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Substitute Assets / Relation Back Doctrine / *Lis Pendens*

- **The relation back doctrine applies to substitute assets; any transfer of substitute assets by the defendant to a third party that occurs after the defendant is named as the target of an investigation is void under section 853(c).**

- **Third party may object, pre-trial, to the government's filing lis pendens on property that the third party says belongs to her, not to the defendant.**

The government charged Defendant with money laundering and sought criminal forfeiture pursuant to 18 U.S.C. § 982. The property subject to forfeiture included ten parcels of real property that were listed as substitute assets. The government filed *lis pendens* notices with respect to all ten properties.

Defendant's wife -- who was named as a co-defendant in the indictment but was not charged with money laundering and thus was not subject to the criminal forfeiture -- filed a motion to void the *lis pendens* notices on two grounds: 1) all ten properties belonged to her, not Defendant, and, therefore, were not subject to forfeiture; and 2) even if the properties were subject to forfeiture, she needed them to raise money for attorney fees in the criminal case.

The government acknowledged that all ten properties were presently held in the wife's name, but it alleged that Defendant had transferred the properties to his wife after the government served grand jury subpoenas and identified Defendant as the target the grand jury's investigation. Thus, the government contended that the transfers of the properties by the Defendant to his wife were made to avoid their forfeiture as substitute assets, and that the properties remained subject to forfeiture under 21 U.S.C. § 853(c) which codifies the "relation back doctrine."

Section 853(c) says that title to property subject to forfeiture under "subsection (a)" vests in the United States as of the time of the offense giving rise to the forfeiture, and that any subsequent transfer of the property is void, unless the transferee is a bona fide purchaser for value. The problem with applying this statute to substitute assets is that such assets are subject to forfeiture under "subsection (p)," not "subsection (a)." This is the same statutory problem that has led some courts to conclude that the restraining order provision in section 853(e) does not apply to substitute assets.

The district court, however, held that "subsection

(a)" should be read as if it said "subsection (a) or (p)" both for the purposes of the restraining order provision in section 853(e) and the relation back provision in section 853(c). The court said that a narrower interpretation would undermine the government's legitimate interest in preventing a defendant from selling or otherwise disposing of substitute assets before entry of a forfeiture judgment. Accordingly, the court held that the government's interest in the parcels would be recognized, notwithstanding the Defendant's attempt to transfer the parcels to his wife, if the government could show that the purpose of the transfers was to shield the property from forfeiture.

The government was able to make the requisite showing with respect to nine of the ten parcels. In each case, the property was transferred to Defendant's wife within days of the issuance of the grand jury subpoenas. With respect to the tenth parcel, however, the court held that the property belonged to the wife before Defendant became a target of the investigation. Thus, the court voided the *lis pendens* for that property. It acknowledged that third parties generally may not assert ownership interests in property subject to criminal forfeiture pre-trial. But, the court held that just as a third party may challenge the erroneous pre-trial restraint of his property, so may a third party challenge the erroneous filing of a *lis pendens* notice.

Finally, the court rejected the wife's request that the other *lis pendens* notices be vacated in order to make the property available to her to pay attorney fees. The wife had failed to show that she lacked other assets that could be used for this purpose, the court said. *SDC*

United States v. Scardino, ___ F. Supp. ___, 1997 WL 7285 (N.D. Ill. Jan. 2, 1997). Contact: AUSA Susan Cox, AILN02(scox).

Comment: The courts remain split on the question whether substitute assets are subject to pre-trial restraint under section 853(e). *Compare In Re Billman*, 915 F.2d 916 (4th Cir. 1990), *cert. denied*, 500 U.S. 952 (1991); and *United States v. Regan*, 858 F.2d 115 (2d Cir. 1988) (pre-trial restraint of substitute assets permitted) *with United States v. Floyd*, 992 F.2d 498 (5th Cir. 1993); *In Re Assets of Martin*, 1 F.3d 1351 (3rd Cir. 1993); *United States v. Ripinsky*, 20 F.3d 359 (9th Cir. 1994); *United States v. Field*, 62 F.3d 246 (8th Cir. 1995) (pre-trial restraint of substitute assets not permitted). Moreover, as noted in the following summary, the Second Circuit's holding in *Regan* has been interpreted differently by district courts within that circuit.

The Seventh Circuit has not ruled on this question, but the district courts within that circuit have sided with the government's interpretation. *See United States v. Schmitz*, 156 F.R.D. 136 (E.D. Wis. 1994) (upholding pre-trial restraint *and pre-trial seizure* of substitute assets); *see also United States v. Infelise*, 938 F. Supp. 1352 (N.D. Ill. 1996) (whether pre-trial restraint of substitute assets was proper is moot once defendant is convicted; improper restraint would not be grounds for relief in ancillary proceeding). The court in *Scardino* was persuaded by the reasoning in *Schmitz* and held that it applied equally to both the application of the relation back doctrine in section 853(c) and the restraining order provision in section 853(e).

Regarding the third party's right to challenge the *lis pendens* notice pre-trial, the court was on solid ground. Section 853(k) says that third parties may not assert ownership interests in property subject to forfeiture until the post-trial ancillary proceeding. But the courts have

created an exception to this rule when property titled in the third party's name is subject to pre-trial restraint. The theory is that, if a third party is being deprived of the use and enjoyment of his property by the restraining order, he should have an early opportunity to show that the property actually belongs to him, not the defendant, and, thus, would not be subject to forfeiture even if the defendant were convicted. *See United States v. Real Property* in Waterboro, 64 F.3d 752 (1st Cir. 1995); *United States v. Wu*, 814 F. Supp. 491, 495 (E.D. Va. 1993) (discussing legislative history and fairness of allowing third party to contest restraining order); *but see United States v. O'Brien*, 836 F. Supp. 438 (S.D. Ohio 1993) (third parties barred from opposing pre-trial restraint by 21 U.S.C. § 853(k)). The court in *Scardino* was careful to limit the exception to section 853(k) to situations where the property was clearly titled in the third party's name. *SDC*

RICO / Restraining Orders / Bill of Particulars

- **District court in New York says Second Circuit law supports pre-trial restraint of substitute assets.**
- **A defendant is required to forfeit the property involved in a RICO offense as a whole, not just the property involved in the racketeering acts with which he is personally charged.**
- **Bill of particulars puts defendant on notice of what property is subject to criminal forfeiture.**

Defendants, who were charged with RICO offenses, filed pre-trial motions challenging the forfeiture counts in the indictment on a number of grounds. The district court rejected all of Defendants' arguments.

First, Defendants argued that the indictment failed to give them adequate notice of the property that the government sought to forfeit. Tracking the language of 18 U.S.C. § 1963(a), the indictment said that Defendants had property constituting the proceeds of racketeering activity that the government intended to forfeit. It also said that the government would seek to forfeit substitute assets. Finally, the government served Defendants with a bill of particulars that listed the specific property to be forfeited.

Taken together, the court said, these allegations were sufficient to put Defendants on notice of the government's intentions and to allow them to marshal what evidence they might have in defense of the property. "Plainly [Defendants are] not prejudiced because those properties were specified in a bill of particulars rather than in the indictment itself." *See United States v. Grammatikos*, 633 F.2d 1013, 1024 (2d Cir. 1980). The court noted, however, that it did not need to decide whether the indictment without the bill of particulars would have been sufficient.

Next, Defendants argued that section 1963(d) does not authorize the pre-trial restraint of substitute assets. There is a split within the Second Circuit on this issue. In *United States v. Regan*, 858 F.2d 115

(2d Cir. 1988), the Court of Appeals approved a restraining order that applied to substitute assets. In a recent case, however, a district court held that *Regan* only applies where the parties consent to the restraining order. *See United States v. Gigante*, 1996 WL 699511 (S.D.N.Y. Dec. 3, 1996) (*See Quick Release*, January 1997). In the present case, the court disagreed with *Gigante*, and held that *Regan* authorizes the pre-trial restraint of substitute assets in all cases. To the extent that Defendants' argument had some force, the court said, it was "better addressed to the Court of Appeals."

Finally, Defendants argued that some of the property should be dismissed from the indictment because it was not derived from any of the acts of racketeering with which Defendants were personally charged. But the court said this fact, even if true, was beside the point. "Forfeiture is not sought because of the commission of the predicate acts, it is sought because of the violation of the RICO statute." Thus, all of the property derived from the RICO offense would be subject to forfeiture from Defendants if they were convicted, whether it was derived from a particular act of racketeering or not. *SDC*

United States v. Bellomo, ___ F. Supp. ___, 1997 WL 20841 (S.D.N.Y. Jan. 17, 1997).
Contact: AUSA Sharon Cohen Levin, ANYS01(slevin).

Lis Pendens / Pre-Trial Restraint / Right to Counsel

- ❒ **The filing of a *lis pendens* against real property is not a seizure.**
- ❒ **A defendant is not entitled to a pretrial hearing regarding the government's filing of a *lis pendens* against real property named in an indictment as subject to criminal forfeiture.**
- ❒ **A defendant has no Sixth Amendment right to use directly forfeitable assets to retain counsel of choice.**

Defendants filed a motion for an evidentiary hearing to determine whether the government had properly filed a notice of *lis pendens* against their real property. The district court denied the motion.

Defendants first argued that, once the grand jury returned the indictment, the government was obligated to take steps to preserve the availability of the property, such as obtaining a restraining order under 21 U.S.C. § 853(e). However, there is nothing in the text of section 853(e) that suggests that such a protective measure is mandatory.

Second, Defendants argued that the government's filing of a notice of *lis pendens* against the property was tantamount to a seizure of the property. A notice of *lis pendens* serves as a constructive notice to all persons that the title to the property is in litigation, and that any interest acquired in the property is subject to the decision of the court. While a notice of *lis pendens* may discourage persons from purchasing or investing in the property, the property may, nevertheless, be purchased or encumbered prior to the court's resolution of the dispute. In contrast, a

seizure occurs when there is some meaningful interference with an individual's possessory interests in the property. In light of these obvious differences, the government's filing of a notice of *lis pendens* does not constitute a seizure of the property.

Third, Defendants argued that the failure to provide them with a pre-trial hearing to determine whether the government's actions were proper violates their due process rights. The Fifth Amendment, however, protects against deprivations of property. Because the filing of a *lis pendens* does not constitute a deprivation of Defendants' possessory interest in the property, the government's action did not fall within the purview of the Fifth Amendment. Even if it did, Defendants would still not be entitled to a pretrial hearing. The language of section 853(e)(1)(A) does not require a pre-trial hearing. Rather, Defendants may challenge the forfeiture of their property at trial. Legislative history indicates that Congress enacted the criminal forfeiture statutes for the very purpose of consolidating the forfeiture action with the criminal prosecution, and allowing prosecutors to avoid premature disclosure of their case before trial. "Given the statutory language, the legislative intent, and the ample opportunities that Defendants will have to challenge the underlying money laundering offense at trial, the Court finds it unnecessary to hold a pretrial hearing on the issue of forfeiture."

Fourth, Defendants asserted that they were entitled to a hearing to determine whether there was probable cause to believe that the property was forfeitable and was being properly restrained. The court held that the grand jury's finding of probable cause is sufficient in the Eleventh Circuit for the pre-trial restraint of property. Therefore, Defendants were not entitled to have the grand jury's finding reconsidered in a pre-trial hearing.

Fifth, Defendants argued that the *lis pendens* made it financially impossible to retain counsel of choice in violation of the Sixth Amendment. However, the *lis pendens* did not constitute a seizure or restraint of the property, so defendants could demonstrate that they were financially unable to retain counsel of choice on this ground. Moreover, under the relation-back doctrine, title to the property will vest in the government if Defendants are convicted. Therefore, Defendants could not use this property to pay for attorney fees, even if they had no other source of funds. Finally, Defendants have no right to counsel of choice. So long as they receive competent counsel, their Sixth Amendment rights will not be violated.

Finally, Defendants argued that the property is a substitute asset that may not be restrained prior to trial. The Eleventh Circuit has not yet determined whether the substitute assets may be restrained pre-trial. Nevertheless, the grand jury has found probable cause to believe that the property was involved in the money laundering offenses with which defendants were charged. The property, accordingly, is not a substitute asset. *RMJ*

United States v. St. Pierre, ___ F. Supp. ___, 1996 WL 756509 (M.D. Fl. Dec. 10, 1996).
Contact: AUSA Robert P. Barclift, AFLMFT01(rbarclif).

Comment: In the final paragraph of the opinion, the district court invited the government to file a motion for a postindictment restraining order under section 853(e)(1)(A), noting that it may order pre-trial restraint of the property in absence of a hearing "without violating Defendants' Fifth Amendment right to due process of the law or their Sixth Amendment right to counsel." *RMJ*

Ancillary Proceeding / Right of Set-off

❒ **Bank that claims right of set-off against customer's bank account lacks sufficient interest to contest forfeiture of customer's funds if it has not exercised the set-off.**

Defendant had a bank account at Security Pacific International Bank (SPIB). When Defendant was convicted of a RICO offense, the bank account was forfeited. SPIB then filed a claim in the ancillary proceeding claiming a right of set-off against Defendant's funds.

SPIB admitted that it had not exercised its right of set-off at the time the funds were ordered forfeited. It claimed, however, that if certain future events took place, it would have a claim against Defendant and would have the right to exercise the set-off at that time. The government moved to dismiss SPIB's claim for failure to assert a sufficient interest in the forfeited funds to establish a basis for recovery under 18 U.S.C. § 1963(l)(6).

The district court agreed with the government and granted the motion to dismiss. To maintain a claim under section 1963(l)(6), a third party must establish either that it has a vested interest in the forfeited property that existed at the time the crime giving rise to the forfeiture occurred, or that it was a bona fide purchaser for value. A bank that has taken a set-off against a customer's bank account has standing to contest the forfeiture of that account, *see United States v. BCCI Holdings (Luxembourg) S.A. (Petition of American Express Bank)*, 941 F. Supp. 180 (D.D.C. 1996), and depending on the timing of the set-off, may have a claim under section 1963(l)(6)(A). But a bank that has not yet exercised its right of set-off has only an inchoate interest in the forfeited funds. An inchoate interest, the court held, is not sufficient to sustain a claim under section 1963(l)(6)(A).

Moreover, the unexercised set-off does not qualify as a "purchase" for purposes of the bona fide purchaser provision in section 1963(l)(6)(B). This provision applies only to the purchase of tangible assets. Here, SPIB did not "purchase" anything. Accordingly, it had failed to state a claim upon which relief could be granted under either prong of section 1963(l)(6). *SDC*

United States v. BCCI Holdings (Luxembourg) S.A. (Petition of Security Pacific International Bank), ___ F. Supp. ___, 1997 WL ____ (D.D.C. Jan. 17, 1997). Contact: AFMLS Assistant Chief Stefan D. Cassella, CRM07(cassella).

Default Judgment / Excessive Fines / Probable Cause / Rule 60(b)

❒ **Claimant's lack of access to legal materials until after default judgment entered against him justifies vacation of civil forfeiture judgment.**

❒ **Claimant's argument that forfeiture of drug proceeds constituted excessive fine is potentially meritorious defense.**

While incarcerated, Claimant received a civil forfeiture complaint on October 23, 1995. On October 24, 1995, prison officials placed Claimant in administrative detention and seized his personal property, including the complaint and his legal materials. On December 5, 1995, a default judgment was entered against Claimant, and his property was forfeited to the government. On December 7, 1995, Claimant's property was returned to him. On January 30, 1996, Claimant filed a motion to set aside the default judgment pursuant to Federal Rule of Civil Procedure 60(b).

Rule 60(b)(1) permits vacation of a civil judgment due to excusable neglect if the motion to vacate is made within one year of the entry of the judgment. Claimant had no access to his legal materials until after default judgment was entered against him. Thus, he "could not defend himself and could not have been expected to do so."

In order to set aside a default judgment under Rule 60(b), Claimant must establish that he possesses a potentially meritorious defense, thereby demonstrating that vacation of the judgment will not be futile. Claimant first argued that the government lacked probable cause to forfeit the property because in its famous double jeopardy case, *United States v. $405,089.23*, the Ninth Circuit criticized the government's exclusive reliance on criminal convictions obtained after the institution of the civil forfeiture proceeding. In this case, however, Claimant's criminal convictions were obtained before institution of the civil forfeiture proceedings; and, therefore, this argument is unavailing.

Nevertheless, Claimant's argument that the forfeiture constituted an excessive fine is potentially meritorious. *Austin v. United States*, 509 U.S. 602 (1993), did not decide whether forfeiture of drug proceeds constitutes punishment for Eighth Amendment purposes. In addition, the D.C. Circuit has not yet established standards for determining whether a forfeiture constitutes an excessive fine. Finally, Claimant, who was acting *pro se*, may not have been aware that he may challenge the theory under which the property was forfeited. For these reasons, the district court granted Claimant's motion to vacate.

RMJ

United States v. Property Identified as 25 Pieces of Assorted Jewelry, 1996 WL 724938 (D.D.C. Dec. 4, 1996) (unpublished). Contact: AUSA William Cowden, ADC01(wcowden).

Interest

❒ **Government is required to pay successful Claimants interest on returned seized cash only to the extent of the interest benefit actually realized from the date of deposit to the date of the return payment.**

The government's proposed order returning seized currency in a civil forfeiture action proposed that the government pay the Claimants interest accruing from the date the funds were deposited "at the prevailing government rate." The Claimants contended that the government should pay them interest from the date of the seizure "at the reasonable rate of return for money prudently invested."

The district court applied the rule that the government is required to pay successful Claimants only the interest that the government has actually accrued or accrued constructively (from the benefit realized from the deposit's reduction of the government's borrowing to finance the national debt), *United States v. $277,000 U.S. Currency*, 69 F.3d 1491, 1497 (9th Cir. 1995) (summarized in *Quick Release*, December

1995, pp. 24-25). Consequently, the government's interest liability to the Claimants was only for interest at the prevailing government rate from the date the funds were actually deposited by the United States to the date of the return payment to the claimants. *JHP*

United States v. $133,735.30, Civil No. 93-1423-JO (D. Or. January 13, 1997). Contact: AUSA Leslie J. Westphal, AOR01(lwestpha).

Section 888

❒ Sixty day period to file complaint set forth in 21 U.S.C. § 888(c) is not applicable to forfeitures of conveyances under 21 U.S.C. § 881(a)(6).

The Federal Bureau of Investigation seized a 1966 Ford Mustang without an engine or transmission pursuant to a civil seizure warrant as property traceable to drug proceeds forfeitable under 21 U.S.C. § 881(a)(6). After Claimants filed a claim, the government filed a verified complaint for forfeiture.

Claimants moved to dismiss the complaint as untimely filed because it was filed beyond the 60 day period set forth in section 888(c). The government argued that section 888(c) does not apply because the forfeiture proceeding against the Mustang was based upon section 881(a)(6) which authorizes forfeiture of property traceable to drug proceeds and not upon section 881(a)(4) which authorizes forfeiture of conveyances used to facilitate drug activities. The district court agreed, holding that the expedited procedures set forth in section 888(c) apply only to the forfeiture of conveyances under section 881(a)(4). The court specifically declined to follow the decision of Seventh Circuit in *United States v. Indoor Garden Supply*, 55 F.3d 1311 (7th Cir. 1995), which held that section 888(c) applies to forfeitures of all conveyances, not just those forfeitable pursuant to section 881(a)(4).

The court opined that section 888(c) applies to conveyances seized for a "drug-related offense." The term "drug related offense" is defined in the administrative regulations, 21 C.F.R. § 1316.91(d), to include offenses related to the distribution and manufacturing of controlled substances. The definition does not include the money laundering aspects of drug dealing which are addressed in section 881(a)(6). Thus, the court concluded that the term "conveyances" as it is used in section 888(c) clearly refers only to conveyances used to facilitate drug offenses which are forfeitable under section 881(a)(4), and not to conveyances purchased with drug proceeds which are forfeitable under section 881(a)(6).

The court also held that the Mustang without its engine or transmission was not a conveyance because it is not capable of transporting anything. The court noted that the purpose of section 888(c) was to assure that innocent owners would not be deprived of their vehicles as a means of transportation while administrative forfeiture proceedings were pending or while the government delayed in filing a civil action. *DAB*

United States v. A 1966 Ford Mustang, ___ F. Supp. ___, 1996 WL 678681 (S.D. Ohio Nov. 19, 1996). Contact: AUSA Marcia Harris, AOHS01(mharris).

Administrative Forfeiture / Standing / Notice / Due Process / Section 888 / Collateral Estoppel

- ❒ **Written release of interest in seized property negates standing to sue for its return.**

- ❒ **Certified mailing of notice of seizure to owner at jail address satisfies due process even though owner never actually received it.**

- ❒ **50-day delay in providing written notice of seizure to determine whether conveyance was related to drug trafficking did not violate 21 U.S.C. § 888(c) requirement for written notice "at the earliest practicable opportunity."**

- ❒ **Collateral estoppel precludes owner from challenging again in civil suit a search warrant already upheld in criminal case.**

Plaintiff sued the government for return of administratively forfeited property alleging that his due process rights had been violated when the Drug Enforcement Agency (DEA) failed to provide sufficient and timely notice of the seizure, and that the government had violated the expedited procedures for seized conveyances (21 U.S.C. § 888). Plaintiff also asserted that the seizures were based on a defective search warrant.

Marijuana plants, growing equipment, $9,780.00 in U.S. currency, and a 1987 Chevrolet were seized in the execution of a state search warrant on plaintiff's property when Plaintiff was arrested. On the way to the county jail after his arrest, Plaintiff was told by a DEA agent that the currency and the car were being seized for forfeiture. The DEA published notices of its seizure and intended administrative forfeiture of the car and the cash in *USA Today*. The DEA also mailed notices by certified mail with return receipt requested to the Plaintiff's last known mailing address for the cash and to the address on the registration certificate for the car. A friend on whose custody Plaintiff's release on bond was conditioned, and who had signed for the notices sent to plaintiff on four other occasions, accepted the notice for the car. The friend's daughter accepted the notice for the cash.

In addition, the DEA mailed notices for the car and the cash by certified with mail return receipt requested to Plaintiff's jail. A jail official signed for the notice for the cash, but the notice for the car was returned to the DEA marked "undeliverable." The DEA then had mailed a second set of notices for the cash and the car to the county jail to which plaintiff had been moved. However, these notices were returned undelivered, apparently because Plaintiff had been moved back to his original jail.

Meanwhile, after the court in the criminal prosecution denied Plaintiff's motion to suppress evidence obtained from the search warrant (including the seized cash and car), Plaintiff pleaded guilty and signed a letter to the county sheriff releasing his claim to any property seized pursuant to the search warrant. The DEA, having received no claim and cost bond or In Forma Pauperis affidavit, administratively forfeited both the cash and the car. Almost a year later, however, Plaintiff sent the DEA a letter from prison requesting information concerning the forfeitures. In response, the DEA sent Plaintiff the second set of notices. Plaintiff did not respond to the DEA's notices, but a year later, commenced the instant lawsuit.

The court dismissed the Plaintiff's suit. First, the court ruled that Plaintiff lacked standing to sue for the return of the property because his letter releasing his claim to any property seized pursuant to the search warrant negated his ownership interest in the seized car and cash. The court rejected Plaintiff's argument that because he did not know about the seizure of the car and the cash, his written release did not apply to them. The court pointed out that Plaintiff had been told by the DEA agent on the day of his arrest that the cash and the car were being seized for forfeiture. Additionally, the court found that Plaintiff had received constructive (if not actual) notice of the seizure and intended forfeiture.

The court ruled that the government's difficulties in delivering written notice to Plaintiff did not negate the adequacy for due process purposes of the government's repeated good faith efforts to provide such notice. Sending certified mail notices to the interested party's jail address satisfies due process requirements, *United States v. Clark*, 84 F.3d 378 (10th Cir. 1996). The court determined that the notice sent to Plaintiff's prison for the cash seizure clearly satisfied due process. A prison official signed for it. As to the notices for the car, the post office returned those sent to the jails undelivered, but the court ruled that the government had been reasonable in concluding that Plaintiff's friend on whose custody Plaintiff's release on $150,000 secured bond had been conditioned, and who had signed notices sent to Plaintiff on four other occasions, was his agent-in-fact when she accepted the DEA's notice for the car. In addition, the court pointed out that plaintiff ignored the DEA's sending of the second set of notices.

Plaintiff's claims that the government failed to comply with the expedited procedures for seized conveyances (21 U.S.C. § 888) also were rejected. Because Plaintiff did not file a claim and cost bond for his seized conveyance as required under section 888(c) to begin the 60-day time limit for commencement of the civil forfeiture, the time limit did not apply. Also, the court found that the government acted reasonably in taking 50 days to provide notice of the seizure "at the earliest practicable opportunity." 21 U.S.C. § 888(b). The court found that the 50 days was reasonable to enable the government to determine whether, in fact, the seized car was related to Plaintiff's drug trafficking activities.

Finally, because the validity of the search warrant was decided against the plaintiff in the denial of his motion to suppress evidence in the criminal proceeding, collateral estoppel precluded his relitigating the same issue in this civil suit. *JHP*

Scott v. United States, ___ F. Supp. ___, 1996 WL 748428 (D.D.C. December 19, 1996). Contact: AUSA Katheryn Goode, ADC04(kgood).

Administrative Forfeiture / Laches

❒ **Doctrine of laches bars claim where plaintiff, who claims his property was forfeited without notice, offers no plausible excuse for a five year delay in filing for the return of approximately $165,000.**

Two couriers were detained and questioned by the U.S. Customs Service after Customs agents inspected their bags and found sums of money in the amounts of $103,000 and $62,000. Subsequently, both caches of money were seized. While one of the couriers was detained, Customs agents saw Plaintiff observing the scene and then fleeing. Although Plaintiff was not arrested at that time, he and the couriers were later indicted on charges involving narcotics, money laundering, and other offenses.

Plaintiff was convicted of various crimes and sentenced. At the same time, Customs sent notices of seizure to the two couriers, but not to the Plaintiff. The first courier petitioned for remission and received $67,000 back. The second courier never responded to the notice and the money was forfeited. Five years after his arrest, Plaintiff petitioned the district court to recover the entire $165,000, claiming that the money belonged to him and that the government knew and ignored this fact when it released some of the money and forfeited the rest without sending him notice. The government moved to dismiss the claim because, *inter alia*, the district court lacked subject matter jurisdiction over the case, the administrative forfeitures complied with the requirements of due process, and the action was barred by the doctrine of laches.

Initially, the court stated that it has subject matter jurisdiction to review an administrative forfeiture only to determine whether the administrative action satisfied the requirements of procedural due process. The court must decide whether the state acted reasonably in selecting means likely to inform persons affected, not whether each person actually received notice. Whether it was reasonable not to send direct notice to Plaintiff depends on whether the government knew, or had reason to know, of Plaintiff's potential interest in the money before the forfeiture proceedings were initiated. After reviewing both Plaintiff's and government's factual contentions as to when the government learned of the potential interest, the court held that the requirements of due process turned on disputed issues of fact; and, therefore, it would be inappropriate to grant the motion to dismiss on this ground.

However, the court did find that Plaintiff's unexplained delay of five years in bringing this action would bar his claim under the doctrine of laches. "An equitable claim is barred by the doctrine of laches in which there is: (1) proof of delay in asserting a claim despite opportunity to do so; (2) lack of knowledge on defendant's part that a claim would be asserted; and (3) prejudice to the defendant by the allowing of the claim." *Rapf v. Suffolk County*, 755 F.2d 282, 292 (2d Cir. 1985). First, Plaintiff offered no plausible excuse for the five year delay. He claimed ignorance of the forfeiture procedures, yet he filed his first return-of-property petition with respect to other property in 1992. Additionally, the money was introduced at trial against him; thus, he knew about the forfeiture at least at that point. Second, because Plaintiff did not file a claim for the money when he filed a motion for return of the other items in 1992, the government had no reason to know that he had an interest in the money. Third, the government suffered prejudice due to plaintiff's delay because it may have rendered a different decision when it returned the $67,000 to one of the couriers. Accordingly, the court granted the government's motion to dismiss based on the doctrine of laches.

MML

Ikelionwu v. United States, No. 95-CV-4622(EHN) (E.D.N.Y. January 3, 1997). Contact: AUSA Elliot Schachner, ANY03(eschachn).

Forfeiture Legislation

On July 22, 1996, the House Judiciary Committee conducted a hearing on forfeiture legislation introduced by Representative Henry Hyde and a more comprehensive bill drafted by the Justice Department. The hearing record has now been published and is available from the House Document Room, U.S. House of Representatives, Washington, D.C. 20515. The citation is Hearing on the Civil Asset Reform Act, H.R.1916, House Judiciary Committee, 104th Cong., 2d Sess., July 22, 1996, Hearing No. 94.

The complete text of the Justice Department's bill and the section by section analysis are printed in the hearing record and will serve as part of the legislative history of the provisions if and when they are ever enacted.

Probable Cause / Airport Seizures

❒ Two courts reach opposite conclusions regarding probable cause to believe currency seized in airport stops from suspected drug couriers represents drug proceeds.

In two airport seizure cases, the government seized currency from suspected drug couriers as they attempted to board airplanes, and instituted civil forfeiture actions under 21 U.S.C. § 881(a)(6) (forfeiture of drug proceeds). In one case, the court found probable cause for the forfeiture, while in the other case, despite similar facts, the court found that probable cause was lacking.

In the first case, *One Lot of U.S. Currency ($36,674)*, the **First Circuit** reversed a district court judgment in favor of the Claimant and found that the government had carried its burden of demonstrating probable cause for the forfeiture for purposes of summary judgment. The facts that the court found sufficient to establish probable cause were as follows: the Claimant purchased an airline ticket for a "red-eye" flight from Boston to Los Angeles just before take off, he paid for the ticket with $972 in cash, he seemed nervous and continuously scanned the area, he checked no bags and carried only a nylon bag which appeared to be mostly empty. The return flight was another "red-eye" flight four days later, the agents recognized the Claimant as an associate of two individuals who were recently arrested for narcotics offenses upon arriving in Boston from Los Angeles on the same flight on which Claimant intended to return. Claimant had posted a $10,000 cash bond for one of those individuals, the Claimant provided a suspect explanation for the source of the money, and a narcotics-detection dog "alerted" to the money.

In *Funds in the Amount of $9,800*, however, a district court presented with similar facts reached a different conclusion. In response to a motion to dismiss the complaint under Rule 12(b)(6), Federal Rules of Civil Procedure, for failure to state a claim upon which relief may be granted, the court found that the following facts failed to establish probable cause: the Claimant purchased the ticket with cash just prior to take off, the Claimant provided vague answers to the agent's questions regarding the source of the money, the cash was contained in an envelope franked with an address which was known for frequent drug activity, there was a positive dog sniff, and Claimant had a record of two prior drug arrests. The court reasoned that, although the Claimant seemed to fit the "drug-courier profile," he did not attempt to deceive the agents, he was traveling in his name for a ten-day stay, he provided a plausible explanation for having $9,800, which the court noted was not an inordinately large amount, the government failed to present evidence of any prior drug convictions, and the government failed to corroborate its conclusory allegation regarding the franking on the envelope.

The court concluded that the government had failed to articulate facts that would have provided a "reasonable basis for its claim that there is probable cause" for the forfeiture of the currency due to its connection with narcotics trafficking. Accordingly, the court dismissed the complaint without prejudice.

MDR

United States v. One Lot of U.S. Currency ($36,674), ___ F.3d ___, 1997 WL 2454 (1st Cir. Jan. 8, 1997). Contact: AUSA Richard Hoffman, AMA01(rhoffman).

United States v. Funds in the Amount of $9,800, ___ F. Supp. ___, 1996 WL 745171 (N.D. Ill. Dec. 23, 1996). Contact: AUSA Sam Brooks, AILN02(sbrooks).

Administrative Forfeiture / Court of Federal Claims

❒ **Federal Claims Court holds that it lacks jurisdiction to hear a claim that personal property was unlawfully seized and forfeited.**

"This case presents the question of whether the United States Court of Federal Claims may hear a claim that personal property was unlawfully seized and forfeited." Holding that it cannot, the court dismissed a suit alleging that the Drug Enforcement Administration (DEA) wrongfully deemed a petitioner's claim to be late, and proceeded to administratively forfeit his property under 21 U.S.C. § 881(a)(6).

The opinion carefully evaluates and rejects several possible bases for jurisdiction over this kind of suit. Its starting point is the Tucker Act, which waives sovereign immunity with respect to certain suits brought in the Court of Federal Claims. However, the Tucker Act is jurisdictional only, and does not create causes of action, which must be found elsewhere. The court went on to reason as follows.

Due process and unreasonable search and seizure claims: The only award the Court of Federal Claims can make is one for monetary damages. "It is settled that the remedy for violations of the Due Process Clause of the Fifth Amendment or the Search and Seizure Clause of the Fourth Amendment is not the payment of money damages. Because claims for violation of these provisions do not lead to the payment of money damages, neither this court nor the district courts may decide them under the Tucker Act. Instead, these provisions are enforced through equitable remedies in the district courts pursuant to their federal question jurisdiction."

The Fifth Amendment takings claim: The Court of Federal Claims has exclusive jurisdiction of takings suits for more than $10,000. But a lawful forfeiture is not a taking. On the other hand, an unlawful forfeiture is also not a taking because a taking only occurs when "a valid exercise of sovereign authority resulted in the taking of private property for public use, but without payment."

Violations of statutory and procedural rights: Petitioner contends that the DEA violated procedures mandated by the statute and DEA regulations. If so, a remedy might lie under the Administrative Procedures Act (APA). However, since the APA does not provide for monetary awards, this court lacks jurisdiction over APA actions.

Unlawful Exactions: An "unlawful exaction" occurs when money or property has been improperly paid, exacted, or taken from someone in contravention of the Constitution, a statute, or a regulation. An improper forfeiture is an unlawful exaction. The Court of Federal Claims might, therefore, have jurisdiction to make a monetary award where the United States has, through an improper forfeiture, made an unlawful exaction. However, this court will not take jurisdiction because Congress through its enactments has expressed a desire to place forfeiture actions and related decisions within the district courts rather than with the Court of Federal Claims. *BB*

Crocker v. United States, ___ Fed.Cl. ___, 1997 WL 21276 (Fed.Cl. Jan. 15, 1997).
Contact: Trial Attorney Elizabeth Newsom, SS13(newsom), 202-616-0462.

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