U.S. Department of Justice
Criminal Division
Asset Forfeiture and Money Laundering Section

Quick Release

A Monthly Survey of Federal Forfeiture Cases

Volume 10, No. 8 **August 1997**

Criminal Forfeiture / Joint and Several Liability

- **District court must announce the forfeiture portion of a defendant's sentence in his presence. Failure to comply with Fed. R. Crim. P. 43(a) means that criminal forfeiture order must be vacated.**

Defendant and several co-defendants were convicted in a "reverse sting" drug case in which they attempted to purchase drugs from an undercover agent. Each defendant was ordered to forfeit the identical sum of $44,409, representing the sum used to commit the underlying offense.

On appeal, Defendant argued that the district court erred in holding each of the defendants jointly and severally liable for the amount subject to forfeiture. The **D.C. Circuit** noted that the appellate courts that have addressed this issue are unanimous in holding that co-defendants are jointly and severally liable for forfeiture under 21 U.S.C. § 853. However, the court found it unnecessary to reach that issue for the following reason.

The Government conceded that the district court had failed to announce the forfeiture portion of Defendant's sentence in his presence. Federal Rule of Criminal Procedure 43(a) requires that the defendant be present at sentencing. Accordingly, the forfeiture—which is an aspect of the sentence—was void.

Rather than remand the case, the court, at the Government's suggestion, simply vacated the forfeiture count as it applied to Defendant. The Government suggested this procedure because it had determined that the cost of bringing the Defendant back to court did not make it worthwhile to further pursue the criminal forfeiture against him. —*SDC*

United States v. Gaviria, ___ F.3d ___, 1997 WL 351217 (D.C. Cir. Jun. 27, 1997). Contact: AUSA William D. Weinreb, ADC04(wweinreb).

Comment: For an earlier, unpublished case on this issue, *see United States v. Shannon*, 1996 WL 341352 (9th Cir. 1996) (Table Case) (order of forfeiture vacated because judge failed to mention forfeiture at sentencing, even though forfeiture was included in the indictment and plea agreement and the court amended judgment eight days after sentencing to include order of forfeiture). —*SDC*

Criminal Forfeiture / Pretrial Restraining Order

- **District court holds that defendant's wife, mother and daughter may challenge pretrial restraint of their property in a criminal forfeiture case.**

- **Third party is entitled to return of restrained property if it is clear that the property belongs to the third party and not the defendant; if the property is commingled, however, the third party must wait to the ancillary proceeding to challenge the forfeiture.**

After Defendant was indicted on RICO charges, the court issued an *ex parte* pretrial restraining order against various assets, including assets held jointly by Defendant and his family members. Defendant's wife, mother and daughter all challenged the restraining order, seeking the immediate release of property that they alleged was not subject to forfeiture. (The wife was also a defendant in the case but was not charged with RICO; therefore, she was considered a third party for purposes of the challenge to the restraining order.)

The district court first considered whether a third party is entitled to challenge a pretrial restraining order in a criminal case. It noted that normally a third party must await the ancillary proceeding to contest the criminal forfeiture of property. *See* 18 U.S.C. § 1963(i). The First Circuit has held, however, that due process considerations may require a court to entertain third party challenges to a restraining order in some circumstances. *See United States v. Real Property in Waterboro*, 64 F.3d 752, 754 (1st Cir. 1995).

Noting that the trial in the criminal case was not scheduled to begin for another six months, the court held that it was appropriate to grant the third parties a "timely pretrial opportunity to challenge the restraining order." Relying on *Waterboro*, the court went on to conclude that the third parties were barred from challenging "the validity of the indictment," but it held that they could attack the restraining order "as 'clearly improper' on the ground that the property was not available for forfeiture."

The court then proceeded to apply this holding to the claims of the three family members.

The Mother's Claim. Defendant's mother argued that one of the restrained bank accounts contained funds that were traceable to the deposit of her Social Security checks. The Government argued that Defendant had also deposited funds into the same

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The *Quick Release* is a monthly publication of the Asset Forfeiture and Money Laundering Section, Criminal Division, U.S. Department of Justice, (202) 514-1758.

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account, and that under the "last out" rule of *United States v. Banco Cafetero Panama*, 797 F.2d 1154 (2d Cir. 1986), it was entitled to assume that the money in the account belonged to Defendant. The court held that under *Banco Cafetero*'s "lowest intermediate balance" test, approximately half the money in the account was arguably the defendant's property, but that the remainder was indisputably the property of his mother. Accordingly, the court released the latter amount to the mother and left the remainder subject to the restraining order so that the mother could challenge its forfeiture in the ancillary proceeding if and when Defendant was convicted.

The Daughter's Claim. Defendant's daughter alleged that she had inherited $13,000 from her Aunt Charlotte, which funds were invested in a joint certificate of deposit account with Defendant. There was no evidence linking any of the funds to Defendant's racketeering activity. Accordingly, the court released the restrained funds to the daughter. In so doing, the court dismissed the Government's argument that the Government had already released a considerable sum of money to the daughter and other family members and that therefore the daughter would not suffer any hardship if forced to await the ancillary proceeding to litigate her interest in the joint account.

The Wife's Claim. Finally, Defendant's wife asserted that the proceeds of the life insurance policy on her deceased son were invested in a joint bond fund with Defendant. These funds were commingled with money the Defendant obtained from other sources, which funds were clearly forfeitable under the terms of the indictment. Because such forfeitable funds were commingled in the account, the court held, "any challenge to the restraint of the assets [would be] a frontal assault on the validity of the indictment, which is impermissible under *Waterboro*." Moreover, the court found that "a final determination as to which portion [of the account], if any, should not be forfeited will require a detailed accounting analysis." Therefore, the court concluded that it would not modify the restraining order as to any portion of the account, and would require the wife to wait until the ancillary proceeding to litigate her claim. —*SDC*

United States v. Siegal, Crim. No. 97-10002-PBS (D. Mass. Jun. 24, 1997). Contact: AUSA Richard Hoffman, AMA01(rhoffman).

Comment: The court in this case struggles to articulate a consistent rule regarding a third party's right to challenge a pretrial restraining order. That it succeeds only to a limited extent may be due to the vagueness in the First Circuit's decision in *Waterboro*.

In that case, which is the leading case on third-party challenges to a pretrial restraining order, the court appeared to hold that a third party may participate in the restraining order proceeding, but may not challenge the validity of the indictment or raise ownership issues. Superior ownership claims must await the ancillary proceeding, the court said, but a claimant may raise "prudential arguments concerning the burdens of restraint" pretrial. But exactly what "prudential arguments" may a thrid party raise? We have concluded that a third party may challenge a pretrial restraining order on the ground that it is clearly improper—*e.g.*, it simply restrains the wrong property—or that less intrusive means exist for preserving the property pretrial. But that a third party may never challenge the forfeitability of the property (*i.e.*, raise a challenge to the validity of the indictment), and may only raise superior ownership issues—the kinds of issues that are litigated in the ancillary proceeding—if the third party alleged that he would suffer immediate and irreparable harm if not granted a timely opportunity to challenge the restraining order. *See* Stefan D. Cassella's article, "Third Party Rights in Criminal Forfeiture Cases," *Criminal Law Bulletin*, Vol. 32, No. 6, (November/December 1996), at p. 499-540.

The court in this case seems to take a somewhat different view of *Waterboro*. It holds that the third party may not make a "frontal assault" on the validity of the indictment, yet it holds that he may challenge the restraining order on the ground that "the property was not available for forfeiture." Does the court

mean that it is "not available for forfeiture" because it lacks any nexus to the offense? Or because it belongs to someone other than the defendant? If the former, what distinction does the court intend to make between challenging the validity of the indictment—which the court says is improper—and challenging the nexus between the property and the offense? Apparently, the court viewed the latter challenge as fairly raised. Other courts seem to agree, though the ownership and nexus issues are difficult to parse. *See United States v. Riley*, 78 F.3d 367 (8th Cir. 1996) (restraining order vacated where forfeitability of property not demonstrated and property belonged to third party); *United States v. Scardino*, ___ F. Supp. ___, 1997 WL 7285 (N.D. Ill. Jan. 2, 1997) (third party entitled to challenge filing of pretrial *lis pendens* on property held in her name).

In our view, a third party should not be able to challenge a restraining order on "lack of nexus" grounds. In the ancillary proceeding, the third party is limited to one challenge: superior ownership. He may not argue that the property should not have been forfeited in the first place because the requisite nexus was not established. *See* 18 U.S.C. § 1963(l)(6) (setting for the only grounds on which a third party challenge may be raised); *United States v. Duboc*, No. GCR 94-01009-MMP (N.D. Fla. May 9, 1996) (ancillary proceeding is essentially a quiet title action in which only the ownership of the property is at issue). If that is so, then the third party should not be able to raise "lack of nexus" arguments in a pretrial challenge to the forfeitability of the property either. He should be limited to arguing that "the property really belongs to me, not to the defendant." And even that argument should be reversed for the ancillary proceeding unless this pretrial restraint is causing the third party some immediate and irreparable harm.

In ruling on the mother's and the daughter's claims, the court does not distinguish between nexus and ownership issues, so it is impossible to say whether the court would have reached the same conclusion based solely on the fact that those family members appeared able to assert a superior interest in the property, regardless of whether it bore any nexus to the criminal offense. What is clear, however, is that the court rejected the Government's argument that a third party should be able to challenge the restraining order on superior ownership (or nexus) grounds only if the third party was suffering an immediate and irreparable injury that made it impossible to wait for the ancillary hearing. In our view, this part of the opinion is incorrect. —*SDC*

Money Laundering / Standing

- **Money transmitter, who holds a client's money in a bank account in the transmitter's name for the purpose of transfer abroad, lacks standing to contest the forfeiture of the funds.**

- **To establish standing, a bailee cannot rely on simple possession of the property, but must identify the bailor and establish that the property is not related to, or the product of an illegal enterprise.**

- **Third party, who "fronted" money for a money transmitter by paying the beneficiary, expecting to be repaid by the transmitter, is merely a general creditor of the transmitter who lacks standing to contest the forfeiture of the funds in the transmitter's account.**

Claimants were money transmitters who received money from customers, deposited the money into bank accounts, and transmitted the money to designated beneficiaries. The bank accounts were held in Claimants' names at banks in New York and were specifically established for the purpose of receiving and transmitting customer funds. The Government instituted civil forfeiture actions against the accounts, alleging that certain funds received by Claimants and deposited into the accounts were forfeitable under 18 U.S.C. § 981 (money laundering) and 21 U.S.C. § 881 (drug trafficking).

In an earlier case, the court held that the Government had established probable cause for the seizure of the funds. *United States v. All Funds on Deposit . . . Perusa, Inc.*, 935 F. Supp. 208 (E.D.N.Y. 1996) (Government may rely on section 984 to establish forfeitability of funds in money transmitter's account, even if the tainted funds have already been disbursed) (*Quick Release,* September 1996, at pp. 7-8). Subsequently, the court, *sua sponte*, asked the parties to brief the question whether Claimants, as money transmitters, had standing to contest the forfeiture of the money in their accounts.

Claimants offered a number of arguments to support their standing. First, the money was seized from accounts held in their names and over which they had exclusive possession and control. Second, Claimants would suffer financial liability—including contractual liability to their customers and regulatory penalties—if they failed to deliver the money to the designated beneficiaries. And third, Claimants had already transferred most of the money alleged to be drug proceeds to the beneficiaries; the funds seized from their accounts were subject to forfeiture only by virtue of the fungible property provision in section 984; and Claimants were the only parties with a legitimate claim to those funds.

But the court denied the claims for lack of standing. Generally, the court said, courts will not deny standing to a claimant who has a "colorable possessory interest" in property subject to forfeiture. But simple possession is not enough. If the claimant is not the owner of the property, he must at least exercise dominion and control over it. The money transmitters in this case took possession of the property only for the purpose of transferring it to designated beneficiaries. In essence, they acted as bailees who lacked the degree of control over the property to satisfy the standing requirement.

That the money was held in bank accounts in Claimants' names was of little consequence, the court said. Claimants were obligated by statute to keep their customers' funds in such accounts. Moreover, it was not the "accounts" that the Government was seeking to forfeit, but the money in the accounts. The accounts might have been in Claimants' names, but

the relationship between the Claimants and their customers was similar to a "special deposit" relationship between a bank and a depositor in which title to the money remains with the depositor and the bank is simply the custodian. Claimants' contractual liability to the customers was simply a consequence of this arrangement.

"As in the case of a special deposit," the court held, "Claimants did not obtain title to the defendant funds by virtue of their title to the accounts. Their limited and circumscribed possession of the defendant funds does not translate into a concomitant right to contest the forfeiture of such funds."

Moreover, the court ruled that in the case of a claim filed by a bailee, possession plus dominion and control is not enough: the claimant must also establish "that the interest in the seized property is legitimate and not the product of illegal activity." In other words, a courier/bailee who exercises dominion and control over currency would nevertheless lack standing to contest its forfeiture if the bailment consisted of drug money or money from some other illegal source.

The concern is that bailees may seek to hide behind the bailment to conceal an "illicit interest" in the seized property. Such claims, the court held, should not be permitted. Thus, to overcome this additional hurdle, the bailee must identify the bailor/ owner of the property in question. In any event, the court noted, "the failure to identify the bailor of the defendant funds is fatal to a claimant's statutory standing." *See* Rule C(6) (requiring bailees asserting claims to identify the bailor).

The last issue in the case concerned a claim filed by a bank in Colombia that acted as one of the Claimant's correspondents. When a money transmitter receives money from a customer in New York, with instructions to pay a beneficiary in another country, the transmitter typically arranges for a correspondent in the receiving country to pay the beneficiary. The transmitter then reimburses the correspondent.

In this case, the correspondent paid the beneficiary but was not reimbursed by the money transmitter because the transmitter's account was seized. The correspondent therefore asserted an interest in the seized funds. But the court rejected this claim for lack of standing as well. It is well established, the court held, that a general unsecured creditor lacks standing to contest the forfeiture of its debtor's funds. "A claim of entitlement to payment is not synonymous with a claim to an ownership interest in the seized funds." Because the Colombian correspondent was an unsecured general creditor of the New York money transmitter, it lacked standing to contest the forfeiture. —*SDC*

United States v. All Funds on Deposit . .. Perusa, Inc., CV-96-3081 (E.D.N.Y. Jun. 18, 1997). Contact: AUSA Elliot Schachner, ANYE03(eschachn), and AUSA Jennifer Boal, ANYE03(jboal).

Comment: The court's holding on the final point is unassailable. A general creditor may not contest the forfeiture of funds from a debtor, even if the creditor had reason to expect that the seized funds were earmarked to pay the debt. Without some secured interest, a creditor simply lacks the degree of ownership in the seized property to contest its forfeiture, regardless of what his expectations may have been. *See United States v. Ribadeneira*, 105 F.3d 833 (2d Cir. 1997) (person holding check drawn on defendant's forfeited bank account is a general unsecured creditor with no interest in specific funds); *United States v. BCCI Holdings (Luxembourg) S.A. (Petition of Chawla)*, 46 F.3d 1185 (D.C. Cir.), *cert. denied*, 115 S. Ct. 2613 (1995); *United States v. $20,193.39 U.S. Currency*, 16 F.3d 344 (9th Cir. 1994); *United States v. Schwimmer*, 968 F.2d 1570, 1581 (2d Cir. 1992).

Thus, the court is on solid ground in rejecting the claim of the Colombian correspondent for lack of standing. The New York money transmitter owed the correspondent a debt, to be sure, but that debt did not give the correspondent any legal interest in the forfeited funds. The holding regarding the transmitters' standing to contest the forfeiture of the funds held in their own names, however, is somewhat surprising.

In a series of both criminal and civil forfeiture cases, courts have held that when a person voluntarily transfers his money to another, he transfers title to the funds to the transferee and thereby surrenders any right to contest the forfeiture of those funds. *United States v. $3,000 in Cash*, 906 F. Supp. 1061 (E.D. Va. 1995) (even though claimant/victim could trace his money to seized bank account, title passed to perpetrator, making claimant an unsecured creditor without standing); *United States v. BCCI Holdings (Luxembourg) S.A. (Petition of Pacific Bank)*, 956 F. Supp. 5 (D.D.C. 1997) (person who transferred funds to defendant's bank account after account was frozen by the Government is merely a general creditor with cause of action against defendant for return of its money). Therefore, the person who has standing to contest the forfeiture of the funds involved in such a transaction is generally the transferee.

That rule was recently applied in two cases in which customers deposited money in a money transmitter's account with instructions to transfer the money to relatives in Pakistan. In *United States v. $79,000 in Account Number 2168050/6749900*, 1996 WL 648934 (S.D.N.Y. 1996), the court held that the customers transferred title to the funds to the account holder and therefore lacked standing to contest its forfeiture. If anyone had standing, the court held, it was the account holder who had title to and control over the funds in his account. The court in that case specifically rejected the notion that the deposit of the money in the third party's account constituted a "special deposit" or a bailment. *See Quick Release* (December 1996), at pp. 10-11.

Similarly, in *United States v. All Funds on Deposit . . . in the Name of Kahn*, ___ F. Supp. ___, 1997 WL 60949 (E.D.N.Y. Feb. 11, 1997), the court held that customers who gave a money transmitter money to transfer to relatives in Pakistan lacked standing to contest forfeiture of transmitter's bank accounts under sections 981 and 984, because they had transferred title to the money transmitter in much the same way as a depositor transfers title to his money to his bank when he makes a deposit. *See Quick Release* (March 1997), at pp. 2-3.

While *Perusa*, *$79,000* and *Kahn* appear superficially to be in conflict—after all, *someone* has to have standing to contest the forfeiture of funds in a money transmitter's account—the facts of these cases are not identical. In *$79,000*, for example, the court stressed that a bailor/customer would have standing to contest the forfeiture of money given over to a money transmitter if a valid bailment were created under state law. Such a bailment is one where the customer retains control over his property; but in *$79,000*, no such bailment was created. At the same time, in *Perusa*, the court suggested that the bailee/money transmitter might have had standing if it had identified the bailor and established both its control over the property pursuant to the bailment and the legitimate source of the money. —*SDC*

Excessive Fines / Gambling / Statute of Limitations

- **Statute of limitations for civil forfeiture runs from the time federal authorities become aware of the offense, regardless of when state authorities became involved.**

- **Forfeiture of real property used to conduct a gambling operation is not excessive under the Ninth Circuit's Eighth Amendment analysis where the owner was directly involved in the operation for many years and made a substantial profit.**

- **An owner's claim that a forfeiture is unduly harsh because of the "intangible, subjective value of the property" is belied by his attempt to sell the property while the forfeiture action was pending.**

The Government filed a civil forfeiture action under 18 U.S.C. § 1955(d) against real property used to conduct a cockfighting operation in the District of Hawaii. The property comprised an arena with bleachers, concession stands and a cockfighting pit. Cockfighting is a violation of Hawaiian state gambling laws. The property was forfeited and Claimant appealed to the **Ninth Circuit.**

Claimant objected first that the complaint was filed outside the statute of limitations. 19 U.S.C. § 1621 permits the Government to file a civil forfeiture action within five years of the discovery of an offense. Claimant argued that state authorities knew about the cockfighting operation as long ago as 1986. The Government argued, however, that federal authorities did not learn of the violation until 1993.

The forfeiture action, the court held, is based on a violation of federal law—*i.e.*, section 1955. Therefore, "the federal crime could not be 'discovered' [for purposes of the statute of limitations] until federal agents became involved." Because Claimant failed to prove that any federal agents were aware of the offense until 1993, the statute of limitations did not begin to run on the federal forfeiture action until that date, regardless of when the state authorities became aware of the state violation.

Next, Claimant argued that the Government failed to establish a section 1955 violation. That statute requires proof of 1) a violation of state gambling law, 2) involving five or more persons, that was 3) in substantially continuous operation for more than 30 days. The second and third elements are distinct, the court said. The Government must show that the gambling operation existed for more than 30 days and involved five or more people, but it need not show that all five people were involved during the same 30-day period. Thus, the Government had sufficient evidence to establish probable cause for the federal offense.

Finally, the court rejected Claimant's assertion that the forfeiture of the property was unconstitutionally excessive. Employing the Eighth Amendment test set forth in *United States v. Real Property Located in El Dorado County at 6380 Little Canyon Road*, 59 F.3d 974 (9th Cir. 1995), the court held first that there was clearly a substantial connection between the cockfighting arena and the gambling violation. "With its bleachers, cockfighting pit, and concession stands, [the property] was to Hawaiian cockfighting what Wrigley Field is to baseball."

Moreover, the forfeiture was not grossly disproportionate to the offense. The owner was directly involved in the violation for many years and earned substantial profits from it. As to the "harshness" factors that must be considered in the Ninth Circuit, the court held that whatever argument Claimant may have had regarding the "intangible,

subjective value of the property" was belied by his efforts to sell the property while forfeiture proceedings were pending. Thus, the court concluded, "the Eighth Amendment claim must fail."

—*SDC*

United States v. Real Property Titled in the Names of Kang and Lee, ___ F.3d ___, 1997 WL 393084 (9th Cir. Jul. 15, 1997). Contact: AUSA Beverly Wee Sameshima, AHI01(bsameshi).

Laches / Notice / Statute of Limitations

- **Failure to send written notice to a person "appearing to have an interest" in seized property, as required by 19 U.S.C. § 1907, violates due process.**

- **Defendant's strategic decision to wait to raise his due process claim until after the statute of limitations had run was not barred by the doctrine of laches; Defendant has no duty to save the Government from the consequences of its own carelessness.**

- **Where the statute of limitations has run on the filing of a civil forfeiture action, the remedy for a due process violation is for the district court to proceed immediately to consider the forfeiture on the merits, based on the evidence already in the record.**

Defendant was the captain of a vessel used to smuggle marijuana into the United States. He was arrested in 1991, and pled guilty to the smuggling offense.

At the same time, the Drug Enforcement Administration (DEA) seized the vessel and sent notice of the administrative forfeiture to Defendant's co-defendant, who DEA thought was the owner. It also published notice in *USA Today*. But despite having information indicating that Defendant was also an owner of the vessel, DEA never sent notice to Defendant himself. When no one filed a claim, the vessel was forfeited.

Four years later, in 1995, Defendant filed a section 2255 motion to vacate his criminal conviction on double jeopardy grounds. Relying on the Ninth Circuit's decision in *$405,089.23*, he argued that the prior administrative forfeiture of his vessel barred his conviction. The district court denied the double jeopardy claim and the Ninth Circuit affirmed.

Finally, in 1996, after the statute of limitations had run on the civil forfeiture of the vessel, Defendant filed a Rule 41(e) motion for the return of seized property, asserting for the first time that DEA's failure to send him notice of the administrative forfeiture as required by 19 U.S.C. § 1607 deprived him of his due process rights.

The Government responded that it was clear from the section 2255 motion that Defendant was aware of the seizure of the vessel as least as early as 1995. Yet, for strategic reasons, Defendant elected not to seek to vacate the forfeiture until after the statute of limitations had run—thus, barring the Government from filing a civil forfeiture complaint and litigating the case on the merits. Accordingly, the Government argued that the doctrine of laches should apply, and that the Rule 41(e) motion should be dismissed. In the alternative, the Government suggested that if the Rule 41(e) motion were granted, it should be permitted to file the forfeiture complaint

notwithstanding the expiration of the limitations period.

The court began by holding that the failure to send Defendant notice of the administrative forfeiture violated his due process rights. Section 1607 requires notification of any who "appears to have an interest" in the seized property. Although DEA was aware that Defendant had an apparent interest, it violated the statute when it failed to send him written notice, and under *Mullane v. Central Hanover Bank & Trust Co.*, 339 US. 306 (1950) (Government must take steps "reasonably calculated" to afford notice), the lack of notice violated Defendant's right to due process.

The court also held that even though no criminal action was pending, it had jurisdiction to consider Defendant's Rule 41(e) motion by converting it into a civil action for equitable relief.

The court acknowledged that Defendant was aware of the administrative forfeiture long before the expiration of the statute of limitations, yet failed to seek the return of his property for strategic reasons—first, so that he would not undermine his double jeopardy claim ("for obvious reasons, at that time, he wanted the forfeiture to stand"); and later, to allow the limitations period to expire. Nevertheless, the court held, the doctrine of laches would not bar the Rule 41(e) motion.

For laches to apply, the Government must demonstrate prejudice resulting from the delay. "Although the Government is undoubtedly prejudiced by the fact that the statute of limitations now precludes it from filing judicial forfeiture proceedings, it was not defendant's delay so much as the Government's own carelessness that precipitated this state of affairs." At any time between 1991—when DEA became aware of Defendant's ownership interest—and 1996, the Government could have filed a civil forfeiture action. Although Defendant did delay in asserting his rights, the court continued, "it was not his duty to prevent the Government from losing its rights due to carelessness."

The Government countered that even if laches did not apply, the court should reject the Rule 41(e) motion because Defendant was not prejudiced by the notice violation. It pointed to evidence in the record that amply demonstrated the legal basis for the forfeiture of the vessel, including admissions Defendant made in his guilty plea. But the court held that the right of a person to contest a forfeiture in district court does not depend on whether he has any colorable claim to the property. Quoting *Peralta v. Heights Medical Center*, 485 U.S. 80 (1988), the court held that when a person is deprived of due process, "it is no answer to say that . . . due process of law would have led to the same result because he had no adequate defense on the merits."

The last issue was what remedy should be granted for the due process violation. Defendant demanded the return of the seized vessel, or the value of the vessel when it was sold. The Government argued that it should be allowed to re-open the forfeiture proceedings and litigate the forfeiture on the merits, regardless of the statute of limitations bar.

The court noted that most circuits permit the Government to remedy a due process violation by filing either an new administrative forfeiture or civil judicial forfeiture action. *See, e.g., Muhammed v. DEA*, 92 F.3d 648 (8th Cir. 1996); *United States v. Giraldo*, 45 F.3d 509 (1st Cir. 1995); *Barrera-Montenegro v. United States*, 74 F.3d 657 (5th Cir. 1996). But in none of those cases had the statute of limitations expired. In *Boero v. United States*, 111 F.3d 301 (2d Cir. 1997), however, the Second Circuit held that the proper remedy for defective notice was to direct the district court to consider the claim on the merits, even though the statute of limitation had expired.

Following *Boero*, the court proceeded to review the merits of the case without requiring the Government to file a new forfeiture action. Based on Defendant's admissions in his guilty plea, the court held that the forfeiture was supported by the evidence. Accordingly, the motion for the return of seized property was denied. —*SDC*

United States v. Marolf, ___ F. Supp. ___, 1997 WL 400804 (C.D. Cal. Jul. 11, 1997). Contact: AUSA Carla Ford, ACAC01(cford).

Comment: One issue the court did not discuss—perhaps because it was not raised by the Government—is whether, aside from the doctrine of laches, there isn't a statute of limitations on a claimant's ability to re-open an administrative forfeiture action on due process grounds. A number of courts have considered this question. *See* Greg Paw's article, "Judicial Review of Administrative Forfeitures" in the *Asset Forfeiture News* (January/February 1996), page 1. *See also Williams v. DEA,* 51 F.3d 732 (7th Cir. 1995) (applying two-year statute of limitations but noting that the contours of the exercise of the court's equitable jurisdiction are "largely undefined"); *Demma v. United States*, 1995 WL 642831 (N.D. Ill. Oct. 31, 1995) (applying six-year statute of limitations to Tucker Act theory); *Mullins v. United States*, 1997 WL 55946 (S.D.N.Y. 1997) (Rule 41(e) motion filed after criminal case is complete is a new civil action that must be filed within six years of seizure of the property; *see* 28 U.S.C. § 2401). Also, pending legislation would put a definite two-year limit on such actions. *See* H.R. 1965, Section 2, 105th Cong., 1st Session. AUSA Bill Pericak (N.D.N.Y.) has filed a brief on this issue in the Second Circuit which is available to anyone needing assistance.

This decision also contains an exceptionally clear and thorough description of the administrative forfeiture process that could be cited whenever it is necessary to explain that process to a judge or magistrate.

—*SDC*

Discovery / Motion to Suppress

- **Claimant may not avoid being deposed on the ground that a pending suppression motion would obviate the need for discovery if resolved in her favor.**
- **If the Government relies on tainted evidence in conducting a deposition, and the evidence is later suppressed, the court must conduct a *Kastigar* hearing to determine if the deposition testimony is tainted.**
- **A motion to suppress is probably not an affirmative defense that must be pled in the claimant's answer under Rule 8(c).**

The Government filed civil forfeiture actions against three parcels of real property and noticed Claimant's deposition. Claimant, however, refused to be deposed on the ground that she had filed a motion to suppress evidence based on an illegal search and an illegal wiretap. She contended that the Fourth Amendment issues should be resolved first because their resolution might obviate the need for any further discovery.

The Government moved to compel discovery on the ground that the existence of a pending motion to suppress is no reason to suspend discovery. The district court agreed. There is no reason, the court held, why discovery should proceed piecemeal or be suspended while a motion to suppress is resolved.

It is true, the court said, that if discovery proceeds and Claimant later prevails on the suppression motion, the court may have to conduct a *Kastigar* hearing to determine if any of the discovery is the fruits of the illegal seizure. But that is no reason for Claimant to decline to be deposed.

With respect to one of the parcels of property, the Government moved to strike the claim for lack of standing. The court held that it was appropriate to

address that issue before resolving the suppression motion, because if the motion to strike for lack of standing was granted, the suppression motion would be moot as to that property.

Finally, the Government suggested that the suppression motion should be denied because Claimant failed to plead it as an affirmative defense under Fed. R. Civ. P. 8(c), in her answer. In *dicta*, the court suggested that a motion to suppress in not an affirmative defense that has to be pled in an answer the way, for example, a statute of limitations claim must be pled. "Rather, it seems more analogous to a motion in limine or an objection to the introduction of evidence, which need not be raised under Rule 8(c)." But the court avoided resolving the issue by permitting Claimant to amend her answer to include the motion to suppress. —*SDC*

United States v. Lot Numbered 718, 1997 WL 280603 (D.D.C. May 16, 1997) (unpublished). Contact: AUSA William R. Cowden, ADC01(wcowden).

Ancillary Proceeding

- **Claimant whose counsel failed to file a timely claim in the ancillary proceeding is not entitled to relief under Rule 60(b), even though counsel's failure was not Claimant's fault.**

Claimant was personally served with a preliminary order of forfeiture against certain real property in a criminal case. She turned the order over to her attorney, advising him that she retained a mortgage interest in the property when she sold it to the defendant. Although the attorney assured her that her rights would be protected, he failed to file a claim to the property or to take any other action to protect Claimant's interest.

Upon receiving notice of the final order of forfeiture, Claimant again contacted her attorney. The attorney assured her that her interest would be protected, but never filed any documents with the court. Upon learning that her attorney did nothing, Claimant retained new counsel who filed a motion to re-open the judgment of forfeiture.

Claimant argued that her failure to file a claim in the original proceeding was due to the negligence of her former attorney and not her own negligence. Proceeding under Fed. R. Civ. P. 60(b), the court addressed whether an attorney's unexplained failure to file a claim to forfeited property within the time set by the court constitutes mistake, inadvertence, surprise or excusable neglect.

The court held that the question is whether the attorney, as the litigant's agent, did all he reasonably could to comply with the court's deadlines, not whether the litigant did everything she reasonably could to police the conduct of the attorney. Because Claimant did not proffer any reasons for her attorney's failure to file a claim within the time permitted, the court held that it could not conclude that his conduct was inexcusable under Rule 60(b) and denied the motion to re-open the forfeiture. —*MML*

United States v. Alequin, Crim. No. 1:CR-95-014 (M.D. Pa. Jun. 3, 1997) (unpublished). Contact: AUSA John J. McCann, APAM01(jmccann).

Remission Petition

- **Court may review the denial of a remission petition if, in denying the petition, the seizing agency fails to comply with its own regulations and thereby denies the claimant due process.**

- **The Drug Enforcement Administration (DEA) may not rescind a decision granting a remission petition because doing so on the basis of unwritten regulations violates the claimant's due process rights.**

DEA seized a pick-up truck involved in a drug-related offense. Claimant, who sold the vehicle to the drug defendant, filed a petition for remission seeking to recover his security interest in the vehicle.

DEA informed Claimant that his petition was granted and gave him instructions on how to reclaim the truck. Claimant presented the letter to a DEA agent at the storage facility, but the agent would not release the truck, stating that he had not received authorization to do so.

Subsequently, DEA informed Claimant that his petition had been denied because further investigation revealed that the documentation in support of his petition had been falsified. Claimant requested a reconsideration, but his reconsideration was denied.

Claimant filed a complaint in district court asking the court to order DEA to release the truck, pay conversion damages, and enjoin any further investigations directed at him. In response, DEA argued that the remission process was an administrative proceeding and that the court lacked jurisdiction over the subject matter. The court found, however, that while Claimant's decision to pursue the property through the petition process waived his right to judicial review of the forfeiture action, the court could properly exercise jurisdiction where an agency violates its own regulations for dealing with an administrative forfeiture.

The court found that DEA violated its own regulations in rescinding its grant of remission and that DEA violated Claimant's due process rights by basing its rescission on unwritten policy. DEA was ordered to return the truck to Claimant.

DEA attempted to frame the central issue of the case as Claimant's failure to properly establish his security interest. The court, however, found the pertinent issue to be whether DEA complied with its regulations when it rescinded the granting of Claimant's petition. DEA was unable to produce any regulations establishing procedures for rescinding a petition where remission has been granted. Thus, the court determined that the issue was whether DEA's taking of an action not specified in its regulations violates those same regulations. The court found that it did.

The court recognized that agencies must be provided discretion in carrying out the various duties assigned to them, but it was another matter to allow DEA to possess unbridled discretion to take actions outside the procedures established by the agency's regulations. DEA argued that an absence of regulations does not prohibit it from rescinding a grant of a petition. The court, however, relied on the statutory construction principle of *expressio unis est exclusio alterius* (codes prohibit what they do not expressly sanction) and found that DEA is limited to the measures specifically enumerated in section 9.7 and that DEA is precluded from utilizing other protective measures, such as an unwritten procedure for rescinding grants of remission.

The court then held that DEA's reliance on unwritten regulations to rescind its grant of remission to Claimant violated Claimant's due process rights and was invalid. The court further stated that DEA must administer the remission program under written standards and, if DEA cannot operate within its

current regulations, then it must see to it that additional regulations are written to provide standards for the needed activities. —*KAV*

Burke v. United States Department of Justice, ___ F. Supp. ___, 1997 WL 362502 (M.D. Ala. Jun. 9, 1997). Contact: AUSA John Harmon, AALM01(jharmon).

Immunity / Section 1983

- **A state policeman who stops a motorist for speeding, seizes his currency for a suspected connection with narcotics, and gives it to the Drug Enforcement Administration (DEA) for adoptive forfeiture, is entitled to qualified immunity from suit.**

- **A state policeman is justified in stopping a motorist for misdemeanor speeding and arresting him even if the policeman had an ulterior motive, may search him and the car incident to the arrest, and finding $10,050 in currency, may detain the currency for the arrival of a dope-sniffing canine.**

This was a civil suit pursuant to 42 U.S.C. § 1983 against a policemen for alleged violations of plaintiff's civil rights. The defendant stopped plaintiff's car and arrested him for misdemeanor speeding and searched his person and car incident to the arrest. Finding $6,050 cash on plaintiff's person and $4,000 cash in a wicker briefcase, he called for an organoleptic canine, which alerted to the money. Defendant gave the money to DEA, which adopted the seizure.

The district court entered judgment for the defendant upon a jury verdict. The Eighth Circuit reversed and remanded because plaintiff was *pro se*. At the retrial, the defendant argued that he was entitled to qualified immunity. The trial court held that its ruling at the first trial that defendant was not entitled to qualified immunity was the law of the case, which it could not change.

On appeal again, the **Eighth Circuit** reversed and remanded with instructions to enter summary judgment for the defendant. It ruled, first of all, that the law of the case does not bar a district court from reversing a ruling which it previously made. It then held that state police officers are entitled to qualified immunity from suit. It explained:

Once a defense of qualified immunity is raised, a plaintiff must offer "particularized" allegations of unconstitutional or illegal conduct. "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." The official is not required to guess the direction of future legal decisions, but must rely on preexisting case law for guidance. Whether any individual will be held liable for official actions "turns on the 'objective legal reasonableness' of the action." (citations omitted)

As for the stop, the Eighth Circuit explained that as long as the stop was justified by speeding, it doesn't matter that the officer may have had an ulterior motive for the stop. Moreover, "Regardless of whether [plaintiff] gave his consent for the search, [defendant] had the authority to search [plaintiff] and his vehicle pursuant to [plaintiff's] lawful arrest." The fact that plaintiff carried a large amount of cash in small denominations and lied about its origin gave defendant authority to detain the cash for a reasonable time in order to conduct a dog sniff. Since the detention was justified for these reasons it does not matter that the officer may have detained the currency for other reasons.

The fact that a dog alerted to the money justified giving it to DEA for adoption. —*BB*

Conrod v. Davis, ___ F.3d ___, 1997 WL 398569 (8th Cir. Jul. 17, 1997). Contact: AUSA Theodore A. Bruce, Telephone: (573) 751-3321.

Excessive Fines

■ Supreme Court brief filed in *United States v. Bajakajian.*

The Government filed its opening brief in *United States* v. *Hosep Krikor Bajakajian*, No. 96-1487, with the Supreme Court on Monday, July 14, 1997. The single issue presented is whether 18 U.S.C. § 982(a)(1) violates the Excessive Fines Clause of the Eighth Amendment by subjecting to criminal forfeiture currency that is about to be transported out of the United States without the filing of the CMIR report required by 31 U.S.C. § 5316 and regulations implementing that statute.

The owner of the currency ($357,144) pleaded guilty to willfully violating the CMIR reporting requirement after he and his wife were discovered attempting to leave the country with the currency concealed on their persons and in their luggage and personal effects, but he nevertheless contested the criminal forfeiture of the currency. The district court found that all of the currency was subject to forfeiture under section 982(a)(1), but held that forfeiture of the full amount would violate the Excessive Fines Clause of the Eighth Amendment at least absent proof that the currency was illegally derived or intended for an unlawful purpose. It mitigated the forfeiture to $15,000 or less than 3 percent of the full amount.

The Government appealed and a divided panel of the Ninth Circuit affirmed. 84 F.3d 334 (9th Cir. 1996). In affirming, however, a majority held that the forfeiture of *any* currency for violation of the CMIR reporting requirements violates the Excessive Fines Clause, reasoning that the currency is not an "instrumentality" of the reporting violation. The Government filed a petition for *certiorari* with the Supreme Court which was granted on May 27, 1997. 117 S. Ct. 1841.

The Government's argument has two parts, at least as applied to *criminal* forfeiture cases (although the first argument very clearly embraces both civil and criminal forfeitures).

First, the brief argues that the forfeiture of unreported currency is not excessive because unreported currency is an essential instrumentality of the CMIR reporting offense. Forfeiture of instrumentalities (defined as "property used or involved in the commission of an offense" that has a more than "incidental or remote relationship to the offense") is entirely remedial because it encourages property owners to take care that their property does not become involved in crime; prevents further use of the property in crime; and imposes an economic sanction that renders crime less profitable.

In view of these purposes, the forfeiture of instrumentalities, whether in a civil or criminal proceeding, is a proportionate remedy. It is the property's involvement in the offense that justifies such a remedial forfeiture; no additional inquiry into the culpability of the owner or the property's economic value is required.

Undeclared currency is justified on this basis because it is an "indispensable instrumentality" of the crime. Without the cash, there is no offense. The remedy prevents the use of unreported cash to conceal or further criminal activity or to evade other legal obligations; it encourages travelers to report information that is critical in the investigation of

criminal, tax, and regulatory matters. And it is precisely tailored to the magnitude of the violation—the more cash involved, the greater the potential harm posed by the unlawful activity.

Second, the brief argues that the criminal forfeiture of undeclared currency is not excessive because such a forfeiture is commensurate with the seriousness of the unreported currency offense. The criminal forfeiture of property used by a criminal in carrying out his offense is an inherently fitting penalty for commission of a serious crime and is justified as serving punitive purposes. The criminal owner effectively sets his own "fine" by electing to use his property in furthering a criminal venture. No analysis of the owner's culpability or the value of the property is required.

Moreover, in determining whether the amount of a financial sanction is excessive in relation to the seriousness of the offense, deference must be given to the legislature's assessment of the seriousness of the offense and the fitting penalties. Here, Congress has authorized a multi-year term of imprisonment, a fine, *and* a forfeiture of the very cash involved in the violation. Including the forfeiture as part of the criminal sentence is far from excessively punitive.

The Government's brief will be available on Westlaw. Oral argument is likely to be schedule for some time soon after the Court reconvenes on the first Monday in October with a decision sometime around the beginning of 1998. —*HHS*

United States* v. *Hosep Krikor Bajakajian, No. 96-1487, Government's brief filed July 14, 1997. Contact: AFMLS Assistant Chief Harry Harbin, CRM07(harbin).

Quick Notes

■ Affect on Sentence

Defendant filed an ineffective assistance of counsel motion, complaining that his attorney failed to apprise the court imposing sentence in a criminal case that Defendant had agreed to the civil forfeiture of his property. The court imposed a criminal fine, which in Defendant's view, might have been lower of the court had been aware of the forfeiture. In rejecting the motion, the court held that a civil forfeiture is not punishment and, therefore, does not preclude the imposition of a fine in a criminal case. Accordingly, counsel was not negligent in failing to raise the matter.

United States v. Daily, ___ F. Supp. ___, 1997 WL 371141 (N.D. Ill. Jun. 27, 1997). Contact: AUSA Segio Acosta, AILN01(acosta).

■ Restitution

Defendant argued that the amount of criminal forfeiture should be reduced by the amount of money the victim was able to recoup in civil litigation. The court held, however, that section 982 mandates the forfeiture of all "property involved" in a money laundering offense, and unlike statutory restitution provisions, "makes no provision for a set-off by reason of the victim's recovery."

United States v. Pelullo, 961 F. Supp. 736 (D.N.J. 1997). Contact: AUSA Mark Rufolo, ANJ02(mrufolo).

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