Money Laundering and Forfeiture Digest

Summaries and Analyses of Recent Money Laundering and Asset Forfeiture Cases
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Application of *Honeycutt* / Health Care Fraud / Money Judgments / Right to a Jury in Criminal Forfeiture Cases

Eleventh Circuit joins the Fifth Circuit in holding that Honeycutt *applies to forfeitures for federal health care fraud.*

But Honeycutt *does not alter the rule that forfeiture orders may take the form of a personal money judgment, and that there is no Sixth Amendment right to a jury determination of the amount of the forfeiture.*

United States v. Elbeblawy, ___ F.3d ___, 2018 WL 3733618 (11th Cir. Aug. 7, 2018).

Eleventh Circuit * Defendant owned three home health care agencies providing in-home medical services to homebound patients. He paid patient recruiters to find patients, paid other health care providers for referrals, paid doctors to approve unnecessary services, and was convicted of conspiracy to commit health care fraud in violation of 18 U.S.C. § 1349.

The court sentenced Defendant to 20 years and held him jointly and severally liable to forfeit $36 million in Medicare proceeds pursuant to Section 982(a)(7). Defendant appealed the forfeiture order on three grounds.

First, he argued that there is no statutory authority to enter a criminal forfeiture order in the form of a personal money judgment, but the court held that "criminal forfeiture acts *in personam* as a punishment against the party who committed the criminal act," and that nothing in the Supreme Court's decision in *Honeycutt* requires any alteration in the view that *in personam* punishments can take the form of a personal money judgment.

Second, Defendant argued that he was entitled by the Sixth Amendment to a jury determination of the amount of the forfeiture and that the Supreme Court's decision to the contrary on that point in *Libretti* has been undermined by subsequent Supreme Court rulings. But the panel held that unless and until the Supreme Court overrules its prior decision, the lower courts remain bound by *Libretti.*

Finally, Defendant argued that the district court erred in holding him jointly and severally liable for the full amount of the forfeiture judgment. On this point, the panel agreed. *Honeycutt*, the court said, applies equally to forfeitures under Section 982(a)(7). While the language of the statute is not identical to the language in Section 853 – the statute at issue in *Honeycutt* – Section 982's incorporation of the procedures in Section 853 is enough to make clear that the two statutes should be interpreted in the same way with respect to joint and several liability.

So, the court vacated the forfeiture order and remanded the case to the district court to reconsider the amount of the forfeiture judgment. *SDC*

Contact: DOJ Attorney Ellen Meltzer

Comment: Regarding the joint and several liability issue, Section 982(a)(7) provides that the court must order the person convicted of a healthcare-fraud offense "to forfeit property, real or personal, that constitutes or is derived, directly or indirectly, from gross proceeds traceable to the commission of the offense." Importantly, unlike Section 853, the statute does not limit the forfeiture order to the proceeds that "the person obtained." As discussed at length in last month's *Digest*, the Sixth Circuit held in *United States v. Sexton,* 894 F.3d 787 (6th Cir. 2018), that this difference is critical. Discussing a forfeiture imposed under Section 981(a)(1)(C), the court held that if a forfeiture statute does not contain the phrase "proceeds the person obtained," *Honeycutt* does not apply. *See Honeycutt v. United States*, ___ U.S. ___, 137 S. Ct. 1626 (2017) (application of the doctrine of joint and several liability is inconsistent with statutory language limiting criminal forfeiture to "proceeds the person obtained"; defendant cannot be liable for proceeds obtained by someone else).On the other hand, the Fifth Circuit has held that *Honeycutt* does apply to forfeitures in health care fraud cases where the forfeiture order is imposed pursuant to Section 982(a)(7). *United States v. Sanjar,* 876 F.3d 725 (5th Cir. 2017).

Apparently, we are in an era in which each circuit will be asked to apply *Honeycutt* to each of the various criminal forfeiture statutes and there will be a split in the circuits as to each one.

The Sixth Amendment issue concerning the right to a jury determination of the forfeiture in a criminal case is discussed in the Comment following the next case summary. *SDC*

Application of *Honeycutt* / Joint and Several Liability / Right to a Jury in Criminal Forfeiture Cases

Sixth Circuit remands a drug conspiracy case to determine the amount of money the leader of the conspiracy may be required to forfeit under Honeycutt.

Honeycutt *applies even though the defendant did not raise the issue in the district court.*

Sixth Circuit also remands the case to determine if there is a Sixth Amendment right to a jury in criminal forfeiture cases.

United States v. Bradley, ___ F.3d. ___, 2018 WL 3637547 (6th Cir. Aug. 1, 2018).

Sixth Circuit * Defendant was a leader of an 18-member drug ring that distributed opiate pills between Michigan and Tennessee. He pled guilty to drug and money laundering conspiracies, was sentenced to 17 years in prison, and was ordered to forfeit $1 million in proceeds. The forfeiture order was based on the court's finding that Defendant was jointly and severally liable for the gross

amount obtained by Defendant and his co-conspirators. *United States v. Bradley,* 2017 WL 2691535 (M.D. Tenn. Jun. 22, 2017) (August 2017 *Digest*).

Defendant appealed the forfeiture judgment raising a number of issues. With respect to the finding of joint and several liability, the panel rejected the Government's argument that the Supreme Court's decision in *Honeycutt* did not apply because Defendant did not raise the issue in the lower court. To the contrary, the panel held that *Honeycutt* barred the imposition of a forfeiture judgment based on joint and several liability and that the forfeiture order thus constituted plain error that affected Defendant's substantial rights.

The Government countered that the evidence nevertheless showed that Defendant personally received at least $1 million in drug proceeds, but the panel held that because the district court did not focus on that evidence and did no fact-finding in that regard, the case should be remanded for the lower court to "conduct fresh factfinding and figure out an amount proportionate with the property [Defendant] actually acquired through the conspiracy."

Defendant also objected that the Government and the district court did not follow the procedures in Rule 32.2 in the forfeiture phase of the proceeding. The panel agreed that there were "Rule 32.2 irregularities," but did not find that they rose to the level of a due process violation. "Not all coloring outside the lines produces a constitutional violation," the court said.

Finally, Defendant objected that the Supreme Court's decision in *Southern Union,* which extended *Apprendi v. New Jersey* to criminal fines, meant that he had a Sixth Amendment right to have a jury determine the amount subject to forfeiture. But the court held that this issue should be briefed by the parties and addressed by the district court on remand.

So, the forfeiture order was vacated and the case remanded. *SDC*

Contact: AUSA Cecil VanDevender (M.D. Tenn.)

Comment: It is no surprise that *Honeycutt* applies to cases that were pending on appeal when the case was decided. All courts that have addressed the issue have so held. So, it was likely inevitable that the joint and several forfeiture order in this case would be vacated.

This case does, however, present an important issue on remand: In the case of the leader of a drug ring, is the amount "obtained" the net amount that the leader *retained* after sharing the proceeds with his underlings? Or is a leader liable for obtaining the gross proceeds regardless of what disbursements later took place?

Several courts have already suggested that although *Honeycutt* limits the court's ability to impose vicarious liability on minor participants in a conspiracy, the leaders of a criminal organization remain liable for the gross amounts they obtain. *See S.E.C. v. Metter,* 706 Fed. Appx. 699, 702 n.2 (2nd Cir. 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. Ward*, 2017 WL 4051753 (W.D. Mich. Aug. 24, 2017) (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); *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).

That issue is now pending in a Second Circuit case, *see United States v. Djibo*, 730 Fed. Appx. 52 (2nd Cir. 2018) (remanding forfeiture order holding ringleader of heroin conspiracy jointly and severally liable for the wholesale value of the drugs seized from his co-conspirators), and I assume that the Government will press this theory in the district court in this case as well. See the Comment following the next case summary for the Fifth Circuit's take on this issue.

With respect to the application of the Supreme Court's decision in *Southern Union Company v. United States*, 567 U.S. 343 (2012), every court that has addressed that issue has held that criminal forfeitures are different from criminal fines, and that until and unless the Supreme Court holds otherwise, its decision in *Libretti v. United States*, 516 U.S. 29, 49 (1995), that the Sixth Amendment right to a jury does not apply to criminal forfeiture remains binding on the lower courts. *See* the cases on this issue collected Section VIII.F.3 of the Criminal Forfeiture Case Outline. *SDC*

Proceeds / Calculating the Amount of the Forfeiture Order / Application of *Honeycutt*

Because the proper measure of forfeiture is the gain to the defendant, it was not error for the district court to base the forfeiture judgment on the market value, not the face value, of the illegally-obtained property.

Defendant who submits both legitimate and fraudulent claims for a Government benefit is ordered to forfeit only the amount attributable to the fraudulent claims.

Fifth Circuit suggests that defendants who act in concert, and jointly receive the proceeds of their fraud, may be held jointly and severally liable for the forfeiture notwithstanding Honeycutt.

United States v. Hoffman, ___ F.3d ___, 2018 WL 4042217 (5th Cir. Aug. 24, 2018).

Fifth Circuit * Defendants, motion picture producers, submitted both legitimate and fraudulent claims for tax credits that the State of Louisiana uses to encourage producers to make motion pictures in the State. They were convicted of mail and wire fraud and were ordered to forfeit the proceeds of the offense.

Defendants and the Government both disagreed with the district court's calculation of the amount of the forfeiture and filed cross appeals, but the panel affirmed the district court's forfeiture order.

Defendants argued that there should have been no forfeiture because their company later qualified for tax credits in excess of the credits that Defendants obtained by fraud. The panel found no merit in this argument.

The Government argued that the district court erred in reducing the amount subject to forfeiture in two ways. Altogether, Defendants received $1.1 million in tax credits. The Government maintained that the forfeiture order should reflect this gross amount, but the court gave Defendants credit for the value of the tax credits to which they were lawfully entitled, and limited the forfeiture to the value of the credits that were obtained by fraud. The panel held that the district court was entitled to limit the forfeiture in that fashion.

Second, the district court found that the face value of the tax credits was greater than their market value and limited the forfeiture order to the smaller amount. Reasoning that the measure of criminal forfeiture is "what the defendants gained from their fraud," the panel held that limiting the forfeiture to the market value of the tax credits was not inappropriate.

Finally, in a footnote, the panel noted that Defendants did not raise *Honeycutt* as a basis for objecting to the forfeiture. It speculated that "perhaps" this was because all three defendants were co-owners of the production company that received the credits, and suggested that all three "therefore acquired the ill-gotten tax credits."

So, the court affirmed the forfeiture money judgment of $223,434 for which Defendants were jointly and severally liable. *SDC*

Contact: AUSA Gaven Kammer (E.D. La.)

Comment: The opinion does not explain the Government's reasons for objecting to the calculation of the amount of the forfeiture judgment in any detail, but it appears that the Government was relying on case law holding that when a defendant submits a mixture of fraudulent and legitimate billings to a Government program, it is appropriate for the court to order the forfeiture of the gross amount received. *See, e.g., United States v. Saoud,* 595 Fed. Appx. 182 (4th Cir. 2014) (doctor who concealed his ownership of his medical practice to circumvent a bar on his participation in Medicare and Medicaid must forfeit all revenue from the practice without credit for services legitimately performed; every dollar constitutes the "gross proceeds" of the fraud under § 982(a)(7)). Apparently, the panel did not find that line of cases applicable to this situation.

The court's footnote on *Honeycutt* is intriguing. As courts have pointed out, *Honeycutt* involved a situation in which one defendant received all of the proceeds of the criminal offense and the other received none, yet the two were held jointly and severally liable. As discussed in the previous Comment, some courts have held that the result should be different where the defendants acted in concert and received the proceeds of the crime jointly. In such cases, it may not be necessary for the court to determine how the defendant divided the proceeds among themselves. *See 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).

The *Honeycutt* footnote in this case suggests that the Fifth Circuit may be receptive to that argument. *SDC*

Pre-Trial Restraining Order / *Lis Pendens* / Interlocutory Appeal / Forfeiture for Money Laundering / Analog Drugs

Because the seizure of a bank account for civil forfeiture has the same effect as a pretrial restraining order, the denial of a motion for the release of seized property is subject to an interlocutory appeal under § 1292(a)(1).

The same is true for the filing of a notice of lis pendens *on real property named in a civil forfeiture complaint.*

The way in which clean money was commingled with the proceeds of the sale of an analog drug was sufficient to establish probable cause to believe that the commingling was for the purpose of concealing or disguising the proceeds, and that all of the

money was therefore involved in money laundering.

United States v. Real Property Located at 1407 N. Collins St., ___ F.3d ___, 2018 WL 3941631 (5th Cir. Aug. 16, 2018).

Fifth Circuit * Defendants were charged in a criminal case with the distribution of an analog drug known as "spice," a synthetic cannabinoid; with mail and wire fraud (based on the misrepresentation of the product as "incense" or "potpourri"); and with money laundering.

In a parallel civil forfeiture case, the Government seized and sought the forfeiture of several bank accounts containing the proceeds of the sale of "spice," as well as untainted funds that were commingled with those proceeds. It also sought the forfeiture of various parcels of real property that were either purchased with the proceeds of the offense or were the places from which the "spice" was distributed. The Government did not seize the real property but filed notices of *lis pendens* against it.

Defendants filed claims in the civil forfeiture action and moved for the release of the bank accounts for lack of probable cause. They also moved to vacate the *lis pendens* against the real property on the same grounds. The district court denied both motions and Defendants appealed.

The panel first had to determine if Defendants were entitled to take an interlocutory appeal. 28 U.S.C. § 1292(a)(1) authorizes an interlocutory appeal from the denial of a motion to modify an injunction. The Government argued that the statute did not apply because there was no injunction or pre-trial restraining order involved in the case. To the contrary, the bank accounts had been seized for civil forfeiture and subsequently arrested with an arrest warrant *in rem* when the complaint was filed, and the real property was merely named in notices of *lis pendens.*

The court held, however, that the seizure of property for civil forfeiture is the functional equivalent of a pre-trial restraint, as is the filing of a notice of *lis pendens*. Accordingly, the court held that Defendants had the right to an interlocutory appeal as to both the bank accounts and the real property.

Turning to the merits, the court quickly disposed of Defendants' contention that there was no probable cause for the continued restraint of the money in the bank accounts. It is true, the court said, that the bank accounts contained both tainted and untainted funds, and it is also true that merely pooling tainted and untainted funds does not, by itself, establish probable cause to believe that all of the money in a commingled account is subject to forfeiture. But given the circumstances of the case – *e.g.,* that the commingling occurred while Defendants were distributing "spice" from their stores – there was "a fair probability" that Defendants commingled the funds to conceal or disguise their criminal proceeds.

Defendants argued that even if the untainted funds were technically "involved in" a money laundering offense, their involvement was so incidental that it could not satisfy the "substantial connection" requirement in 18 U.S.C. § 983(c). If that requirement was not satisfied, Defendants argued, there could not be probable cause to believe the commingled funds were forfeitable. But the court held that the intentional commingling of funds for the purposes of concealing or disguising criminal proceeds satisfied the substantial connection requirement.

The court did not discuss the probable cause for the forfeiture of the real property, but nevertheless denied Defendants' motions for both the release of the seized bank

accounts and the removal of the *lis pendens* on the real property. *SDC*

Contact: AUSA Joseph Magliolo (N.D. Tex.)

Comment: This case reaches the right result but is otherwise a bit of a mess and is likely to spawn a lot of additional litigation.

First, the court never mentions the *Jones-Farmer* rule, which provides that there can be no pre-trial challenge to a seizure or a restraining order unless the defendant shows that he has no other funds with which to retain counsel in a criminal case. We must assume that the district court entertained the probable cause challenge, and the appellate court heard the appeal, because the *Jones-Farmer* requirements were satisfied.

Second, the court's assumption that a district court should treat a notice of *lis pendens* as if it were a pre-trial restraining order, and apply the probable cause requirement to it, is highly controversial. Other courts have rejected the notion that a *lis pendens* is a restraining order or that the Government must establish probable cause for the forfeiture of the real property if the property owner asks that the *lis pendens* be removed. *See United States v. Clark*, 717 F.3d 790, 801 n. 7 (10th Cir. 2013) (assuming *arguendo* that filing a *lis pendens* is a "restraint" triggering the defendant's rights under *Jones-Farmer*, but acknowledging the case law holding that a *lis pendens* is not a restraint within the meaning of § 853(e); citing *Asset Forfeiture Law in the United States*, § 17-8); *United States v. Register*, 182 F.3d 820, 836 (11th Cir. 1999) (because filing a *lis pendens* does not implicate due process rights, no post-filing hearing is required to determine if a *lis pendens* should be removed); *United States v. Jefferson*, 632 F. Supp. 2d 608, 617 (E.D. La. 2009) (same; notice of *lis pendens* "is in fact one of the less restrictive means of preserving the Government's interest" in that it allows the defendant to continue to use and enjoy the property).

Indeed, the Supreme Court itself recognized the difference between a notice of *lis pendens* and a pre-trial seizure or restraining order in *United States v. James Daniel Good Property*. *See Diaz v. Paterson*, 547 F.3d 88, 98 (2d Cir. 2008) (the effect of a *lis pendens* "is simply to give notice to the world of the remedy being sought" in a pending lawsuit; the owner of the property "continues to be able to inhabit and use the property, receive rental income from it, enjoy its privacy, and even alienate it"; thus, a *lis pendens* "is deemed one of the less restrictive means of protecting a disputed property interest", citing *James Daniel Good*).

The court's assumption that the retention of seized property for forfeiture is the equivalent of a restraining order, and that there is therefore a right to an interlocutory appeal from the denial of a motion to release seized property, is also controversial. The rule has always been that the issuance of a seizure warrant is not appealable, and the same rule has generally been applied to a court's refusal to release property seized with a warrant. *See United States v. Michelle's Lounge I*, 39 F.3d 684, 693 (7th Cir. 1994) (seizure warrants are not appealable under section 1292(a); if seizure warrants were treated as injunctions, every seizure warrant would be appealable in the first instance*); United States v. Victoria-21,* 3 F.3d 571, 575 (2d Cir. 1993) (absent a compelling showing that an *ex parte* warrant has shut down a business, issuance of seizure warrant is not subject to interlocutory appeal); *United States v. Quintana-Aguayo*, 235 F.3d 682, 686 (1st Cir. 2000) (seizure warrant issued after *Good* hearing, like any other seizure warrant, is not subject to inter-

locutory appeal; rejecting analogy to an injunction appealable under section 1292 even though warrant directed USMS to seize and operate a business).

In particular, Rule 41(g) motions for the release of seized property are denied all the time – for failure to satisfy *Jones-Farmer*, for lack of jurisdiction once a forfeiture proceeding is commenced, or for other reasons; but interlocutory appeals from such orders are hardly routine. *See United States v. Swenson*, 2014 WL 3687231, *2 (D. Idaho July 22, 2014) (if the order being appealed is not the entry of a restraining order, but the denial of the defendant's Rule 41(g) motion for the release of his property, there is no right to an interlocutory appeal). Whether that changes in the Fifth Circuit (or elsewhere) as a result of this opinion remains to be seen.

The good news in this case for the Government, however, is that the court unequivocally reaffirmed the Fifth Circuit's holdings in *United States v. Tencer,* 107 F.3d 1120 (5th Cir. 1997), and *United States v. Wyly,* 193 F.3d 289 (5th Cir. 1999), which broadly construed the phrase "property involved in money laundering." In particular, the panel in this case emphasized *Tencer's* seminal holding that clean money is forfeitable as property involved in money laundering if it is commingled with criminal proceeds in a way that conceals or disguises those proceeds. *SDC*

Concealment Money Laundering / Application of *Cuellar*

A money laundering transaction may have more than one purpose: that the transaction was intended to facilitate the underlying SUA by paying a kickback did not mean that it was not also designed to conceal or disguise the source of the funds.

Using a third party to pay a kickback derived from tainted funds was a transaction designed to conceal or disguise the source of the funds.

United States v. Mehmood, ___ Fed. Appx. ___, 2018 WL 3414591 (6th Cir. Jul. 13, 2018).

Sixth Circuit * Defendant paid bribes to Medicare-eligible persons to sign up for in-home physical therapy sessions, and then submitted $40.5 million in false claims to Medicare for services that were not provided or were medically unnecessary. He was convicted of health care fraud and concealment money laundering and appealed.

With respect to the money laundering counts, the evidence showed that Defendant deposited the Medicare payments in the bank account of a shell company (nominally owned by the janitor in one of Defendant's businesses), cashed checks signed by the janitor that were drawn on that account, and gave the cash to an intermediary who used it to pay kickbacks to the recruiters who bribed the Medicare patients. He argued that the purpose of these transactions was to facilitate the underlying health care fraud scheme, not to conceal or disguise the source of the money, and that accordingly, the Government had not established the elements of concealment money laundering.

In *Cuellar v. United States,* the Supreme Court held that the concealment money laundering statute requires proof not only that the financial transaction had the *effect* of concealing the criminal proceeds, but that the *purpose* of the transaction was to conceal them. In the instant case, the panel acknowledged that the Government had to prove the purpose of the transaction to satisfy *Cuellar,* but it rejected Defendant's argument that a transaction primarily intended to facilitate the underlying crime cannot also be designed to conceal or disguise

the source of the money.

Here, Defendant paid kickbacks through a multi-step process that was designed to disguise the link between the payments and the source the money. Thus, the court held that "concealment was, at least partially, an animating purpose for conducting the transactions" and that they were not conducted merely to facilitate the health-care fraud.

So, the money laundering convictions were affirmed. *SDC*

Contact: AUSA Daniel Hurley (E.D. Mich.)

Comment: In the decade since *Cuellar* was decided, the courts have struggled to find the bright line between a transaction that incidentally conceals the money being laundered and one that was *designed* for that purpose. *See* Section XII.W of the Money Laundering Case Outline. In this case, the defendant's argument was that if the transaction was principally designed to facilitate the underlying SUA (by paying kickbacks to the third parties who recruited the Medicare patients into the scheme), any concealment that happened along the way must have been incidental and not the "animating purpose" of the transaction. Thus, in his view, it could not have satisfied the concealment requirement as defined in *Cuellar.*

The key holding in the opinion, then, is that a money laundering transaction may have more than one purpose. That it was designed – perhaps primarily -- to facilitate the SUA did not mean that it was not also designed to conceal the source of the money.

By placing the SUA proceeds in the account of a shell company and converting it to cash before giving it to a third party as a kickback, the defendant concealed his connection to the money, which is all that *Cuellar* requires. *SDC*

Money Laundering Conspiracy / International Promotion Money Laundering

Circumstantial evidence that the defendant participated in sending money to China to purchase raw materials used to manufacture steroids was sufficient to sustain a conviction for conspiracy to violate Section 1956(a)(2)(A).

United States v. Groden, ___ Fed. Appx. ___, 2018 WL 3640891 (11th Cir Jul. 31, 2018).

Eleventh Circuit * Defendant was convicted of conspiring to send money to China to buy raw materials used in the manufacture of steroids. Evidence presented at trial showed that other co-conspirators did send money to China, procured the chemicals, manufactured the steroids, and sold them to customers in the US on the "dark web." But Defendant argued that the evidence was insufficient to show that he knew money was being sent to China, and thus was insufficient to sustain his conviction for conspiracy to commit international money laundering in violation of 18 U.S.C. § 1956(a)(2)(A). He appealed.

On appeal, the panel held that the following evidence was sufficient to support the conviction: Witnesses testified that the leader of the conspiracy asked Defendant and others to send money to China, that the others did so, and that Defendant's name was found in Western Union records associated with three transactions to China. Moreover, Defendant admitted at trial that he had purchased steroids from the leader of the conspiracy.

On this evidence, the panel said, the jury could have found that Defendant had either conducted at least one of the transfers to China or had approved the use of his identity for the transfer.

So, the conviction was affirmed. *SDC*

Contact: AUSA Emmett Boggs (M.D. Fla.)

International Money Laundering / IEEPA

The same transaction can be charged as both an international money laundering offense under § 1956(a)(2)(A) and the IEEPA violation being promoted.

United States v. Tajideen, ___ F. Supp.3d ___, 2018 WL 345945 (D.D.C. Aug. 10, 2018).

D.D.C. * The International Emergency Economic Powers Act (IEEPA) bars any US person from conducting a financial transaction with a Specially Designated Global Terrorist (SDGT). Defendant, an SDGT, was charged with conspiring to commit an IEEPA violation by engaging in such transactions with US persons. In addition, he was charged with conspiracy to commit international money laundering in violation of 18 U.S.C. § 1956(a)(2)(A).

The money laundering charge alleged that the conspirators agreed to send money into or out of the United States with the intent to promote the IEEPA violation. Defendant moved to dismiss the money laundering count on the ground that the alleged money laundering transaction and the IEEPA offense were one and the same, and thus violated the rule requiring money laundering transactions to be separate from the offense that generated the proceeds being laundered.

The court acknowledged that in domestic money laundering cases, which are charged under Section 1956(a)(1), there is a "merger" rule that requires the Government to prove that the money laundering transaction occurred after the proceeds being laundered were generated in a separate transaction. But in this case Defendant was charged with international money laundering under Section 1956(a)(2)(A) – a statute that does not contain any proceeds requirement. To the contrary, under Section 1956(a)(2)(A), the Government need only prove that money was sent into or out of the United States to promote another offense such as IEEPA.

Because the international statute has no proceeds requirement, the court reasoned, the rule requiring a distinction between the money laundering transaction and the transaction that generated the proceeds does not apply.

So, the court denied the motion to dismiss. *SDC*

Contact: DOJ Attorney Joseph Palazzo and AUSA Luke Jones.

Comment: The merger rule exists because Section 1956(a)(1) requires proof that the property a defendant is accused of laundering was the proceeds of another crime – the specified unlawful activity (SUA) – *at the time the money laundering transaction took place.* For that to be so, there must have been an earlier act that generated the SUA proceeds, followed in time by a separate transaction that violated the money laundering statute. Accordingly, the same act cannot at once be a money laundering offense and the act that generated the proceeds being laundered.

But Section 1956(a)(2)(A) has no proceeds element. And if there are no proceeds being laundered, there is no reason to require any separation between the money laundering transaction and the act that generated such proceeds.

To the contrary, Section 1956(a)(2)(A) focuses solely on the SUA *being promoted*,

and there is no reason why the money laundering transaction and the transaction constituting the crime being promoted cannot be one and the same. Thus, for example, as the Second Circuit held long ago in *United States v. Piervinanzi*, 23 F.3d 670, 679-83 (2d Cir. 1994), transferring money out of the United States to commit a bank fraud violation may be charged as both money laundering and bank fraud.

The court in this case follows *Piervinanzi.* Other cases on the same point are collected in Section XIV.C of the Money Laundering Case Outline. *SDC*

International Money Laundering / IEEPA / Default Judgment

The standard for granting a motion for a default judgment is whether the Government has satisfied the pleading requirements in Rule G(2) – including the "reasonable belief" standard in Rule G(2)(f) – and has complied with the notice requirements in Rule G(4).

It is a violation of Section 1956(a)(2)(A) for a foreign entity, acting as a front for a North Korean entity, to use US banks to transfer money from the US to China in violation of IEEPA.

United States v. $1,071,251.44 of Funds Associated with Mingzheng International Trading Ltd., ___ F. Supp.3d ___, 2018 WL 3941949 (D.D.C. Aug. 15, 2018).

D.D.C. * The Government filed a civil forfeiture action against $1.9 million in six US bank accounts used by a Chinese company to move money through the US financial system on behalf of an entity in North Korea. The complaint alleged that the North Korean entity was barred from using banks in the US by the Office of Foreign Asset Control (OFAC), and that the Chinese company was acting as a front for the North Korean entity. Accordingly, the complaint alleged that the funds were forfeitable as the proceeds of an IEEPA violation and as property involved in international money laundering.

When no one filed a claim to the funds, the Government obtained a default from the Clerk of the Court pursuant to Rule 55(a) and moved for a default judgment pursuant to Rule 55(b).

Turning first to the procedure for granting a default judgment, the court declined to accept the Government's view that it was sufficient to show that it had filed a complaint and complied with the notice requirements in Rule G(4). To the contrary, the court held that the Government also had to show that its complaint complied with all of the pleading requirements in Rule G(2), including the requirement in Rule G(2)(f) that that complaint contained sufficient facts to support a reasonable belief that the Government would be able to establish the forfeitability of the property at trial.

At the same time, the court declined to follow the minority of cases requiring the Government to establish the forfeitability of the property by a preponderance of the evidence at the default stage. To obtain a default judgment, the court said, it is only necessary for the Government to satisfy the pleading standards; it is not necessary for it to prove its case. Accordingly, because the standard for filing a complaint is the "reasonable belief" standard in Rule G(2)(f), that is the only requirement that the Government is required to satisfy to obtain a default judgment.

Turning to the substance of the complaint, the court noted that it is a violation of IEEPA for any US person to provide financial services to an entity designated as a "Specially Designated National." Moreover,

it is also a violation of IEEPA for a foreign person to cause a US person – such as a US bank -- to provide financial services to such an entity. Finally, it is a violation of the international money laundering statute, 18 U.S.C. § 1956(a)(2)(A), for a foreign person to cause a US bank to transfer money into or out of the United States in a way that violates IEEPA.

Here, the complaint alleged that the Chinese company, acting as a front for a North Korean entity designated as a Specially Designated National, used correspondent accounts at US banks to move money through the US to China. Taking the allegations in the complaint as true, the court held that they satisfied the reasonable belief standard.

So, the motion for a default judgment was granted. *SDC*

Contact: AUSA Zia Faruqui

Comment: There is a wide disparity in the standards that the courts apply to entering default judgments in civil forfeiture cases. Some – perhaps a majority – require only that the Government show that it complied with the notice requirements in Rule G(4) and that no one filed a timely claim. Others hold that the Government must also show that its complaint satisfies the pleading requirements in Rule G(2). Finally, a small number of courts hold that a default judgment will not be issued unless the Government establishes the forfeitability of the property by a preponderance of the evidence.

The court in this case rejects the two extremes of the spectrum and adopts the middle view. Of all the cases to discuss this issue, this decision is perhaps the most detailed and well-reasoned. The cases are collected at Section VIII.I of the Civil Forfeiture Case Outline. *SDC*

Firearms / Collateral Estoppel / Disposal of Property Not Forfeited

Collateral estoppel does not bar the Government from seeking the civil forfeiture of a firearm following the defendant's acquittal on the offense giving rise to the forfeiture.

With respect to firearms that are <u>not</u> forfeited, the district court retains jurisdiction to determine how to dispose of them when the person from whom they were seized – a convicted felon -- is no longer allowed to possess them.

In that instance, the district court has the equitable power to order the sale of the firearms and to apply the proceeds to a state-court civil judgment awarding damages to the defendant's victims.

United States v. One Assortment of 93 NFA-Regulated Weapons, ___ F.3d ___, 2018 WL 3602377 (8th Cir. Jul. 27, 2018).

Eighth Circuit * Defendant, a medical doctor, was an avid firearms collector. When he was disciplined by the Arkansas State Medical Board for professional misconduct, he attempted to murder the Chairman of the Board with a grenade from his collection. He was convicted by a jury of various federal offenses and ordered to serve a life sentence. On one charge, however – the possession of an unregistered shotgun – Defendant was acquitted.

The victim, who was severely injured by the grenade but survived, obtained a personal judgment against Defendant for $122.5 million in state court. In addition, the Government filed a civil forfeiture action against the shotgun that was the subject of the acquittal in the criminal case and a separate action to forfeit 76 machine guns, 10 silencers, and other firearms in Defendant's

collection.

The district court conducted a bench trial and entered a judgment for the Government with respect to the shotgun, but it found in favor of Defendant with respect to the other firearms, all of which were properly registered and not used to violate the law. Nevertheless, because Defendant was by this time a convicted felon who could not possess a firearm, the court had to decide what to do with the weapons that were not forfeited. It decided that they should be sold and the proceeds used to satisfy the victim's state court judgment. *United States v. One Assortment of 93 NFA-Regulated Weapons*, 2017 WL 4570802 (E.D. Ark. Mar. 14, 2017) (January 2018 *Digest*).

Defendant appealed both the forfeiture of the shotgun and the disposition of the proceeds of the sale of the other weapons. His wife, who was an unsuccessful claimant in the civil forfeiture case, appealed the latter judgment as well.

With respect to the shotgun, Defendant argued that the doctrine of collateral estoppel barred the Government from seeking the forfeiture of a firearm after the jury's acquittal on the offense giving rise to the forfeiture. But the panel, relying on the Supreme Court's decision in *One Assortment of 89 Firearms,* held that because of the difference in the burden of proof, an acquittal on a firearms charge in a criminal case does not bar the subsequent civil forfeiture of the same firearm based on the same offense.

The jury in the criminal case, the court noted, could have found that the evidence was insufficient to prove Defendant's guilt beyond a reasonable doubt, whereas the district court in the bench trial could have found it sufficient to meet the preponderance standard.

Turning to the disposition of the non-forfeited firearms, the court first rejected the wife's claim to 50 percent of the proceeds of their sale because, under Arkansas law, she had no legal interest in property titled exclusively in her husband's name. The court then held that a district court in a civil forfeiture case retains jurisdiction to determine how to dispose of non-forfeited property that cannot be returned to the person from whom it was seized. Moreover, on the facts of this particular case, it held that the district court had the equitable power to order the sale of the property and to direct that the proceeds be used to satisfy the outstanding state court judgment without allowing Defendant to relitigate the merits of that case.

So, the forfeiture of the shotgun and the disposition of the remaining weapons were both affirmed. *SDC*

Contact: AUSA Cameron McCree (E.D. Ark.)

Comment: The cases applying the Supreme Court's decision in *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 361-62 (1984), are collected in Section I.C.1 of the Civil Forfeiture Case Outline.

The cases dealing with the disposition of firearms that cannot be forfeited but cannot be returned to a convicted felon are collected in Section XXVI.F of the Civil Forfeiture Case Outline. *SDC*

Cultural Property

The forfeiture provision of the Cultural Property Implementation Act has a shifting burden of proof: The Government has the initial burden of showing that the property is of the type or class listed in the regulations; and the claimant then has the burden of showing that one of the defenses to the prohibition

on importation of such property applies.

United States v. 3 Knife-Shaped Coins, ___ F.3d ___, 2018 WL 3734281 (4th Cir. Aug. 7, 2018).

Fourth Circuit * Claimants, the Ancient Coin Collectors Guild, imported a set of 23 ancient Chinese and Cypriot coins from London to the United States. Customs and Border Protection (CBP) intercepted and seized the coins based on a violation of the Cultural Property Implementation Act (CPIA), 19 U.S.C. §§ 2601-13, which prohibits the importation of certain cultural property without the permission of the country of origin.

Claimants filed an action to declare the CPIA invalid on constitutional and other grounds. But the district court and the Fourth Circuit rejected the challenge. *Ancient Coin Collectors Guild v. U.S. Customs and Border Protection,* 698 F.3d 171 (4th Cir. 2012).

With the validity of the CPIA settled, the Government filed a civil forfeiture action against the defendant coins. After conducting discovery including expert witness testimony, the parties filed cross motions for summary judgment. The district court entered judgment for the Government, *United States v. 3 Knife-Shaped Coins, 2017 WL 1207536 (D. Md. Mar. 31, 2017) (May 2017 Digest),* and Claimants appealed.

The forfeiture provision of the CPIA is a hybrid of pre-CAFRA and post-CAFRA law. It provides that the Government has the initial burden of establishing that the statute and regulations apply to the imported property. The burden then shifts to the claimant to prove by a preponderance of the evidence that the property is not subject to forfeiture because one of the exceptions to the bar on importation of the property applies. The Government's theory was that all of the coins were archaeological material of China and Cyprus of the type listed in the regulations, and that Claimant could not establish that any of the exceptions applied.

Claimants argued, however, that it is not enough for the Government to show that the imported articles fell within the type of property described in the regulations. Rather, they asserted that it had to prove that the particular coins were discovered in Cyprus and China, respectively, and that they were illegally removed from those countries. Otherwise, Claimants argued, the Government could not show that the articles were part of the cultural heritage of those countries. Without that showing, Claimants argued, the Government could not show that the CPIA and the related regulations applied. The panel held, however, that the Government bears no such burden.

It may be, as Claimants asserted, that coins circulated throughout the world in ancient times, but by listing the coins, by type, in the applicable regulation, Congress has already determined that an ancient coin minted in a given country is part of the cultural heritage of that country. So, the Government did not have to establish where the coin was found to show that the CPIA applied.

Accordingly, the court held that to meet its initial burden under the CPIA the Government must prove only three things: 1) that the imported material is covered by an agreement between the US and the requesting state party; 2) that the material is listed, by type, in the applicable regulations, and 3) that the listing is sufficiently precise to provide fair notice to importers. In the court's view, the Government met its burden on all three points.

The burden then shifted to Claimant to show that the coins were not subject to forfeiture because one of the statutory exceptions applied. Among other things,

Claimants could have met their burden by producing a document authorizing the export of the coins from the country of origin, or it could have produced evidence that the coins left the country of origin more than 10 years ago or before coins of that type were listed in the CPIA. Claimants, however, had no documentation authorizing export from China or Cyprus, and their expert witnesses could only say that it was "more probable than not" that coins of that type had left China and Cyprus "thousands of years ago in trade, or decades ago as collectables." Claimant's evidence, the court said, must be "particularized to the coins at issue" and cannot rely on generalizations about the travel history of ancient coins.

Nor did it matter, the court said, that the coins were lawfully exported from the UK where they were purchased. What matters is not where the coins were immediately before they were imported to the United States, but whether they were lawfully exported from the country of origin.

Accordingly, the court affirmed the judgment of forfeiture. *SDC*

Contact: AUSAs Molissa Farber and Stef Cassella (ret.)

Search and Seizure / Structuring

If there is probable cause to believe that a person engaged in structuring, a warrant may authorize the seizure of currency and ledgers found in his residence.

United States v. Lin, 2018 WL 3416524 (E.D.N.Y. Jul. 11, 2018).

E.D.N.Y. * Defendant moved to suppress evidence seized pursuant to a warrant for the search of his residence. He argued that the warrant was overbroad insofar as it authorized the seizure of bulk cash and bulk cash ledgers, which Defendant considered beyond the scope of the crimes for which there was probable cause.

The court noted, however, that the affidavit included probable cause to believe that Defendant had engaged in currency structuring in violation of 31 U.S.C. § § 5324 and held that bulk cash and bulk cash ledgers would be reasonably related to the structuring offenses.

So, the motion to suppress was denied. *SDC*

Contact: AUSA Ian Richardson

Comment: For other cases on the permissible scope of a search warrant in a money laundering case, *see* Section XLVI of the Money Laundering Case Outline. *SDC*

Ancillary Proceeding / Notice to Third Parties

The dismissal of an untimely third-party claim in the ancillary proceeding is mandatory.

Having provided proper notice of the forfeiture order to claimant's counsel, the Government had no duty to remind him of the pending deadline while discussing other matters related to the case.

United States v. Sayegh, 2018 WL 3819128 (D. Ariz. Aug. 10, 2018).

D. Ariz. * Defendant pled guilty to drug and money laundering conspiracies and was ordered to forfeit certain real property connected to the crimes. The Government then provided notice of the forfeiture to Claimant, Defendant's wife, in three ways: by mail to her address, to her attorney in a related civil matter, and by publication on the Government's internet website.

Claimant filed a claim to the forfeited property through counsel five months after receiving notice of the forfeiture. The Government moved to dismiss the claim as untimely and the court granted the motion. Dismissal of an untimely claim is mandatory, the court said, and regardless of which of the three methods of notice started the 30-day clock for filing a claim, the claim was not filed within the time prescribed by 21 U.S.C. § 853(n)(2).

Claimant argued that her failure to file was due to her attorney's mistake and faulted the Government for not reminding the attorney of the deadline when discussing other issues while the case was pending. But the court held that the Government had no obligation to do so. It was sufficient, the court said, that the Government made diligent efforts to notify Claimant of her right to file a claim, and that there was no showing that the Government intentionally misled her attorney or otherwise engaged in inappropriate conduct.

So, the motion to dismiss the claim was granted. *SDC*

Contact: AUSA Lacy Cooper

Preliminary Order of Forfeiture / Ancillary Proceeding

A forfeiture order becomes final as to the defendant at sentencing; he therefore lacks standing to complain that he was not given notice of the Government's settlement of a third-party claim.

Dillon v. United States, 2018 WL 3820228 (N.D. Tex. Aug. 9, 2018).
N.D. Tex. * Defendant pled guilty to a drug offense and agreed to forfeit $19,000 in proceeds. The court entered a preliminary forfeiture order that became final as to Defendant at his sentencing, and he did not appeal.

When the Government settled a third-party claim in the ancillary proceeding, it moved for a final order of forfeiture pursuant to Rule 32.2(c)(2). The court granted the motion, but Defendant objected that he was not given notice of the Government's motion.

The court overruled the objection, holding that because the preliminary order of forfeiture extinguished Defendant's interest in the property when it became final as to him at sentencing, he was not entitled to notice of the Government's motion for a final order of forfeiture when the third party's claim was resolved, and lacked standing to object to it. *SDC*

Contact: AUSA Amanda Burch

Settlements / DOJ Policy / Substitute Assets

Government's proposed "settlement" of forfeiture money judgment – converting lump sum into a 20-year payment plan – was unenforceable when Government withdrew it upon receiving word that MLARS disapproved.

Court encourages the Government to seek approval from MLARS for settlement agreements before sending them to defendants.

United States v. Factor, ___ F. Supp.3d ___, 2018 WL 3642133 (D.P.R. Jul. 31, 2018).

D.P.R. * Defendant pled guilty to diverting prescription drugs and agreed to the forfeiture of $300,000 in the form of a money judgment. The district court entered a forfeiture order in that form, providing that the

Government could move at any time pursuant to Rule 32.2(e) to amend the order to forfeit substitute assets.

The U.S. Attorney subsequently negotiated a settlement of the forfeiture order with Defendant whereby Defendant agreed to pay $1250/month for 20 years and sent a signed copy of the agreement to Defendant for his signature. Within an hour of doing so, however, and before Defendant signed the agreement, the AUSA informed Defendant that the Money Laundering and Asset Recovery Section of the Department of Justice (MLARS) disapproved the agreement and required that it be withdrawn.

The Government subsequently moved under Rule 32.2(e) and in accordance with the forfeiture order to forfeit Defendant's real property in California as a substitute asset. Defendant responded by moving for specific performance of the 20-year settlement agreement.

The court held that it had no authority to enforce the agreement. Rule 32.2, the court said, authorizes the court to amend an order of forfeiture on motion of the Government, "not *sua sponte* or the defendant's motion." Here, the Government moved only to amend the order to forfeit substitute assets, not to convert the judgment from a lump sum to a payment plan. Accordingly, the court did not need to address whether a binding contract existed between Defendant and the Government.

Nevertheless, the court expressed doubt that the agreement was enforceable absent the Defendant's signature.

The court then noted that the Asset Forfeiture Policy Manual, Ch. 3, Sec. I.B.7 provides that "Settlements shall not provide for partial payments, except upon the advice and approval of [MLARS]," and admonished the Government that prosecutors should obtain authorization from MLARS "before tendering proposed settlement agreements to defendants."

The court then found that the Government had satisfied the requirements of Section 853(p) and granted the motion to forfeit the California property as a substitute asset. *SDC*

Contact: AUSA Maritza Gonzalez

Forfeiture and Bankruptcy

Property that is seized for forfeiture before a bankruptcy proceeding is commenced does not become part of the bankruptcy estate.

In re: VPH Pharmacy, Inc., 2018 WL 3574721 (E.D. Mich. Jul. 25, 2018).

E.D. Mich. * The Government seized $242,000 from bank accounts held by a pharmacy, alleging that the money was the proceeds of drug diversion and/or health care fraud. It subsequently filed a civil forfeiture complaint against the seized property, and moved to stay the proceeding pending the conclusion of a related criminal investigation. The court granted the stay.

Eight months later, the pharmacy filed for Chapter 11 bankruptcy. The petition was converted to Chapter 7 and the Trustee moved to bring the seized funds within the bankruptcy proceeding pursuant to 11 U.S.C. § 542(a). He alleged that the money was part of the bankruptcy estate and should be used to pay creditors.

The Government, however, opposed the Trustee and moved to withdraw the bankruptcy reference. It argued that the forfeiture proceeding was the exclusive forum for determining the disposition of the seized money. The court agreed with the

Government, and held that the seized funds were not part of the bankruptcy estate.

When the Government seizes property before a debtor files for bankruptcy, the court said, the debtor has no equitable right to the proceeds and they are not includable in the estate. If the law were otherwise, the court continued, "entities subject to forfeiture proceedings could undo any prepetition seizures by filing bankruptcy and seeking turnover."

Accordingly, the court held that "the withdrawal of the reference of the portion of the bankruptcy proceedings that encompasses the seized money is mandatory" and granted the Government's motion. *SDC*

Contact: AUSA Pete Ziedas

Comment: Cases on the intersection of forfeiture and bankruptcy are collected in Section XXII of the Civil Forfeiture Case Outline. *SDC*

Hardship Petition

Seizure of the RV claimant used to transport merchandise for his business did not create a hardship that outweighed the risk that the vehicle would become unavailable if released.

In Re Seizure of One 2018 Forest River Forester, 2018 WL 3795939 (S.D. Ill. Aug. 9, 2018).

S.D. Ill. * DEA Task Force Officers stopped Claimant for a traffic violation while he was driving his Recreational Vehicle ("RV") on the interstate through Madison County, IL. They seized the vehicle based on probable cause to believe it was being used to facilitate the distribution of a controlled substance.

Claimant filed a petition for the release of the vehicle under the hardship provision in 18 U.S.C. § 983(f). He argued that he needed the vehicle to operate his business – traveling around the country to music shows and selling merchandise to patrons – and that he lived in the vehicle while traveling.

The court applied the criteria in the statute and denied the petition.

First, the court questioned whether Claimant had sufficient "ties to the community" to provide assurance that the vehicle would be available when the Government commenced a civil action against it. Because Claimant does not "call one particular place home" but instead travels around the country, the court said, the future availability of the property was "dubious."

Second, the court found that the seizure of the vehicle did not cause Claimant a hardship that outweighed the risk that it would become unavailable. While it might be convenient to use an RV to transport his merchandise to music venues and to sleep in the RV while traveling, the court said, Claimant had already purchased a new pickup truck in which to transport the merchandise and apparently had the resources "to find himself an appropriate residence other than the RV." At most, the court concluded, the seizure amounted to an "annoyance," but not a substantial hardship.

Finally, the court found that because the vehicle had a concealed compartment suitable for transporting drugs, the Government was justified in retaining possession of it for evidence, even though neither criminal charges nor a civil forfeiture complaint had yet been filed.

So, the motion to release the vehicle was denied. *SDC*

Contact: AUSA William Coonan

Motion to Dismiss Complaint / Dog Sniff

For purposes of a motion to dismiss a civil forfeiture complaint, the Government's allegations regarding a drug dog's training and its ability to detect an odor indicating that currency was recently in proximity to a controlled substance must be assumed to be true.

United States v. $22,800.00 in U.S Currency, 2018 WL 3738962 (C.D. Cal. Jul. 25, 2018).

C.D. Cal. * A DEA agent approached Claimant when he deplaned at the Los Angeles airport and obtained his consent to search his carry-on luggage. Finding $22,800 in envelopes stuffed with currency, she called for a drug dog which alerted to the currency.

Claimant gave several explanations for his travel and his possession of the money. First, he said that he had come to Los Angeles to look for real property in which to invest. When he could not provide the location where he would be looking for such property, he changed his story, explaining that he had come looking for a vehicle to buy, but he could not identify the type of vehicle he was interested in purchasing.

The Government filed a civil forfeiture action against the currency and Claimant filed a motion to suppress, which was denied. *United States v. $22,800.00 in U.S Currency*, 2018 WL 2077945 (C.D. Cal. May 1, 2018) (June 2018 *Digest*). Claimant then filed a motion to dismiss the forfeiture complaint, alleging that the allegations in the complaint were insufficient to satisfy the pleading standard in Rule G(2)(f).

The court denied the motion, holding that the following allegations, which for purposes of the motion were assumed to be true, satisfied the pleading standard: the quantity of currency and the manner in which it was bundled; the dog alert; Claimant's "evasive, inconsistent and implausible answers regarding his intentions in visiting Los Angeles;" his 10-year-old conviction for a drug offense; and his purchase of a one-way ticket to Los Angeles only three days before his departure.

Claimant objected most strenuously to the court's reliance on the dog alert, alleging that there were questions regarding the adequacy of the dog's training, and putting forward the "contamination theory" as a reason to doubt the probative value of the alert. But the court held that for purposes of a motion to dismiss the complaint, the Government's allegation that the dog was adequately trained to react only to currency that had been in recent proximity to a controlled substance had to be assumed to be true, and any evidence of widespread contamination of all US currency in circulation was outside the pleadings and thus irrelevant at the pleading stage.

So, the motion to dismiss the complaint was denied. SDC

Contact: AUSA Frank Kortum

Comment: The court reaches the right result but I would not read this case looking for a clear statement of the pleading standard that the complaint had to satisfy. Mixing and confusing pre- and post-CAFRA cases and cases that pre-date Rule G, the court defines the standard at one point as "probable cause" and at another as "reasonable belief of probable cause," neither of which is correct. As set forth in Rule G(2)(f), the standard for filing a complaint is that there are sufficient facts to support a reasonable belief that the Government will be able to meet its burden of proof at trial. In any event, the key holding in this case concerns the dog alert. For purposes of a

motion to dismiss, the factual allegations in a complaint must be assumed to be true. Here, the complaint alleges that there was an alert by a dog that was trained to alert to the odor of controlled substances that – because the odor quickly dissipates – indicated that the money had recently been in proximity to illegal drugs. Claimant disputed that, but the court held that the dog's training and sophistication were factual allegations that must be assumed to be true at the pleading stage. Thus, Claimant's skepticism regarding the dog was irrelevant for purposes of the motion to dismiss.

The next case summary involves an even more interesting application of the rule that allegations in the complaint are assumed to be true. *SDC*

Motion to Dismiss the Complaint / Jurisdiction / Medical Marijuana

The Government's allegation that the defendant property was seized by the DEA, not by a state police officer, must be assumed to be true for purposes of a motion to dismiss a civil forfeiture case for lack of jurisdiction.

United States v. $44,000.00 U.S. Currency, 2018 WL 3611955 (E.D. Mo. Jul. 27, 2018).

E.D. Mo. * DEA agents stopped Claimant in the St. Louis airport as he was about to board a flight to Los Angeles. Obtaining consent to search his carry-on bag, the agents found a "bong" used for smoking marijuana and currency that smelled of marijuana. The agents then retrieved Claimant's checked luggage and found $44,000 in currency. A drug dog alerted to the currency.

Claimant moved to dismiss the ensuing civil forfeiture complaint on several novel grounds. First, he alleged that the agents who accosted him and seized his currency were not DEA agents but state or local police officers, and that because the officers did not obtain a turnover order in accordance with Missouri law before transferring the seized currency to the DEA, the court lacked jurisdiction over the forfeiture action. The court held, however, that the complaint's allegation that the property was seized by DEA agents must be assumed to be true for purposes of a motion to dismiss the complaint, and thus rejected Claimant's challenge to the court's jurisdiction.

Second, Claimant argued that he held a medical marijuana card and that the forfeiture action constituted illegal federal interference with the State's medical marijuana laws. The court expressed skepticism that Claimant, a Missouri resident, had a medical marijuana card, as Missouri does not have a medical marijuana law. But the court nevertheless rejected Claimant's argument on the merits.

"Medical marijuana laws do not permit drug trafficking," the court said, and the forfeiture complaint set forth allegations sufficient to support a reasonable belief that Claimant was a drug trafficker. Among other things, the court noted Claimant's inconsistent statements regarding the purpose of his travel; the smell of marijuana on the currency; his possession of the bong; and the dog alert. The court also noted the allegation that the seized currency was equal to 88 percent of Claimant's gross income and that Claimant had been the subject of an earlier DEA drug investigation.

So, the motion to dismiss was denied. *SDC*

Contact: AUSA Stephen Casey

Comment: On the first point, even if it were established that the seizure was made by state police officers who violated Missouri

law by transferring the property to the DEA without first obtaining a turnover order, that would not deprive the federal court of jurisdiction over the federal forfeiture action. *See Madewell v. Downs,* 68 F.3d 1030, 1044 n.18 (8th Cir. 1995) (neither constitutional infirmity in transfer of seized property nor lack of authority to transfer the property taints adoption of seizure by federal agency); *United States v. $16,757.00 in U.S. Currency,* 2012 WL 1865415 (N.D. Ohio May 22, 2012), adopting Magistrate's Report, 2012 WL 1865419 (N.D. Ohio April 12, 2012) (following *Madewell:* federal agency may adopt a forfeiture even if the turnover did not comport with state law). *SDC*

Motion to Dismiss Complaint / Tracing

Strict tracing of the defendant property in a civil forfeiture case to the underlying crime is not required at the pleading stage.

United States v. Real Property Known as 615 Elmhurst, 2018 WL 3655081 (S.D. Tex. Aug. 1, 2018).

S.D. Tex. * The Government filed a civil forfeiture complaint alleging that certain real property in Texas was subject to forfeiture as the proceeds of the theft of millions of dollars in public funds in Mexico and as property involved in money laundering. Claimant moved to dismiss the complaint on the ground that it failed to contain any facts establishing that the real property was traceable to the Mexican theft offense.

The court held, however, that there is no tracing requirement at the pleading stage of a civil forfeiture case, and that the Government can satisfy the "reasonable belief" standard in Rule G(2)(f) with circumstantial evidence. Among other things, the court noted the Government's allegations that Claimant was the Secretary of Administration and Finance in the Mexican State of Tabasco, that $190 million in state funds are missing from his tenure in office, that Claimant created shell companies and transferred significant amount of money from Mexico into these companies, and that one of the shell companies purchased the defendant real property.

So, the motion to dismiss the complaint was denied. *SDC*

Contact: AUSA Julie Hampton

Comment: In a similar case raising the same issue, the court held that a civil forfeiture complaint against real property allegedly derived from public corruption in Mexico was not defective for failure to trace the stolen funds to the property. It was sufficient, the court said, that the complaint alleged facts sufficient to support a reasonable belief that the underlying crime had been committed and that the claimant lacked sufficient legitimate income to have purchased the defendant property with funds other than the criminal proceeds. *United States v. Real Property Known as 1 West Century Dr. #23B, 2018 WL 3829250 (S.D. Tex. Aug. 13, 2018).*

Other cases on this point are collected in Section VIII.J.4 of the Civil Forfeiture Case Outline. *SDC*

Claim and Answer / Default Judgment

Court strikes claimant's answer for failure to file a verified complaint, but instead of automatically entering a default judgment, it requires the Government to file a motion under Rule 55(b).

United States v. $40,000 in U.S Currency, 2018 WL 3729503 (S.D. Cal. Aug. 6, 2018).
S.D. Cal. * The Government seized $40,000

from Claimant's carry-on luggage at the San Diego airport and commenced a civil forfeiture action against the currency. Claimant filed an answer to the complaint but never filed a claim setting forth his interest in the property, so the Government moved to strike the answer and for a default judgment.

The court agreed with the Government that filing a claim is a mandatory requirement of Rule G(5) and that absent good cause it should grant the motion to strike. The court further agreed that there was no showing of good cause to excuse Claimant's failure to comply with the pleading requirement: he was not *pro se*, he did not request an extension of time, and he had not made any good faith attempts to file a claim.

So, the court granted the motion to strike the answer pursuant to Rule G(8)(c). It held, however, that it could not grant the motion for a default judgment as a sanction for failing to comply with the pleading requirements but could do so only if the Government made a proper motion pursuant to Rule 55(b).

Accordingly, the court denied the motion for default judgment without prejudice to the Government's filing the motion under Rule 55. *SDC*

Contact: AUSA Bruce Smith

Comment: Some courts will enter a default judgment automatically when the only claim is dismissed pursuant to Rule G(8)(c). Others, like this one, insist that the Government file a separate motion for a default judgment under Rule 55. The cases are collected in Section VIII.I of the Civil Forfeiture Case Outline. *SDC*

90-Day Deadline for Civil Forfeiture

The 90-day deadline for filing a judicial forfeiture action does not apply if the property was seized in a related criminal case and there was no administrative forfeiture proceeding.

United States v. 6544 Sni-a-Bar Road, 2018 WL 3730031 (D. Kan. Aug. 6, 2018).

D. Kan. * The Government filed a civil forfeiture action against real property traceable to the proceeds of a methamphetamine offense and Claimant filed a claim. Nine months later, the Government filed an amended complaint adding various items of personal property seized in a parallel criminal case to the civil forfeiture action.

Claimant filed a motion to dismiss the personal property, arguing that because he had filed a claim in the original action against the real property, the 90-day deadline in 18 U.S.C. § 983(a)(3) was triggered, and the Government's attempt to add the personal property to the forfeiture action was out-of-time.

The court held, however, that that the 90-day deadline applies only when a claimant files a claim under Section 983(a)(2) to property seized in an administrative forfeiture proceeding. In this case, the personal property was seized as part of a related criminal investigation and there never was any administrative forfeiture proceeding against the property. Accordingly, the 90-day deadline did not apply.

So, Claimant's motion to dismiss the forfeiture action against the personal property was denied. *SDC*

Contact: AUSA Annette Gurney

Comment: Property may be seized by the Government for many different purposes. For example, it may be seized as evidence in a criminal investigation. As other courts

have recognized, it is only when the Government seizes property for the purpose of initiating an administrative forfeiture proceeding that the deadline for filing a judicial forfeiture action is triggered by the filing of a claim to the property. The leading case on this issue is *Langbord v. U.S. Dept. of Treasury,* 832 F.3d 170 (3rd Cir. 2016) (*en banc*). Other cases are collected in Section III.C.7 of the Civil Forfeiture Case Outline. *SDC*

Federal Tort Claims Act

The forfeiture provision of the Federal Tort Claims Act does not apply if the defendant's property was not seized for forfeiture.

Smith v. Sessions, 2018 WL 3536421 (N.D. Ind. Jul. 23, 2018).

N.D. Ind. * Defendant, who was convicted of drug trafficking and sentenced to 40 years in prison, filed a complaint against the Attorney General for the return of jewelry and other items seized from him but not forfeited The Government could not account for the missing property, but the court nevertheless held that Defendant failed to set forth any legal basis for his complaint.

Among other things, the court held that Defendant could not rely on the forfeiture provision of the Federal Tort Claims Act because his property was not seized for the purpose of forfeiture. *SDC*

Contact: AUSA Orest Szewciw

Notes

Administrative Forfeiture / Notice

United States v. Mayes, 2018 WL 3602971 (E.D. Tenn. Jul. 5, 2018).

E.D. Tenn. * Denying a motion for the returned of forfeited property, a district court held that notice sent by certified mail to Defendant's place of incarceration satisfied the due process notice requirements under the Supreme Court's decision in *Dusenbery.*

Contact: AUSA Cynthia Davidson

Motion for Return of Forfeited Property / Section 983(e)

Webb v. United States, 2018 WL 4026732 (E.D. Mo. Aug. 22, 2018).

E.D. Mo. * The DEA seized jewelry from Defendant at the time of his arrest, and administratively forfeited the property when Defendant filed no claim. Four years later, after pleading guilty to a drug offense, Defendant moved under 18 U.S.C. § 983(e) for the return of the property alleging lack of adequate notice. But the court held that because Defendant had actual notice of the seizure from his person, his motion was barred by Section 983(e)(1)(B). That Defendant may not have had notice of the forfeiture *proceeding*, the court said, was irrelevant.

Contact: AUSA Kyle Bateman

Comment: The courts are divided as to whether Section 983(e)(1)(B) means what it says – that a person with "reason to know of the seizure" may not complain of lack of adequate notice – or whether it means that a claim is barred only if the person also was aware of the forfeiture proceeding. The cases are collected in Section IV.C of the Civil Forfeiture Case Outline. *SDC*

Ancillary Proceeding / Judicial Immunity

Jabbor v. Graham, 2018 WL 3636588 (S.D. Ohio Jul. 31, 2018).

S.D. Ohio * The district court dismissed Plaintiff's third-party claim in the ancillary proceeding in a criminal forfeiture case for failure to comply with the pleading requirements in Section 853(n)(3). He responded by filing a civil lawsuit against the judge, but another court in the same district dismissed the complaint on the ground that the judge in the criminal forfeiture matter had absolute judicial immunity for acts committed in the course of his judicial function.

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