Money Laundering and Forfeiture Digest

Summaries and Analyses of Recent Money Laundering and Asset Forfeiture Cases
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Substitute Assets / Right to Counsel / Application of *Luis* / Rule 32.2

The Supreme Court's decision in Luis *does not give the defendant to right to use substitute assets to retain counsel for his appeal; he has a Sixth Amendment right to use property to retain counsel only while it belongs to him; once the court includes the property in a forfeiture order, it belongs to the Government.*

Under Rule 32.2(e), the Government can move at any time to forfeit a substitute asset; therefore, the Government was not required to move to forfeit the defendant's substitute property prior to sentencing but could wait until after sentencing to do so.

United States v. Marshall, ___ F.3d ___, 2017 WL 4227960 (4th Cir. Sept. 25, 2017).

Fourth Circuit * Defendant was convicted of a drug offense and was ordered at sentencing to pay a $51.3 million forfeiture money judgment. Two days thereafter, Defendant moved for the release of $59,000 that the Government had restrained in Defendant's bank account pre-trial but had failed to ask the court to include in the forfeiture order. The Government responded by moving pursuant to Rule 32.2(e) to forfeit the $59,000 as a substitute asset, and the court granted the motion.

Defendant then moved to release the $59,000 so that he could use it to pay for counsel to handle his appeal. The district court denied the motion and Defendant appealed that order. The Court of Appeals agreed to stay the appeal on the merits of the underlying conviction until it could determine if Defendant had the right to use the forfeited money to retain appellate counsel.

Defendant raised two issues on appeal – one constitutional and one procedural. First, he argued that under the Supreme Court's decision in *Luis v. United States,* he had a Sixth Amendment right to use untainted property – *i.e.,* substitute assets – to retain counsel of his choice to handle his appeal. The court held, however, that *Luis* was distinguishable.

In *Luis*, the Supreme Court held that a criminal defendant has a Sixth Amendment right to use untainted assets to hire counsel of his choice, even though those assets may become subject to forfeiture in the event of his conviction. The point, the Court said, was that prior to his conviction the untainted assets belong to the defendant, and he has the right to use them to retain counsel if he wishes to do so. In contrast, a defendant may not use *tainted* property to retain counsel because that property belongs to the Government, and as the Court held in *Caplin and Drysdale,* "a defendant has no Sixth Amendment right to spend another person's money for services rendered by an attorney."

The defendant's ability to use property to retain counsel turns, therefore, on who owns the property at the time the defendant wants to use it. "If the defendant owns the property, he is entitled to use it for his defense; if he does not own the property, he may not." Prior to trial, substitute assets belong to the defendant so he may use them to retain counsel, but once a court enters an order forfeiting his property as a substitute asset, the defendant's property rights are extinguished, and the property belongs to the United States. Accordingly, in this case, once the district court granted the Government's motion to forfeit the $59,000 as a substitute asset, the money belonged to the Government, and under *Caplin & Drysdale,* Defendant had no right to use the Government's money to retain counsel.

Defendant's procedural objection concerned the timing of the Government's motion to forfeit the $59,000. Under Rule 32.2(b), he argued, the court was required to determine what property is subject to forfeiture "as soon as practical after a verdict or finding of guilty," and then to "promptly enter a preliminary order of forfeiture" that becomes final as to the defendant at sentencing. By waiting until after sentencing to move for the forfeiture of the $59,000, Defendant argued, the Government violated this rule, and the forfeiture order was therefore void. But the panel disagreed for two reasons.

First, the timing requirements in Rule 32.2(b) do not apply to the forfeiture of substitute assets. To the contrary, a motion to forfeit substitute assets is governed by Rule 32.2(e), which provides that the Government may file its motion "at any time." Accordingly, there was no reason why the Government could not wait until after sentencing to file its motion to forfeit the $59,000.

In addition, even if the forfeiture of substitute assets were governed by Rule 32.2(b), a violation of the timing requirement would not render the forfeiture order void absent a showing that the violation affected the defendant's substantial rights. Here, Defendant was well aware – from the listing of the $59,000 as property subject to forfeiture in a bill of particulars that was filed months before trial – that the Government would be seeking the forfeiture of that property. Thus, the forfeiture of the money as a substitute asset came as no surprise to him and did not violate his rights.

Accordingly, the court affirmed the denial of Defendant's motion to use the forfeited substitute assets to retain counsel to handle his appeal. *SDC*

Contact: Former AUSA Evan Shea (D. Md.)

Comment: The key point in this case is the way the panel explained the Supreme Court's decision in *Luis v. United States,* 136 S. Ct. 1083 (2016), and how it contrasted that with the rationale in *Caplin & Drysdale v. United States,* 491 U.S. 617 (1989). In *Caplin & Drysdale,* the Court held that the defendant could not use his forfeited property to pay his lawyer because the proceeds of crime belong to the Government, not to the defendant. A defendant, the Court famously declared, has no right to use another person's money to retain counsel. In contrast, in *Luis*, the Court held that untainted property *belongs to the defendant,* at least until he is convicted, and he therefore has the right to use it to pay a "reasonable" fee to an attorney of his choice.

The question in this case then was, when does a substitute asset stop being the property of the defendant and become the property of the Government. The court does not answer that question categorically, but it holds that the Government's title in a substitute asset vests *at the latest* at the time the

court enters a forfeiture order under 21 U.S.C. § 853(p). Because the court had already granted the Government's Rule 32.2(e) motion to forfeit the substitute asset by the time the defendant in this case moved to use it retain appellate counsel, he was too late.

Left unanswered, of course, is exactly when the Government's interest in a substitute asset does vest. The panel seems to concede that *Luis* has implicitly overruled the Fourth Circuit's pre-*Luis* rule that the relation back doctrine applies to a substitute asset, and that the Government's title vests at the time of the offense, but the panel expressly reserved ruling on that issue. The issue is important not only to determine when *Luis* applies – *i.e.,* when the defendant may use the money to retain counsel – but also to determine when third party rights apply – *i.e.,* when a third party who takes title to the substitute asset has to show that she was a bona fide purchaser for value under Section 853(n)(6)(B). For the latter purpose, it could matter greatly whether the Government's title vested at the time of conviction, at the time when the Government files is motion to forfeit the substitute asset, or when the court grants that motion and issues its order. *SDC*

Money Judgments

The Government's brief in opposition to cert. in Lo v. United States *defends and explains the rationale for entering a forfeiture order in the form of a personal money judgment.*

But the Solicitor General concedes that forfeiting substitute assets pursuant to Section 853(p) is the only way to enforce a forfeiture judgment.

Henry Lo v. United States, No. 16-8327 (Brief of the United States in Opposition to Petition for Writ of *Certiorari)*, filed in the Supreme Court September 2017.

Brief of the United States * In *United States v. Lo,* 839 F.3d 777 (9th Cir. 2016), the Ninth Circuit joined all others in holding that a criminal forfeiture order may take the form of a personal money judgment, imposing on the defendant a continuing obligation to forfeit the proceeds of his offense even if he has dissipated the property directly traceable to that crime and no longer has any such assets in his possession at the time the forfeiture order is entered.

In *Honeycutt v. United States,* 137 S. Ct. 1626 (2017), the Supreme Court, ruling on the question of joint and several liability, held that a defendant may only be held liable for the criminal proceeds that he personally obtained, and not for property obtained by co-conspirators or others with whom he acted in concert.

While *Honeycutt* dealt only with joint and several liability, the defendant in *Lo* petitioned for *certiorari,* arguing that the rationale in *Honeycutt* – that a defendant is liable in a criminal forfeiture case only for property that he personally obtained – undercuts the rationale for holding a defendant liable for the forfeiture of property that he previously obtained but no longer possesses.

In its opposition to the *cert.* petition, the Solicitor General explains both the rationale for imposing forfeiture orders in the form of a money judgment and how the structure of the forfeiture statutes and the applicable provisions of Rule 32.2 evince Congress's intent to authorize the courts to enter forfeiture orders in that form.

In the course of its brief, the Solicitor General concedes, however, that the only way to enforce a forfeiture money judgment is to forfeit substitute assets pursuant to 21

U.S.C. § 853(p), and that the cases holding that the judgment may also be enforced under the Federal Debt Collection Procedures Act or otherwise as any other personal judgment might be enforced are no longer good law. *SDC*

Contact: DOJ Attorney David Lieberman

Comment: The rationale for personal money judgments in criminal forfeiture cases and the case law on that issue are discussed at length in *Asset Forfeiture Law in the United States* (2d ed. 2013) and 2016 Supplement at § 19-4(c). The following is the link to the text of the Government's Opposition and to an excerpt from the treatise.

While the Solicitor General mounts a strong defense of the universally accepted practice of imposing forfeiture orders in the form of money judgments, his concession that forfeiting substitute assets is the only way to enforce a forfeiture money judgment vitiates the Government's ability to rely on the cases holding otherwise in various circuits. Those cases are collected in Section XXVI.B of the Criminal Forfeiture Case Outline. *SDC*

Application of *Honeycutt* / Plea Agreement

A defendant who agreed to joint and several liability in his plea agreement and did not appeal cannot raise Honeycutt *on collateral review.*

United States v. Yancey, ___ Fed. Appx. ___, 2017 WL 3833204 (6th Cir. Sept. 1, 2017).

Sixth Circuit * Defendant agreed, as part of a written plea agreement, that he was jointly and severally liable to forfeit $1.8 million in criminal proceeds. The court entered a forfeiture money judgment in that amount at sentencing and Defendant did not appeal. Sometime later, however, Defendant objected to the forfeiture on collateral review, but the district court overruled his objections and Defendant appealed.

On appeal, Defendant argued, *inter alia,* that he could not be jointly and severally liable for the full amount of the forfeiture under the Supreme Court's decision in *Honeycutt.* The panel held, however, that a defendant who waived any objection to a forfeiture order in his plea agreement, and who did not appeal, has no right to challenge the forfeiture order on collateral review.

So Defendant's appeal was denied. *SDC*

Contact: AUSAs Charles Wisdom and Paul McCaffrey (E.D. Ky.)

Comments: The courts have only begun to deal with the impact of *Honeycutt* on closed cases, and with cases in which the defendant agreed to joint and liability in a plea agreement.

In *United States v. Javidan*, 2017 WL 3616577, *11 (E.D. Mich. Aug. 23, 2017), the court held that *Honeycutt* does not apply retroactively to cases pending on collateral review. This case does not go that far, holding only that the defendant was bound by his plea agreement and his failure to take a direct appeal.

Even if a defendant were barred by his plea agreement from raising *Honeycutt* on collateral review, however, he could have a second opportunity to raise the issue if the Government attempted to enforce its money judgment by forfeiting a substitute asset. In *United States v. Purify,* ___ Fed. Appx. ___, 2017 WL 3028534 (10th Cir. July 18, 2017), for example, the defendant was permitted to oppose the Government's motion to satisfy

the money judgment by forfeiting a substitute asset even though he had agreed to be jointly and severally liable for a money judgment in his plea agreement. *SDC*

Application of *Honeycutt* / Gross v. Net Proceeds / Real Property

The leader of a drug organization "obtains" the gross proceeds of the drug offense, even if some of the money is actually received by his employees; Honeycutt *does not limit his liability to the money that comes into his own hands.*

Nothing in Honeycutt *changes the long-standing rule that a drug defendant is liable to forfeit the gross proceeds of his offense, not the net profits.*

A farm that is used to grow marijuana is subject to forfeiture in its entirety even though it comprises separate parcels; the test is whether the parcels were conveyed to the defendant at the same time and treated as one.

United States v. Ward, 2017 WL 4051753 (W.D. Mich. Aug. 24, 2017).

W.D. Mich. * Defendant was the leader of a large marijuana conspiracy. He grew the marijuana on his farm and sold it through retail outlets, supervising his employees and making all hiring and firing decisions.

When Defendant entered his guilty plea, the Government sought a forfeiture money judgment in the amount of $475,000, representing the gross proceeds of the offense, as well as the forfeiture of the farm. Citing the Supreme Court's decision in *Honeycutt,* Defendant argued that the forfeiture should be limited to the amount of money that he personally obtained, and that it should be limited to the net proceeds of the offense after taking into account his expenses for "wages, rent, water, electricity, soil, fertilizer, tools, transportation, and employee theft."

The court held that the leader of a drug organization "obtains" all of the proceeds of the sale of the illegal drugs, even if those proceeds do not come personally into his hands. *Honeycutt* holds that a defendant cannot be held liable for proceeds that he does not obtain at all, but it does not preclude holding a defendant liable for proceeds that he obtains "indirectly." Proceeds that are delivered to the hands of a defendant's employees are proceeds that he obtains "indirectly."

Nor does *Honeycutt* require the courts to give a drug dealer credit for his expenses. The leader of a drug organization "obtains" the gross proceeds of the offense even if he must pay certain expenses in the course of running his operation. Thus, *Honeycutt* does not change the long-standing rule in most circuits that the "proceeds" subject to forfeiture in drug cases are the "gross proceeds" of the illicit sales.

Defendant also argued that his farm actually comprised three separate parcels, only two of which were used in the marijuana operation. The court held that even if that was so, the three parcels were conveyed to Defendant in a single quitclaim deed and thus were treated as if they were a single parcel. That being so, all three parcels were subject to forfeiture as property used to commit the drug offense. *SDC*

Contact: AUSA Joel Fauson

Comment: The post-*Honeycutt* cases continue to distinguish between a low-level participant in a criminal scheme who does not "obtain" the proceeds of the offense for himself, and the leader or organizer who "obtains" all of the money, and then disburses a

portion of it to his employees and associates. *See S.E.C. v. Metter,* ___ Fed. Appx. ___, 2017 WL 3708084, *2 n.2 (2nd Cir. Aug. 29, 2017) *(Honeycutt* is limited to cases involving "incidental figures" whose role in the offense does not justify joint and several liability and does not apply to a person with a controlling interest who determined how the proceeds of the offense were distributed); *United States v. McIntosh,* 2017 WL 3396429 (S.D.N.Y. Aug. 8, 2017) (notwithstanding *Honeycutt*, when defendants act in concert, jointly acquiring proceeds and dividing them among themselves by joint decision, they each remain liable to forfeit the total proceeds; applying *Contorinis* and holding that it was not overruled by *Honeycutt). SDC*

Application of *Honeycutt* / Money Laundering / Collateral Review

District court expresses doubt that Honeycutt *applies to the forfeiture of property involved in a money laundering offense, whether the defendant retained the money for himself or not.*

In all events, there is no right to collateral review of a criminal forfeiture judgment; the defendant's only remedy is direct appeal.

United States v. Alquza, 2017 WL _____ (W.D.N.C. Sept. 20, 2017).

W.D.N.C. * Defendant was a professional money launderer who laundered millions of dollars in criminal proceeds for his clients, and retained $275,000 for himself as his fee. He was convicted of a money laundering conspiracy pursuant to 18 U.S.C. § 1956(h) and ordered to pay a $6 million forfeiture money judgment pursuant to Section 982(a)(1). He did not object to the forfeiture order and did not appeal.

More than a year later, Defendant moved to vacate the forfeiture on the ground that the Supreme Court's decision in *Honeycutt* limited the amount he could be ordered to forfeit to the amount that he personally retained. The district court denied the motion.

Honeycutt, the court explained, involved forfeitures under a proceeds theory – specifically, the forfeiture of proceeds under Section 853(a)(1). It did not address forfeitures under "the more broad money laundering forfeitures of 'involved in' property under 18 U.S.C. § 982(a)(1)." Nor did it address the scope of forfeiture money judgments against professional money launderers "who receive millions in proceeds and retain a portion of those proceeds as payment for nefarious laundering."

For those reasons, the court said, it remains uncertain whether *Honeycutt* even applies in case like this one.

The court found in unnecessary, however, to resolve that question. Instead, it held that Defendant's motion should be denied because there is no ground for collateral review of criminal forfeiture judgments. A defendant must challenge a forfeiture order on direct appeal or not at all. Accordingly, even if *Honeycutt* applied to a money laundering case, Defendant's motion was due to be denied. *SDC*

Contact: AUSA Benjamin Bain-Creed

Comment: The district court judge (Whitney, C.J.) is an expert on money laundering and money laundering forfeiture. *See* B. F. Williams and F. Whitney *Federal Criminal Money Laundering* (Lexis 1999). Accordingly, his opinion in this case should be accorded considerable weight.

In all events, the court cites with approval the opinion in *United States v. McIntosh,* 2017 WL 3396429 (S.D.N.Y. Aug. 8, 2017)

(September 2017 *Digest*) which likewise questioned the applicability of *Honeycutt* outside the context of Section 853(a) or any other forfeiture statute that limits forfeiture to property obtained by the defendant.

Importantly, the forfeiture statutes for money laundering – Sections 981(a)(1)(A) and 982(a)(1) – authorize the forfeiture of all property involved in a money laundering offense, and are not limited to the proceeds of the offense obtained by a particular person. Indeed, Section 982(b) expressly authorizes the forfeiture of substitute assets equal to the value of all of the money laundered by the defendant – even if he retained none of it for himself – as long as he laundered $100,000 in a 12-month period. That provision would make no sense if Section 982(a)(1) were limited to the amount of money that the defendant retained for himself. *SDC*

Property Involved in Money Laundering

A defendant who purposefully commingles a third party's drug money with his legitimate funds to facilitate a money laundering offense must forfeit all of the commingled funds as "property involved" in money laundering.

Airplanes that are used to facilitate a money laundering offense are also subject to forfeiture as "property involved" in the offense.

United States v. Cessa, ___ F.3d ___, 2017 WL 4230828 (5th Cir. Sept. 25, 2017).

Fifth Circuit * Defendant, a Mexican businessman, was convicted by a jury of conspiring to launder millions of dollars in drug proceeds for Los Zetas, a Mexican drug cartel, by investing the Zetas' money in racehorses. The court ordered Defendant to forfeit several bank accounts containing commingled funds as well as two airplanes, and he appealed.

The panel began be reaffirming the Fifth Circuit's long-standing rule that the forfeiture of property "involved in" a money laundering offense includes the money or other property being laundered, any commissions paid to the launderer, and any property used to facilitate the laundering offense. Facilitating property, the court added, includes any property that makes the prohibited conduct "less difficult or more or less free from obstruction or hindrance."

The court then held that Defendant purposefully used his bank accounts to facilitate the money laundering offense by commingling Zeta drug money with otherwise legitimate funds, rendering all of the commingled funds subject to forfeiture as property "involved in" the money laundering offense. It also held that the two aircraft facilitated the money laundering offense as well

Accordingly, the forfeiture of the bank accounts and airplanes was affirmed. *SDC*

Contact: AUSAs Joseph Gay and Elizabeth Berenguer (W.D. Tex.)

Comment: The extensive case law on what constitutes property "involved in" a money laundering offense – including commingled funds in a bank account – is collected and discussed in Chapter 27 of *Asset Forfeiture Law in the United States* (2d ed. 2013) and 2016 Supplement, and in the Money Laundering Forfeiture Case Outline. In this case, the court reaffirmed its seminal decision in *United States v. Tencer*, 107 F.3d 1120, 1135 (5th Cir. 1997), the first appellate case to hold that property "involved in" money laundering includes legitimate funds in a commingled bank account, and also adopted the Fourth Circuit's definition of "facilitating property" as any property that makes the money laundering offense "less difficult or more or less free from obstruction

or hindrance." *United States v. Schifferli*, 895 F.2d 987, 990-91 (4th Cir. 1990).

It is important to note, however, that commingled funds in a bank account are not *automatically* subject to forfeiture as property involved in money laundering. Rather, as the court points out, it may be necessary for the Government to show that *the purpose* of the commingling was to facilitate the money laundering offense – or at least that it had that effect.

Note also that an earlier decision in the same case concerned a possible *Brady* violation that occurred when the Government failed to turn over evidence supporting the defendant's argument that he laundered the Zeta's drug money out of fear, and not because he wanted to join their conspiracy. *United States v. Cessa,* 861 F.3d 121 (5th Cir. 2017) (August 2017 *Digest*). On remand, the district court found that none of the withheld evidence was material, and the panel accordingly affirmed the criminal conviction. *SDC*

Property Involved in Money Laundering / Standing / Excessive Fines / Stay Pending Appeal

A judgment creditor is an unsecured creditor without standing to contest the forfeiture of the debtor's property.

Property that the Government of Iran would not have been able to retain but for an IEEPA offense is forfeitable as the proceeds of that offense.

Property maintained with the proceeds of an IEEPA offense is subject to forfeiture as property involved in money laundering.

Forfeiture of property that the Government of Iran was able to retain in violation of IEEPA does not violate the Excessive Fines Clause of the Eighth Amendment.

Request to stay the sale of property forfeited from the Government of Iran is denied as contrary to the public interest.

In re: 650 Fifth Avenue, 2017 WL 3834795 (S.D.N.Y. Sep. 1, 2017).

S.D.N.Y. * A jury returned a verdict finding that an office building on Fifth Avenue in Manhattan was owned by the Government of Iran and was subject to forfeiture as the proceeds of an IEEPA violation and as property involved in money laundering. (July 2017 *Digest*). The court then addressed several post-verdict motions.

First, the court granted the Government's motion to dismiss the claim filed by a judgment creditor who had obtained a judgment against the property owner. A judgment creditor, the court said, is merely an unsecured creditor with no legal interest in the forfeited property, and thus lacks standing to contest the forfeiture.

Second, the court denied Claimant's motion for a judgment notwithstanding the verdict, holding that Claimant's interest in the building was the proceeds of the IEEPA offense. Proceeds, the court said, includes property that a person would not have retained but for the underlying criminal violation. Here, Claimant would not have retained its interest in the property but for having concealed Iran's ownership interest in violation of IEEPA. Accordingly, its interest was the proceeds of the offense.

Third, the court held that Claimant used its interest in the property to conduct various money laundering transactions – *viz.,* using proceeds of the IEEPA violation to make improvements to the property. Thus, Claimant's interest was subject to forfeiture as property involved in the money laundering violation.

Next, Claimant argued that forfeiture of the building, worth hundreds of millions of dollars, violated the Excessive Fines Clause of the Eighth Amendment. The court held, however, that the IEEPA offense "was an extremely serious one involving national security, and one that was carried out in a brazen fashion for years and years." Moreover, the court found that the violation "was the product of planned, carefully executed judgment" designed to protect Iranian interests "in the face of clear and well-understood laws." So, the court held that the forfeiture was not unconstitutionally excessive.

Finally, the court denied Claimant's request to stay the execution of the forfeiture judgment pending appeal. The public interest, the court said, including the interests of victims of terrorism who stand to benefit from the forfeiture and sale of the property, weighs strongly against a stay, as "the public has an interest in seeing its laws enforced." Moreover, the court found that Claimant's likelihood of success on the merits of an appeal was remote.

So, the Government's motion to dismiss the judgment creditor's claim was granted and all of Claimant's motions were denied. *SDC*

Contact: AUSA Michael Lockhart

Money Laundering Conspiracy / Money Transmitting Business / Search and Seizure

Under the collective knowledge doctrine, if there is probable cause for a traffic stop of a person carrying a large sum of drug money based on physical and electronic surveillance, a police officer with no personal knowledge of the surveillance may make the stop and seize the money.

In a conspiracy case, the Government does not have to prove that the defendant joined the conspiracy knowing that the money to be laundered was drug proceeds; it is sufficient that he knew it was the proceeds of some form of criminal activity.

United States v. Singh, 2017 WL 3701448 (C.D. Cal. Aug. 17, 2017).

C.D. Cal. * Defendant ran a hawala that specialized in picking up and transmitting large quantities of currency for drug traffickers. Police officers had him under both visual and electronic surveillance and had probable cause to believe that he would be transporting a large quantity of currency in his car at a particular time on a particular day.

Rather than stop Defendant themselves and risk exposing the details of their investigation, however, the officers asked a highway patrol officer to make a pretext stop of Defendant for a traffic violation, and to determine if he was in fact transporting currency. The patrol officer did so, and discovered $100,000 in cash wrapped in plastic bags inside what Defendant said was a shoebox containing his wife's shoes.

Defendant, charged with a money laundering conspiracy under 18 U.S.C. § 1956(h) and with operating an illegal money transmitting business in violation of Section 1960, moved to suppress the fruits of the traffic stop. He argued that the patrol officer knew nothing about the surveillance of Defendant and thus lacked probable cause for the stop based on the money laundering violations, and that his pretext for the stop -- that Defendant was not wearing a seatbelt – was insufficient to justify it under the traffic laws.

The court held, however, that law enforcement officers are permitted to make a "walled-off" traffic stop to protect an ongoing investigation, and that when they do so, the

probable cause for the stop is provided by the collective knowledge doctrine – *i.e.*, the combined knowledge of all of the officers involved in the investigation, and not by what is known by the particular officer making the stop. Thus, there was probable cause for the stop based on the earlier surveillance of Defendant even if the patrol officer who made the stop was unaware of the surveillance, and even if there was no other valid reason for making it.

Defendant nevertheless objected that he should have been given *Miranda* warnings during the traffic stop and moved to suppress the statement about the shoebox and his wife's shoes. The court held, however, that questioning during a traffic stop does not constitute custodial interrogation and that *Miranda* warnings were therefore not required.

Defendant also moved for a bill of particulars detailing the predicate offenses that, in the Government's view, generated the money being transmitted in violation of Section 1960. The court held, however, that because Sections 1960(b)(1)(A) and (B) do not require proof of any underlying criminal offense, the motion for the bill of particulars should be denied.

Finally, the Government asked the court to resolve a pre-trial dispute as to whether, in a money laundering conspiracy case, the Government must prove that the defendant knew the money in question was the proceeds of drug trafficking specifically, as opposed to being the proceeds of "some form of unlawful activity." The court agreed with the Government that it was not necessary to prove that the defendant joined the conspiracy knowing that the money was derived from drug trafficking and so ruled. *SDC*

Contact: AUSA Carol Chen

AML / KYC Compliance / Securities Fraud

Shareholders' class action suit against Deutsche Bank for failing to detect and prevent the "mirror trading" scheme, which resulted in investigations, sanctions, and the decline in the value of the bank's stock, is dismissed for failure to state a claim.

In re Deutsche Bank, 2017 WL 4049253 (S.D.N.Y. Jun. 28, 2017).

S.D.N.Y. * Plaintiffs holding stock in Deutsche Bank filed a class action lawsuit alleging that the bank's failure to maintain adequate Anti-Money Laundering (AML) and Know Your Customer (KYC) programs resulted in investigations, the imposition of sanctions by bank regulators, and ultimately a loss in value of the bank's stock. Specifically, Plaintiffs alleged that Deutsche Bank failed to detect and prevent the laundering of $6 billion in Russian money through the "mirror trading" scheme.

Under the scheme, a Deutsche Bank customer in Russia would buy $10 million in shares of a Russian company through the Deutsche Bank branch in Moscow while a related Deutsche Bank customer in the UK would sell the same shares at roughly the same time for roughly the same amount through Deutsche Bank branch in London. In so doing, the customer effectively used the bank to move the proceeds of organized crime and other offenses from Russia to London, converting them from rubles to dollars in the process.

The complaint alleged that Deutsche Bank misrepresented to its shareholders that it maintained adequate AML and KYC programs to prevent such abuse when in fact its programs were demonstrably deficient and led to sanctions and the decline in the price of its stock, but Deutsche Bank moved to dismiss the complaint for failure to

state a claim. The court agreed with the bank and granted its motion

According to the court, the statements cited by Plaintiffs were not necessarily false. For example, Plaintiffs complained that Deutsche Bank told its shareholders that it had KYC procedures "in place" and that "global risk assessments were performed on a regular basis." But Plaintiffs were alleging not that the bank's AML and KYC programs did not exist; they were alleging that they were inadequate. Mere allegations of corporate mismanagement are not actionable," the court said, nor is a company obligated to disclose uncharged illegal conduct.

So the motion to dismiss the complaint was granted. *SDC*

Claim and Answer

Rule G(5) requires claimants only to identify themselves and state their interest in the property subject to forfeiture; it does not require the claimant to provide any explanation for his possession of the property.

United States v. $31,000 in U.S Currency, ___ F.3d ___, 2017 WL 4159178 (6th Cir. Sept. 20, 2017).

Sixth Circuit * Law enforcement agents stopped Claimants as they were about to board a plane at the Cleveland airport, and obtained their consent to search their luggage. They found $31,000 in currency concealed in the lining of one suitcase, and $10,000 in a sock in another. A drug dog alerted to the currency, and follow-up investigation belied Claimants' explanations that the money came from a cleaning business and other legitimate sources.

In the ensuing civil forfeiture action alleging that the money was drug proceeds, Claimants filed identical claims asserting only that the money was taken from their possession and that it belonged to them. Before conducting any discovery as to Claimants' standing, the Government moved to dismiss the claims pursuant to Rule G(8)(c)(i)(A) for failure to comply with the pleading requirements in Rule G(5)(a). The rule, the Government said, requires a claimant to provide an explanation for his possession of the seized property, and thus requires more than a naked assertion of ownership.

The district court agreed with the Government and granted the motion to dismiss. *United States v. $31,000 in U.S. Currency,* 2016 WL 5661608 (N.D. Ohio Sept. 30, 2016) (November 2016 *Digest*). Claimants appealed.

The panel began by noting the differences between the showings that must be made to establish statutory standing on the one hand and Article III standing on the other. Naked possession of the defendant property may well be insufficient to establish Article III standing, the court said, but to establish statutory standing, the claimant need only comply with the pleading requirements in Rule G(5)(a). That rule, the court held, "does not require a claimant to provide any explanation or contextual information" regarding his possession of ownership of the property. To the contrary, "Rule G(5) requires claimants to do no more than identify themselves and state their interest in the property subject to forfeiture."

The Government argued that a heightened pleading requirement is necessary to discourage the filing of false claims and to allow the Government to test the claimant's Article III standing with special interrogatories focused on the claimant's explanation for his possession of the property. But the panel rejected those arguments.

There is no support in the text of Rule

G(5) for such a heightened pleading requirement, the court said. "If Congress wishes to add an additional layer of protection [against false claims] to the statutory requirements by having claimants state their interest with specificity, it may." But in the meantime, the verification requirement in Rule G(5) is sufficient for that purpose.

Regarding the Government's suggestion that a more detailed claim would promote judicial efficiency by allowing the Government to focus its special interrogatories and test the claimant's standing by zeroing-in on the factual assertions in the claim, the court said the following: "We have no doubt that the lawyers of the United States Attorney's Offices within the Sixth Circuit have the capacity to draft useful interrogatories that will either confirm a claimant's interest in the *res* or expose the futility of the claim. They do not need our hand on the scale.""

So the judgment of the district court was reversed. *SDC*

Contact: AUSA Phil Tripi (N.D. Ohio)

Comment: The circuits are divided as to what level of detail is required to satisfy the pleading requirement in Rule G(5)(a). The Seventh Circuit held in *United States v. $196,969.00 in U.S. Currency,* 719 F.3d 644, 646 (7th Cir. 2013), that a bald assertion of ownership is all that Rule G(5) requires. In contrast, in *United States v. $154,853.00 in U.S. Currency,* 744 F.3d 559, 562-63 (8th Cir. 2014), the Eighth Circuit held that Rule G(5)(a) requires that the claimant's interest in the property "be stated with some level of specificity," and that a claim making only a bald assertion of ownership and possession may be dismissed. *See also United States v. $100,348*, 354 F.3d 1110, 1118-19 (9th Cir. 2004) (because "the danger of false claims in these proceedings is substantial," courts require more than "conclusory or hearsay allegations of some interest in the forfeited property"); *United States v. $104,250.00 in U.S. Currency,* 947 F. Supp.2d 560, 565-66 (D. Md. 2013) (claim asserting that money seized from carry-on luggage was "proceeds of an investment in the entertainment industry" was insufficient; claim must be specific enough to put the claimant in jeopardy of a perjury prosecution if the claim is false, and to allow the Government to focus its discovery requests without having to issue rounds of interrogatories just to find out what it is that the claimant is asserting as the basis for her claim of ownership); *United States v. $39,557.00, More or Less, in U.S. Currency,* 683 F. Supp.2d 335, 339 40 (D.N.J. 2010) (bald assertion of ownership is not sufficient to comply with Rule G(5); claimant who was passenger in vehicle where currency was found under the seats, and who initially denied any knowledge of it, must explain how he obtained the currency and what it was doing there).

A majority of courts apply the latter rule, but the panel in this case expressly adopted the Seventh Circuit's approach and rejected that of the Eighth Circuit and the district courts. A complete list of the cases going both ways on this issue appears in Section VIII.M.4 of the Civil Forfeiture Case Outline. *SDC*

Ancillary Proceeding / Standing / Unsecured Creditors

First Circuit joins all others in holding that an unsecured creditor lacks a legal interest in the specific property forfeited by the defendant, and so cannot recover in the ancillary proceeding.

Because the Government's interest in proceeds vests at the time of the offense, a third party cannot contest the forfeiture of the proceeds as a person with a pre-existing

interest under Section 853(n)(6)(A).

United States v. Catala, ___ F.3d ___, 2017 WL 3725314 (1st Cir. Aug. 30, 2017).

First Circuit * Defendant was convicted of drug trafficking and was ordered to forfeit $14,792 in cash that was seized at the time of his arrest. Claimant filed a claim in the ancillary proceeding asserting that Defendant owed him $8,500 plus interest on an unpaid loan, and that he had reduced his debt to judgment in state court.

The Government moved to dismiss the claim for lack of standing and for failure to state a viable claim. The district court granted the Government's motion and Claimant appealed.

A claimant must have both Article III and statutory standing to file a claim in the ancillary proceeding. The panel held that Claimant had Article III standing because the forfeiture caused him an actual injury (it rendered him unable to collect his debt), and it was an injury that could be redressed if the court were to rule in his favor.

The court did not rule on the Government's challenge to Claimant's statutory standing, however, finding it unnecessary to do so. If a claim will fail on its merits, the court said, the court may, in the interest of judicial economy, move directly to that issue and leave unresolved whether the claimant had standing to make the claim in the first place. Thus, the court did not rule on whether an unsecured creditor who has reduced his debt to judgment has statutory standing to contest the forfeiture of the debtor's property under Section 853(n)(2).

The court did rule, however, that the claim would fail on the merits. To prevail under Section 853(n)(6)(A), the claimant must show that he had a legal interest in the particular asset that is subject to forfeiture. But Claimant, as an unsecured creditor, had no legal interest in the specific "chunk of cash" that was seized from Defendant at the time of his arrest.

To rule otherwise, the court said, would mean that a criminal defendant could benefit from his illicit activities by having his forfeited criminal proceeds used to reduce the debts he owes to his creditors. "Such a result would be at cross-purposes with the goals of criminal forfeiture, such as separating a criminal from his ill-gotten gains and lessening the economic power of unlawful activities."

"We refuse," the court concluded, "to carve such a gaping hole into the forfeiture framework."

Moreover, the court held that Claimant's reducing his debt to judgment had no effect on the outcome. To prevail under Section 853(n)(6)(A), the claimant must show that he had an interest in the property before the Government's interest vested under the relation back doctrine. Whatever interest Claimant acquired by virtue of the state court action, the panel concluded, came too late to overcome the Government's interest, which vested at the time the money came into existence as the proceeds of Defendant's criminal offense. So the court denied Claimant's motion to amend the forfeiture order. *SDC*

Contact: AUSA Donald Lockhart (D.R.I.)

Comment: This case brings the First Circuit into accord with all of the others in holding that an unsecured creditor cannot prevail under Section 853(n)(6)(A) because he has no legal interest in the particular assets subject to forfeiture. *See* Section XVIII.H.1 of the Criminal Forfeiture Case Outline. What's interesting, of course, it the panel's colorful explanation of the policy rationale for that rule – that a contrary rule would

benefit a defendant by allowing him to use criminal proceeds to reduce his debts and would thus "carve a gaping hole" in the forfeiture framework which seeks to preclude criminals from benefitting from their life of crime.

The panel is also in accord with all others in holding that because the Government's interest in criminal proceeds vests at the time of the offense, a third party cannot have a valid claim under Section 853(n)(6)(A) in property forfeited as proceeds. Section XX.B.4 of the Criminal Forfeiture Case Outline.

Finally, the panel agrees with other courts in holding that reducing an unsecured debt to judgment does not change anything: the interest that the judgment creditor acquires simply comes too late to trump the Government's interest under the relation back doctrine. *Id.* § XVIII.M.3.

That the claimant obtained a judgment against the defendant in this case, however, may explain the panel's decision to skip over the statutory standing issue and rule instead on the merits of the third-party claim. While the "legal interest" that a claimant must have to establish standing under Section 853(n)(2) is likely the same as the "legal interest" he must have to prevail under Section 853(n)(6), it is possible to have a legal interest – *e.g.*, a judgment lien on the forfeited property – and still fail to prevail because the interest was acquired after the Government's interest vested under the relation back doctrine.

By skipping over the standing issue, the panel avoided having to determine if the claimant -- as a judgment creditor -- acquired a "legal interest" in terms of Section 853(n)(2), and allowed it to hold that whatever interest he may have acquired, Claimant had no *pre-existing interest* in the forfeited property cognizable under Section 853(n)(6)(A). *SDC*

Ancillary Proceeding / Standing / Constructive Trust

If a corporate shareholder or member of an LLC would lack standing to contest the forfeiture of the corporation's assets, then the spouse of the shareholder cannot have standing based solely on the marital relationship.

To contest the forfeiture of her husband's bank account under § 853(n)(6)(A), a wife must show that she had a legal interest in the funds deposited into the account before the acts giving rise to the forfeiture.

A divorce decree giving a wife a 50-percent interest in the defendant's forfeited assets that is entered after the acts giving rise to the forfeiture comes too late to trump the Government's interest under the relation back doctrine.

To make a claim in the ancillary proceeding based on constructive trust, the claimant must allege facts showing that a fraud giving rise to the trust occurred before the criminal acts giving rise to the forfeiture.

United States v. Couch, 2017 WL 4105769 (S.D. Ala. Sept. 15, 2017*)*.

S.D. Ala. * Defendant was convicted of RICO, money laundering and other offenses arising out of a healthcare fraud scheme and was ordered to forfeit various assets. His ex-wife (Claimant) filed a claim in the ancillary proceeding contesting the forfeiture.

First, Claimant asserted that she had a 50 percent spousal interest in assets forfeited by Defendant's LLC. It is well-established, however, that a shareholder of a cor-

poration, or a member of an LLC, has no legal interest in the corporation's assets. It follows that the spouse of the shareholder cannot have any interest in such assets if the interest is based solely on the marital relationship. Accordingly, the court dismissed Claimant's claim to the forfeited corporate assets for lack of standing.

Second, Claimant asserted an interest in several bank accounts that Defendant held either in his own name, or created as a college savings plan for the benefit of his and Claimant's children. The court dismissed those claims as well.

First, as a matter of pleading, Claimant's claim failed to allege facts sufficient to find that she had any legal interest in the money Defendant used to open the respective bank accounts that was vested in her before Defendant committed the offenses giving rise to the forfeiture. Thus, Claimant had not alleged any facts on which she could be granted any relief under 21 U.S.C. § 853(n)(6)(A).

To the extent Claimant acquired an interest in any of those assets by virtue of her divorce decree – which awarded her 50 percent of her husband's assets – she may thereby have acquired standing to contest the forfeiture of those assets, but because the divorce decree was entered after the onset of the offense giving rise to the forfeiture, her interest arose too late to trump the Government's interest in those assets under the relation back doctrine.

Finally, Claimant argued that Defendant held the money that went into the bank accounts in constructive trust for her from a date that preceded his criminal conduct. But the court held that to establish a constructive trust, a claimant must show that there was "some kind of inequity or fraud" involving a fiduciary obligation. Accordingly, the court held that Claimant's constructive claim failed because she did not allege any facts supporting such inequity or fraud that occurred – and thus gave rise to the trust – before the criminal act giving rise to the forfeiture.

So all of Claimant's objections to the forfeiture were dismissed. *SDC*

Contact: AUSA Christopher Brinson

Comment: The courts generally agree that a claim filed in the ancillary proceeding of a criminal case may be based on the existence of a constructive trust in the forfeited property. The beneficiary of the constructive trust may, in other words, assert that the imposition of the trust gave her an interest in the forfeited property that was vested in her, not the defendant, in terms of Section 853(n)(6)(A).

But the claimant still must establish each of the elements of the constructive trust, and must establish that the facts giving rise to the trust occurred before the acts giving rise to the forfeiture. Here, the defendant's wife's constructive trust failed on both of those points.

One of the elements of a constructive trust is that the wrongdoer acquired the beneficiary's property through fraud or some breach of a fiduciary duty. Here, the wife did not allege any facts to support such a claim. To the contrary, she appeared to allege only that her husband owed her some compensation for the "family support and physical work" she performed during the marriage.

Moreover, to the extent the wife was asserting that there was a breach of fiduciary duty, she did not allege that it occurred before the crime giving rise to the forfeiture. To prevail under Section 853(n)(6)(A), the claimant must show that she had an interest in the

property before the Government's interest vested under the relation back doctrine. Even assuming *arguendo* that a constructive trust comes into existence automatically when the fraud occurs (and not later when recognized by a court, as some courts hold), it comes too late to help a claimant laying claim to the property under Section 853(n)(6)(A) if the fraud did not occur until after the crime giving rise to the forfeiture, and hence not until the government's interest had already vested.

For an extended discussion of the elements of a constructive trust and the viability of a constructive trust claim in the ancillary proceeding of a criminal forfeiture case, see *Asset Forfeiture Law in the United States* (2d ed. 2013), § 23-15(g) and Section XX.H of the Criminal Forfeiture Case Outline. *SDC*

Ancillary Proceeding / Forfeiture and Bankruptcy / Challenge to Forfeitability

Third party may not contest the district court's finding that the property was the proceeds of the defendant's offense and not a substitute asset even though it was vital to the outcome of his claim.

United States v. Calle-Serna, 2017 WL 3738413 (E.D.N.Y. Aug. 29, 2017).

E.D.N.Y. * Defendant, a Colombian drug dealer, invested $2.7 million in a bankrupt sugar company that was attempting to sell its assets and raise money to pay off its creditors. The Government seized the $2.7 million from the bankruptcy estate and included it in an order of forfeiture in Defendant's criminal case. Claimant, the bankruptcy trustee, objected to the forfeiture in the ancillary proceeding, arguing that the money belonged to the bankruptcy estate.

The court agreed with the Government that Claimant could not prevail under Section 853(n)(6)(A). That statute "works hand-in-hand with the relation back doctrine" and thus requires the third party to show that he had an interest in the property before the Government's interest vested at the time of the offense. Because a third party cannot have had a pre-existing interest in criminal proceeds – which did not exist before the offense was committed – his claim failed.

Claimant objected, however, that the $2.7 million was forfeited not as the proceeds of Defendant's offense, but as a substitute asset. The court held, however, that the Government's theory all along was that the money was drug proceeds and the district court entered its forfeiture order on that basis. Accordingly, the court said, Claimant had no right to challenge the ground on which the forfeiture order was entered, even though the distinction between proceeds and substitute assets was "vital to his claim." *SDC*

Contact: AUSA Claire Kedeshian

Comment: Every circuit has adopted the rule that a third party has no right to relitigate the basis for the entry of the court's order of forfeiture. The rationale for the rule is that because a third party will prevail if he is the true owner of the property *regardless of what the Government's theory of forfeiture might have been,* the court's finding of forfeitability, even if erroneous, is no concern of his. *See* Section XIX.B of the Criminal Forfeiture Case Outline.

That rule, however, may not take into account the effect of the relation back doctrine which applies to the proceeds of the defendant's offense, but may not apply to substitute assets. If the doctrine does not so apply, then it matters greatly to the third party

whether the property was forfeited as proceeds or not: in one instance, the forfeiture will trump the third party's claim under Section 853(n)(6)(A) and in the other instance it will not. (See the Comment following the summary of *United States v. Marshall, supra*.)

Nevertheless, the courts appear to be unanimous in holding that third parties cannot challenge a finding by the district court that the property was the proceeds of the offense and not a substitute asset. *See United States v. Daugerdas,* 2017 WL 1052592 (S.D.N.Y. Mar. 20, 2017) (the rule barring a third party from relitigating whether the property is traceable to the offense applies even though a finding that the property was only a substitute asset would be determinative of her claim, because in that instance the relation back doctrine would not apply);
SKL Investments, Inc. v. United States, 2014 WL 4365297, *5-6 (W.D. Tenn. Sept. 2, 2014) (third party could not argue that forfeited property was a substitute asset and not directly forfeitable so that it could argue that it had a pre-existing interest under § 853(n)(6)(A), or so that it could argue that the *lis pendens* on the property was invalid, and thus it had a claim under § 853(n)(6)(B)). *SDC*

Ancillary Proceeding / Spousal Interest

If a defendant takes out a home equity line of credit on the equity in his property, borrows the money and repays the loan with criminal proceeds, the entire property becomes subject to forfeiture as property traceable to the proceeds of the offense.

That the defendant's wife had a spousal interest in the property before the defendant used it to obtain the HELOC is irrelevant; her interest is gone and cannot be recovered in the ancillary proceeding.

United States v. Caspersen, 2017 WL 3671078 (S.D.N.Y. Aug. 25, 2017).

S.D.N.Y. * Defendant and his wife purchased a New York apartment with approximately $440,000 in clean funds and a $680,000 mortgage. Defendant, unknown to his wife, paid off the mortgage with the proceeds of a securities fraud scheme, obtained a Home Equity Line of Credit (HELOC) equal to the resulting equity in the property and borrowed the funds, and then paid off the HELOC with more fraud proceeds.

Following Defendant's guilty plea, the court entered an order forfeiting the entire real property. It reasoned that when Defendant used the equity in his property to secure the HELOC and then paid off the loan with criminal proceeds, all of the equity became property traceable to the offense and hence subject to forfeiture. To rule otherwise, the court said, would allow a defendant to "convert criminal proceeds into clean funds simply by taking out a HELOC and repaying it with crime proceeds."

Defendant's wife nevertheless filed a claim in the ancillary proceeding asserting that she held a one-half interest in the property as a tenant by the entireties. The court denied the claim, but permitted the wife to remain in the property "for a reasonable period" to allow her to make arrangements to relocate before the Government displaced her. *SDC*

Contact: AUSA Christine Magdo

Comment: If the defendant had simply paid off the $680,000 mortgage with criminal proceeds, the wife would have retained her spousal interest in the portion of the property that was acquired with clean funds. That would have led to an interesting discussion of the proper means of allowing the Government to acquire its interest in the

property while the defendant and his wife retained their untainted interest.

As it happened, however, the original untainted equity in the property was wiped out when the defendant used all of the equity to obtain a $1.1 million HELOC, borrowed all of it, and then repaid the loan with tainted funds. That meant that all of the equity in the property was traceable to the defendant's crime, and that none of either the defendant's nor his wife's untainted equity remained. Therefore, the wife was left with nothing to recover in the ancillary proceeding. *See In re Jebril,* 2008 WL 1995095, *4 (E.D. Mich. 2008) (defendant's spouse could not contest the forfeiture of his property in the ancillary proceeding as a tenant by the entireties because, as a matter of state law, the entireties estate was destroyed when defendant and his spouse transferred the property to a third party). *SDC*

Ancillary Proceeding / Proof of Legal Interest / Firearms

Bare legal title is insufficient to establish a legal interest in forfeited property in the ancillary proceeding.

Female companion of felon in possession of a firearm failed to show that she exercised dominion and control over the weapon, and thus could not establish that she had a legal interest in it.

Moore v. United States, 2017 WL 4150711 (E.D. Mich. Sept. 19, 2017).

E.D. Mich. * Defendant was convicted of being a felon in possession of a firearm, and was ordered to forfeit the firearm in question. Claimant, Defendant's female companion, filed a claim in the ancillary proceeding asserting that the firearm belonged to her.

Although Claimant produced evidence that she had purchased the firearm, she also acknowledged that she never registered it as required by state law. She also admitted that she had forgotten that she left the firearm in Defendant's vehicle after completing the purchase, and that it had remained in his possession until it was seized. She explained that she was experiencing cognitive and memory difficulties at that time.

On these facts, the court held that despite having bare legal title, Claimant failed to establish that she exercised dominion and control over the forfeited firearm, and thus lacked standing to contest its forfeiture.

So her petition to recover the firearm pursuant to Section 853(n)(6)(A) was denied. *SDC*

Contact: AUSA Adriana Dydell

Facilitating Property / Jury Instructions

Forfeiture of property "intended to be used" to facilitate a criminal offense requires proof of some action taken to effectuate that intent. Mental intent alone is not sufficient.

United States v. $11,500 in U.S. Currency, ___ F.3d ___, 2017 WL 3863815 (9th Cir. Sept. 5, 2017).

Ninth Circuit * Claimant and his wife were long-time heroin addicts. When his wife was arrested on drug charges, Claimant gave a friend $11,500 in $100 bills to bail her out of jail.

Suspecting that the money might be related to drug trafficking, law enforcement officers seized the money (to which a drug dog alerted) and also conducted a search of Claimant (who was waiting outside the jail) and his vehicle. They found another $2900

in cash on Claimant's person and 3.6 grams of heroin in the vehicle.

The Government filed a civil forfeiture action against both sums of money and the district court granted summary judgment. On appeal, the panel affirmed the forfeiture of the $2900 but reversed as to the bail money, holding that Claimant's story (that the money was from an insurance settlement) created a triable issue of fact. *United States v. $11,500 in U.S. Currency,* 710 F.3d 1006 (9th Cir. 2013).

On remand, the case was tried to a jury on two theories: that the $11,500 was the proceeds of drug trafficking, and that it was property that was *intended to be used to facilitate* drug trafficking. In explaining the latter theory to the jury, the prosecutor asserted that if Claimant had not attempted to use the money for his wife's bail, he would have used it to buy more heroin to feed his addiction.

The jury found for Claimant on the proceeds theory but found for the Government on the facilitation theory. Claimant appealed once again.

The court construed Claimant's appeal as a challenge to the district court's jury instruction on the facilitation theory. Reading the statute literally, the court had instructed the jury that it should find for the Government if it believed that Claimant intended to use the money to buy drugs. The panel held that that was plain error.

A statute that authorized forfeiture based purely on a person's intent to use it to commit a crime, the court said, would likely be unconstitutional, for it would punish a person merely for thinking about using his property in an illegal fashion. Citizens are not subject to punishment merely for having bad thoughts. To be constitutional, therefore, the statute must be read to require proof of some action taken to effectuate the illegal intent.

Here, the only proof that Claimant intended to use the money to buy drugs was his status as a long-time drug addict. To be sure, it is possible that a drug addict would use his money for that purpose, but that was not enough, in the court's view, to support the forfeiture.

So the forfeiture of the $11,500 was reversed. *SDC*

Contact: AUSA Alexis Lien (D. Or.)

Comment: The panel makes no attempt to set forth the facts that would be sufficient to prove that a defendant intended to use a stash of cash to commit a criminal offense. It holds only that having the status of a drug addict is not good enough.

In many cases, the government forfeits money on a facilitation theory by showing, based on circumstantial evidence and past conduct, that a person was going to use it to consummate a drug deal, either as the purchase money or in some other fashion that made the drug offense easier to commit. *See, e.g., United States v. $890,718.00 in U.S. Currency,* 433 F. Supp. 2d 635, 645-46 (M.D.N.C. 2006) (hoard of cash that drug dealer keeps in his house, which allows him to get a better deal from his suppliers by offering an immediate payment of cash, is subject to forfeiture under section 881(a)(6) as facilitating property because it makes the drug offense easier to commit). In light of this case, the Government will want to be careful to make clear on the record that there was such evidence, and that it was not relying on mere supposition. *SDC*

Forfeiture and Restitution

Funds in an ERISA-protected pension plan

are protected from forfeiture but are not protected from restitution.

Accordingly, the Government may satisfy a forfeiture order by seizing the proceeds of the defendant's crime from his bank accounts, and instead of applying the money to restitution, garnish his pension plan to satisfy a restitution order.

United States v. Feldman, 2017 WL 3866024 (W.D.N.Y. Sep. 5, 2017).

W.D.N.Y. * Defendant, a medical doctor, pled guilty to defrauding the hospital where he was employed by causing it to pay him $1.46 million in fraudulent fees. He was ordered to forfeit $1 million that was seized from his bank accounts and to pay $1.46 million to the hospital as restitution. He paid $460,000 toward the restitution order and expected that the Government would satisfy the balance from the forfeited funds.

Pursuant to Defendant's plea agreement, the U.S. Attorney asked the Asset Forfeiture and Money Laundering Section (AFMLS) of the Department of Justice to apply the forfeited funds to the restitution order. Later, when the AUSA discovered that Defendant had a pension plan that guaranteed him an annuity, she advised AFMLS that Defendant had funds other than the forfeited proceeds with which to satisfy the restitution order, but she did not withdraw her previous request. AFMLS, however, denied the request on the ground that there were other funds available to the victims.

Defendant objected that the Government's refusal to apply the forfeited funds to restitution violated his plea agreement, but the court did not agree and ordered Defendant to pay the restitution order. *United States v. Feldman*, ___ F. Supp.3d ___, 2017 WL 3172854 (W.D.N.Y. Jul. 17, 2017) (August 2017 *Digest*). Defendant moved for reconsideration.

The court first reaffirmed its ruling that the Government did not violate the plea agreement. At most, the AUSA's obligation under the agreement was to recommend that AFMLS permit the forfeited funds to be applied to the restitution order. The government never guaranteed that AFMLS would accept that recommendation. Moreover, even after she discovered that Defendant had other assets in an investment account and so advised AFMLS, she did not withdraw her recommendation. Accordingly, the court held that the Government upheld its part of the bargain.

Defendant argued, however, that the pension fund was not actually available to compensate the victim because it was protected by the anti-alienation provision in the Employment Retirement Income Security Act (ERISA). But the court held that the Mandatory Victim Restitution Act (MVRA), 18 U.S.C. § 3613(a), trumps the anti-alienation provision and allows the Government to garnish a pension plan to satisfy a restitution order.

Finally, Defendant argued that the victim would be better off if the forfeited funds were applied to the restitution order because that would mean the victim would receive the $1 million in a lump sum. Garnishing the pension plan, he noted, would provide the victim only with Defendant's annuity payments over a long period of time.

The court held, however, that this was a policy choice that was the Government's to make, and that Defendant had no right to challenge AFMLS's decision on that point.

Accordingly, the court held that the Government may step into Defendant's shoes and garnish the annuity payments that he would be entitled to receive for the purpose of satisfying the restitution order. *SDC*

Contact: AUSAs Richard Resnick and Grace Carducci

Comment: It is well-established that ERISA-protected pension plans are immune from criminal forfeiture orders. See Section XXXI of the Criminal Forfeiture Case Outline. The point of this case, however, is that the Government can work around that limitation if the defendant has other funds.

Because funds in a pension plan are not protected from restitution orders, if the Government obtains both a forfeiture order and a restitution order in a criminal case, it may satisfy a forfeiture order from other funds seized from the defendant while applying the funds in his pension plan to the restitution order. *SDC*

Right to Counsel / Application of *Luis*

Luis v. United States *does not apply retroactively to closed cases.*

Even if Luis *applied, it would not help a defendant whose property was seized on probable cause to believe it was proceeds, who did not contest that finding and ask to use the property to retain counsel, and who later admitted that the property was traceable to his offense.*

United States v. Sadiq, 2017 WL 3457175 (E.D. Mich. Aug. 11, 2017).

E.D. Mich. * When Defendant was indicted for committing health care fraud, the Government obtained a warrant and seized various assets that were subject to forfeiture as the proceeds of the offense. Defendant made no motion to release the assets so that he could use them to retain counsel. To the contrary, Defendant entered a guilty plea agreeing to the forfeiture of the assets as criminal proceeds.

Later, after his conviction was final, Defendant filed a Section 2255 petition to vacate is conviction on the ground that the pre-trial seizure of his property violated his Sixth Amendment right to counsel under the Supreme Court's intervening decision in *Luis*. But the court held that *Luis* does not apply retroactively to closed cases and that even if it did, there was no Sixth Amendment violation here.

Luis holds that a criminal defendant has the right to use *untainted* property to retain counsel of choice. Thus, under *Luis*, it would be a violation of a defendant's Sixth Amendment rights to bar him from using property seized or restrained as a *substitute asset* if he needed it to retain counsel. Here, however, the Government seized Defendant's property with a warrant after establishing probable cause to believe that the property was the proceeds of health care fraud. Moreover, Defendant did not seek the release of the property and later admitted, in his plea agreement, that the property was in fact traceable to his offense.

In those circumstances, the court said, *Luis* does not apply and there was no Sixth Amendment violation. So the § 2255 petition was denied. *SDC*

Contact: AUSA Elizabeth Young

Motion to Strike Claim / Special Interrogatories / Fifth Amendment / Hardship Petition

Claimant cannot avoid responding to special interrogatories in a civil forfeiture case by taking a blanket invocation of the Fifth Amendment as to every question.

The Government does not have to respond to a motion to dismiss its complaint until the

claimant responds to the Government's special interrogatories.

A claimant moving for the release of seized property under § 983(f) has the burden of showing that he first sought release from the seizing agency, and that the requirements of Section 983(f)(1) are satisfied.

United States v. Eight (8) Counterfeit Watches, 2017 WL 3706040 (S.D. Ohio Aug. 28, 2017).

S.D. Ohio * The Government seized various counterfeit items of clothing and accessories from Claimant's residence and commenced a civil forfeiture action against the property under 18 U.S.C. § 2323. The Government also served Claimant with special interrogatories pursuant to Rule G(6), and moved to strike his claim when he responded to virtually all of the interrogatories by invoking the Fifth Amendment right against self-incrimination.

For his part, Claimant moved to dismiss the Government's complaint and moved for the release of the property under the hardship provision in Section 983(f). The magistrate judge ruled on each motion in turn.

The court held that a claimant may not avoid responding to special interrogatories by making a blanket invocation of the Fifth Amendment but must instead respond to each request individually. It held, however, that while the Government may move to strike a claim for failure to respond to special interrogatories, it would, in the exercise of discretion, permit Claimant to revise his response to the special interrogatories before granting the Government the relief it sought.

The court then held that the Government did not need to respond to Claimant's motion to strike the complaint until claimant responded to the special interrogatories.

Finally, the court denied without prejudice Claimant's hardship petition, ruling that Claimant had the burden of showing that he had first attempted to obtain the release of the seized property from the seizing agency, and that he was able to satisfy the criteria in Section 983(f)(1).

Accordingly, all of the parties' motions were denied. *SDC*

Contact: AUSA William King

Comment: On the Fifth Amendment issue, see the cases collected in Section X.A of the Civil Forfeiture Case Outline. *SDC*

Motion to Strike Claim

Exercising discretion, court declines to dismiss claim filed by wife of fugitive drug dealer six weeks after the expiration of the filing deadline.

United States v. 5124 Gumwood Ave., 2017 WL 3842373 (E.D. Tex. Aug. 10, 2017).

E.D. Tex. * The Government filed a civil forfeiture action against the residence purchased by a fugitive Mexican drug dealer, alleging that it was purchased with drug proceeds. The drug dealer's estranged wife filed a claim contesting the forfeiture six weeks after the filing deadline. She explained that she did not speak English, that the residence was her homestead, and that she had filed her claim as soon as she was able to raise funds to retain counsel to act on her behalf.

Denying the Government's motion to dismiss the claim, the court held that the delay caused minimal prejudice to the Government, and that strict enforcement of the deadline would be unreasonable in light of Claimant's status as a "non-native speaker who has suddenly been left without funds

due to her husband's alleged criminal activity and consequent disappearance." *SDC*

Contact: AUSA Michael Lockhart

***Bivens* Action / Counterclaims**

The claimant in a civil forfeiture action may not use the proceeding to file a Bivens *action as a counterclaim against the United States.*

Zappone v. United States, ___ F.3d ___, 2017 WL 3906806 (6th Cir. Sept. 7, 2017).

Sixth Circuit * IRS agents executed a search warrant at Plaintiff's business and seized $1.2 million from a safe. When the Government filed a civil forfeiture action against the money alleging that it was involved in tax evasion and structuring, Plaintiff filed a claim.

Sometime later, Plaintiff filed a separate *Bivens* action against the agents, alleging that there had actually been $3.1 million in the safe, and that the agents had stolen the missing money. When the Government moved to dismiss the *Bivens* action as untimely, Plaintiff responded, *inter alia,* that his claim in the civil forfeiture action reflected the diligent pursuit of his claim, and that accordingly the deadline for commencing the *Bivens* action should be equitably tolled. The district court rejected that argument and Plaintiff appealed.

The Sixth Circuit agreed with the district court. Equitable tolling may be appropriate where a Plaintiff initially files an action in the wrong forum, and then corrects his error after the filing deadline has passed. But that rule did not apply here because the civil forfeiture claim had nothing to do with Plaintiff's *Bivens* action. Indeed, as the panel explained, a *Bivens* action could never be part of a civil forfeiture action.

Civil forfeiture actions are *in rem* proceedings against property in which the property owner may intervene, but they are not lawsuits in which the property owner may file a counterclaim against the United States. Thus, the claim that Plaintiff filed in the civil forfeiture case could not be construed as the timely commencement of his *Bivens* action, albeit in the wrong forum.

So the dismissal of the *Bivens* action was affirmed. *SDC*

Contact: AUSA Jim Morford (N.D. Ohio)

Administrative Forfeiture / Plea Agreement

Court rejects defendant's claim that the reference to his property was stricken from his plea agreement because the Government agreed to return it; to the contrary, it was stricken because the property had already been forfeited administratively.

United States v. Lestrick, 2017 WL 3602022 (W.D. Wash. Aug. 22, 2017).

W.D. Wash. * The DEA seized various items of jewelry from Defendant's residence and commenced an administrative forfeiture proceeding against it. Defendant attempted to file a claim to the property, but the DEA denied it as untimely.

The Government nevertheless included the jewelry in Defendant's indictment for a drug offense, and listed it along with various other assets in the draft of Defendant's plea agreement. When Defendant signed the agreement and agreed to the forfeiture of the assets listed therein, however, the reference to the jewelry was stricken.

Defendant argued that the striking out of the jewelry signified that the Government had agreed that it would not be forfeited,

and filed a motion for the return of his property. The court denied the motion, agreeing with the Government that striking the reference to the jewelry signified only that the jewelry had already been forfeited administratively. *SDC*

Contact: AUSA Rich Cohen

Comment: To avoid confusion and unnecessary litigation on this issue, the Government would be well-advised to do one of two things when an intervening administrative forfeiture proceeding has made it unnecessary to include certain property in a criminal forfeiture order: either file a motion striking the property from the indictment, citing the intervening administrative forfeiture as the reason; or include language in the plea agreement whereby the defendant acknowledges that certain property has been forfeited administratively. *SDC*

Notes

Pre-Trial Probable Cause Hearing

Washington v. Marion County Prosecutor, 2017 WL 3581641 (S.D. Ind. Aug. 18, 2017).

S.D. Ind. * Following the Second and Seventh Circuits' decisions in *Krimstock v. Kelly* and *Smith v. City of Chicago*, the court held that an Indiana statute that allows the Government to hold a seized motor vehicle for forfeiture for an extended period before trial, without the possibility of a post-seizure, pre-trial probable cause hearing, violates the Due Process Clause of the Fifth Amendment.

Comment: The constitutional issues implicated by the absence of any right to a post-seizure, pre-trial challenge to the Government's right to the retention of seized property are discussed in Section 3-8(e) of *Asset Forfeiture Law in the United States* (2d. ed. 2013). *SDC*

Structuring

Coleman v. Bank of America, 2017 WL 3334104 (N.D. Tex. Aug. 4, 2017).

N.D. Tex. * Plaintiff, an African-American, was fired from her job at Bank of America when it was discovered that she had used her personal bank account to conduct structured cash transactions. Plaintiff sued the bank, alleging that the structuring allegation was a pretext for engaging in racial discrimination, but the court held that because structuring is a criminal offense, it was a valid reason for the bank's terminating her employment.

Application of *Honeycutt* / Section 2255

Bangiyev v. United States, 2017 WL 3599640 (E.D. Va. Aug. 18, 2017).

E.D. Va. * Defendant challenged the forfeiture order in his criminal case by making a collateral attack under 28 U.S.C. § 2255, but the court held that Section 2255 may not be used to challenge a non-incarcerative aspect of a defendant's sentence.

Contact: AUSA Gordon Kromberg

Special Interrogatories / Motion to Strike Claim

United States v. $65,419.00 in U.S. Currency, 2017 WL 3896660 (C.D. Ill. Sep. 6, 2017).

C.D. Ill. * Claimants filed a claim to $65,419 in currency that was seized during a traffic

stop, but provided only partial answers to the Government's special interrogatories. When Claimants failed a second time to respond fully to the interrogatories and ignored the court's order granting the Government's motion to compel, the Government moved to strike their claim. Finding that Claimants' "silence appears to be a conscious decision" and not due to lack of awareness of the process, the court granted the Government's motion.

Contact: AUSA Greg Gilmore

Failure to Prosecute / Motion to Strike Claim

United States v. $35,157.00 in U.S. Currency, 2017 WL 3911024 (C.D. Ill. Aug. 17, 2017).

C.D. Ill. * Claimant retained counsel and filed a claim contesting the forfeiture of $35,157 that was seized from his residence during the execution of a search warrant. After more than three years, Claimant's counsel advised the court that he had lost contact with his client and did not know how to reach him. Finding that Claimant's "failure to remain in contact with his counsel and thus his failure to prosecute is evidence of abandonment of his claim," and that his absence precluded the Government from litigating the case on the merits, the court granted the Government's motion to strike the claim and entered a default judgment.

Contact: AUSA Greg Gilmore

Ancillary Proceeding / Constructive Trust

United States v. Gettel, No. 16-cr-01099-WQH (S.D. Cal. Sept. 7, 2017).

S.D. Cal. * Defendant was convicted of a multi-million dollar mortgage fraud scheme and was ordered to forfeit multiple properties. Numerous victims filed claims contesting the forfeiture, asserting that they should be deemed to be beneficiaries of a constructive trust. One of the victims could trace its losses to the forfeited property, but the others could not. Accordingly, the court granted the petition of the victim that could trace and denied the others.

Contact: AUSA Leah Bussell

Comment: See the Comment following the summary of *United States v. Couch, supra,* regarding the elements of a constructive trust that must be satisfied before a court will impose a trust in favor of a claimant in a forfeiture case. One of those elements is tracing; but another is a showing that imposing the trust will not result in the unfair treatment of similarly situated parties. That requirement often precludes a "tracing victim" from prevailing under a constructive trust theory when other victims are unable to trace and thus are unable to share in the recovery. *SDC*

Administrative Forfeiture / Notice

United States v. Davis, 2017 WL 4158626 (N.D. Miss. Sept. 19, 2017).

N.D. Miss. * Claimant filed a motion for the return of administratively forfeited property that was seized from his residence pursuant to a search warrant, claiming that he was not given notice of the forfeiture proceeding. But the DEA produced the "green card" bearing Claimant's signature, signifying his receipt of the notice of the forfeiture. Moreover, Claimant was present when his residence was searched and his property was seized. Accordingly, the court denied his motion.

Contact: AUSA Sam Wright

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