Money Judgments

The following is excerpted from Stefan D. Cassella, *Asset Forfeiture Law in the United States* (Second Edition) (Juris 2013), at pp. 691-700.

§ 19-4 Directly Forfeitable Property, Substitute Assets and Money Judgments

c. Money judgments

The term "money judgment" is used to describe a particular kind of directly forfeitable property. It is a short-hand way of describing the defendant's continuing obligation to forfeit the money derived from or used to commit his criminal offense whether he has retained the actual dollars in his possession or not.

For example, if the defendant sold a million dollars' worth of drugs, or laundered a million dollars in drug proceeds, he is required to forfeit the million dollars as directly forfeitable property. The forfeiture is mandatory,[1] and is not excused by the fact that the defendant dissipated the actual money derived from the offense when he plowed it back into his scheme, passed it on to an accomplice, buried it in his garden, or spent it on wine, women and song.[2] If the

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[1] *See United States v. Newman*, 659 F.3d 1235, 1240 (9th Cir. 2011) (holding that the district court must enter a money judgment if the Government has met the requirements). The mandatory nature of criminal forfeiture is discussed *infra* at Section 20-2.

[2] *See United States v. Hall*, 434 F.3d 42, 59 (1st Cir. 2006) (the district court may order the defendant to forfeit a sum of money equal to the drug proceeds that he earned but did not retain; this reflects the nature of criminal forfeiture as "a sanction against the individual defendant rather than a judgment against the property itself," and is the only way to truly separate the wrongdoer from the fruits of his crime once he has spent them on "wine, women and song"); *United States v. Grose,* ___ Fed. Appx. ___, 2012 WL 581218, *18 (10th Cir. Feb. 23, 2012) (that defendant lost the proceeds of his wire fraud offense in a subsequent bad

defendant no longer has the actual dollars or any traceable property in his possession -– or the Government cannot locate them — the obligation to forfeit the money simply takes the form of a mandatory judgment in favor of the Government. It might have been called a "mandatory judgment of forfeiture of the money involved in a crime that has been disbursed or cannot presently be located." The term "money judgment" is simply a lot shorter.

The use of money judgments in criminal forfeiture cases is now well-established in the case law. Indeed, the concept is codified in Rule 32.2[3] and in some criminal forfeiture statutes.[4] But it was not always so. To understand fully what it means when a court includes a money judgment in an order of forfeiture, it is worth spending a moment to review how the concept evolved.

In the 1980s, the entry of a forfeiture order in the form of a money judgment was controversial and generated a significant amount of litigation. The first court to hold that criminal forfeiture is not limited to specific assets in the defendant's possession was the Seventh Circuit in *United States v. Ginsburg*.[5] In that case, the court held that criminal forfeiture is a personal judgment that requires the defendant to pay the total amount derived from the criminal activity

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investment does not excuse him from liability for a money judgment any more than if he'd spent the money on wine, women and song).

[3] *See* Fed. R. Crim. P. 32.2(b) and (c).

[4] *See* 31 U.S.C. § 5332(b)(4) (authorizing forfeiture in the form of a personal money judgment if the property involved in a bulk cash smuggling offense is unavailable); *United States v. Roberts*, 696 F. Supp.2d 263, 269 n.4 (E.D.N.Y. 2010) (that Congress included money judgment language in § 5332(b)(4) does not imply that money judgments are not otherwise authorized; it was merely codifying what by then was a well-established proposition), *aff'd in part, vacated in part by United States v. Roberts*, 660 F.3d 149, 153 (2d Cir. 2011).

[5] 773 F.2d 798 (7th Cir. 1985) (en banc).

"regardless of whether the specific dollars received from that activity are still in his possession."[6] Because criminal forfeiture is a sanction against the individual defendant rather than a judgment against the property itself, the court said, it does not matter whether the government recovers the identical dollars that the defendant received in committing the criminal offense. The number of dollars derived from the crime serves only to set the limit on the magnitude of the money judgment that the court is authorized to impose.[7]

The Eleventh Circuit reached the same conclusion in *United States v. Conner*.[8] By enacting the criminal forfeiture statutes, the court said, Congress "revised the concept of forfeiture," making the forfeiture part of the criminal penalty into a sanction against the individual instead of a remedial action against the property.[9] As such, the court continued, it could take the form of "a money judgment against the defendant" for the amount of money that came into his hands as a result of the criminal offense.[10]

Another panel of the Eleventh Circuit reached the same conclusion in *United States v. Navarro-Ordas*.[11] Expanding on the analysis in *Conner,* the panel held that Congress' purpose in enacting the criminal forfeiture statutes was to ensure that the criminal was separated from the proceeds of his offense. Allowing a criminal to escape the sanction of forfeiture if the government could

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[6] 773 F.2d at 801-02.

[7] 773 F.2d at 801.

[8] 752 F.2d 566 (11th Cir. 1985).

[9] 752 F.2d at 576.

[10] *Id.*

[11] 770 F.2d 959 (11th Cir. 1985).

not actually locate the proceeds of the criminal activity would serve only to reward criminals who were successful in hiding or dissipating their profits. Thus, to carry on Congress' intent, a court must be able to order the convicted defendant to pay a judgment equal to the proceeds obtained from the offense, "regardless of what he may actually have done with his profits."[12]

When the Second and Fourth Circuits followed suit,[13] it appeared that the court's authority to enter an order of forfeiture in the form of a money judgment was well established. In 2004, however, a district court in Philadelphia held in *United States v. Croce* that it could not enter a money judgment if the defendant was insolvent and thus was unable to satisfy the order out of assets available to him at the time of sentencing.[14] This led to a new round of litigation on the money judgment issue, but ultimately the courts rejected the *Croce* court's analysis and conclusion.

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[12] 770 F.2d at 970.

[13] *See United States v. Robilotto*, 828 F.2d 940 (2d Cir. 1987) (because forfeiture is a sanction against the individual defendant and not a judgment against the property itself, the requirement that the property be traceable to the criminal offense does not apply); *United States v. Amend*, 791 F.2d 1120 (4th Cir. 1986) (proof that the directly-forfeitable property is still in existence is not required; the purpose of the sanction is not to recover specific property, but to ensure that the defendant suffers a punishment commensurate with the value of the proceeds he received -- and dissipated -- in the course of the offense).

[14] *See United States v. Croce*, 334 F. Supp. 2d 781, 794 (E.D. Pa. 2004) (*Croce I*) (disagreeing with all precedents and holding that section 982(a)(1) authorizes the forfeiture of specific assets only), *on reconsideration*, 345 F. Supp. 2d 492 (E.D. Pa. 2004) (*Croce II*) (section 982(a)(1) authorizes money judgments but only up to the value of assets that may be forfeited as substitute assets; it does not authorize money judgments that exceed the defendant's net worth). *Accord United States v. Day,* 416 F. Supp. 2d 79, 90-91 (D.D.C. 2006) (following *Croce*).

For example, in *United States v. Hall,*[15] a defendant opposed the Government's motion for an order of forfeiture in a criminal case and asked the district court to adopt the reasoning in *Croce.* When the district court refused to do so, the defendant appealed to the First Circuit, which affirmed the order of forfeiture. In a criminal case, the court said, the court may order the defendant to forfeit a sum of money equal to the drug proceeds that he earned but did not retain; this reflects the nature of criminal forfeiture as "a sanction against the individual defendant rather than a judgment against the property itself," and is the only way to truly separate the wrongdoer from the fruits of his crime once he has spent them on "wine, women and song."[16] Thus, the court concluded, "a money judgment permits the Government to collect on the forfeiture order in the same way that a successful plaintiff collects a money judgment from a civil defendant."[17] Whether the defendant has assets available to satisfy the judgment at the time he is sentenced is irrelevant.

Similarly, in *United States v. Casey,*[18] the Ninth Circuit rejected *Croce* in emphatic terms. The overriding purpose of the forfeiture statute, the court said, is to eliminate the gain that a defendant realizes from committing a criminal act. Every defendant who sells drugs in exchange for money realizes a gain whether he retains the money or spends it. Forfeiture is the tool Congress has devised to eliminate that gain. If the defendant still has the actual proceeds, he must forfeit them; if he does not have the actual proceeds but has something of equal value, he must forfeit that as a substitute asset; and if he has nothing to forfeit because

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[15] 434 F.3d 42 (1st Cir. 2006).

[16] 434 F.3d at 59.

[17] *Id.*

[18] 444 F.3d 1071 (9th Cir. 2006).

he is insolvent he must be ordered to pay a money judgment. Otherwise a defendant who has spent the proceeds of his crime would be able to retain the benefit of those proceeds while other defendants may not.[19]

The money that a defendant receives in exchange for drugs is money that "should never have been available for him to spend," the court said. "Imposing a money judgment despite his lack of assets at sentencing negates any benefit he may have received from the money, ensuring that, in the end, he does not profit from his criminal activity."[20]

This conclusion, the panel continued, is dictated by the mandatory nature of the criminal forfeiture statute and the Congressional directive to construe the statute liberally to achieve its remedial purpose. "Requiring imposition of a money judgment on a defendant who currently possesses no assets furthers the remedial purposes of the forfeiture statute by ensuring that all eligible criminal defendants received the mandatory forfeiture sanction Congress intended and disgorge their ill-gotten gains, even those already spent."[21] Allowing a defendant who was insolvent to escape the forfeiture sanction, the court said, would "frustrate[] the broad remedial purpose of the statute."[22]

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[19] 444 F.3d at 1074.

[20] *Id.*

[21] *Id.*

[22] *Id.* It is interesting to note that the Supreme Court of Canada, addressing the identical issue under Canada's criminal forfeiture statute, reached the same conclusion based on an identical analysis. *See R. v. Lavigne,* 2006 SCC 10 at para. 30 (Supreme Court of Canada March 30, 2006) (holding that the ability of the defendant to pay a judgment equal to the proceeds of the offense for which he has been convicted is irrelevant; "If the offender no longer has the money, it will often be because he or she has spent it. If the fact that the money has been spent is a ground for being exempted from the order, would this not incite offenders to quickly squander the proceeds of crime? This result would undoubtedly run counter to the intended

Most important, the Third Circuit reversed the *Croce* decision itself,[23] and expressly rejected its reasoning in a separate case. In *United States v. Vampire Nation*,[24] the court followed *Casey* and *Hall,* holding that a forfeiture order in a fraud case could take the form of an *in personam* judgment for the amount of proceeds the defendant obtained from his fraud offense, even if he was insolvent at the time the forfeiture order was imposed. Mandatory forfeiture, the court said, "is concerned not with how much an individual has but with how much he received in connection with the commission of the crime."[25] Every appellate court to have addressed the issue since then has followed *Casey, Hall* and *Vampire Nation.*[26]

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purpose, which is to deprive offenders and criminal organizations of the proceeds of their crimes.").

[23] *United States v. Croce*, 209 Fed. Appx. 208, 213 (3d Cir. 2006).

[24] 451 F.3d 189 (3rd Cir. 2006).

[25] 451 F.3d at 202, quoting *Casey*, 444 F.3d at 1077.

[26] *See United States v. Misla-Aldarondo*, 478 F.3d 52, 73-74 (1st Cir. 2007) ("If the Government has proven that there was at one point an amount of cash that was directly traceable to the offenses, and that thus would be forfeitable under 18 U.S.C. § 982(a), that is sufficient for a court to issue a money judgment, for which the defendant will be fully liable whether or not he still has the original corpus of tainted funds—indeed, whether or not he has any funds at all;" following *Hall*); *United States v. Awad,* 598 F.3d 76, 79 (2d Cir. 2010) (following all other circuits; contrary interpretation would create an incentive for criminals to spend their proceeds to avoid forfeiture); *United States v. Olguin*, 643 F.3d 384, 396-97 (5th Cir. 2011) (because the forfeiture statute is broadly worded and must be "liberally construed," a court must assume that any property of the defendant may be forfeited unless specifically excluded from the scope of the statute; because the statute does not exclude money judgments, a forfeiture order may take that form); *United States v. Bevelle*, 437 Fed. Appx. 399, 407 (6th Cir. 2011) ("Where the Government is unable to recover the actual property that is subject to

Money judgments are generally based on a calculation of the proceeds the defendant received from the offense giving rise to the forfeiture.[27] In cases where the proceeds were something other than money, the money judgment is based on the value of the benefit defendant received.[28] Moreover, money judgments

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forfeiture, the Government can seek a money judgment against the defendant for an amount equal to the value of the property that constitutes the proceeds of the drug violation"); *United States v. Smith,* 656 F.3d 821, 827 (8th Cir. 2011) (following all other circuits, but basing the authority to impose a money judgment on § 853(o) and (p); under the rule requiring liberal construction, forfeiture of a money judgment is just a mechanism for forfeiting the property the defendant may acquire in the future as substitute assets); *United States v. Newman*, 659 F.3d 1235, 1242-43 (9th Cir. 2011) (reaffirming *Casey*: forcing defendants to disgorge their ill-gotten gains, "even those already spent," ensures that defendants do not benefit from their crimes; when the Government seeks a money judgment, the district court's only role, under Rule 32.2(b), is to determine the amount of money that the defendant will be ordered to pay); *United States v. McGinty,* 610 F.3d 1242, 1246 (10th Cir. 2010) (same; joining all other circuits and collecting cases); *United States v. Padron,* 527 F.3d 1156, 1162 (11th Cir. 2008) (the authority to issue a forfeiture order in the form of a money judgment is clear from the cross-reference in Section 2461(c) to Rule 32.2 which "explicitly" contemplates the entry of money judgments); *United States v. Day,* 524 F.3d 1361, 1378 (D.C. Cir. 2008) (same, following *Vampire Nation, Hall* and *Casey)*, rev'g 416 F. Supp. 2d 79 (D.D.C. 2006).

[27] *See infra* § 25-6.

[28] *See United States v. Holland*, 160 F.3d 377, 380 (7th Cir. 1998) (defendant ordered to pay judgment equal to value of property concealed from bankruptcy court and subsequently laundered); *United States v. Crumpler*, 229 Fed. Appx. 832, 840 (11th Cir. 2007) (proceeds needs not be cash; where the proceeds were stock options, defendant had to forfeit an amount of money equal to the fair market value of the stock options when they were acquired); *United States v. Diallo,* 2011 WL 135005, *2 (S.D.N.Y. Jan. 13, 2011) (defendant liable to pay a money judgment equal to the value of the stolen cigarettes that were the proceeds of an offense under § 1951); *United States v. Vasquez-Ruiz*, 2002 WL 1880127, *5 (N.D. Ill. 2002) (court enters money judgment for the value of the free rent defendant received as proceeds of the health care fraud

are not limited to property forfeited under a "proceeds" theory; if a sum of money was used to facilitate an offense, it may be forfeited in the form of a money judgment.[29]

As will be discussed in Chapter 22, before the Government can forfeit substitute assets, it must satisfy the requirements in 21 U.S.C. § § 853(p), which relate to the unavailability of the directly-forfeitable property. Those requirements, however, do not apply to money judgments.[30]

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offense).

[29] *See United States v. Puche*, 350 F.3d 1137, 1153-54 (11th Cir. 2003) (affirming money judgment equal to the combined value of the commission paid to the money launderer and the untainted money used to facilitate the offense); *United States v. Numisgroup International Corp,* 169 F. Supp. 2d 133, 136 (E.D.N.Y. 2001) (money judgment entered under § 982(a)(8) may be based on the value of the gross proceeds derived from the offense and the value of the property used to facilitate or promote it); United States v. Harrison, 2001 WL 803695, *1-2 (N.D. Ill. 2001) (Government entitled to money judgment for the amount of money defendant used to facilitate his drug offense—i.e., the amount he used to purchase drugs).

[30] *See United States v. Newman*, 659 F.3d 1235, 1242-43 (9th Cir. 2011) (when seeking only a money judgment, the Government does not have to show that the requirements for forfeiting substitute assets in § 853(p) or Rule 32.2(e) are satisfied); *United States v. St. Pierre*, 809 F. Supp. 2d 538, 541 n.1 (E.D. La. 2011) (where the Government is seeking a judgment for the proceeds of the criminal activity, and not substitute assets for assets that cannot be located, the Government is not required to show that it first exercised due diligence in terms of § 853(p)); *United States v. Roberts*, 696 F. Supp. 2d 263, 268 n.3 (E.D.N.Y. 2010) (when the Government seeks only a money judgment, and "does not seek to seize specific substitute assets, it need not satisfy the requirements of Section 853(p)"), *aff'd in part, vacated in part by United States v. Roberts*, 660 F.3d 149, 153 (2d Cir. 2011). *But see United States v. Podlucky,* 2012 WL 1850931 (W.D. Pa. May 21, 2012) (assuming without deciding that § 853(p) applies to money judgments and rejecting challenge on the merits); *United States v. Gregoire*, 638 F.3d 962, 972 (8th Cir. 2011) (Government may not use money judgment theory to deprive defendant of his right to a jury under Rule 32.2(b)(5) by seeking a money judgment for the value of the specific assets

Once entered, the money judgment remains in effect until satisfied.[31] The Government is in the same position as any other creditor, and may attempt to satisfy its judgment as any other creditor would, but it may also use the tools set forth in the Federal Debt Collection Procedures Act,[32] or it may simply seize the

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when the assets themselves were available for forfeiture); *United States v. Abdelsalam*, 311 Fed. Appx. 832, 847 (6th Cir. 2009) (because the only way the Government can, in the future, enforce the money judgment is by forfeiting substitute assets, it must show that § 853(p) is satisfied before the money judgment is entered).

[31] *See United States v. Navarrete,* 667 F.3d 886, 887-88 (7th Cir. 2012) (like a restitution order, a forfeiture order is an *in personam* judgment that remains in effect until satisfied; if defendant earns money after his release from prison, he may be able to pay both debts); *United States v. Casey*, 444 F.3d 1071, 1074 (9th Cir. 2006) (if the defendant is insolvent at the time of sentencing, the court must impose a money judgment that remains in effect until it is satisfied when the defendant acquires future assets); *United States v. Baker*, 227 F.3d 955, 970 (7th Cir. 2000) (a forfeiture order may include a money judgment for the amount of money involved in the money laundering offense; the money judgment acts as a lien against the defendant personally for the duration of his prison term and beyond); *United States v. Fischer,* 394 Fed. Appx. 322, 332 (7th Cir. 2010) (following *Baker*, the 20-year limitation on judgments in the FDCPA, 28 U.S.C. § 3201, does not apply to criminal forfeiture money judgments which "remain in effect until satisfied"; the Government may enforce the judgment by forfeiting substitute assets at any time).

[32] *See United States v. Bradley*, 644 F.3d 1213, 1309-10 (11th Cir. 2011) (if a defendant does not satisfy a money judgment, the Government may depose him or anyone else, or conduct other discovery under the Fed. R. Civ. P., to learn what assets he has, and may use the FDCPA to seize the assets with a writ of attachment or garnishment); *United States v. Coyne*, 2010 WL 56049, *4 (D.N.J. Jan. 4, 2010) (granting Government's motion for garnishment under 28 U.S.C. § 3205(a), FDCPA, and granting Government's request for interest from the date of the entry of the forfeiture order); *United States v. Bertolo*, 55 Fed. Appx. 406, 410 (9th Cir. 2002) (noting without explanation that the Government had not followed proper procedures for collection of the forfeiture judgment, and remanding to allow the Government to forfeit substitute assets or collect the judgment in accordance with the FDCPA); *United States v.*

defendant's future assets and move to forfeit them as substitute assets under section 853(p) and Rule 32.2(e).[33]

Maxwell, 189 F. Supp. 2d 395, 400-01 (E.D. Va. 2002) (when defendant transfers his real property to third party to prevent Government from using it to satisfy money judgment, Government may sue to void the transfer under 28 U.S.C. §§ 3304(b) and 3306(a)). *Cf. United States v. Fischer,* 394 Fed. Appx. 322, 323 (7th Cir. 2010) (even if the FDCPA generally applies to criminal forfeiture judgments, it does not preclude the Government from satisfying the judgment by forfeiting substitute assets). *But see United States v. Misla-Aldarondo*, 478 F.3d 52, 74 (1st Cir. 2007) (expressing uncertainty whether forfeiture of substitute assets under section 853(p) might be the *only* way the Government can satisfy a money judgment, or whether the Government might also be able to use the money judgment to attach assets like any other judgment creditor, but leaving the issue for another day); *United States v. Zorrilla-Echevarria,* 671 F.3d 1, 11 n.15 (1st Cir. 2011)(reiterating that it is unclear if the Government can satisfy a money judgment without going through the process of forfeiting substitute assets); *United States v. Poulin,* 690 F. Supp. 2d 415, 428 n.18 (E.D. Va. 2010) (dicta suggesting that money judgment may only be satisfied pursuant to Rule 32.2(e)).

[33] *See United States v. Fogg,* 666 F.3d 13, 19 (1st Cir. 2011) ("a money judgment allows the Government to collect on the forfeiture order 'in the same way that a successful plaintiff collects a money judgment from a civil defendant[,] . . . even if a defendant does not have sufficient funds to cover the forfeiture at the time of conviction, the Government may seize future assets to satisfy the order'" (quoting *United States v. Levesque*, 546 F.3d 78, 85 (1st Cir. 2008))); *United States v. Hall*, 434 F.3d 42, 59 (1st Cir. 2006) ("even if a defendant does not have sufficient funds to cover the forfeiture at the time of the conviction, the Government may seize future assets to satisfy the order); *United States v. Carroll*, 346 F.3d 744, 749 (7th Cir. 2003) (defendant may be ordered to forfeit "every last penny" he owns as substitute assets to satisfy a money judgment).