

THE IMPORTANCE OF CIVIL FORFEITURE AS A LAW ENFORCEMENT TOOL

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I. INTRODUCTION

My topic is the critical role that civil (or non-conviction based) asset forfeiture plays in the enforcement of the criminal laws

- And why it is important for all countries to enact legislation making it possible to recover property in this fashion

I am going to talk about what I mean by civil forfeiture,

- How it works in the United States
- And the instances where it is useful – and generally *necessary* – to commence a forfeiture action civilly rather than making it part of a criminal case

I will conclude by giving some examples of civil forfeiture cases to illustrate the important role that civil forfeiture plays in enforcing the criminal laws

- Cases involving international money laundering, public corruption, the evasion of international sanctions against countries like North Korea, terrorist financing and many other matters

First, however, I should say a few words about why it is important to recover assets through forfeiture at all

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II. WHY DO FORFEITURE

There are lots of reasons to invest the time to do an asset forfeiture case

- *Kaley v. United States*, ___ U.S. ___, 134 S. Ct. 1090 (2014) (forfeiture serves to punish the wrong-doer, deter future illegality, lessen the economic power of criminal enterprises, compensate victims, improve conditions in crime-damaged communities, and support law enforcement activities such as police training);

1. Punish the wrongdoer

- don't just put him jail; take away the fruits of the crime;
 - make him pay a judgment equal to the proceeds he received, even if he has spent the money, and even if he has reimbursed the victim
- *United States v. Peters*, 732 F.3d 93, 98-99,101 (2nd Cir. 2013) (the purpose of forfeiture is punishment; that is what distinguishes forfeiture from restitution and other remedial tools; restitution puts the defendant and the victim back in the position they were in before the crime occurred; forfeiture punishes the defendant by forcing him to pay the gross receipts of the crime, not just his net profit);

2. Deter other wrongdoers

- the point of committing the crime was to make money
- if the defendant does not get to keep the money, there is less incentive for the next person to commit the same offense
 - *United States v. Martin*, 662 F.3d 301, 309 (4th Cir. 2011) (Criminal forfeiture is part of the defendant's sentence; its purpose is "to deprive criminals of the fruits of their illegal acts and deter future crimes");

3. Take away the tools of the trade and the economic resources

- we don't want drug dealers to keep the airplane so they can use it again,
- In a money laundering case, it would make no sense to let the money launderer keep the money

- We don't want to let corrupt leaders of developing countries to use the US financial system to loot their treasuries and safeguard a nest egg to use when they have to go into exile
- figuring out how terrorism is financed, and taking away the money before it can be used, is a critical part of the anti-terrorism effort

4. Disrupt the organization

- money is the glue that holds organized criminal enterprises together; they have to recycle the money to keep the scheme going
- it is harder for a drug organization to replace the money than to replace the drugs
- taking the money does more to interrupt the cycle than any number of buy/bust arrests
- the same is true for persons engaged in wildlife trafficking; seizing the money flowing from Asian markets back to the poaching enterprises is more effective than arresting the guy with the truck and the gun in Africa
- and seizing money destined for sanctioned countries like N. Korea and Iran disrupts their ability to evade those sanctions

5. Get money back to the victim

- forfeiture is a more effective way of recovering money for victims than ordering the defendant to pay restitution
 - *United States v. Blackman*, 746 F.3d 137, 143 (4th Cir. 2014) (“The Government’s ability to collect on a [forfeiture] judgment often far surpasses that of an untutored or impecunious victim of crime . . . Realistically, a victim’s hope of getting paid may rest on the Government’s superior ability to collect and liquidate a defendant’s assets” under the forfeiture laws);

6. Protect the community

- shutting down the crack house or meth lab removes a hazard to public health and safety and gives law enforcement the opportunity to convince the community that they're not letting the bad guys profit from their crimes

- and ensures that the playing field is level, so that people trying to run businesses honestly don't have to compete with capital from illegal sources

7. Recycle the money

- forfeited funds can be shared with law enforcement agencies and used to fund law enforcement programs.
- and some forfeited property can be put into official use or handed over to community organizations
- this is the controversial feature of forfeiture

III. ASSET FORFEITURE IN THE UNITED STATES

In the United States, very broadly speaking, we can recover, or “forfeit”, two categories of property:

- The proceeds of a criminal offense
- And property used to commit, or to facilitate the commission, of a criminal offense

And we can do this for most federal crimes, and for some foreign crimes as well, if the property is found in the US

By the “proceeds of the crime” I mean any property that the defendant would not have but for having committed the crime

- If he robs a bank, the money he takes are the proceeds
- If he commits fraud or sells drugs, the money he gets are the proceeds
- If he pays a bribe to get a contract, the payments he receives on the contract are the proceeds because he would not have the contract but for having paid the bribe

And by property used to commit the offense I mean both the instrument by which the crime was committed

- Like the gun used to commit an armed robbery

- Or the money raised to finance terrorism or sent to another country in violation of UN sanctions
- And any property that made the crime easier to commit
- Like the business that was the front for a money laundering operation

In the United States, we can recover such property in either of two ways

- As part of the sentence if the property owner is convicted of a criminal offense: what we call criminal forfeiture
- Or in a separate civil action that is not part of any criminal case: what we call civil forfeiture

I'm here to talk about the latter: civil forfeiture

Civil judicial forfeiture

Civil forfeiture grew out of the American experience in the 18th Century with vessels being used for piracy and slave trafficking

- It was often possible to lay hands on the vessel and its crew, but not on the vessel's owner
- To prevent the vessel from being used again to commit a criminal offense, but without the possibility of obtaining a conviction against the vessel's owner in a criminal case, the Government would bring a civil action against the vessel itself, and invite anyone who wished to lay claim to the vessel to come into court and do so
- If someone did file a claim, we would litigate the merits of the case in court
- If no one filed a claim, the Government would acquire title to the property by default

That is still how civil forfeiture works in the US today

- The Government files an action naming the property (a boat, an airplane, a gun, a pile of cash, a bank account, or whatever) as the property to be forfeited – i.e., as the defendant in the case

- It then sends notice of the forfeiture proceeding to all persons with a potential claim to the property, inviting them to file a claim
- If someone does file a claim, the Government must prove two things: that a crime occurred and that the property was derived from or used to commit that crime;
- If the Government proves those two things by a balance of the probabilities, the property is forfeited and title passes to the United States
- If it does not, the property is returned to the property owner and the Government must pay his legal fees
- And if no one filed a claim, the property is simply forfeited to the US by default

It is because we bring our civil forfeiture cases against the property

- that is, because we name the property as the defendant in the case and invite all potential claimants to file claims at the same time
- that our cases have funny names: US v. \$60,000 in U.S Currency, US v. One 30' Yacht, US v. Contents of Account 123 at Bank of America

It is not that the property did something wrong

- this is just a procedural device to tell the world what property the Government is seeking to forfeit, so that all persons with an interest in the property can come into court at the same time to make their claims and put the Government to its proof
- and again, that means establishing on a balance of the probabilities that a criminal occurred and that the property was either the proceeds of that crime or was used to commit it.
- But at no time – *and this is important* – at no time is there any requirement that there be a criminal case filed against anyone, or that there be a criminal conviction
- Nor is it necessary to show that a criminal prosecution was not possible
- It is solely to the prosecutor's discretion whether to proceed criminally, civilly, or both

IV. WHY DO CIVIL FORFEITURE

At this point, it would be reasonable for you to ask, when does the Government bring forfeiture actions as civil forfeiture actions, and when does it instead forfeit the property as part of the sentence in a criminal case

Or stated differently, if civil forfeiture is so wonderful, why doesn't the Government forfeit everything civilly instead of including it as part of a criminal case?

- first, it's a lot of extra work for something that can be done easily if there is a criminal case
- also, civil forfeiture has a serious limitation
- recall the second requirement: that the Government must prove the property was derived from or used to commit the crime
- because it is an *in rem* action against specific property, there are no substitute assets or money judgments in civil forfeiture cases
- so if the Government cannot establish the connection between the particular asset and the underlying crime, there can be no forfeiture
- so civil forfeiture should be reserved for cases where there is not likely to be a criminal case, or where a criminal case is not ready to indict

When would you use civil forfeiture?

Here are some of the instances in which the United States would typically bring a civil forfeiture action instead of seeking the forfeiture as part of a criminal prosecution

1. when the property is seized but the forfeiture is unopposed
2. when the wrongdoer is dead or is incompetent to stand trial;
3. when the defendant is a fugitive or a foreign national beyond jurisdiction of the United States;
 - recall my example of the first civil forfeiture cases from the 1700s when the pirates or the slave traffickers were beyond the jurisdiction of the courts in the US

- the same is true today: money or other property may be in the US that was derived from public corruption in Nigeria or the theft of money in Russia,
 - or it may have been left behind in the US by a person who committed a crime in the US and then fled to Mexico or Pakistan
4. when the statute of limitations has run on the criminal case;
 5. when we have recovered the property but do not know who committed the crime giving rise to the forfeiture;
 - If weapons, flight simulators, contraband electronics, or money is intercepted while on the way to a country designated as a supporter of terrorism, but it is unclear who the exporter or recipient of the property might be, there is no one to prosecute and hence no one to convict.
 - The same is true if money is seized from a courier who is unable (or unwilling) to identify the owner of the property
 - Or if a cultural artifact or work of art is recovered from an auction house but no one knows who stole it or imported it
 - In all of those instances, a non-conviction based order will reach the property and force the property owner to come forward to contest the forfeiture proceeding.
 6. when the defendant pleads guilty to a crime different from the one giving rise to the forfeiture;
 - In the US, the courts have not fully adopted the concept of ‘extended confiscation’ whereby a conviction for a given offense will give rise to a forfeiture order directed at the proceeds of all other crimes that the same defendant has committed.
 - To the contrary, because criminal forfeiture is regarded as part of the defendant’s sentence relating to the commission of a given offense, only property connected to the commission of that offense is subject to criminal forfeiture.
 - In those cases, the Government must bring a non-conviction based forfeiture action to recover any property involved in other offenses.

7. when there is no federal criminal case because the defendant has already been convicted in a state or foreign or tribal court;
 - suppose the crime was committed outside of the United States, the perpetrator has been convicted in the foreign country, but the property is now in the United States and the foreign country has not (for whatever reason) been able to obtain a confiscation order that the US is able to enforce.
 - In that instance, either because they lacked jurisdiction over the foreign crime or because there was no reason to prosecute the offender a second time for the same offense, prosecutors in the US would not be able to obtain a conviction-based forfeiture order against the foreign defendant,
 - but with a non-conviction based order they could recover the proceeds of the foreign crime and return them to the foreign state. Indeed, cases in which the US brings civil forfeiture actions to recover the proceeds of foreign crimes – including public corruption – at the behest of the victim country are quite common.
8. when there is no criminal case because the interests of justice do not require a conviction even though there was a clear violation of a criminal law;
 - suppose a convicted felon persuades his 70-year old mother to purchase a firearm on his behalf, in a situation where both of them know that it is a violation of federal law for a convicted felon to possess such a weapon.
 - And suppose the mother not only buys the firearm, but lies on the required document when asked if she is buying it for herself or for a third party.
 - In that case, the mother has clearly violated federal law and would be subject to criminal prosecution, but faced with the choice between doing nothing (and allowing the felon to retain the weapon) and bringing criminal charges against the aged woman, the Government might decide that confiscating the weapon pursuant to a non-conviction based forfeiture order is the right thing to do.
9. when the evidence is insufficient to prove that the defendant committed the offense beyond a reasonable doubt;

10. when the defendant uses someone else's property to commit the crime and that person is not an innocent owner.

- For example, he may have laundered his money through a third party's business, robbed a bank with a third party's gun, or distributed drugs using a third party's airplane.
- Conviction-based forfeiture cannot reach the property of third parties;
- it would be a violation of the due process rights of third parties to attempt to confiscate their property in a proceeding in which they were not able to participate;
- but non-conviction based forfeiture can reach third-party property, because in that setting the third party has the right to intervene and defend his property interest by contesting the Government's proof on the merits and/or by asserting that he is an innocent owner of the property.
- the key disadvantage to civil forfeiture is that there is no possibility of obtaining a money judgment or forfeiting substitute assets
- we can only forfeit property that is traceable to the offense

I could give examples of all of these instances, but for our purposes today, I will give just a few:

Abacha

The first case is that of Gen. Sani Abacha, the late military ruler of Nigeria who looted \$4 billion from his country's treasury, laundered it through financial institutions in the United States, and placed it in bank accounts around the world in the names of nominee companies that his family controlled

- \$287 million of that money was traced to bank accounts in Jersey in the Channel Islands

Taking the view that the United States does not want its financial institutions used to launder money for kleptocrats in developing countries,

- And that the US has an obligation to attempt to recover that money and return it to the people of the country from which it was stolen
- The U.S. Department of Justice filed a civil forfeiture action against the \$287 million in the Jersey bank in the district court in Washington DC

Why a civil forfeiture action?

- Because Gen. Abacha was dead and would have been beyond the jurisdiction of the US even if he were still living

The money in the bank account was held in the name of one of the Abacha family's shell companies called Doraville

- So the Government sent notice of the forfeiture action to Doraville with instructions on how to file a claim contesting the forfeiture
- Doraville received the notice but chose not to file a claim
- So the court entered a default judgment.

Now, what to do with the default judgment:

- The judgment has been entered by a court in the US, but the money is still in Jersey
- So the US asked Jersey's assistance

Acting on behalf of the United States, the Attorney General of Jersey asked the Royal Court to restrain the money in the Doraville accounts in anticipation of a request by the US to enforce the default judgment.

- The court made that order, but Doraville opposed it

The matter was litigated in the Royal Court in 2016, and a judgment was issued in favor of the United States

- The case is *Doraville Properties Corporation v. Her Majesty's Attorney General* [2016] JRC128, Royal Court, Bailiwick of Jersey, (July 2016)

MegaUpload

The second case is the MegaUpload case

For those who don't know it, an international cast of characters, including Mr. Kim Schmitz,

- who changed his name to Kim Dotcom to reflect his view of himself as someone who was internet savvy
- set up a file-sharing website on the internet called MegaUpload
- The function of which was to allow users to transfer pirated intellectual property such as motion pictures, television programs, and music anywhere in the world
- In violation of the owners' property rights and national copyright laws

In its heyday, MegaUpload was the largest file-sharing service for pirated property in the world

- Causing losses to copyright holders of more than \$500 million
- And earning \$175 million in income for its perpetrators

Dotcom lives in New Zealand and operated his business from there and other countries,

- but the computer servers that he used to transfer the software – and to transfer the proceeds of his crime -- were located in Virginia in the United States
- so the United States had a basis for charging Dotcom with at least two criminal offenses: copyright infringement and money laundering
- because the crimes occurred at least in part in the United States

So he was indicted; but there were two problems:

- he resisted extradition and it was clear he would not be coming to the US to stand trial anytime soon
- and the money that he earned from his illegal business (which the US would like to recover) was located not in the US but in bank accounts in New Zealand and Hong Kong

So what to do

Well

- when the bad guy is a fugitive fighting extradition and a criminal conviction is not possible, the remedy is to file a civil forfeiture action against the money
- so that's what the US Department of Justice did
- it filed a civil forfeiture action against the money in the New Zealand and Hong Kong banks
- \$60 million in Hong Kong, and \$15 million in New Zealand and asked those countries to restrain the money, which they did

Mr. Dotcom and his associates did not take kindly to this action, and they attempted to oppose the US action in the Virginia court

- Oppose it, that is, through counsel, without ever appearing in the US

In the end, the US court held that a fugitive cannot use the courts in the US to oppose a civil forfeiture action while at the same time refusing to appear in the same court to answer criminal charges

- We call this “fugitive disentitlement”
- So his attempt to contest the forfeiture was dismissed and the court entered judgment for the US, which judgment it will attempt to register and enforce in New Zealand and in Hong Kong as it did with the Abacha order

Prevezon

The third case is the Prevezon case

- It involved the theft of \$230 million from the Russian treasury
- The laundering of that money through numerous shell companies and bank accounts in Eastern Europe
- And eventually in the investment of a portion of the money in real estate in New York

The case has gained some notoriety for several reasons

- This was the case in which the lawyer for one of the victims who uncovered the crime, Sergei Magnitsky, was arrested and found murdered in his jail cell
 - The case has also been much in the news more recently because Prevezon Holdings, the Russian company that ended up with the laundered funds,
- And that purchased the apartments in New York
- Was represented by this woman, Natalia Veselnitskaya, who at the same time was meeting with Donald Trump, Jr, the President's son, Jared Kushner, the President's son-in-law, and other members of the Trump Campaign, including the campaign chairman
- As well as with this man, Ike Kaveladze, a US-based employee of a Russian real estate company with a long history of creating shell companies and using them to acquire US assets.

Kaveladze was implicated in 2000 in an investigation into the methods Russians and other foreign nationals used to launder large amounts of money through US financial institutions.

- The report revealed that as the head of a company called International Business Creations, Kaveladze had opened 236 bank accounts in the United States for shell corporations formed in Delaware on behalf of mostly Russian brokers
- And that \$1.4 billion was subsequently wire-transferred into the 236 accounts

All of which may be a coincidence

- But it is surely of interest to this man, Robert Mueller, the Special Counsel investigating ties between Russia and the Trump Campaign during the 2016 election.

Anyway, that's why this money laundering case is particularly interesting

- The question is, how was it done

The Prevezon Scheme

According to the complaint filed in a civil forfeiture action in New York to recover the apartments, the scheme worked like this:

- a Russian company (the victim) owned three businesses
- a Russian criminal organization stole the identities of the three companies by stealing corporate documents
- the criminals then orchestrated a series of sham lawsuits against the stolen companies, obtained default judgments against them,
- and used those judgments to apply for tax refunds, claiming that the losses so reduced the companies' profits as to negate their tax liability.
- The result was that the Russian treasury sent \$230 million in false tax refunds to the three businesses, which were now controlled by the criminals.

That's how they stole the money

- Now, how did they launder it
 - Here's how: this is a diagram that only a forensic accountant could love
- It comes from the civil forfeiture complaint and details how the money moved from the Russia bank to the New York property in just over 60 days
- Let me simplify it for you

The \$230 started out in three accounts at the two Russian banks

- It then moved through the accounts of no fewer than 14 shell companies at nine different Russian banks,
- Was deposited it in the correspondent account of yet another Russian bank for the benefit of four more shell companies,
- and ultimately was placed in the accounts of two Moldovan shell corporations with accounts at Banca di Economii in Moldova

- all within a period of 60 days.

Finally, part of the money, commingled with other funds, was transferred from the Moldovan companies to three entities:

- a New Zealand shell company and a British Virgin Islands shell company that had accounts at an Estonian bank,
- and another BVI company with an account at a Lithuanian bank
- finally \$1.9 million was transferred from the Moldovan and Lithuanian banks to the Swiss bank account of Prevezon Holdings,
- which used a portion of it to acquire the parcels of property in Manhattan.

Now, the view taken by the United States is that we don't want money stolen in Russia to be laundered and invested in the United States

- but what to do
- the perpetrators of this scheme were unknown, or even if they were known, were beyond the reach of US law enforcement
- so the Government commenced a civil forfeiture action in New York against the property in New York, alleging that it was derived from a Russian crime and was involved in money laundering offenses committed in the US
- the case was settled with Prevezon agreeing to forfeit \$5.9 million to the US

Dandong Zhicheng

The last case is *United States v. All Wire Transactions Involving Dandong Zhicheng Metallic Material Co.*, 2017 WL 3233062 (D.D.C. May 22, 2017)

- a civil forfeiture action that was filed in Washington, DC earlier this year against \$4 million that was intercepted in the US as it was being sent to North Korea in violation of international sanctions

The complaint alleges that that a Chinese company called Dandong Zhicheng Metallic Material Co. and four related companies were acting as “front companies” for North Korea

- that they were using various tactics to disguise the use of US dollars obtained through the US financial system to purchase coal from North Korea in violation of international sanctions, with 95 percent of the money going to fund North Korea's weapons program

Specifically, the complaint alleged that the Chinese company had received over \$700 million through the US financial system for this purpose over a period of years

- And that money has passed through eight correspondent accounts at US financial institutions in New York
- with each of eight correspondent banks processing the transfer of at least \$20 million to Dandong

Now, any money being sent to North Korea in violation of the sanctions is subject to forfeiture under US law under several theories

- The problem, of course, is that there isn't going to be any criminal prosecution of this Chinese company unless the US can show get jurisdiction over it and bring it into a US court
- Moreover, even a civil forfeiture action would be difficult
- the \$700 million that had been sent to China through these correspondent accounts in the past was already gone
- What could the US do to stop the flow of this money in the future?

Damming warrant

The answer is that the Government applied to the court for what is called a "damming warrant"

- That is, a warrant that permits the Government not to seize money already in a bank account that was involved in a crime that occurred in the past
- But a warrant that acts as a net to catch new money as it flows through a particular bank account on a date sometime in the future

In this case, the Government had probable cause to believe that these eight correspondent bank accounts at US banks in New York had been used in the past to send money to the Chinese companies in violation of US law

- And that the illegal activity was ongoing (\$52 million in the last 7 months)

And accordingly, that there was probable cause to believe that additional money, also forfeitable under US law, would be moving through those same accounts in the near future

- So the court issued eight warrants, authorize the Government to freeze any money moving through those eight accounts to Dandong Metallic for a period of 14 days

At the end of that time, the Government had captured \$4 million in its net, and filed its civil forfeiture action against that money

- The case is currently pending in the trial court.
- if no one files a claim, or if the US establishes by a balance of the probabilities that the money was being sent to North Korea in violation of the sanctions
- It will be forfeited to the United States.

V. CONCLUSION: THE IMPORTANCE OF CIVIL FORFEITURE

The point of all of this is to illustrate why civil forfeiture is such a critical law enforcement tool

- There are times when the wrongdoer is dead, a fugitive, a foreign national beyond the jurisdiction of the domestic courts or otherwise not subject to criminal prosecution
- Yet the Government can lay hands on the money or other property involved in the crime
- And needs a tool to recover it.

The cases I've mentioned are just some of the most recent examples

- Here are some others:

- *United States v. One Gulfstream G-V Jet Aircraft*, 941 F. Supp. 2d 1 (D.D.C. 2013) (aircraft purchased with proceeds of public corruption by leader of West African country);
- *United States v. A 10th Century Cambodian Sandstone Sculpture*, 2013 WL 1290515 (S.D.N.Y. Mar. 28, 2013) (cultural property stolen during civil war in Cambodia);
- *United States v. \$671,160.00 in U.S. Currency*, 730 F.3d 1051 (9th Cir. 2013) (money seized from fugitive Canadian drug dealer);
- *United States v. All Assets Held at Bank Julius Baer & Co.*, 2015 WL 4450899 (D.D.C. July 20, 2015) (action to recover more than \$250 million deposited into over 20 bank accounts located in Guernsey, Antigua, Switzerland, Lithuania and Lichtenstein by former Ukrainian Prime Minister Pavel Lazerenko); 2017 WL 65554 (D.D.C. Jan. 6, 2017) (same);
- *In re 650 Fifth Ave. and Related Properties*, 830 F.3d 66 (2nd Cir. 2016) (civil forfeiture action against a building and related properties owned by front for the Government of Iran, and financed in violation of IEEPA);
- *United States v. Two General Electric Aircraft Engines*, 2016 WL 6495397 (D.D.C. Nov. 2, 2016) (civil forfeiture action against two aircraft engines being shipped to Iran in violation of US law and were intended to be delivered to a terrorist organization: the Islamic Revolutionary Guard Corps-Qods Force);
- *United States v. \$70,990,605*, 2017 WL 573499 (D.D.C. Feb. 13, 2017) (action to recover funds in Afghan banks traceable to \$70 million in fraud proceeds paid to contractor to provide transportation for military supplies in Afghanistan); *United States v. Sum of \$70,990,605*, 4 F. Supp.3d 189 (D.D.C. 2014) (same);

Many countries – particularly the English common law countries – now have civil or non-conviction based forfeiture systems

- the European Union has been considering the implementation of similar systems for some time

My hope is that these examples will serve to illustrate the critical role that this tool plays in cases of great importance to all of us.