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Money Laundering / Facilitating Property / Excessive Fines

- **Fifth Circuit adopts "facilitation theory" for money laundering forfeiture. Clean money in a bank account is subject to forfeiture if it facilitates the laundering of criminal proceeds.**

Defendant acquired $450,000 in proceeds from an insurance fraud, and proceeded to launder it through an elaborate money laundering scheme. He deposited the proceeds in personal bank accounts at various banks across the country, directed those banks to send the funds as cashiers checks to an address in Louisiana, and then, mailed the checks to a new account he opened in Nevada. Finally, as investigators closed in, Defendant arranged to have the balance in the Nevada account delivered to him in cash at a local airport, but the government seized the account before this plan could be executed. Along the way, Defendant commingled the fraud proceeds with untainted funds so that the balance in the Nevada account was more than $1 million at the time it was seized.

When Defendant was convicted of money laundering, the jury found that all $1 million was subject to forfeiture as property involved in a money laundering offense. *See* 18 U.S.C. § 982(a)(1). The district court, however, reduced the amount of the forfeiture. The Defendant appealed his conviction, and the government cross-appealed with respect to the forfeiture.

Relying on a series of district court cases, as well as the legislative history of the money laundering forfeiture statute, the **Fifth Circuit** granted the government's appeal and held that the entire sum of money seized from the Nevada account was subject to forfeiture. The convoluted series of transactions, including the opening of bank accounts in geographically distant places, the timing of the transfers, and the "pooling" of the proceeds with funds from other sources, indicated that Defendant intended to conceal or disguise the source, location, nature, ownership or control of the fraud proceeds. Thus, Defendant was properly convicted of money laundering. Moreover, because the pooling was part of the scheme to conceal or disguise, the clean money was "involved in" the money laundering offense and was subject to forfeiture.

Quoting a leading district court case, the court said the following:

> "Limiting the forfeiture of funds under these circumstances to the proceeds of the initial fraudulent activity would effectively undermine the purpose of the forfeiture statute. Criminal activity such as money laundering largely depends upon

> the use of legitimate monies to advance or facilitate the scheme. It is precisely the commingling of tainted funds with legitimate money that facilitates the laundering and enables it to continue."

Accordingly, "the district court was bound by the mandatory provisions of section 982 and erred in reducing the forfeiture."

Finally, the court rejected Defendant's claim that the application of the facilitation theory in a money laundering case violated the Excessive Fines Clause. "Given the extensive nature of the criminal activity in this case over a three-year span," the court said, "and the large sum of money derived from that activity [$450,000], we conclude that the forfeiture [of $1 million] does not represent an excessive fine under the Eighth Amendment." —*SDC*

United States v. Tencer, ___ F.3d ___, 1997 WL 104157 (5th Cir. Mar. 10, 1997). Contact: AUSA Harry W. McSherry, Jr., ALAE01(hmesherr).

Comment: The Fifth Circuit is the first court of appeals to apply the facilitation theory to untainted funds in a bank account in a money laundering case. The leading district court decisions are the following: *United States v. All Monies*, 754 F. Supp. 1467, 1475-76 (D. Haw. 1991); *United States v. Certain Funds on Deposit in Account No. 01-0-71417*, 769 F. Supp. 80, 84-85 (E.D.N.Y. 1991); *United States v. Certain Accounts*, 795 F. Supp. 391, 397 (S.D. Fla. 1992); *United States v. Contents of Account Numbers 208-06070*, 847 F. Supp. 329, 334-35 (S.D.N.Y. 1994); and *United States v. South Side Finance, Inc.*, 755 F. Supp. 791, 797-98 (N.D. Ill. 1991).

In *Tencer*, the court of appeals was careful to point out that merely "pooling" tainted and untainted funds in a bank account does not render the entire balance in the account subject to forfeiture. The untainted funds are forfeitable only if the pooling serves to conceal or disguise the laundering of the tainted funds. Thus, while clean money can be forfeited if it is involved in a violation of section 1956(a)(1)(B)(i) (concealing or disguising SUA proceeds), the court distinguished cases where the clean money was not forfeited because it was merely present in an account into which the defendant happened to placed structured funds. *See United States v. All Funds on Deposit (Great Eastern Bank)*, 804 F. Supp. 444, 447 (E.D.N.Y. 1992) (legitimate funds in bank account do not facilitate structuring; account itself is not subject to forfeiture; cases involving facilitation of section 1956 or 1957 offenses distinguished); *Marine Midland Bank N.A. v. United States*, 1993 WL 158542 (S.D.N.Y. May 11, 1993), aff'd on other grounds, 11 F.3d 1119 (2d Cir. 1993) (untainted funds in interbank account used to "clear" structured money orders not forfeitable under facilitation theory). —*SDC*

Burden of Proof

■ **Eleventh Circuit upholds constitutionality of burden shifting provision in civil forfeiture cases.**

Claimant challenged the constitutionality of 19 U.S.C. § 1615 which provides that in civil forfeiture cases, once the government establishes probable cause to believe that property is forfeitable, the burden shifts to the claimant to prove the contrary by a preponderance of the evidence. The **Eleventh Circuit** rejected the challenge and held that section 1615 is constitutional.

The Supreme Court's decision in *United States v. Ursery*, the court said, makes it clear "that the Supreme Court continues to view *in rem* forfeiture

proceedings as civil actions rather than criminal punishment." In civil actions, Congress is free to allocate the burden of proof as it sees fit. Accordingly, the court held that it would follow the First, Second, Fourth, Seventh, Ninth and Tenth Circuits in upholding the constitutionality of section 1615. —*SDC*

United States v. One Beechcraft King Air 300 Aircraft, ___ F.3d ___ 1997 WL 85490 (11th Cir. Jan. 8, 1997). Contact: AUSAs Robert Barcliff, AFLMFT01(rbarclif) and Peggy Ronca, AFLMJ01(pronca).

Discovery / Innocent Owner

■ **Where claimant's failure to comply with government's legitimate discovery requests, despite court orders to the contrary, evidenced bad faith, the district court's dismissal of the innocent owner claim was not an abuse of discretion.**

The government commenced a civil forfeiture action under 21 U.S.C. § 881(a)(7) against real property used by claimant's husband as a dwelling to facilitate drug activity. Claimant filed a claim asserting an innocent owner defense.

When Claimant failed to comply with the government's numerous discovery requests, the district court ordered Claimant to comply, warning "that failure to obey this Order may result in a dismissal of its claim, taxation of costs and attorney fees, and other sanctions." Claimant failed to comply with the order, and the government sought sanctions, specifically requesting that the court dismiss her claim and grant summary judgment in favor of the government.

The district court then ordered Claimant to contact the government and participate in a pretrial conference and preparation of a pretrial order, pursuant to the district court's local rules. Contained within the local rule was a requirement that the parties exchange discovery material. The order stated: "Failure to comply with this order may result in an order striking the claim."

Claimant's lawyer contacted the government and orally agreed to provide the government the required documentation; however, the documents were not provided, and the government filed a second motion for sanctions seeking dismissal of the claim. The court granted the government's motion, dismissed the innocent owner claim, and granted the government's motion for summary judgment based upon its prior finding of probable cause.

The **Fourth Circuit** affirmed the dismissal holding that the district court did not abuse its discretion because Claimant's repeated refusals to comply with the government's legitimate discovery requests, despite the district court's orders, evidenced willful bad faith, was prejudicial the government, and hampered the district court's efforts to resolve the litigation. The Court of Appeals also affirmed the order of summary judgment in favor of the government, holding that probable cause had been established and that Claimant had failed to show by a preponderance of the evidence that the factual predicate had not been met. —*LLGE*

United States v. One Tract of Real Property ... Little River Township, 1997 WL 71719 (4th Cir. Feb. 20, 1997) (unpublished). Contact: AUSA Thomas P. Swaim, ANCE01(tswaim).

Rule 41(e)

■ **Holding currency for three years as part of a tax investigation without filing forfeiture action, tax lien or criminal charges is too long. Evidentiary value of the currency may be preserved by other means.**

Three family members filed a Rule 41(e) motion for the return of records and currency seized by Internal Revenue Service (IRS) agents and held for three years without charging anyone with a crime. The government indicated that it did not seek forfeiture of the property.

The court stated that under a reasonableness standard it must order return of the currency, explaining that "any evidentiary value of the currency itself may be preserved by photographing it, recording the serial numbers, and having defendants or their agents sign a receipt acknowledging return of the cash." "Although the government contends that it will seek tax evasion charges, the government has been making this assertion from the moment it seized the property." No tax lien had been filed against the currency. Finally, the court commented that even if the government intended to forfeit the currency, it had held it too long.

As for the records, the court ordered the government to show cause why it should not return the originals or provide photocopies.

The court rejected the holding of other courts that a preindictment Rule 41(e) movant must demonstrate that there is no adequate remedy at law and that movant would be irreparably harmed if the property is not returned. —*BB*

United States v. Lamplugh, ___ F. Supp. ___ 1997 WL 101561 (M.D. Pa. Mar. 4, 1997). Contact: AUSA Wayne Samuelson, APAMW01(wsamuels).

Rule 41(e)

■ **Rule 41(e) motion is appropriately denied when the government does not possess the property; and, therefore, cannot return it.**

Appellant filed a Rule 41(e) motion for the return of his car, which was seized at the time of his arrest. A post-conviction Rule 41(e) motion is treated as a civil equitable proceeding for the return of the property in question in the Seventh Circuit.

The district court found that the car, which was seized by the Milwaukee County Sheriff's Department, was never in the actual possession of the federal government. Because the United States was not in possession of the vehicle at the time the appellant filed his motion and had never been in possession of the vehicle, it was not the appropriate party from which to request its return. Accordingly, the court denied the Rule 41(e) motion, and on appeal, the **Seventh Circuit** affirmed. —*MML*

United States v. Solis, ___ F.3d ___, 1997 WL 81143 (7th Cir. Feb. 27, 1997). Contact: AUSA Mel S. Johnson, AWIE01(mjohnson).

Administrative Forfeiture / Notice

■ **Tenth Circuit vacates administrative forfeiture because the Drug Enforcement Administration (DEA) sent direct notice to only two of the defendant's three residences.**

Local law enforcement authorities seized two caches of U.S. currency, two Corvettes and an Econoline van from Appellant and turned them over to DEA for forfeiture under federal law. Appellant was arrested by the local authorities but was released and became a fugitive.

DEA published notice of the forfeitures in *USA Today* once a week for three consecutive weeks, and mailed a written notice of the forfeiture to two of Appellant's three known addresses. Appellant argued, however, that DEA's attempts to provide him with notice of its intent to forfeit failed to satisfy statutory and due process requirements, and that the administrative forfeitures should be vacated.

The **Tenth Circuit** held that DEA's publication in *USA Today* satisfied the forfeiture statute's "notice by publication" requirement. However, the court found that DEA's attempts to give Appellant actual notice of the forfeitures was insufficient. The government is not only chargeable with information it has within its possession but also with information it could have discovered by making reasonable efforts. If, through reasonable effort, the government can determine that the defendant has more than one address, it must send direct notice to each address, and not just to one of them, if certain factors are present.

The factors that the government needs to take into account in deciding whether to mail its notice letters to a particular address include the following: (1) whether there is physical evidence linking the claimant to the address; (2) whether there are other indicia of residency; (3) whether the claimant has a real property interest in the property represented by the address; (4) whether there is any direct evidence linking the claimant to the address; (5) whether there is evidence suggesting that a notice letter mailed to the address will be forwarded to the claimant; and, (6) whether there are alternative methods of providing actual notice that may be available to the government.

In this case, DEA was aware, or should have become aware, that Appellant had three residences at which he kept his belongings. In particular, DEA is charged with information that Appellant provided in the local authorities' seizure records. Those records contained information about the three addresses, including strong evidence as to which address was Appellant's primary address. The Econoline van was seized from the primary address, DEA knew Appellant maintained a residence there, and DEA's mailings to the other addresses were returned undelivered; thus, it was unreasonable for DEA not to mail a notice letter concerning the seizure of the Econoline van to that address.

Additionally, the court found that DEA cannot rely upon a claimant's fugitive status as an excuse for failure to give notice that might reasonably result in actual notice to the fugitive. Because it was unacceptable for DEA to rely upon notice by publication while failing to use the information it possessed from the beginning of the forfeiture process to notify Appellant, the court vacated the administrative forfeitures. —*MML*

United States v. Rodgers, ___ F.3d ___, 1997 WL 105030 (10th Cir. March 11, 1997). Contact: AUSA Catherine Depew Hart, AOKN01(cdhart).

Due Process / Notice / Rule 60(b)

- **Lack of formal notice does not justify relief from forfeiture where owner of forfeited property had actual notice of forfeiture action but failed to file a timely claim and did not request relief from the forfeiture judgment within one year of the judgment as required by Rule 60(b).**

The government filed a complaint and an amended complaint for the judicial forfeiture of computer equipment in May 1994, but did not formally serve the complaints on the owner. Nevertheless, the owner received both pleadings and filed a response and a motion for appointment of counsel, but no claim. In August 1994, based on the absence of a claim, the government filed a motion for default (which the owner admitted also receiving) and the property was ordered forfeited.

In March 1996, the owner filed a motion for return of the property which the court treated as a motion under Rule 60, F.R.Civ.P. for relief from the judgment. In addition to a double jeopardy claim that was nullified by *United States v. Ursery*, 116 S. Ct. 2135 (1996) (civil forfeiture is not punishment for purposes of double jeopardy), the owner asserted that the forfeiture violated due process because he was not provided notice of the forfeiture.

The court denied relief because, although the owner was not served formally with the forfeiture complaints, it was clear from his responsive pleadings that he had, in fact, received notice of the proceedings and failed to file a timely claim. The court noted that the owner appeared to have been fully capable of preparing and filing a timely claim. He was a certified public accountant; he had retained counsel for his criminal proceedings; he represented himself on appeal; and, he filed other pleadings in the civil forfeiture action. The court added that the owner had not requested relief from the judgment of forfeiture within one year of the entry of the judgment as required by Rule 60(b), F.R.Civ.P. —*JHP*

United States v. One Samsung Computer, 1997 WL 104974 (E.D.La. March 7, 1997) (unpublished). Contact: AUSA Constantine Georges, ALAE01(cgeorges).

Administrative Forfeiture / Subject Matter Jurisdiction / Excessive Fines

- **Procedurally sound administrative forfeiture deprives court of subject matter jurisdiction for review on the merits.**

- **District court suggests that forfeiture does not violate the Excessive Fines Clause where the owner could have been fined much more than the forfeited cash and was arrested carrying both the drugs that served as the basis for his conviction and the forfeited cash.**

The plaintiff, a convicted heroin trafficker, brought suit pro se seeking recovery of $10,455 that the Drug Enforcement Administration (DEA) had seized from him at the time of his arrest for smuggling heroin into the United States.

DEA published notice of the administrative forfeiture proceeding and sent notice by certified mail to the plaintiff in prison. The plaintiff filed no claim and cost bond or affidavit of indigency. Instead, the plaintiff sent a letter to DEA requesting return of the

seized money. Because the plaintiff's letter contained no cost bond or affidavit of indigency, DEA treated the letter as a petition for remission. DEA proceeded to forfeit the seized money administratively and deny remission.

In addition to a double jeopardy claim that was nullified by *United States v. Ursery*, the owner asserted that the DEA's administrative forfeiture violated the Fifth Amendment and the Excessive Fines Clause. The court determined that DEA's treatment of the plaintiff's letter requesting return of the money as a petition for remission was correct given the absence of a cost bond or affidavit of indigency. The court ruled that because the forfeiture was procedurally sound, it lacked subject matter jurisdiction to review the forfeiture on the merits. *See Toure v. United States*, 24 F.3d 444, 445-46 (2d Cir. 1994) (review of administrative forfeiture limited to procedural errors); *Infante v. Drug Enforcement Administration*, 938 F. Supp. 1149, 1157 (E.D.N.Y. 1996) (failure to file a claim is tantamount to implicit consent to administrative forfeiture).

In dicta, the court added that even if it had subject matter jurisdiction, the Excessive Fines claim would fail under *United States v. Milbrand*, 58 F.3d 841, 847-48 (2d Cir. 1995), because the plaintiff could have been fined much more than the $10,455 that was forfeited and because there was a strong relationship between the forfeited property and the illegal conduct based on the fact that when the plaintiff was arrested he was carrying both the heroin (which served as the basis for his conviction) and the forfeited cash. —*JHP*

Ezennwa v. United States, ___ F. Supp. ___, 1997 WL 63318 (E.D.N.Y. Feb. 12, 1997).
Contact: AUSA Thomas A. Jones, Jr., ANYE03(tjones).

Jurisdiction / Adoptive Forfeiture

- **Federal court has exclusive jurisdiction over lawsuit against city to recover currency seized by city police, because the currency had been given to the Drug Enforcement Administration (DEA) for forfeiture and the United States had removed the case to federal court.**

City police seized $280,000 from plaintiffs and turned it over to DEA to forfeit. Plaintiffs sued the city and police in state court to recover the money. That court granted the city's motion to add DEA as a party. The United States removed the action to federal court. The parties stipulated that the currency was in federal custody. Plaintiffs moved the federal court to dismiss DEA as a party and to remand the cause to the state court. It granted the motion to dismiss DEA as a party, pursuant to Fed.R.Civ.P. 41(a), inasmuch as DEA had not yet filed a responsive pleading.

However, the federal court denied the motion to remand, reasoning that because DEA had commenced administrative forfeiture proceedings against the currency, the federal court retained exclusive jurisdiction over the action, based on 21 U.S.C. § 881(c) and 28 U.S.C. § 1355. Section 881(c) provides that property seized under section 881 is not repleviable and is deemed to be in the custody of the Attorney General. The federal court specifically ruled that the state court was without jurisdiction to order return of the money. —*BB*

Edney v. City of Montgomery, ___ F. Supp. ___, 1997 WL 120020 (M.D. Ala. Feb. 28, 1997).
Contact: AUSA John T. Harmon, AALM01(jharmon).

Excessive Fines

- **Eighth Circuit reaffirms that property determined to be criminal "proceeds" should be excluded from the excessive fines analysis.**

- **Because the defendant challenging a forfeiture on excessive fines grounds has the burden of showing "gross disproportionality," the burden is on the defendant to establish the value of the property forfeited.**

In *United States v. Alexander*, 509 U.S. 544 (1993), the Supreme Court held that criminal forfeitures are subject to the Excessive Fines Clause of the Eighth Amendment, and remanded the case to the **Eighth Circuit**. That court, in turn, remanded the case to the district court with instructions to develop the record and determine whether the forfeiture imposed on Alexander, a big time pornographer, was excessive.

On remand, the district court found that most of the property forfeited by Alexander—more than $8.9 million—constituted proceeds of his racketeering enterprise. Accordingly, the court excluded the property representing the proceeds from its Eighth Amendment analysis. As to the remaining property, the court held that Alexander had to make a prima facie showing that the amount of the forfeiture was grossly disproportionate to the extent and duration of the underlying criminal activity. This meant that the defendant had the burden of establishing the value of the property that was forfeited and showing a disproportionality between the forfeiture and the crime. The district court held that Alexander failed to make the required prima facie showing and rejected the Eighth Amendment challenge. Alexander appealed and the **Eighth Circuit** affirmed.

First, the court reaffirmed its earlier holding that the forfeiture of criminal proceeds is never excessive. "The forfeiture of proceeds from the illegal enterprise is not considered punishment subject to the excessive fines analysis because the forfeiture of proceeds simply deprives the owner of the fruits of his criminal activity." Thus, the district court did not err in excluding the property it found to be proceeds from its Eighth Amendment analysis.

Second, the court held that because the defendant bears the burden of showing a gross disproportionality between the forfeiture and the crime, it was entirely proper to put the burden on the defendant to establish the value of the property forfeited. Alexander's inability to do this was due largely to his own efforts, prior to the seizure of his property, to conceal the extent of his wealth. Under those circumstances, the court saw no reason to relieve the defendant of the burden to show gross disproportionality.

Accordingly, the panel found no error in the district court's rejection of the Eighth Amendment challenge.

—*SDC*

United States v. Alexander, ___ F.3d ___, 1997 WL 101566 (8th Cir. Mar. 10, 1997). Contact: AUSA Paul Murphy, AMN01(pmurphy).

Probable Cause / Innocent Owner / Summary Judgment / Excessive Fines

- **In the face of overwhelming evidence connecting real property to drug trafficking, claimants' sworn affidavits claiming otherwise are insufficient to block entry of summary judgment for the government on the probable cause issue.**
- **Claimants' general denial of knowledge of drug activity on their property is insufficient to create a material issue of fact regarding the innocent owner defense, even if the court applies the "actual knowledge" standard.**
- **Claimant who fails to take *all* reasonable steps to prevent illegal use of her property cannot establish "lack of consent" prong of the innocent owner defense.**
- **Forfeiture of a residence is not excessive even if the owner was not personally involved in the drug activity taking place on the premises.**

Local police were aware of drug trafficking activity taking place at a residence in Washington, D.C. They executed search warrants on the premises, made several arrests, and warned the landlady, who resided on the first floor, that unless action was taken to control the drug problem, forfeiture of the residence could result.

In response to these warnings, the landlady and her daughter took certain steps, including making verbal requests to the drug dealers to desist from illegal activity, and installing locks on the doors to bar strangers from the premises. But instead of evicting the drug dealers, the landlady gave keys to the new locks to the persons who were arrested, and subsequently convicted, and the drug trafficking activity continued unabated. Ultimately, after making an undercover buy at the premises, the government filed a civil forfeiture action under 21 U.S.C. § 881(a)(7).

The government filed a motion for summary judgment, which the landlady and her daughter opposed on two grounds: (1) that the government lacked probable cause to believe the residence was used to facilitate a felony drug offense (as opposed to a simple possession misdemeanor); and (2) that the claimants were innocent owners. They also asserted that the forfeiture of the residence would violate the Excessive Fines Clause of the Eighth Amendment, given that the owners of the building were not themselves involved in any illegal activity.

The district court found that the evidence connecting the residence to felony drug trafficking activity was overwhelming. In addition to the undercover buy, the government established that the house contained packaged drugs and drug paraphernalia that was consistent with distribution. Hence, there was probable cause to believe that the residence was used to facilitate a felony, not just a personal use misdemeanor.

To rebut the evidence of probable cause, the claimants offered several sworn affidavits denying that anything other than personal use of drugs took place on the premises. In the claimants' view, these affidavits created a material issue of fact that would bar the entry of summary judgment for the government on the probable cause issue. The court disagreed.

Whether a summary judgment motion should be granted depends on what the moving party's burden of proof would be at trial. In a civil forfeiture case, the government need only establish probable cause, and it is entitled to summary judgment on that issue notwithstanding the claimant's denials if its evidence meets the usual probable cause standard and no

reasonable jury could find otherwise. Sworn affidavits denying the facts might create a material issue with respect to issues on which the government bears a higher burden, but they are insufficient to bar the entry of summary judgment on the question whether the government has established probable cause. Accordingly, the government's motion for summary judgment was granted as to the first issue.

The court then addressed the claimants' innocent owner defense in two steps. First, it noted that the circuits are split over whether a claimant must establish lack of "constructive knowledge" or lack of "actual knowledge." The latter standard is obviously easier for the claimant to satisfy; but even under the "actual knowledge" test, the claimants failed to raise a material issue of fact.

The court acknowledged that summary judgment is difficult to enter where a party's state of mind is at issue and the party denies having the requisite state of mind. Generally, such issues must be resolved at trial. However, "faced with overwhelming evidence to the contrary, a claimant cannot rely upon mere denials to prove an absence of actual knowledge, but rather must come forward with something more substantial." Given the numerous drug raids on her property, the warnings from the police, the seizure of drugs in plain view from a table located just outside the claimant's bedroom, and the fact that the claimants did take *some* steps to reduce the drug activity, the court held that there was no material issue regarding the claimants' state of mind.

Second, the court addressed the consent prong of the innocent owner defense. Following "the substantial majority of jurisdictions," the court held that to establish lack of consent, a claimant must prove that she took "all reasonable steps to prevent illicit use of the premises once [she] acquires knowledge of that use." Here, the court said, the claimants had taken *some* reasonable steps, but not *all* such steps. Drug dealers were not evicted, the front exterior of the house was rarely checked to discover illegal acts, and drugs and drug paraphernalia remained in plain view. Moreover, after the forfeiture action was filed, the claimants did take strong steps, which were successful in ridding the premises of drug dealers, indicating that such measures could have been taken earlier. In light of these facts, the court held, no reasonable jury could find that the claimants had taken all reasonable steps. Accordingly, the government was entitled to summary judgment on the innocent owner defense.

Finally, the court turned to the excessive fines issue and held that the forfeiture was not excessive whether it employed a strict "instrumentality test," as the Fourth Circuit did in *United States v. Chandler*, 36 F.3d 358 (4th Cir. 1994), or a combination instrumentality and "proportionality test," as the Second Circuit did in *United States v. Milbrand*, 58 F.3d 841 (2d Cir. 1995). Under the instrumentality test, the house was clearly forfeitable given the long term use of the house for illegal activity, and the pervasiveness of that activity within the residence. "Indeed, no part of the three-story house appeared to be immune from illicit activities."

The hybrid test posed a closer question, because it requires a court to take into account, among other things, the culpability of the owner. But, the court held, even if the owner was entirely uninvolved in the illegal activity, the forfeiture would not be excessive if other factors outweighed the owner's lack of personal culpability. Here, the claimants' lack of personal involvement was outweighed by the substantial connection between the property and the offense, and the harmful impact on the community that resulted from the use of the premises for over a year to "foster and shelter" the distribution of illegal narcotics. Thus, the court rejected the excessive fines challenge.

—*SDC*

United States v. Property Identified as 1813 15th Street, N.W., ___ F. Supp. ___, 1997 WL 115669 (D.D.C. Feb. 27, 1997). Contact: AUSA William Cowden, ADC01(wcowden).

Probable Cause / Hearsay / Summary Judgment

- **Hearsay testimony intended to show probable cause may properly be included in an affidavit opposing a motion for summary judgment.**

Claimants moved for summary judgment in a civil forfeiture case. In opposing the motion, the government submitted the affidavit of a Secret Service special agent. Claimants moved to strike the portions of the affidavit that included hearsay evidence.

The court denied the motion. The court acknowledged that Rule 56(e), of the Federal Rules of Civil Procedure, requires that affidavits, either supporting or opposing a motion for summary judgment, shall be based upon personal knowledge and set forth facts that would be admissible as evidence. However, the court held that in forfeiture cases, when the issue involves the existence of probable cause, the concept of admissibility differs significantly from the ordinary evidentiary rules of admissibility, and hearsay testimony may properly be considered in a probable cause showing.

The court reasoned that probable cause determinations often involve information gleaned from confidential sources, and a court may properly consider this information, deciding whether the information is sufficiently reliable based upon the totality of the circumstances including the informant's previous "track record." Here, because the informants were other law enforcement officers, the court was far less concerned about the reliability of the hearsay information than if the informants had been confidential informants. —*MSB*

United States v. $271,070.00 in United States Currency, 1997 WL 106307 (N.D. Ill. Feb. 12, 1997) (unpublished). Contact: AUSA Jonathon Haile, AILN02(jhaile).

Standing

- **Whether claimants possess Article III standing to contest a forfeiture is a threshold matter because the district court's subject matter jurisdiction extends only to actual cases and controversies; absent standing, the court lacks jurisdiction to address claimants' claims.**

- **Claimants' motion for summary judgment must be denied if there are material issues of fact concerning Claimants' standing.**

The defendant's currency, $271,070 in cash, was seized and held pursuant to 18 U.S.C. § 981(a)(1)(C), and 21 U.S.C. § 881(a)(6), after agents went to the home of a man suspected of illegal drug transactions ("Lewis"), and observed a man carrying a large shopping bag behind the house. The agents pursued, and the man fled, dropping the bag that contained the defendant's currency. When the government commenced a civil forfeiture action, several of Lewis' relatives, who shared the house with him, filed claims for the money and moved for summary judgment.

The court denied the motion, finding that issues of material fact existed as to whether any of the claimants possessed Article III standing to contest the forfeiture. Without constitutional standing, there is no "case or controversy," and the court lacks jurisdiction to address the merits of the claims. To establish the

requisite standing, each claimant must show a "legally cognizable interest in the property that will be injured if the property is forfeited." Generally, claimants need only assert a colorable ownership interest *or* possessory interest, but bald assertions without evidentiary support are insufficient.

Here, each of the claimants filed an affidavit claiming that the defendant's currency was legitimate family money, earned in part by each of them, and available for use by all of them. However, several of the claimants had submitted prior statements to the government that contradicted the assertions in the affidavits relating to the existence, source, ownership, and/or control of the funds. The court held that these earlier inconsistent statements were sufficient to create an issue of material fact as to standing; thus, the motion was denied. —*MSB*

United States v. $271,070.00 in United States Currency, 1997 WL 94722 (N.D. Ill. Mar. 3, 1997) (unpublished). Contact: AUSA Jonathon Haile, AILN02(jhaile).

Res Judicata / *Good* Violation

- **Failure to comply with the time limits for filing claims under Rule C(6) bars the relitigation in another proceeding of any issue that might have been raised with respect to the subject matter of the civil forfeiture action.**
- ***James Daniel Good* is not applicable to cases that were final prior to that decision. Thus, *Good* cannot be invoked to avoid the *res judicata* effect of failing to file a timely claim.**

Claimants filed claims to dairy farms and other property seized by the U.S. Marshals Service as proceeds of narcotics trafficking perpetrated by their brother. The claims were dismissed with prejudice by the district court for lack of statutory standing because claimants failed to file within ten days of being served with the complaint or to answer the complaint within twenty days. The Court of Appeals affirmed, and the property was forfeited. *United States v. One Dairy Farm*, 918 F.2d 310 (1st Cir. 1990).

Claimants then filed another action in district court to recover the forfeited property. The government moved for summary judgment on grounds of *res judicata* and failure to state a claim upon which relief might be granted. Claimants opposed the government's motion arguing that: (1) they were innocent owners of the properties; (2) the U.S. Marshals Service failed to provide notice and an opportunity to be heard prior to the seizure; and (3) the holding in *James Daniel Good* applied retroactively.

The district court granted the government's Motion for Summary Judgment, and dismissed claimants' action with prejudice finding that their claims were precluded under the doctrine of *res judicata*. The court found that the elements of claim preclusion were met: (1) the identity of the parties in the prior and present action were the same; (2) the causes of action in the prior and the present action were identical because the parties were seeking to recover the same properties; and (3) the prior judgments were on the merits.

The "crucial issue" was the third one. Claimants objected that the dismissals of their claims in the civil forfeiture case were not "on the merits" because they were based on lack of standing. The court disagreed. Unlike a case dismissed for "curable" lack of

standing, a case dismissed for failure to comply with time requirements precludes the claimant from bringing further claims for possession of the property. "The ten-day claim period and the subsequent twenty-day answer period in Rule C(6) is designed to force claimants to come forward as soon as possible after forfeiture proceedings have begun and to prevent false claims. A dismissal for failure to comply with Rule (C)(6) forecloses a claimant from ever bringing a second suit or a future claim for the defendant properties." Thus, the dismissal of a claim for failure to comply with Rule (C)(6) is "on the merits" and *res judicata* applies.

The court also found that the Supreme Court's decision in *James Daniel Good* was not retroactive to claimants' case. *Good* is only retroactive to civil cases which were still pending or on direct appeal on December 13, 1993 when *Good* was decided. As a result, Claimants could not rely on *Good* either to avoid *res judicata* or to seek damages for the *Good* violation. —*LLGE*

Cameron v. Drug Enforcement Administration, ___ F. Supp. ___ 1997 WL 115245 (D.P.R. March 7, 1997). Contact: AUSA Jacqueline Novas, APR01(jnovas).

False Statements

■ False statements made to an AUSA by a third party in a forfeiture proceeding are punishable under 18 U.S.C. § 1001.

Government agents arrested a drug dealer and found a promissory note evidencing a loan made by the drug dealer to Defendant. At the time of seizure, Defendant had repaid $13,000 of the loan in cash. The court granted the AUSA's application for a seizure warrant for the loan proceeds (which were forfeitable as property traceable to drug trafficking) and ordered that Defendant pay the unpaid balance of the loan to the government.

The AUSA told Defendant that he would receive credit for the amounts he had already paid on the loan if he could produce evidence of the repayments. Defendant then produced false affidavits that provided documentation of additional loan payments. These affidavits were submitted to the AUSA, but they were neither requested by, nor filed with, the court.

Subsequently, Defendant was convicted of making false statements in violation of 18 U.S.C. § 1001. He appealed, arguing that the false statements had been made in a matter under the jurisdiction of the court, and therefore, were not punishable under section 1001. The Second Circuit affirmed the conviction, holding that false statements made to an AUSA violate section 1001, even if the matter in which the false statements arose may also be within the jurisdiction of the court. —*MSB*

United States v. Tracy, ___ F.3d ___ 1997 WL 109210 (2d Cir. Mar. 13, 1997). Contact: AUSAs Joseph M. Guerra, III, ANYW01(jguerra) and Richard D. Kaufman, ANYW01(rkaufman).

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