Choose Your Weapon: Is civil forfeiture really necessary, or is it an undesirable shortcut to real law enforcement.

By Stefan D. Cassella

Introduction

Civil – or non-conviction-based – forfeiture is an increasingly common way for governments to relieve criminal wrongdoers of the proceeds of their crimes and to restore the property to the victims of the offense. Led by the United States, the UK, South Africa and Australia, many countries are now adopting civil forfeiture regimes to allow for the recovery of criminal proceeds without the necessity of obtaining a criminal conviction.

The question that is asked, however, is this: is this necessarily a good thing? Is civil forfeiture an essential tool that is needed to fill a gap in the arsenal of weapons available to law enforcement, or is it a prosecutorial shortcut that allows cases to be closed without obtaining the evidence needed to obtain a criminal conviction in cases that should be prosecuted criminally.

The answer is that it is both. When properly used, civil forfeiture is an essential tool that provides a means of recovering property, preventing its illegal use, and restoring it to victims in situations in which a criminal conviction is either impossible or unnecessary. But it is a tool that can also be used to save time and money even though the investment of those resources in bringing a criminal to justice would better serve the public interest.

Three points

I want to make three points:

1. First, that it not necessarily the case that a criminal prosecution and conviction is always the optimal result of an investigation, and that asset recovery is always a less desirable alternative.

2. Second, that even when a criminal conviction would be preferred, civil asset recovery may be the only available alternative, and thus may be pursued out of necessity.

3. Even so, law enforcement must acknowledge that there are instances in which a criminal conviction and prosecution would be the optimal result,
but that the Government settles for asset recovery out of convenience, or because priority is given to conserving resources.

Let me briefly discuss each of these points.

**Criminal conviction is not the only goal**

Discussions of civil forfeiture in the media usually contain an implicit assumption that it is always better when a criminal investigation results in a prosecution and conviction, and that somehow it is less satisfactory when the Government simply takes the possession of someone’s property and walks away. That is not the case.

There are many instances in which the proper outcome of an investigation – or even the goal of an investigation – should be the recovery of property, not the prosecution and conviction of any person. Let me give two examples.

**Seizing the money versus buy-bust arrests**

For years, drug agents would invest their resources in making buy-bust cases – *i.e.*, buying small amounts of drugs from street-level dealers, arresting them, and putting them in jail. But these people were immediately replaced with other street-level dealers, which meant that while the jails were filling up with the least culpable individuals, law enforcement achieved no lasting effect on the ability of the organization to distribute drugs in the community.

Eventually the suggestion was made that following the money and seizing it when it was on its way back to the leadership of the organization, or its supplier, would have a greater law enforcement impact. As any economist would agree, seizing $500,000 in cash destined for Mexico after the drug organization has already incurred all of the risks and costs involved in smuggling the drugs into the US and distributing them on the streets has greater impact on the drug organization than any number of seizures of the drugs coming into the country or the arrest of the street-level distributors.

The drugs and the distributors are easily replaced; the money is not.

So it makes a great deal of law enforcement sense to focus on seizing the money and not on arresting the couriers and street-corner hoodlums.

**The Interests of Justice**

Here a different example. Sometimes a prosecutor can prove a criminal case beyond a reasonable doubt but determines that it is not in the interest of justice to do so. This is called exercising prosecutorial discretion
Suppose there’s evidence that someone has been supplying a convicted felon with firearms, but investigation reveals the supplier is his 74-year-old mother, who knew her son was a felon who was prohibited by law from buying his own guns but wanted to buy him a gift. How should the prosecutor deal with the mother: Do nothing? Charge her with a felony? Or just confiscate the guns?\textsuperscript{ii}

Or suppose there is evidence that someone is structuring $500,000 in cash deposits in amounts under $10,000 to avoid the Currency Transaction Reporting requirement, but investigation reveals he’s a privacy buff who just doesn’t think it is the Government’s business that he has a lot of money.\textsuperscript{iii} Again, what are the prosecutor’s choices? Do nothing? Indict the defendant for structuring? Or forfeit 10 percent of the money as a civil penalty?

In these cases and many others like them, pursuing asset recovery through civil forfeiture is often the proper sanction given the seriousness of the offense and the motivation of the wrongdoer. If civil forfeiture did not exist, governments would not have this alternative.

**When civil forfeiture is the only alternative**

My second point is that even when a criminal prosecution and conviction is the proper goal of an investigation, it may not be possible to achieve that result. In those cases, the Government properly pursues asset forfeiture out of necessity as the only alternative to doing nothing.

Suppose, for example, the defendant who committed a serious offense is dead or is a fugitive and there is no likelihood of a criminal conviction. In one such case, a woman who ran a cancer clinic charging $15,000 for worthless remedies to terminally-ill cancer patients fled to Mexico when she was indicted, leaving behind her assets. Without civil forfeiture, there would have been no way of recovering what assets remained to be distributed to her victims or their families.\textsuperscript{iv}

In another case, an investment advisor ran a Ponzi scheme depriving his clients of millions of dollars in savings but committed suicide when the FBI arrived with search warrants for his records.\textsuperscript{v} In such a case, what is Government to do if it wants to recover the money for victims if not through civil forfeiture?

This problem arises frequently in cases involving foreign nationals who commit an offense outside of the United States but in violation of US law, or who commit an offense in violation of foreign law but place the proceeds of the crime in the US.
For example, suppose a corrupt dictator in an African country loots his country’s treasury of $4 billion and launders it through bank accounts in Europe or the US. In such a case, there may be no jurisdiction to prosecute the public corruption offense in the Western country, but it is possible to use civil recovery to take custody of the assets and return them to the developing country where they belong.$^vi$

In other cases, property that is derived from criminal activity may be found in circumstances in which there is no way to determine who the wrongdoer was. Suppose, for example, ancient artifacts looted from an archaeological site in Greece turn up in an auction house in New York, consigned by an innocent collector, and suppose that in the same auction house there is also a painting stolen by the Nazis from a Jewish family during the Holocaust. What alternative is there to using civil forfeiture to recover the property in those cases?

The same is true when a million dollars in drug proceeds is found in the concealed compartment of a vehicle driven by a courier who has no idea that it’s there, and doesn’t know the name of the person who hired him to drive the vehicle.$^vii$

The easy way out

All of these are instances where it is entirely appropriate for the Government to pursue civil recovery instead of investing resources in piecing together a criminal case. But law enforcement has to acknowledge that not all of its civil forfeiture cases fall into these categories, and that there are some – perhaps many – in which police officers and other law enforcement agents seize currency as the short cut to resolving a case instead of investing the additional effort that might have resulted in a criminal conviction.

The proto-typical example is the police officer who stops a vehicle for a traffic violation, finds $10,000 in currency wrapped in rubber bands, has a drug dog sniff the money and sees that it alerts, and lets the driver go without his money, making no effort to find out if this was or was not part of a major drug trafficking organization or some other criminal offense.

This, unfortunately, happens more often than it should; it is the easy route to concluding a matter without investing a lot of resources in a less important case that might or might not result in a conviction. Moreover, parochial concerns (the sense that the traveler was just passing through the jurisdiction, and that if there was a bigger crime being committed, it occurred somewhere else) frequently take precedence over law enforcement objectives. A state police officer in Nebraska who stops a courier transporting cash between the East
Coast and California is likely to be satisfied with the seizure of the money, and to let his counterparts elsewhere worry about tracking down the perpetrators of the underlying crime.

To be sure, some prosecutors and law enforcement agents resist taking the easy way out. The seizure of $500,000 from a courier may be the tip of the proverbial iceberg and, with the investment of significant resources, may result in uncovering a major drug, terrorist financing, or other criminal scheme. Thus, there are cases where the Government will conduct an investigation to find out whose money was seized, and why it was being transported or smuggled out of the country. But unfortunately, that approach is not always taken.

CONCLUSION

The bottom line is simple: To suggest that civil forfeiture is always used as a short cut to doing effective law enforcement is to ignore the realities of life: there are times when civil recovery is the appropriate approach, and there are times when it is the only available remedy. But we must acknowledge, too, that there are times when law enforcement simply takes custody of the money derived from a crime and fails to invest the resources needed to determine if there is someone who should be charged with a criminal offense. Going forward, the key is to address the latter problem without limiting the ability of governments to use civil forfeiture where it is necessary or appropriate to do so.

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i The author is a former federal prosecutor who was a Deputy Chief in the Asset Forfeiture and Money Laundering Section of the U.S. Department of Justice for many years, and later Chief of that Section in the Office of the U.S. Attorney for the District of Maryland. He is now retired from federal service and is the CEO of Asset Forfeiture Law, LLC, a consulting company. This article is derived from a presentation by the author at the Cambridge International Symposium on Economic Crime on September 7, 2016.


iii See 31 U.S.C. § 5324(a)(3) and 31 U.S.C. § 5317(c) (authorizing criminal prosecution and criminal and civil forfeiture for structuring offenses, respectively).

United States v. $7,599,358.09, 953 F. Supp.2d 549 (D.N.J. 2013) (noting that the Government filed its civil forfeiture action to recover fraud proceeds when the perpetrator died). See also United States v. Real Property at 40 Clark Road, 52 F. Supp. 2d 254, 265 (D. Mass. 1999) (defendant died while criminal forfeiture was pending, making civil forfeiture necessary); United States v. Real Property . . . 404 W. Milton St., 2014 WL 5808347 (W.D. Tex. Nov. 7, 2014) (husband and wife indicted; wife convicted in criminal case but because husband died before trial, Government files civil forfeiture to address his interest in jointly-held property).
