Joint and Several Liability

Supreme Court overturns decades of criminal forfeiture law, holding that a defendant is only liable to forfeit property that he personally obtains, and is not jointly and severally liable with other defendants for the proceeds of the entire scheme.

Honeycutt v. United States, ___S. Ct. ___ 2017 WL 2407468 (June 5, 2017).

Supreme Court * Two brothers were convicted of a drug conspiracy. The Government sought forfeiture money judgments against each brother in the amount of $269,751, which represented the proceeds of the entire scheme. One brother pled guilty and agreed to forfeit $200,000, the other was convicted by a jury.

The Government argued that the second brother should be held jointly and severally liable for the entire amount, and thus requested a money judgment for the remaining balance of $69,751, even though the second brother had not personally obtained any of the proceeds of the scheme. The Sixth Circuit upheld the forfeiture order as consistent with the doctrine of joint and several liability, which had been applied in criminal forfeiture cases in all circuits but one. The Supreme Court granted *certiorari* to resolve the split in the circuits.

In a unanimous decision by Justice Sotomayor, the Court reversed the Sixth Circuit, holding that the doctrine of joint and several liability is inconsistent with the plain language of the criminal forfeiture statute.

Section 853(a) authorizes the forfeiture of any property obtained, directly or indirectly, by the defendant. Applying the dictionary definition of the term "obtained," the Court held that the statute applies only to property that a defendant actually acquires; it does not make a defendant liable for the forfeiture of property obtained by someone else.

The Government relied on the phrase "directly or indirectly," arguing that when two people are convicted of a conspiracy, each "indirectly" obtains the property directly obtained by the other. But the Court did not agree.

The Government also argued that under the doctrine of *Pinkerton* liability, each member of a conspiracy is liable for the acts of the others. But the Court held that Congress did not incorporate *Pinkerton* liability into the structure of the criminal forfeiture statute. "Congress provided just one way for the Government to recoup substitute property when the tainted property is unavailable," the Court

said, and that is through "the procedures outlined in § 853(p)." The Court continued: "Congress did not authorize the Government to confiscate substitute property from other defendants or coconspirators; it authorized the Government to confiscate assets only from the defendant who bears responsibility for its dissipation."

Accordingly, the Court reversed the judgment of the Court of Appeals and held that because "forfeiture pursuant to § 853(a)(1) is limited to property that the defendant himself actually acquired as the result of the crime," and because the second brother did not personally benefit from the drug sales, the second brother was not required to forfeit anything. *SDC*

Comment: Obviously, this decision overturns decades of criminal forfeiture law. Every circuit but one (the District of Columbia Circuit) has held that criminal defendants are jointly and severally liable for the forfeiture of the proceeds of the crime for which they are jointly convicted. *See* Section XII of the Criminal Forfeiture Case Outline and Section 19-5 of *Asset Forfeiture Law in the United States* (2d ed. 2013) and 2016 Supplement.

How the decision will affect outstanding forfeiture orders in closed cases remains to be seen. In many of those cases, the Government will have recovered money with a view toward applying the forfeited funds to the defendant's restitution order. Cancellation or reversal of such forfeiture orders would thus leave the victims without the benefit of the Government's forfeiture powers to collect money owed to them.

In countless other cases, defendants who were convicted of criminal offenses – some of whom are serving lengthy prison sentences – remain subject to subject forfeiture orders that were based on a finding of joint and several liability.

Going forward, the decision in *Honeycutt* leaves at least two important questions unanswered: 1) will district courts, as part of the forfeiture phase of a trial, now be required not only to determine the total amount subject to forfeiture, but also how much each of the defendants in a multi-defendant case personally acquired; and 2) does *Honeycutt* apply to all criminal forfeitures or only to those based on a statute that limits the forfeiture to proceeds that a person "obtained." For example, two of the most frequently-used forfeiture statutes – 18 U.S.C. § 982(a)(1) (forfeiture of property involved in money laundering) and 18 U.S.C. § 981(a)(1)(C) / 28 U.S.C. § 2461(c) (forfeiture of proceeds of most fraud offenses) – are not limited to property "obtained" by the defendant but instead describe the property that is subject to forfeiture.

The only real solution to the problems created by this decision, of course, is a legislative fix. *SDC*