fund for his children. A telemarketer could use the life savings he stole from an elderly widow to buy jewelry for his girlfriend. And if those people were innocent, they'd be allowed to keep the property and the victims would get nothing.

"We understand that criminals have families, as I heard someone say once, "even pornographers have kids to feed." But a drug dealer should not be allowed to send his kids to Harvard with the money he raised selling cocaine on the schoolyard. A con artist should not be allowed to shower his girlfriend with gifts purchased

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with the victim's money. The *victims* of crime should have priority in the recovery of property, not the families and friends of the criminals.

"We have many other problems with the bill, but let me name two. The bill would allow seized property to be returned to criminals pending trial to avoid a "hardship." There are instances, of course, where a truly innocent person's property is held pending trial—undoubtedly to the inconvenience of the claimant. But in thousands of cases every year, property—like cars, airplanes and cash—is seized from drug dealers, gamblers and money launderers. You can't give a pile of cash back to a drug courier just because he claims some "hardship" will befall him. The money will disappear. The same is true for his car, boat or airplane.

"And think about the impact of this provision on the Southwest Border. The INS seizes 19,000 vehicles a year in alien smuggling cases. If the Service has to return those vehicles to avoid a hardship pending trial, there will be little left of the enforcement program.

"We also oppose the provision allowing judges to appoint counsel for claimants in civil cases. However well intended, this provision will surely encourage attorneys in search of a fee to file frivolous claims. What's more, the bill would pay for those fees out of the funds that are earmarked for local law enforcement. We might as well stick a siphon hose into the Forfeiture Fund and pump the money Chief Moody would use to buy bullet-proof vests for his officers into the pockets of defense lawyers. As a policy choice, we think that's a mistake.

"There are other things in the bill that we disagree with, but let me conclude by pointing out some things that are missing. The most important element of any asset forfeiture legislation must be a sense of balance, but this bill fails to contain any provision that addresses the concerns of law enforcement.

"For example, it is right to put the burden of proof on the Government, but it is wrong to deny the Government the tools it needs to gather evidence to meet its burden. There's also the problem of claims filed by fugitives. It is a sorry spectacle that today, because of a recent court decision, a fugitive can hide out overseas, beyond the reach of our criminal courts, yet file papers in a civil forfeiture case and expect them to be honored.

"The most serious omission is that H.R. 1835 does nothing to enhance criminal forfeiture. Nothing would do more to decrease our reliance on civil forfeiture than to make the criminal forfeiture laws as effective as their civil counterparts.

"Finally, once the due process issues have been addressed, there is no reason not to expand forfeiture into new areas. From terrorism to counterfeiting to violations of the food and drug laws, the remedy of asset forfeiture should be applied. In fact, unless someone can name a crime for which the offender should be allowed to keep the proceeds, the proceeds of all federal crimes should be subject to forfeiture.

"Mr. Chairman, at the conclusion of my testimony a year ago, I said that a balanced forfeiture bill would ensure that "the forfeiture laws of the United States will be tough but fair—tough but fair—which is what the American people have a right to expect." I still believe that. Working together, we can craft a balanced set of forfeiture laws that combine fairness with effective law enforcement. In conversations with your staff over the past weeks, we have made a start. We should continue. We have a long way to go, but a balanced bill that law enforcement can support is within our grasp."

FDA Pursues Forfeiture

By John J. Rooney, Operations Manager, Office of Criminal Investigations, Food and Drug Administration

The Office of Criminal Investigations (OCI) serves as the criminal law enforcement arm of the Food and Drug Administration (FDA). It was created in 1992, after the FDA commissioner realized the need for traditional law enforcement expertise, with its full range of investigative tools and techniques, in combating criminal attacks within the agency's jurisdiction. OCI investigates suspected violations of the Federal Food, Drug, and Cosmetic Act (FDCA), the Federal Anti-Tampering Act (FATA), other similar statutes, and related Title 18 violations, many of which involve violations of the Money Laundering Control Act (MLCA).

Almost one-third of our nation's gross domestic product is regulated by the FDA, creating a vast territory that is conducive to criminals intent on exploiting enforcement limitations. The FDA is dedicated to ensuring the safety of food and drugs provided to the American public. Many of the cases which OCI investigates involve counterfeit and unapproved drugs and devices; diversion of prescription drugs; distribution of adulterated misbranded foods; product substitution and application fraud; health fraud; and product tampering. Perpetrators run the gamut from lone miscreants to multibillion dollar corporations.

OCI has had significant success in a variety of ways. With respect to unapproved drugs, a New York defendant was recently convicted of 19 violations related to the fraudulent promotion and sale of unapproved drug advertised as a treatment for cancer, AIDS, and other serious illnesses. With respect to medical devices, a doctor in Oklahoma City, who specialized in breast augmentation, was indicted for violations of the FDCA and the MLCA. He was illegally importing, selling, and implanting silicone gel breast implants that were manufactured in Brazil and the Bahamas. These implants, which were unapproved in the United States, were implanted in some 400 women. The doctor later pled gulity and forfeited over $321,000 to the Government.

OCI has also been involved in a number of cases involving the false export diversion of prescription and over-the-counter drugs. In may instances, the drugs are relabeled or given a new expiration date because they lose their potency overtime. They are issued lot numbers for recall purposes in the event there is a defect or a user experiences an adverse reaction. Without these measures, the safety of the consumer is at risk, particularly for patients whose lives are dependent on drugs for survival.

While the fraud in these cases severely compromises the consumers' health, the criminal penalties are far too inadequate. Pursuing forfeiture actions in all FDA cases in which it may be a sanction is one way corrupt corporations and individuals who pray on the vulnerability of the American consumer can be stopped. Thus far, it has proven to be a very valuable tool, both in putting deceptive entrepreneurs out of business and in the successful forfeiture of assets totaling millions of dollars for money laundering violations.

Pursuing forfeiture actions in all FDA cases . . . is one way corrupt corporations and individuals who pray on the vulnerability of the American consumer can be stopped.

For more information concerning FDA investigations, contact our headquarters' office at (301) 294-4030, or write to us at 7500 Standish Place, Room 250N, Rockville, MD 20855. Our field offices are located in Atlanta, GA; Austin, TX; Boston, MA; Calverton, MD; Chicago, IL; Kansas City, KS; Miami, FL; Jersey City, NJ; San Diego, CA; San Francisco, CA; and San Juan, Puerto Rico.

Treasury Trends

By Charles Ott, Special Projects Advisor, Executive Office for Asset Forfeiture, Department of the Treasury

Treasury Trends columnist, Charles Ott, recently interviewed Jan Blanton, Director, Executive Office for Asset Forfeiture, Department of the Treasury, regarding its asset forfeiture program. Highlights from that exchange are captured below.

Briefly, please explain how the Treasury Forfeiture Fund works.

Blanton: The Treasury Forfeiture Fund was established by the Treasury-Postal Appropriations Act of 1992 (Public Law 102-393). It is the repository for the value of all the non-tax forfeitures made by Treasury law enforcement agencies, namely, the U.S. Customs Service, the Criminal Investigation Division of the Internal Revenue Service, the U.S. Secret Service and the Bureau of Alcohol, Tobacco and Firearms. It also receives deposits that follow from the seizures and forfeitures made by the United States Coast Guard. This value in the Treasury Forfeiture Fund is then paid out in accord with the permissible mandatory and discretionary payment categories allowed by the law. In general, these categories allow for the payment of expenses associated with specific seizures, to support the forfeiture programs of Treasury enforcement agencies, and for other law enforcement purposes.

How does Treasury approach the challenge of managing its seized property?

Blanton: Although most of the value deposited in the Treasury Forfeiture Fund comes from seizures of cash and currency, other seized property traditionally has been a high profile area subject to much public interest. I believe it is also an area that presents many opportunities for effective and efficient management techniques. These, in turn, result in direct savings that can be applied to the law enforcement purposes of the Treasury Forefeiture Fund. We use a national seized property management contractor, EG&G Dynatrend, for this task so that our law enforcement personnel are free to attend to their primary law enforcement missions.

What is Treasury doing to realize some of these direct savings you mentioned?

Blanton: Seized property management is a particular priority of Treasury law enforcement and we believe that this reflects the interests of the General Accounting Office and the Congress. In light of this, during the last year, we have conducted five regional seized property management conferences to bring together over 700 first line Treasury agents, Treasury and contractor property management personnel and others to explore ways to attain greater efficiencies and savings in this part of the program. These conferences have led to another series aimed at an additional 300 agents and supervisory personnel this spring and we expect to conduct several more during FY 1998. With regard to seized property, we are reminding attendees that communication, consultation and common sense should be the watchwords of their efforts in this key area of the forfeiture program.

Another area of public concern with asset forfeiture is the degree to which it safeguards individual rights. Do you think asset forfeiture currently affords adequate protection here?

Blanton: Safeguarding the rights of individuals has always been one of the goals of the Treasury forfeiture program. The policies and procedures issued by our Executive Office for Asset Forfeiture aim at ensuring proper notice, the handling of cases without undue delay and giving affected individuals every opportunity to be heard

and considered. The Supreme Court's decision last year in the matter of asset forfeiture and double jeopardy reaffirmed the correctness of federal asset forfeiture applications. We have worked with our colleagues at the Department of Justice in crafting a federal forfeiture bill to address ongoing concerns and we support the positions in the Administration's bill.

Beyond possible legislative changes, what are you doing now to protect the rights of individuals who may be affected by asset forfeiture?

Blanton: Our Executive Office for Asset Forfeiture, which develops the policies for the Treasury program, aims to ensure that this powerful law enforcement tool is never used frivolously or without regard to its inherent gravity. Education and training of program personnel is our priority. We continuously review our Treasury policies and procedures with an eye toward areas such as minimum equity guidelines, the timely adjudication of cases, and management reports, to ensure the timely disposition of forfeited properties. All of this is done to safeguard individual rights to due process from seizure through forfeiture and to ensure the congressional intent that revenues resulting from duly forfeited property be fully available to pay for seizure costs, strengthen law enforcement and promote cooperation among federal, state, local and international law enforcement agencies.

For information about accessing the AFBB, contact the system operator at (202) 307-0265.

Policy Directives of the Department of the Treasury's Executive Office for Asset Forfeiture Available on the Asset Forfeiture Bulletin Board

Date of Issue	Title of Policy Directives
10/01/93	Purchase or Personal Use of Forfeited Property by Treasury Employees
10/01/93 (revised 10/95)	Seizure of Financial Instruments
10/01/93	Seizure of Occupied Real Estate
10/01/93 (revised 06/26/96)	Seized Cash Management Policies
10/01/93	Sixty-day Notice Period in All Administrative Forfeited Cases
10/01/93	Judicial Approval Prior to Seizure
10/01/93	Seizure and Forfeiture of Real Property that is Potentially Contaminated or is Contaminated with Hazardous Substances
10/01/93	Use of Property Under Seizure
10/01/93	Weed and Seed Initiative, Transfers of Real Property
10/01/93	Points to Remember in Working with Contract Employees
12/03/93	Processing Cost Bonds
04/08/94	Liability of the United States for the State and Local Taxes on Seized and Forfeited Property
04/08/94	Occupancy Agreements
04/08/94 (revised 10/95)	Expedited Settlement Policy for Mortgagees and Lienholders for Property Seized, Arrested, Restrained, or Charged in a Civil or Criminal Forfeiture Action
04/08/94	Seizure of Livestock and Registered Animals
09/16/94	Equitable Sharing: Acknowledgements and Advice on Sharing Requests
11/30/94	Policy Regarding Plea Bargainng and Forfeiture by Settlement
10/07/94 (revised 10/95)	Policy for Payment(s) to Local, County, and State Police Officers Participating with Treasury Law Enforcement Agencies
11/07/94	Policy for the Initiation or Continuation of Administrative Forfeiture(s) Following Acquittal of the Defendant(s) in a Criminal Action
09/23/94 (revised 03/21/97)	Net Equity Requirements for Seized Property
07/26/94	Policy for the Filing of DAG 71s for Reverse Asset Sharing
04/14/95	Vehicle Lien Policy/Posting Equity Bonds
10/01/95	Execution of Warrants of Arrest *in rem* by Treasury Law Enforcement Agencies
01/09/95	Post and Walk Policy in Light of the Supreme Court's Decision in *United States v. James Daniel Good Real Property*
11/30/94	Departmental Policy Regarding the Seizure and Forfeiture of Real Property that is Included in or Eligible for the National Register of Historic Places
03/01/95	Timely Processing of Administrative and Civil Judicial Forfeiture Cases
10/01/95	Processing Interlocutory Sales
12/22/94	Payment of Interest and Penalties on Taxes on Real Property Forfeitures
10/01/95	Seizure and Disposition of Properties Subject to Title Restrictions
08/23/96	Interim Guidelines Regarding Lead-based Paint in Residential Property Built Prior to 1978
11/01/96	Liquidation of Seized and Forfeited U.S. Savings Bonds

Equitable Sharing

By Irene Gutierrez, Trial Attorney, AFMLS, Criminal Division, and Terrence Sweeney, Dyncorp Government Services

Houston-Detroit Task Force Cooperation Nabs Drug Proceeds

S.D. Texas—In January 1993, a confidential informant began providing information to the Drug Enforcement Administration (DEA) about an individual's drug distribution activities. The informant identified the individual as a multi-kilogram distributor of cocaine who made frequent trips between Detroit and Los Angeles. The informant also connected individual and his girlfriend to drug distribution in Houston. On April 29, 1993, the DEA Task Force at the Detroit Metropolitan Airport (DMATF) learned that the individual and one of his associates, also a suspected drug trafficker, were travelling to Houston from Detroit, and were likely transporting a large amount of U.S. currency.

DMATF, which is comprised of agents and officers from DEA, the Romulus Police Department, the Wayne County Sheriff's Department, the Detroit Police Department, the Michigan State Police Department, initially confronted both the individual and his associate at the airport. DMATF agents obtained consent to search the luggage, but could not conduct the search because the bags had already been loaded onto the airplane. The individual and his associate were allowed to continue on their trip to Houston.

After the failed search in Detroit, DMATF agents alerted the DEA/Houston Police Department Narcotics Interdiction Unit (DEA/HPD Task Force) that the individual and his associate were on the flight and were thought to have drugs in their bags. When the plane arrived, DEA/HPD Task Force agents met them and received their permission to search the six pieces of luggage they had checked from Detroit to Houston. The agents took the bags from the plane, and a detection dog alerted to the presence of narcotics. The agents searched the bags and discovered $1,306,264 in U.S. currency, which they seized as proceeds from drug trafficking. The individual and his associate were arrested. The individual also was wanted by the Texas Board of Pardon and Parole for violation of his parole and felony possession of controlled substances.

On April 20, 1994, $1,241,264 of the seized currency was forfeited and $65,000 was returned to the individual. The funds were equitably shared among the Detroit Metropolitan Airport Task Force, the Houston Police Department and the Assets Forfeiture Fund.

Wilmington, Delaware Takes a Step Into 2000

Delaware—On November 18, 1993, the Federal Bureau of Investigation (FBI) seized the residence at 1312 West Third Street, Wilmington, Delaware because drug dealers sold and distributed drugs on the premises.

Nearly three years later, Step Into 2000, Inc. inquired about obtaining the property through the Weed and Seed Initiative. Step Into 2000 had established Step-Up, a non-profit building maintenance and repair apprenticeship program sponsored by the Wilmington Housing Authority, as a way to help city residents help themselves, and, in the process, revitalize Wilmington. Its mission is to train public and low income housing residents in the building trades. Participants develop skills in carpentry, electrical work, plumbing, painting, appliance maintenance and groundskeeping. Step-Up offers a chance for those in need to acquire job skills for positions in the work force. The Wilmington Housing Authority works closely with Step-Up to provide this training program. The participants use their new building trade skills to renovate public housing and residences of low to middle income families. Step-Up places the renovated property on the Section 8 subsidized housing listing for low income families. Step-Up manages and maintains the property to assure that the residents adhere to the program's high standards. By improving the buildings and renting them to conscientious individuals, Step Into 2000 will help to revitalize the neighborhood. Step-Up plans to continue acquiring properties, and use the rents to subsidize the program. The transfer to Step Into 2000, pursuant to the Weed and Seed Initiative, was approved on March 31, 1997.

International Asset Sharing Update

By Linda M. Samuel and Juan C. Marrero, Special Counsel, International Forfeiture Matters, AFMLS, Criminal Division

More and more federal criminal cases involve multinational interests, and international asset sharing is increasingly viewed as an integral part of international forfeiture cooperation. Indeed, one district court found the likelihood of international asset sharing to be relevant to whether it possessed extra-territorial *in rem* jurisdiction in a civil forfeiture action.[1] Although the United States has had statutory authority to transfer forfeited proceeds to foreign governments since 1986, it did not use that authority until 1989 in Operation Polar Cap when $1 million was transferred to both Canada and Switzerland. Since that time, the Department of Justice has transferred more than $65 million from the Assets Forfeiture Fund to 21 different countries. (The chart below shows the top ten recipients of the Department of Justice's International Asset Sharing Program.) These recipient countries include: Argentina, Bahamas, Cayman Islands, Costa Rica, Egypt, Guatemala, Luxembourg, Paraguay, Romania, and the United Kingdom, and the assistance they have rendered has ranged from providing bank records, to engaging in undercover operations in conjunction with U.S. law enforcement agencies, to defending litigation by claimants on behalf of the United States, and to repatriating forfeitable assets.

Three statutes make international asset sharing possible.[2] Each statute requires:

(1) direct or indirect participation by the foreign country in acts leading to seizure or forfeiture of the property;

(2) approval by the Attorney General (or the Secretary of the Treasury in a case where a Treasury agency is the lead seizing agency);

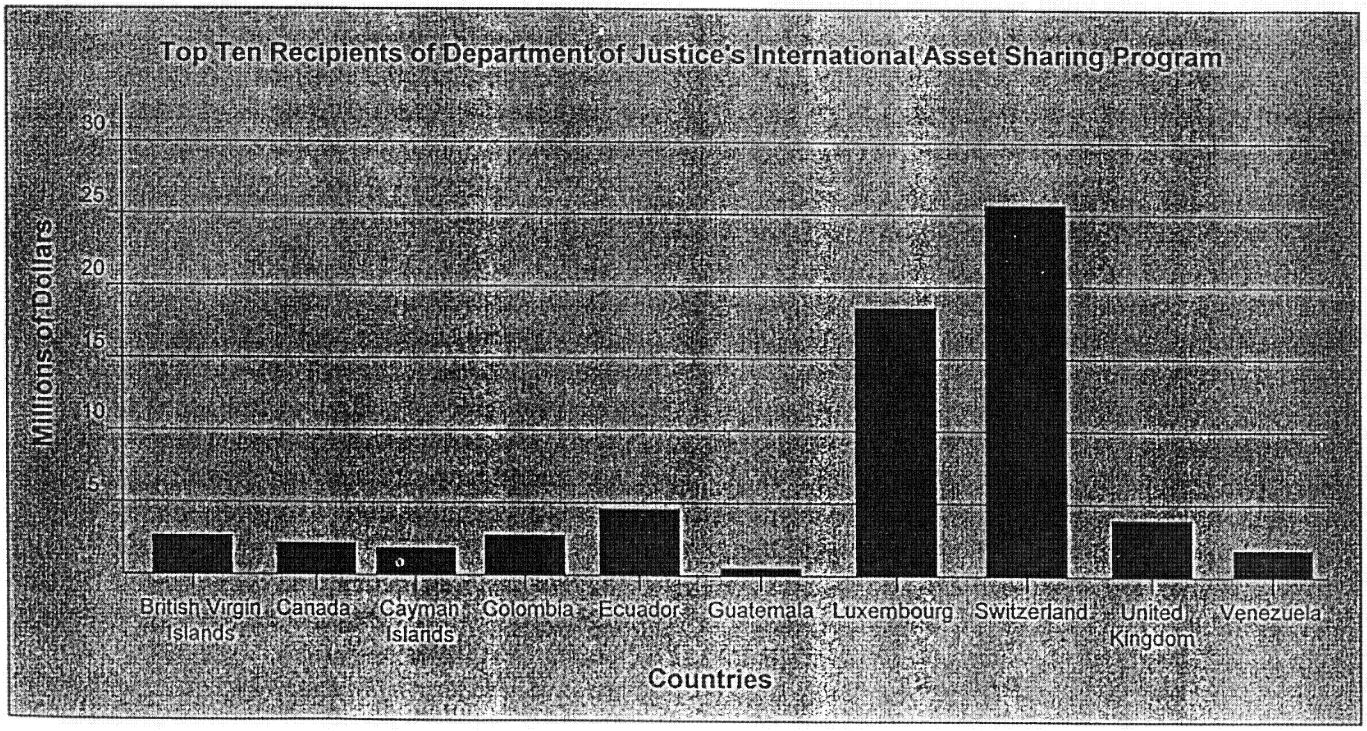
(3) approval by the Secretary of State;

(4) an international agreement between the United States and the foreign country to which the property would be transferred; and

(5) certification of the country under 22 U.S.C. § 2291(h), if applicable.[3]

While these provisions are broadly drafted to permit asset sharing for all manner of foreign assistance resulting in the seizure or forfeiture of property, this

*See **International**, page 22*



International Asset Sharing Update

International, from page 21

does not mean that we can share with foreign governments in all U.S. forfeiture cases. As currently drafted, the sharing laws provide that the forfeiture itself must have occurred pursuant to Chapter 46 of Title 18, Subchapter I of Chapter 13 of Title 21, or under any law (other than section 7301 or 7302 of the Internal Revenue Code of 1986) enforced or administered by the Department of the Treasury. Thus, if the forfeiture took place pursuant to some other statute, we would not be able to share with a foreign government even though their assistance facilitated the forfeiture. Hopefully, this discrepancy will be corrected through a legislative amendment. The Department of Justice has proposed the creation of an omnibus international asset sharing statute authorizing the transfer of forfeited property to foreign countries in any case where they had assisted in a U.S. forfeiture case.

The international sharing process is initiated when the Asset Forfeiture and Money Laundering Section receives a recommendation from the United States Attorney's Office and/or the seizing agency providing: 1) details of the foreign assistance provided; 2) copies of forfeiture orders and other supporting documents; and 3) an amount to be shared with the foreign government.[4] This procedure must be followed regardless of whether the forfeiture was obtained as a result of a criminal, civil, or administrative proceeding.

The Attorney General has delegated her international asset sharing authority to the Deputy Attorney General. But, this authority has *not* been delegated to United States Attorneys' Offices or to seizing agencies. In order to determine a sharing percentage for its recommendation to the Deputy Attorney General, the Asset Forfeiture and Money Laundering Section evaluates the foreign assistance under guidelines established in a Memorandum of Understanding between the Department of Justice and the Department of the Treasury, which ties the amount transferred to the importance of the assistance provided to the overall U.S. effort. Once approved, the Department of Justice's international proposal is transferred to the Department of the Treasury and the State Department for their concurrences.

Another statutory condition to sharing is that there must be an international agreement between the United States and the recipient country authorizing the transfer. Normally,[5] this condition is satisfied if the United States has a mutual legal assistance treaty with the country that addresses forfeiture cooperation. Presently, the United States has MLATs with the following countries:

Anguilla	Morocco
Argentina	Netherlands
Bahamas	Panama
British Virgin Islands	Philippines
Canada	Spain
Cayman Islands	Switzerland
Italy	Thailand
Jamaica	Turkey and Caicos Islands
Mexico	United Kingdom
Montserrat	Uruguay

Additionally, the United States is a party to executive agreements with the following countries: Anguilla; British Virgin Islands; Canada; Cayman Islands; Colombia (non-reciprocal agreement); Ecuador; Hong Kong (limited to drug cases, which will expire on June 30, 1997); Mexico (non-reciprocal agreement); Monserrat; The Netherlands and the Netherlands Antilless and Aruba; Russia; Turks and Caicos Islands; and United Kingdom (limited to drug cases). Although not ratified by the U.S. Senate, these executive agreements nonetheless satisfy the statutory requirement of an international agreement as a precondition to international asset sharing. Where there is no treaty or executive agreement in place, the State Department will draft a case-specific agreement with the proposed recipient country.

In many respects our international asset sharing program is different from domestic asset sharing. For instance, unlike domestic sharing, international sharing payments are generally made to the foreign government itself, not to the particular law enforcement agency that assisted in the forfeiture. In addition, there is no statutory requirement that shared monies be used for a law enforcement purpose, although some of our sharing agreements have added this condition. Foreign governments are not required to submit a DAG-71. They may, however, affirmatively request a portion of forfeited proceeds

through diplomatic channels or pursuant to a treaty or executive agreement. Lastly, international sharing payments "come off the top," *i.e.*, payments to foreign governments are made from the net forfeited proceeds, whereas domestic sharing payments are calculated from the federal share which is the net forfeited proceeds less any international sharing payments.[6]

The objectives of the Department of Justice's international forfeiture program are: (1) to distribute equitably the assets derived from multinational forfeiture efforts; (2) to foster international forfeiture cooperation by creating an economic incentive for law enforcement agencies representing different countries to work together; and (3) to provide our foreign law enforcement partners with resources they may need to carry out their fight against international crime. Each year our program expands as countries increasingly appreciate the benefits that can be realized from successful international forfeiture cooperation. Moreover, this cooperation is not just a one-way street, and several governments, including Canada, Switzerland, and the United Kingdom, have shared forfeited proceeds with the United States where we have supplied law enforcement support to their foreign forfeiture efforts.

The Asset Forfeiture and Money Laundering Section is available to provide assistance and guidance to Assistant United States Attorneys and agents who wish to share assets with foreign governments in recognition of their assistance to U.S. cases or to make requests for asset sharing from foreign governments. Please contact Linda M. Samuel or Juan C. Marrero from the Asset Forfeiture and Money Laundering Section at (202) 514-1758.

Endnotes

[1] *United States v. All Funds on Deposit in the Name of Meza, et al.*, 856 F. Supp. 759 (E.D.N.Y. 1994), *aff'd*, 63 F.3d 148 (2d Cir. 1995) (Santa Cruz Londono property in the United Kingdom civilly forfeited in Brooklyn).

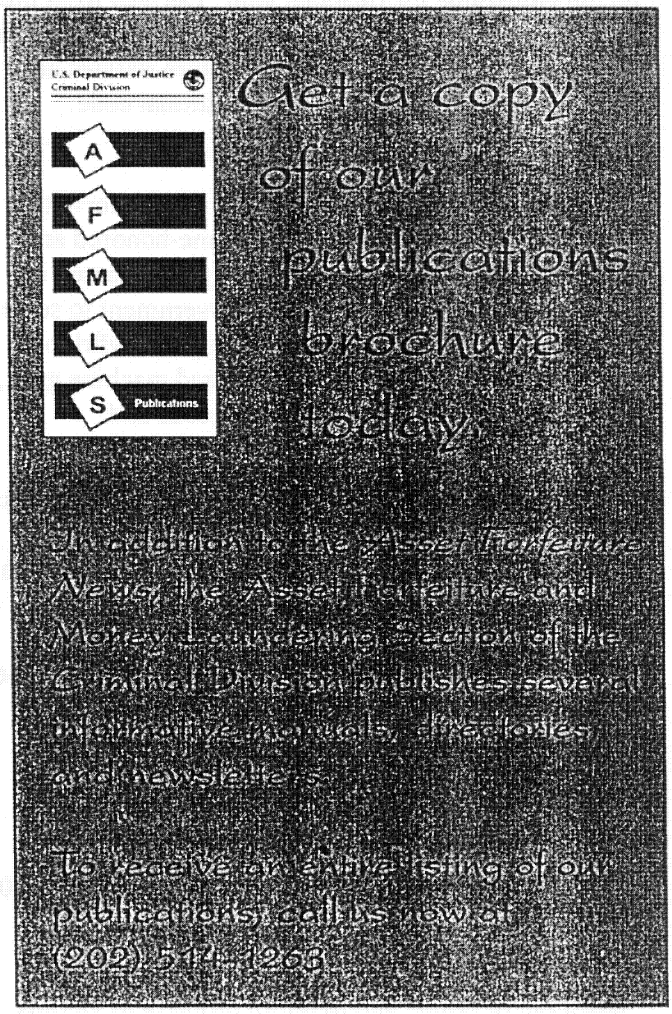
[2] *See* 18 U.S.C. § 981(i)(1), 21 U.S.C.§ 881(e)(1)(E), 31 U.S.C. § 9703(h)(2).

[3] Five countries (Burma, Colombia, Iran, Nigeria, and Syria) were decertified in 1997, and therefore, are ineligible to receive asset sharing payments from the United States.

[4] International sharing recommendations involving cases where a Treasury agency had lead responsibility for forfeitures should be transmitted to the Treasury Executive Office for Asset Forfeiture.

[5] Since neither the MLAT with Italy nor the one with Switzerland authorize asset sharing, they cannot serve as the statutory basis for the transfer of forfeited proceeds. For those countries, a case specific agreement must be negotiated in each instance of asset sharing.

[6] Switzerland is by far our most significant forfeiture partner, with the Department of Justice having transferred more than $26 million to the government of Switzerland in ten cases. This successful and active relationship with Switzerland warrants special mention. The United States has an informal agreement with Switzerland to share on an equal basis the proceeds of forfeiture matters which we work on together. In other words, where Switzerland repatriates funds that are then forfeited in the United States, unless there is a third country involved, we routinely share 50 percent of the forfeited proceeds with Switzerland. Indeed, often times, where Switzerland has frozen the funds, they will not consent to their repatriation unless we have committed in advance to share 50 percent of the proceeds with them. Accordingly, prosecutors and agents should factor this arrangement into their decisionmaking process when considering disbursements for domestic sharing requests.



Forfeiture is Reasonable, and it Works

By Stefan D. Cassella, Assistant Chief, AFMLS, Criminal Division

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Asset forfeiture has become one of the most powerful and important tools that federal law enforcement can employ against all manner of criminals and criminal organizations—from drug dealers to terrorists to white collar criminals who prey on the vulnerable for financial gain. Derived from the ancient practice of forfeiting vessels and contraband in Customs and Admiralty cases, forfeiture statutes are now found throughout the federal criminal code.

Why do Forfeiture?

federal law enforcement agencies use the forfeiture laws for a variety of reasons, both time-honored and new. Like the statutes the First Congress enacted in 1789, the modern laws allow the Government to seize contraband—property that it is simply unlawful to possess, like illegal drugs, unregistered machine guns, pornographic materials, smuggled goods and counterfeit money.

Forfeiture is also used to abate nuisances and to take the instrumentalities of crime out of circulation. If drug dealers are using a "crack house" to sell drugs to children as they pass by on the way to school, the building is a danger to the health and safety of the neighborhood. Under the forfeiture laws, we can shut it down. If a boat or truck is being used to smuggle illegal aliens across the border, we can forfeit the vessel or vehicle to prevent its being used time and again for the same purpose. The same is true for an airplane used to fly cocaine from Peru into Southern California, or a printing press used to mint phony $100 bills.

The Government also uses forfeiture to take the profit out of crime, and to return property to victims. No one has any right to retain the money gained from bribery, extortion, illegal gambling, or drug dealing. With the forfeiture laws, we can separate the criminal from his profits—and any property traceable to it—thus removing the incentive others may have to commit similar crimes tomorrow. And if the crime is one that has victims—like carjacking or fraud—we can use the forfeiture laws to recover the property and restore it to the owners far more effectively than the restitution statutes permit.

Finally, forfeiture undeniably provides both a deterrent against crime and as a measure of punishment for the criminal. Many criminals fear the loss of their vacation homes, fancy cars, businesses and bloated bank accounts far more than the prospect of a jail sentence. In fact, in many cases, prosecution and incarceration are not needed to achieve the ends of justice. Not every criminal act must be answered with the slam of the jail cell door. Sometimes, return of the property to the victim and forfeiture of the means by which the crime was committed will suffice to ensure that the community is compensated and protected and the criminal is punished.

The Parade of Horribles

The expansion of forfeiture into all of these areas has, of course, been controversial. When laws that were designed to seize pirate ships from privateers are applied, over the course of a decade, to the seizure of homes, cars, businesses and bank accounts, there are a lot of issues to sort out. How do we protect innocent property owners? What procedures afford due process? When does forfeiture go too far, in violation of the Excessive Fines Clause of the Eighth Amendment? The ten forfeiture cases that the Supreme Court has had on its docket in the past five terms are part of this sorting out process. There are certain to be more; and Congress will need to pass legislation to fill in many of the loopholes.

An informed debate on these issues is welcome. The debate is not informed, however, if it is muddled by the misconceptions and plain old-fashioned misstatements that seem to pop up in every article critical of asset forfeiture. Roger Pilon's article,[1] containing the usual parade of horribles, is a good example.

Once again we are told that forfeiture is based on an absurd legal "fiction" that the property is guilty of the crime, which implies that property can be forfeited without proof that a crime was committed by a real live person. We're told that the Government can seize property "almost at will," *i.e.* without due process, and that innocent people find the process so unfair that they walk away from their property without filing claims. And we're told that even when they do file claims, innocent owners just don't have any rights. Let's see if we can't inject a little truth and understanding into the debate on these points.

The Legal "Fiction"

There are three types of forfeiture under federal law: administrative forfeiture, civil judicial forfeiture, and criminal forfeiture. An administrative forfeiture is essentially a default proceeding. It occurs when property is seized and no one files a claim contesting the forfeiture. By definition, *all* administrative forfeitures are uncontested. Between 80 and 85 percent of all forfeitures handled by the Department of Justice fall into this category.

If someone does file a claim to the property, the Government has a choice (assuming Congress has provided both options by statute). It can file a civil complaint against the property in district court, thus commencing a civil judicial forfeiture; or it can include the forfeiture in the indictment in a criminal case, which sets the stage for a criminal forfeiture. In 1995, the Department of Justice began aggressively training criminal prosecutors in the use of the forfeiture laws, so that now more than half of all contested forfeitures are criminal forfeitures.

Just because a forfeiture is handled administratively or civilly, of course, doesn't mean that there isn't a related criminal case. In *all* forfeiture cases there must be proof that a crime was committed by someone. In fact, in more than 80 percent of *all* forfeitures, including administrative and civil forfeitures, there is a parallel arrest and/or criminal prosecution. There wouldn't have been such a wail and cry about forfeiture constituting a violation of the Double Jeopardy Clause a few years ago if that weren't so. (Between the Ninth Circuit's decision in *United States v. $405,089.23* in 1994 and the Supreme Court's decision putting the double jeopardy issue to rest in *United States v. Ursery*, thousands of federal prisoners filed post-conviction actions alleging that their criminal conviction and the civil forfeiture of their property constituted double jeopardy.)

The legal "fiction" that the property is "guilty" of the crime is simply a shorthand for the way a civil forfeiture case is styled: *United States v. $405,089.23*, *United States v. 92 Buena Vista Ave.*, and so forth. In legal parlance, the property in such a case is the "defendant." But property doesn't commit crimes; people do. If there isn't proof that a person committed a crime, there is no forfeiture. If our normally verbose legal system styled its civil forfeiture cases to set forth the full legal theory, this would be obvious. The above cases, for example, might have been called *United States v. $405,089.23 in Proceeds Earned by Charles Arlt From Selling Methamphetamine*; or *United States v. A Residence at 92 Buena Vista Ave. Purchased with Drug Proceeds that Joseph Brenna, a Drug Dealer, Gave to his Girlfriend.*

In short, forfeiture is a way of reaching the property involved in a crime, but the focus is on the crime, without which there can be no forfeiture.

Why do Civil Forfeiture?

If all forfeitures involve the commission of a crime, and the vast majority involve an arrest or prosecution, why does the Government use civil forfeiture at all? It is not, as many contend, because it is necessarily easier. To the contrary, the easiest way to forfeit a criminal defendant's property in many cases is not to file a separate civil action, but to present the forfeiture issue to the same jury that just convicted the defendant in the criminal case. But sometimes, criminal forfeiture isn't available or doesn't make sense.

Take the administrative forfeiture cases for example. There is no point in including a criminal forfeiture count in an indictment and presenting the issue to a jury if the defendant is not going to contest the forfeiture. If a defendant facing criminal conviction for drug trafficking thinks it pointless to contest the forfeiture of the cash seized from him as drug proceeds at the time of his arrest, it is equally pointless to clutter the indictment with a forfeiture count when administrative forfeiture will answer.

What about the contested forfeitures that are done civilly? The reasons for this are many. First, while there are over 100 civil forfeiture statutes, there are

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relatively few criminal forfeiture statutes. Drug proceeds can be forfeited either civilly or criminally, for example, but firearms, gambling proceeds, vehicles used to smuggle illegal aliens, and counterfeiting paraphernalia can only be forfeited civilly.[2] This is a problem that Congress needs to fix.

Second, criminal forfeiture requires a federal conviction for the crime giving rise to the forfeiture. If the defendant is dead or is a fugitive, there can be no prosecution and therefore no criminal forfeiture. If the defendant was prosecuted in a State case, the federal forfeiture has to be civil because there is no federal prosecution for the criminal offense. And if the defendant is prosecuted for one crime, but the property was involved in a related but separate crime, the forfeiture has to be civil because the criminal forfeiture is limited to the offense of conviction. For example, drug proceeds seized from a defendant at the time of his arrest must be forfeited civilly if the defendant is charged with possession of drugs with intent to distribute because such money was necessarily the proceeds of an *earlier* drug deal, not the one for which the defendant is actually prosecuted.

Third, and perhaps most important, criminal forfeiture is limited to the property *of the defendant*. If the defendant uses someone else's property to commit the crime, criminal forfeiture accomplishes nothing. Only civil forfeiture will reach the property. For example, if a drug dealer uses an airplane to smuggle drugs into California, the Government has an interest in seizing and forfeiting the plane. But suppose the only person arrested and prosecuted is the pilot. If he owns the plane outright, criminal forfeiture is the way to go. But if the plane is owned by a corporation, or a third party in South America, or by the pilot jointly with his spouse, criminal forfeiture is pointless.

The same is true if we want to forfeit a crack house. We can prosecute the tenants in the building until the cows come home but will never be able to forfeit the building criminally if the tenants don't own it. If the building belongs to a slumlord who allowed his property to be turned into a crack house, we need civil forfeiture to shut it down.

Due Process

Whatever the reasons why civil forfeiture is essential to federal law enforcement, it goes without saying that the process must be fair. All property owners—whether they be criminal defendants or third parties—are entitled to due process of law. Mr. Pilon contends that due process is lacking. He says that the Government can seize property "almost at will," that officials can "seize property, real or personal, without notice or hearing," and that innocent parties find the system so daunting that they abandon their property without filing a claim. On all points, he is greatly mistaken.

Seizures of property for forfeiture are governed by the same rules that govern seizure of property for evidence—the search and seizure requirements of the Fourth Amendment.[3] If federal agents want to seize property for forfeiture, they have to get a warrant, unless one of the recognized exceptions to the Fourth Amendment applies, like when cash is found in plain view in a vehicle that can be driven away, and there is probable cause to believe it's drug proceeds, or when property is found during a search incident to a lawful arrest. In fact, in many instances, forfeiture seizures are more limited than their evidentiary counterparts.[4]

In real property cases, the rules are still more restrictive. In *United States v. James Daniel Good Property*, 114 S. Ct. 492 (1993), the Supreme Court held that real property may not be seized at all, even with a warrant based on a showing of probable cause, until the property owner has been given notice and an opportunity to be heard. In short, in real property cases, the Due Process Clause of the Fifth Amendment requires the Government to give property owners more "process" even than is due under the Fourth Amendment.

Moreover, seizing the property isn't the end of the process; it's only the beginning. If someone wants to contest a forfeiture he has a right to file a claim, thereby forcing the Government to file a civil or criminal forfeiture action in federal court. If the case is civil, the claimant has all the rights that attend normal civil litigation, including the right to discovery

and the right to a trial by jury. Finally, the forfeiture verdict must be based on a preponderance of the *admissible* evidence, not the probable cause evidence that was sufficient for the seizure.

Of course, any system can be improved. The Department of Justice has proposed legislation to make the Government carry the burden of proof in civil forfeiture cases. We also have suggested making it easier for people to file claims in forfeiture cases by extending the filing deadlines, and we have proposed a remedy for those whose property is damaged in Government custody. (The Department of Justice's legislative proposal and supporting testimony are published in the record of the Hearing on the Civil Asset Forfeiture Reform Act, H.R. 1916, House Committee on the Judiciary, 104th Congress, 2d Sess., Serial No. 94, July 22, 1996.) But it is preposterous to say that property owners are denied due process under current law.

The Uncontested Forfeitures

What should we make of the fact that so many forfeitures are uncontested? The critics, of course, see this as evidence that innocent property owners are walking away from their property without filing a claim because the procedures are unfair. But the opposite is far more likely. Four out of five forfeitures are uncontested because in most cases the evidence is so overwhelming that contesting the forfeiture would be pointless. A defendant charged with smuggling illegal aliens, for example, might see little advantage in contesting the forfeiture of the truck he was driving when he was arrested and the aliens were found. Remember, 80 percent of all forfeitures involve a parallel arrest or prosecution. Those are cases in which the defendant is in court anyway, has counsel, and yet most of the time does not object to the forfeiture.

Certainly, there are still due process issues to be worked out. One of the most nettlesome involves the current flood of post-conviction pleadings being filed by federal prisoners who contend that they didn't contest forfeiture actions because they didn't receive proper notice.[5] Most commonly, the prisoners complain that the Government sent the notice to the wrong jail or to a home address when the Government knew that the person was incarcerated. Criminals have due process rights just like everyone else, so the Government must find a way to provide notice of forfeiture actions to persons being held in jail. But these are hardly cases that involve innocent claimants not filing claims because the procedures are stacked against them.

Innocent Owners

In his discussion of *Bennis v. Michigan*, Mr. Pilon makes a persuasive argument that the Constitution does not adequately protect innocent owners in civil forfeiture cases. It is an argument, however, that has little relevance to federal forfeiture law.

Bennis, it must be remembered, was a State case. Michigan, apparently, does not provide statutory protection for innocent owners, and the Supreme Court held that no such protection is required by the Due Process Clause. Fair enough. But the fact that the Constitution doesn't protect innocent owners doesn't mean that the legislature cannot do so. In fact, Congress has included an innocent owner defense in virtually all of the most widely used federal forfeiture statutes. For example, the drug statutes, 21 U.S.C. § 881(a)(4) and (7), say that neither vehicles nor real property, respectively, may be forfeited if they were used to commit a crime without the knowledge or consent of the owner.

Mr. Pilon's claim that "hotels and apartment buildings are today forfeited when their owners are unable to prevent drug transactions in them" is just plain wrong. Even a property owner who "knows" that his property is being used for an illegal purpose is protected from forfeiture if he shows that he took all reasonable steps to prevent the activity.[6]

For example, the owner of a residential hotel doesn't have to put a stop to drug transactions on his property; he just has to do what a reasonable owner would do to try to stop it, like call the police, evict tenants convicted of committing drug crimes on the premises, and install security devices like locks and adequate lighting.[7]

What Congress Can Do

A key provision in the Department of Justice's legislative proposal would codify this concept and thus extend the innocent owner defense to *all* federal forfeiture statutes. In addition to the other due process reforms discussed above, this would go a long way toward making sure that the forfeiture laws are up to date and protect the rights of all property owners. But

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there is more that Congress can do to enhance the forfeiture laws.

First, the criminal forfeiture statutes should be revised to make sure the Government can use them in all cases where it's appropriate to do so. Criminal forfeiture should be available wherever civil forfeiture is authorized. The Government also needs better tools to enforce criminal forfeiture judgments against convicted defendants, and needs to be able to restrain property subject to forfeiture, including substitute assets, pretrial to make sure that it's still around once the defendant is convicted.

Also, there is no rhyme or reason to the current forfeiture laws regarding the forfeiture of criminal proceeds. We can forfeit proceeds in drug cases, but not in fraud cases; we can forfeit the money paid to a "bagman" in a money laundering case, but not the money paid to a "hit man" in a murder-for-hire case. All criminal proceeds should be subject to forfeiture, and the term "proceeds" should be defined to mean gross proceeds, not net profits. It is absurd that some courts have allowed heroin traffickers to deduct their overhead expenses from the amount of proceeds subject to forfeiture.[8]

In these and many other ways, the forfeiture laws can be improved both to protect the rights of property owners and to allow the Government to make full use of this dramatically successful law enforcement tool. Congress has that opportunity this year. If we can avoid the misstatements and misconceptions that serve only to polarize the debate, law enforcement, defense attorneys and legislators can work together to produce a genuinely comprehensive and effective body of laws to make forfeiture work for all of us.

Endnotes

[1] Robert Pilon's article, "Forfeiting Reason," appeared in *Criminal Law and Procedures News*, Vol. 1, No. 2 (Spring 1997): 1.

[2] *See* 28 U.S.C. § 2461(a).

[3] *See United States v. Lasanta*, 978 F.2d 1300 (2d Cir. 1992).

[4] *See* 18 U.S.C. § 981(b)(2) (in money laundering cases, warrantless seizures are authorized during searches incident to arrest, but not in other exigent circumstances).

[5] *See, e.g., United States v. Clark*, 84 F.3d 378 (10th Cir. 1996).

[6] *See United States v. 141st Street Corp.*, 911 F.2d 870, 877-78 (2nd Cir. 1990) (landlord who knew building was being used for drug trafficking had opportunity to show he did not consent to such use), *cert. denied*, 111 S. Ct. 1017 (1991); *United States v. Parcel of Real Property Known as 6109 Grubb Road*, 886 F.2d 618, 626 (3rd Cir. 1989) (wife who knew of husband's use of residence for drug trafficking had opportunity to show she did not consent to such use); *United States v. One Parcel of Real Estate at 1012 Germantown Road*, 963 F.2d 1496 (11th Cir. 1992).

[7] *See United States v. All Right, Title and Interest (Kenmore Hotel)*, 77 F.3d 648 (2d Cir. 1996).

[8] *See United States v. McCarroll*, 1996 U.S. Dist. LEXIS 8975 (N.D. Ill. Jun. 19, 1996).

Does your agency have any asset forfeiture problem areas?

Has your agency undergone policy changes in the area of asset forfeiture?

Does your agency have new employees working in the asset forfeiture field?

Has your agency participated in any successful asset forfeiture cases?

Does your agency sponsor any asset forfeiture training conferences or meetings?

If you answered **Yes** to any of these questions, then contribute articles to the *Asset Forfeiture News*. We welcome articles from federal agencies and United States Attorneys' Offices on any asset forfeiture topic.

☎ Call the editor today at (202) 514-1263!

Questions & Answers

Concerning Agreement, Certification, and Audit Report Requirements

by Araceli G. Carrigan, Attorney, AFMLS, Criminal Division, and Rebecca Brown, Equitable Sharing Program Manager, Treasury Executive Office for Asset Forfeiture, Department of the Treasury

This is the second in a series of frequently asked questions about the Department of Justice and the Department of the Treasury's agreement, certification, and audit reporting requirements. The agreement and certification forms mentioned in this column refer to the revised forms, *not* the ones found in the Department of Justice's *A Guide to Equitable Sharing of Federally Forfeited Property to State and Local Agencies* [hereinafter *A Guide to Equitable Sharing*]. To obtain copies of the revised forms, please contact Araceli Carrigan at (202) 616-5088 or Rebecca Brown at (202) 622-2807.

Q Earlier this year, our department sent a three-year agreement form signed by our sheriff, who has since retired. Do we need to resubmit the form?

A Yes. You submitted an agreement form stamped "valid through September 30, 1999," which will be valid until that date. However, when a change in administration for the head of the law enforcement agency or the governing body occurs during this period, a new agreement form must be submitted to reflect the signatures of the new officials.

Q My agency received a forfeited luxury sports car as our share. We did not receive any cash or proceeds. Do we need to complete the reporting forms?

A The reporting requirements apply to any state or local agency that receives forfeited *property* or cash. The value of the car must be reported.

Q During the past fiscal year, my agency received $10,000 from the federal equitable sharing program. We reported the amount in the Annual Certification Form. This form was returned because we did not include the interest income accrued in *line 3*.

A Any interest on equitable sharing monies is subject to the same restrictions as the monies themselves. For example, when your agency does not complete *line 3* (interest income accrued), it is assumed that the interest earned went directly to the general fund—a violation stated in *A Guide to Equitable Sharing*.

Q What does "EFT" mean?

A Electronic funds transfer (EFT) is any transfer of funds, other than by cash, check or similar paper instrument through an electronic terminal, telephone, computer, or magnetic tape for the purpose of instructing or authorizing a financial institution to debit (withdraw) or credit (deposit) an account. The Debt Collection Improvement Act of 1996, Public Law 104-134, mandates the EFT of all payments made by federal agencies into the recipient's accounts after January 1, 1999. Although EFTs will not be implemented until 1999, state and local agencies that participate in the equitable sharing program should make arrangements to designate a financial institution to receive shared funds. Agencies will receive further instructions about EFT in the future.

Q We heard about the reporting requirements, but we do not have the forms. Can I just send a memo detailing my agency's beginning and ending balance with the amounts we spent during the fiscal year?

A You must complete the agreement and certification forms. Forms can easily be obtained by calling Araceli Carrigan at (202) 616-5088 and Rebecca Brown at (202) 622-2807.

Note: In a future issue, we will discuss the audit reporting requirement and its relation to the Single Audit Act.

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Below is AFMLS' contact list arranged alphabetically by subject area. This list is designed to help you reach appropriate AFMLS personnel quickly and easily. It is not a listing of our entire staff.

Adverse Decisions/Appellate
Harry Harbin

Ancillary Hearings
Stefan Cassella
Michele Crawford
Laury Gordon Estrada

Asset Forfeiture Bulletin Board
Araceli (Celi) Carrigan
Alice Dery
Morenike Soremekum

Assets Forfeiture Fund/Seized Asset Deposit Fund
G. Allen Carver, Jr.
Pamela Dempsey
Nora Kelly
Joseph (Mike) Payne
Nancy Rider

Attorney Fee Forfeitures
Barry Blyveis
Michael Davitt
Pamela Dempsey
Harry Harbin
James Katz
James Lindsay
Joseph (Mike) Payne

Attorney Money Laundering Litigation
Stefan Cassella
Harry Harbin
John Hyland
Lester Joseph
Stephen May
Mark Rubino
Susan Smith

Attorney General's Guidelines
Michael Burke
G. Allen Carver, Jr.
Irene Gutierrez
James Katz
Joseph (Mike) Payne
Nancy Rider

Bankruptcy
Michael Burke
John Hyland
Linda Samuel

BCCI
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Stefan Cassella
Michele Crawford

Business Restraint/Seizure
Matthew Bode
Stefan Cassella
Pamela Dempsey
James Lindsay

Cash Retention as Evidence
G. Allen Carver, Jr.
James Katz
Joseph (Mike) Payne

Commercial Transactions and Interests
Barry Blyveis
Matthew Bode
Deborah Brinley
Michele Crawford
Mark Rubino

Contaminated Property
James Katz
Joseph (Mike) Payne

Controlled Substances
Barry Blyveis
Michael Davitt
Stephen May

Discovery: Civil
Barry Blyveis
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Deborah Brinley
Michele Crawford
Mark Rubino

EAJA: Awards from the Assets Forfeiture Fund
Barry Blyveis
James Katz
Joseph (Mike) Payne

Equitable Sharing
Michael Burke
Irene Gutierrez
Nancy Rider
Karen Vogel

Equitable Sharing/Audit and Certification
Araceli (Celi) Carrigan
Alice Dery

Equitable Sharing/Audits
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Nancy Rider

Excessive Fines
Stefan Cassella
Harry Harbin

Federal, State and Local Liaison
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Alice Dery

Fraud
G. Allen Carver, Jr.
Pamela Dempsey

Gambling
James Katz
Joseph (Mike) Payne

Grand Jury (Rule 6(e))
Barry Blyveis
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Michael Davitt
Pamela Dempsey

Health Care Fraud/Money Laundering
Stefan Cassella
Laury Gordon Estrada
Joseph (Mike) Payne

International Forfeiture (Including Sharing)
Juan Marrero
Linda Samuel

International Money Laundering
Michael Davitt
Lester Joseph
Susan Smith

Legislative Analysis and Review
Stefan Cassella
Joseph (Mike) Payne

Litigation/Forfeiture
A. Civil
Barry Blyveis
Matthew Bode
Deborah Brinley
Michele Crawford
Pamela Dempsey
Mark Rubino

Litigation/Forfeiture
B. Criminal
Barry Blyveis
Stefan Cassella
Michael Davitt
Pamela Dempsey
Laury Gordon Estrada
Harry Harbin

Litigation/Forfeiture
C. Money Laundering
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Michael Davitt
Pamela Dempsey
Laury Gordon Estrada
Lester Joseph
Stephen May
Margaret (Meg) O'Donnell
Susan Smith

Money Laundering Prosecution Guidelines
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Money Laundering Sentencing Guidelines
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Policy: Forfeiture
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Stefan Cassella
James Katz
Joseph (Mike) Payne

Policy: Money Laundering
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Stefan Cassella
Harry Harbin
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Susan Smith

Publications
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Real Property
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Pamela Dempsey
Laury Gordon Estrada

Receivers/Trustees/Monitors
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Pamela Dempsey
James Lindsay

Remission/Mitigation
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James Lindsay
Nancy Rider
Karen Vogel

Restraining Orders
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Pamela Dempsey

RICO
Michael Davitt
Lester Joseph
James Katz
Margaret (Meg) O'Donnell

Settlement/Expedited Settlement
James Katz
Joseph (Mike) Payne

Statutes/Regulations
Stefan Cassella
Harry Harbin
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Substitute Assets
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Pamela Dempsey

Training/International
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Linda Samuel

Training Seminars: Federal
Mary Ann DeToro
Sarah Dunklin
Nancy Martindale
Nancy Rider

Training Seminars: State and Local
Araceli (Celi) Carrigan
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Victim/Restitution
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James Lindsay
Nancy Rider
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Weed and Seed
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Irene Gutierrez
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Working Group/Federal Asset Forfeiture
Araceli (Celi) Carrigan
Alice Dery

Working Group/State and Local Asset Forfeiture
Araceli (Celi) Carrigan
Alice Dery

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Asset Forfeiture Bulletin Board

Writers needed:

The Asset Forfeiture and Money Laundering Section wants your help to keep the AFBB up-to-date and relevant to your needs. Submit documents that you think will be useful to asset forfeiture practitioners in other districts.

The following documents are currently needed for the AFBB:

- civil forfeiture jury instructions for money laundering under 18 U.S.C. § 981 and 21 U.S.C. § 881;
- civil forfeiture complaints with attached agent affidavits;
- Warrants of Arrest and Notice *In Rem* that comply with *United States v. James Daniel Good Real Property,* 114 S. Ct. 492 (1993);
- civil and criminal appellate motions and briefs; and
- state and local asset forfeiture legislation.

Contact:
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Send document(s) on 3-1/2" IBM compatible disk to:
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Upload document(s) to the AFBB or EOUSA BBS

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