

OVERVIEW OF ASSET FORFEITURE

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I. INTRODUCTION

Most countries have a procedure for confiscating property at the conclusion of a criminal case

- And many also have the authority to confiscate property even if there is no criminal case: what is called non-conviction-based (NCB) confiscation

In most countries, courts have the authority to confiscate the proceeds of crime

- In many countries, the authority is broader, applying not only to the *proceeds of crime*, but to the *instrumentalities* of the crime and to property that was the *subject of a money laundering offense* as well
- Finally, some countries have the authority to obtain an extended confiscation order – an order which applies to other criminal conduct the defendant may have committed but was not the subject of his conviction
- And to obtain an order for the “equivalent value” of the property if the forfeitable property itself is unavailable

The Law on Combatting Money Laundering and Terrorism Financing, which came into effect last September, contains almost all of these authorities

- It provides for criminal confiscation in all cases where there is a criminal conviction, and limited NCB confiscation authority where there is not

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- It authorizes the confiscation of proceeds and instrumentalities of any crime, property that is commingled with the proceeds, and property that is the subject of a money laundering offense
- And with respect to the proceeds of the crime, it authorizes the confiscation of property of equivalent value in criminal cases.
- The only thing I'm not clear on is whether the confiscation authority is limited to the crime for which the defendant is convicted, or if it applies to other criminal conduct the defendant may have committed but was not the subject of his conviction
- From my reading of Art. 89, it appears to be limited to the offense for which the defendant was convicted
- If so, it would be similar to the law in the United States on that point

Our task now is to explain what these terms mean, so that everyone understands what property is subject to confiscation

- What steps can be taken to preserve that property pending conviction
- What the Government has to prove to obtain a confiscation order
- And what must be done to protect the rights of innocent third parties

The goal is to make you feel comfortable using the new law so that the confiscation of property in criminal cases becomes a routine part of every criminal investigation and prosecution.

II. WHY DO FORFEITURE

First, we should talk about why all of this is necessary

- Why should we include the financial aspects of the crime in the criminal investigation?

— And why should we make the effort to obtain a confiscation order
There are lots of reasons to invest the time to do an asset forfeiture case

- *Kaley v. United States*, 571 U.S. 320, 323 (2014) (forfeiture serves to punish the wrong-doer, deter future illegality, lessen the economic power of criminal enterprises, compensate victims, improve conditions in crime-damaged communities, and support law enforcement activities such as police training);

1. Punish the wrongdoer

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

2. Deter other wrongdoers

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

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

- we don't want drug dealers to keep the airplane so they can use it again,
- the same is true for letting the child pornographer keep the computer and cameras that he used

- or letting the money launderer keep the business through which he laundered his money

4. Disrupt the organization

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

5. Get money back to the victim

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

6. Protect the community

- Taking guns off the street is an obvious way to protect the community, but other ways are more subtle

- you don't want organized crime or drug organizations that have acquired great wealth use it to control markets or institutions
- you don't want to let corrupt leaders of developing countries use your financial system to loot their treasuries and safeguard a nest egg to use when they have to go into exile
- and forfeiture ensures that the playing field is level, so that people trying to run businesses honestly don't have to compete with capital from illegal sources

7. Recycle the money

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

III. WHAT CAN YOU FORFEIT?

Art. 89 authorizes the court to order the confiscation of “funds constituting the proceeds of crime”

- the term “proceeds of crime” is defined in Art. 1 as any “funds derived or obtained, directly or indirectly,” from committing any felony or misdemeanor
- in turn, “funds” is defined as “assets or property of any kind”: tangible or intangible, moveable or immovable
- let's see what all of this means

What kinds of property may be confiscated?

First, notice that the definition of “funds” is very broad

- the property subject to confiscation is not limited to money, but could include cars, boats, and buildings as well as bank accounts, and contract

rights, licenses, patents, interests in trust funds and all manner of intangible property

What are “proceeds”?

What constitutes proceeds in most cases is fairly obvious

- it’s whatever the defendant acquired as a result of the offense, or stated differently, what he would not have “but for” having committed the offense
- usually that’s expressed in terms of his gross receipts without any reduction for costs
- but I will return to that point in a minute

If a person sold drugs, the money that he received is the proceeds

- If he robbed a bank, the money that he stole is the proceeds
- If he took a bribe, the bribe money is the proceeds
- If he *paid* a bribe, whatever he got in return would be the proceeds
 - *E.g.*, if a contractor obtains a contract by paying a bribe or kickback, the contract itself would be the proceeds of the crime

Appreciation and other traceable property

The scope of the term “proceeds” can actually be quite broad:

- proceeds include any property traceable to the proceeds,
- In fact, Art. 89 refers specifically to funds “derived from or exchanged for such proceeds”
- if the person who sold drugs or robbed a bank used the money to buy a car, the car can be confiscated as property traceable to, or derived from, the crime
- and that is true regardless of how much time has passed or how many times the property has changed form

- if a defendant uses the proceeds of his crime to buy a car, uses the car as collateral for a loan, and uses the loan proceeds to buy a boat, the boat is traceable to the crime and is subject to confiscation
- or if he uses criminal proceeds to gamble at the casino and hits the jackpot, the gambling winnings are traceable to the crime and subject to confiscation
 - *United States v. Tolliver*, ___ F.3d ___, 2020 WL 465740 (6th Cir. Jan. 29, 2020) (commission that a third-party money launderer is paid is forfeitable as property involved in money laundering, and when the defendant uses that money to gamble, his winnings are forfeitable as property traceable to such property);

Traceable property also includes appreciation and income derived from the property

- a person who buys a lottery ticket for one dollar and wins a million dollars forfeits the entire million, because the ticket appreciated in value
 - *United States v. Betancourt*, 422 F.3d 240, 251 (5th Cir. 2005) (if defendant buys a lottery ticket with drug proceeds, the lottery winnings are traceable to the offense even though the value of the ticket appreciated enormously when it turned out to contain the winning number);
- Or if he invests his money in a beach house and rents it out, the rental income would be proceeds

I mentioned that proceeds is often defined as whatever the defendant would not have “but for” having committed the offense

- Under the “but for” test, an entire business, and all of its revenue and assets, are subject to forfeiture if the business would not exist but for the investment of criminal proceeds to start the business or to keep it going.
 - *United States v. Warshak*, 631 F.3d 266, 329-330 (6th Cir. 2010) (all proceeds of defendant’s business are forfeitable because the business was “permeated with fraud;” but even if a part of the business was legitimate, the proceeds of that part are nevertheless forfeitable if the legitimate side of the business would not exist but for the “fraudulent beginnings” of the entire operation);
 - *United States v. Smith*, 749 F.3d 465, 488-89 (6th Cir. 2014) (following *Warshak*; if business is so pervaded by fraud that its revenue stream would not have existed but for the fraud, any asset derived from that revenue stream is forfeitable as proceeds);

Directly or indirectly

Notice that the definition of “proceeds” includes property obtained “directly or indirectly”

- What is property that the defendant obtained “indirectly”?
- It would include property obtained by a third party – such as the defendant’s corporation or his family member – to whom the defendant directed the proceeds to be paid
 - *United States v. Peters*, 732 F.3d 93, 102 (2nd Cir. 2013) (because the statute makes defendant liable for property obtained “directly or indirectly,” he is liable for proceeds obtained by a corporation that he dominates or controls, even if he did not obtain the money himself);
- It could also include some benefit that the defendant received as collateral consequence of committing the crime
- All that is required is a causal nexus between the crime and the property
- For example, if there is a Government program that provides housing at a lower rate for persons with low income, and the defendant lies on his application for such housing, claiming that he has low income, the money he saves would be proceeds obtained “indirectly”
 - *United States v. Torres*, 703 F.3d 194, 199 (2d Cir. 2012) (all that is required is a “causal nexus between the wrongdoer’s possession of the property and her crime”; rent money that defendant saved or retained as a consequence of the crime is proceeds obtained “indirectly”);

So, in the case of a contract obtained by fraud, or by paying a bribe or kickback, all of the payments on the contract would be proceeds because they would not have been obtained but for the crime

- *United States v. Farkas*, 2011 WL 5101752, *3 (E.D. Va. Oct. 26, 2011) (any money defendant derived from a business that would not have existed but for his fraud is property obtained “indirectly” from the fraud);

Net v. Gross

As I’ve said, while your law doesn’t address this specifically, there should be no deduction for the cost of committing the crime

- *United States v. Peters*, 732 F.3d 93, 101 (2nd Cir. 2013) (the purpose of forfeiture is punishment; forfeiting defendant's profits is not punishment because it merely returns him to the economic position he occupied before he committed the offense; therefore, defendant must forfeit the gross receipts);
- The drug dealer does not get to deduct the cost of the drugs
 - *United States v. McHan*, 101 F.3d 1027, 1041-42 (4th Cir. 1996) (gross proceeds forfeitable in drug case);
- A person who embezzles money from his employer, or mismanages someone's investment plan, or steals money from a Government program does not get to deduct his costs
 - *United States v. Bodouva*, 853 F.3d 76 (2nd Cir. 2017) (forfeiting gross proceeds of embezzlement);
 - *United States v. Uddin*, 551 F.3d 176, 181 (2d Cir. 2009) (affirming forfeiture of gross proceeds under § 981(a)(2)(A) in a criminal forfeiture cases involving food stamp fraud; defendant must forfeit the amount he received from the Government for the food stamps without credit for the amount he had to pay for them);
- The person who obtains business by paying a bribe or kickback does not get to deduct the amount of the bribe or kickback

There is some question, however, as to whether the person who obtains a contract by fraud or bribery, but who performs the work, gets to deduct the cost of that work or of the goods he provides

- *United States v. Martin*, 2014 WL 221956, *5 (D. Idaho Jan. 21, 2014) (contractor who obtains a Government contract by falsely claiming eligibility for a program for disadvantaged businesses must forfeit the net profits, not the gross proceeds, of the fraudulently-obtained contracts);

Commingled property

Art. 89 is not limited to the proceeds of the crime and property traceable to those proceeds

- It also authorizes the confiscation of funds “intermingled with such proceeds”
- So, if the defendant puts \$10,000 in criminal proceeds into a bank account that contains another \$20,000 and commingles the money, the entire \$30,000 would be subject to confiscation

- Or if he uses \$10,000 in criminal proceeds as the down payment on a car, and pays for the rest of the car with \$20,000 in untainted money, the entire car could be confiscated because it is the result of commingling the money

Property of equivalent value

Finally, Art. 89 says that the court may order the confiscation of funds that correspond to the value of the criminal proceeds

- So, if the defendant has spent his criminal proceeds on wine, women and song
- Or he has placed the money in a foreign bank account where it cannot be recovered
- Or if it simply cannot be determined what happened to the criminal proceeds
- The court may order the defendant to pay a sum of money equal to the value of the missing proceeds,
- Or it may order the confiscation of some untainted property that the defendant owns that is equivalent in value to the missing proceeds
- These are sometimes called “substitute assets”

For example, if the defendant made \$3 million dollars selling weapons to an arms dealer in violation of Qatari law, but it is not possible to recover that money

- But the defendant has another \$3 million in a bank account, or owns a \$3 million estate that he inherited from his grandfather
- The court could order the forfeiture of the bank or the estate in substitution for the missing proceeds of the illegal arms deal.

2. Instrumentalities

Art. 89 directs the court to order the confiscation not only of the proceeds of the offense, but the “instrumentalities” used to commit the offense as well

- Such “instrumentalities” are often called facilitating property, though that is a somewhat broader term

- The gun used to commit an armed robbery is certainly an instrumentality of the offense; the car the robber used to make a get-away, or the house where he stashed the loot, would probably fall into the broader category
- Allowing for the uncertainty caused by translation, I will assume that the broader term was intended in Art. 89

Facilitating property is anything that makes the crime easier to commit or harder to detect

- *United States v. Schifferli*, 895 F.2d 987, 990-91 (4th Cir. 1990) (dentist’s office “provided an air of legitimacy and protection from outside scrutiny,” and thus made the crime of writing false prescriptions less difficult to commit and “more or less free from obstruction or hindrance”);
- *United States v. Huber*, 404 F.3d 1047 (8th Cir. 2005) (facilitating property is anything that “makes the prohibited conduct less difficult or more or less free from hindrance”);

In cases stretching back over decades, courts have upheld the forfeiture of real property, vehicles, and other personal assets as facilitating property

- *United States v. Rivera*, 884 F.2d 544, 546 (11th Cir. 1989) (defining facilitating property broadly to include cows and horses used to make a heroin operation appear to be a working ranch);
- *United States v. Diaz*, 413 Fed. Appx. 704, 708 (5th Cir. 2011) (real property where owner allowed drug dealers to park their tractor-trailers while waiting to transport drugs and money across the border forfeited as facilitating property);
- *United States v. Ortiz-Cintrón*, 461 F.3d 78, 80 (1st Cir. 2006) (residences where defendants packaged drugs and stored drug money, and where telephone calls were made, was forfeitable as facilitating property);
- *United States v. Juluke*, 426 F.3d 323, 326 (5th Cir. 2005) (property is subject to forfeiture as facilitating property even if only a portion of it was used to facilitate the offense; defendant’s residence was forfeitable even though no drugs were found in the house because he parked his car containing heroin in the driveway and kept guns and currency in the house);
- *United States v. Singh*, 390 F.3d 168, 190 (2d Cir. 2004) (a medical license is forfeitable as facilitating property under section 853(a)(2) if the doctor uses the license to distribute controlled substances in violation of the Controlled Substances Act; under section 853(b), property includes “rights, privileges, interests, claims, and securities”);

- in fact, an entire business and/or all of its assets could be forfeited as facilitating property
 - *United States v. \$7708.78 in U.S. Currency*, 2011 WL 3489835, *3 (S.D. Miss. Aug. 9, 2011) (facilitating property is anything that makes the crime “less difficult or more or less free from obstruction or hindrance;” a pharmacy used as a cover for the illegal distribution of drugs is forfeitable as facilitating property, and hence so are all of its assets; including funds in its bank accounts that include money traceable to legitimate sales);
 - *United States v. Segal*, 432 F.3d 767, 779 (7th Cir. 2005) (if a business is forfeited, then so are all of its assets, including any subsidiary business that is wholly owned by the forfeited business; that there is no independent basis for the forfeiture of the subsidiary does not matter);

Instrumentalities in Money Laundering Cases

What might be an instrumentality in a money laundering case?

If we are talking about concealment money laundering, it could be anything that allows the defendant to make the concealment easier or the underlying crime harder to detect

- For example, if the defendant conceals the source of illegally-derived money by commingling it with money from a legitimate source, the commingled money would be an instrumentality of the money laundering crime
 - *United States v. Aguasvivas-Castillo*, 668 F.3d 7, 17 (1st Cir. 2012) (retailer who commingled \$4.4 million in food stamp fraud proceeds with legitimate funds “to shield the fraud” ordered to forfeit \$20 million);
- Or if he laundered his money by running it through his legitimate business, the entire business would be an instrumentality

Subject matter property

Finally, Art. 89 directs the court to order the confiscation of property “constituting the subject of the offense”

- This term is particularly important in money laundering cases
- It means that property is subject to confiscation in a money laundering case if it is the subject of a money laundering transaction

- For example, if the defendant launders his money by investing in real property or in securities, the real property and the securities would be subject to confiscation
- This would be true even if only a fraction of the investment were traceable to illegally-derived money
 - *United States v. Beltramea*, 2016 WL 427096, *6-7 (N.D. Iowa Feb. 3, 2016) (defendant’s use of fraud proceeds to pay for improvements to real property was a money laundering offense, making the property forfeitable in its entirety as the “object” of the offense);

IV. OVERVIEW OF FORFEITURE PROCEDURE

That is what can be forfeited in a criminal case

- Now we need to talk about the procedure for getting a confiscation order

This is my list of steps to take to obtain a confiscation order:

1. Make the financial investigation part of the criminal investigation from the beginning
2. Preserve the Property Pending Trial.
3. Ask for a confiscation order at sentencing
4. Follow the requirements for giving notice to third parties

Let’s talk about each of those

Making the financial aspects part of the criminal investigation

It is important not to wait until the defendant is convicted and is being sentenced to think about confiscation

- To the contrary, a financial investigation aimed at locating proceeds of the crime and other assets of the defendant must be part of the criminal investigation from the beginning
- Indeed, Art. 49 specifically authorizes the Public Prosecution to investigate, and “order parallel financial inquiries” to identify the financial aspects of criminal activity while the criminal investigation is underway

There are several reasons why this is important:

1. The financial investigation may aid in proving the crime
 - For example, showing that a public official has more assets than can be explained by his public salary can aid in proving that he is corrupt
 - And following the money can aid in identifying other parties to the crime and their relationship to each other
2. Failure to include a financial investigation can lead to missing the opportunity to bring a money laundering case as part of the prosecution
3. If you wait until the end of the case to try to locate the defendant's assets, you will likely find that they have disappeared
 - If you want to get a confiscation order, you need to do the financial investigation at the beginning of the case, not the end
 - And you need to freeze or seize the property to preserve it pending trial
 - Otherwise, it will be too late

The most important parts of a financial investigation are the interviews with cooperating witnesses

- That is, persons who were part of the criminal enterprise and who know how and where the defendant kept or laundered his money
- And obtaining bank records and other documents

Art. 53 provides that the Public Prosecutor may serve compulsory process on financial institutions and anyone else to produce records that “may help” in identifying and tracing the proceeds of crime

- Moreover, Art. 54 provides the person who receives the request for records may not disclose the request to anyone
- And Art. 55 provides that the Public Prosecutor may seize electronic records, such as emails and text messages, that “may help” in the investigation

So, as part of any criminal investigation, the investigators will want to use these tools to determine if the defendant, in addition to committing the predicate offense, has engaged in money laundering

- And to identify and locate the proceeds of the offense.

Freezing and seizing assets

In a criminal case, no confiscation order may be made until the defendant is convicted

- So, it is critical that any property identified as subject to confiscation during the investigation be frozen or seized to preserve it pending trial and conviction

Freezing an asset means to leave it in the possession of its custodian subject to an order prohibiting its transfer, conversion, disposition or movement (Art. 1)

- For example, the Public Prosecutor could decide to freeze an investment account rather than liquidate it and take possession of the proceeds

Seizure, on the other hand, means to take physical possession or control of the asset (Art. 1)

- Generally, you would want to seize assets that were in the possession of the defendant
- And you might want to seize assets that are easily moved – like funds in a bank account – even if they are in the possession of a third party, such as bank – if you want to be certain that they do not disappear

Art. 51 and 57 provide that the Public Prosecutor may, in the course of the investigation, freeze or seize proceeds and instrumentalities that may be subject to confiscation upon conviction

- And they both seem to allow the freezing or seizing of other property that may be subject to confiscation on the ground that the tainted property is unavailable and the untainted property is of equivalent value

I have struggled to understand the difference between Art. 51 and Art. 57.

- As I said, both appear to authorize the Public Prosecutor to freeze or seize proceeds and instrumentalities
- Art. 57 may be somewhat broader in the sense that it refers specifically to freezing and seizing “property of corresponding value” whereas Art. 51 refers more generally to proceeds, instrumentalities, “and the funds that are subject . . . to confiscation”
- If Art. 57 is broader, that may explain why it – unlike Art. 51 – contains a pre-condition to the freezing or seizing
- That is, the prosecutor may freeze or seize assets under Art. 57 only if he determines that doing so is necessary “to prevent any disposal of funds” that may be subject to confiscation.

In any event, notice that while a confiscation order may only be imposed by a court, a freeze or seizure order may be imposed by the Public Prosecutor without the intervention of a court

As if to emphasize the importance of freezing orders, Art. 83 makes it a criminal offense, punishable by 5 years in prison, for anyone to contravene a freezing order

Confiscation at Sentencing

A confiscation order is generally imposed by the court as part of the defendant’s sentence after he/she has been convicted

- This is where Art. 89 comes into play
- It says that “in the event of a conviction” for money laundering, terrorism financing or a predicate offense, the court *shall issue a confiscation order*
- Thus, issuing the order is mandatory

As I discussed earlier, Art. 89 then goes on to list the categories of property that may be confiscated:

- proceeds (including traceable and commingled property)

- instrumentalities
- the subject of the offense (such as the subject of money laundering transaction)
- And in the case of the proceeds, if the defendant has dissipated the property, property of “equivalent value”

The burden is on the prosecutor to prove that the property he wants the court to include in the confiscation order falls into one of the listed categories

- In the case of proceeds, that will mean having to trace the money or other property back to the criminal offense, or show that it was commingled with such traceable property
- Tracing can be complicated, involving lots of financial records and, as we discussed earlier with respect to money laundering, circumstantial evidence
- So, in addition to witness testimony and financial records, you may want to rely on such facts as the timing of the defendant’s acquisition of the funds in comparison with the date of the offense,
- his lack of other sources of income during that time
- and any convoluted or seemingly unnecessary transactions that may indicate an awareness that the property was criminally derived

In the case of instrumentalities, the prosecutor will have to show that the property was involved in the commission of the offense in a way that made it easier to commit or harder to detect

- while Art. 89 does not expressly say this, it is likely that the court will require a showing that the connection between the property and the offense was substantial or significant, and not incidental or fortuitous
- the residence where a defendant planned a series of criminal acts and used to hide incriminating evidence would be substantially connected to his crime

- but the residence where he happened to be when he received one phone call, or where he kept the car that he drove to scene of the crime, might not

Extended confiscation

As I mentioned earlier, in some countries, the confiscation order is limited to the property derived from, or used to commit, the specific offense for which the defendant is convicted

- if he is convicted of robbing a bank on Monday, and taking 10,000 euros, the confiscation order will be limited to the 10,000 euros that he stole on that occasion
- even if he stole another 10,000 euros from another bank on Tuesday unless he was also convicted of that offense
- that is the rule, for example, in the United States

In other countries, where there is an “extended confiscation” statute, the court will be able to order the confiscation of all of the proceeds of all related crimes that the defendant may have committed once he is convicted of one of those crimes.

As I said earlier, it appears that Art. 89, like the law in the US, is limited to the offense for which the defendant was convicted.

Non-conviction-based confiscation

Sometimes it is not possible to obtain a criminal conviction

- in which case it will not be possible to obtain a criminal confiscation order as part of the defendant’s sentence
- many countries, however, have a procedure that allows the court to make a confiscation order without the need for a criminal conviction
- these are called civil or “non-conviction-based” or “NCB” confiscation orders
- In the United States, NCB confiscation is fully part of the statutory scheme and is used all the time in appropriate cases

When would you use NCB confiscation?

Examples

1. when the wrongdoer is dead or is incompetent to stand trial;
2. when the defendant is a fugitive or a foreign national beyond jurisdiction of your court, but the property is in your country;
3. when the statute of limitations has run on the criminal case;
4. when we have recovered the property but do not know who committed the crime giving rise to the forfeiture;
5. when the defendant is convicted of a crime different from the one giving rise to the confiscation, and you don't have extended confiscation authority;
6. when the defendant has already been convicted in another country and there is no need to bring a sequential prosecution;
7. when there is no criminal case because the interests of justice do not require a conviction;
8. when the evidence is insufficient to prove that the defendant committed the offense beyond a reasonable doubt but sufficient to establish the crime and the connection between the property and the criminal on a balance of the probabilities;
9. when the defendant uses someone else's property to commit the crime
10. when the criminal case will not be concluded for a very long time, and there is a need to recover the property sooner rather than later

Art. 89 authorizes NCB confiscation, but unfortunately it is not available in all of these instances

- to the contrary, NCB confiscation is available only if the perpetrator "is unknown" or has died
- moreover, you may use NCB confiscation only to recover the proceeds of crime

- it does not apply to instrumentalities, and it does not apply to property of equivalent value that is not traceable to the offense
- nevertheless, in the instances where it does apply, NCB confiscation is a very valuable law enforcement tool

The important thing to know about NCB confiscation is that it doesn't require a conviction or even a criminal case,

- but the Government still has to prove that a crime was committed, *and* that the property was derived from that crime

Rights of third parties

There are times in criminal cases when the property you want to confiscate belongs not to the defendant but to a third party

- For example, the defendant may have transferred the proceeds of his crime to his children, or used it to pay his lawyer, or pledged it as the security for a loan
- Art. 89 takes these situations into account by providing for limited protection for third parties from a confiscation order

Under Art. 89, property must be exempted from a confiscation order – even if it constitutes the proceeds of crime or an instrumentality or the subject of a money laundering offense

- If it was acquired by a third party who was unaware of the illicit origin of the property
- And who obtained it in exchange for goods or services of equivalent value
- This applies in both criminal cases and in NCB confiscation cases

So, if the defendant used his criminal proceeds to buy a boat, the boat may be subject to confiscation as property traceable to the offense

- But if the boat is missing, the Government could not confiscate the money in the hands of the boat seller if he was unaware, when he sold the boat, that he was receiving criminal proceeds in return
- Likewise, the lawyer who provided legal services to the defendant would be able to keep his payment, assuming he did not know that the property was the proceeds of crime
- And the person who extended a loan to the defendant, accepting a secured interest in the property in return, would also be protected to the extent of his secured interest

But this provision protects only bona fide purchasers who acquire the property for equivalent value

- It does not protect donees, such as the defendant's wife or children who received the property as a gift
- And it does not protect persons who knew that they were receiving criminal proceeds, or who did not pay fair market value for the property.
- Regarding the last point, courts generally honor only arm's length transactions and disregard sham transactions between related parties such as spouses
 - *United States v. Smith*, 953 F. Supp.2d 1260, 1268 (M.D. Fla. 2013) (entity that defendant used to receive the money he fraudulently obtained from victims had no claim because it did not receive the money in an arm's length commercial transaction);
 - *United States v. Infelise*, 938 F. Supp. 1352, 1368 (N.D. Ill. 1996) (wife is not a bona fide purchaser of property husband placed in her name because she gave nothing of value in exchange for the property);
 - *United States v. Allmendinger*, 2012 WL 966615, *2 (E.D. Va. Mar. 21, 2012) (defendant's mother, who received forfeited truck as a gift, could not be a bona fide purchaser for value);

There is one type of innocent third party who appears not to be covered by the statute.

- Suppose the defendant commits a crime using his neighbor's car

- The car would be subject to confiscation as an instrumentality of the offense, but that would be unfair to the neighbor if he did not know that his car was being used for an illegal purpose
- Because the law protects only bona fide purchasers, it seemingly would not protect the neighbor, who should be protected regardless of how he acquired the instrumentality
- I am assuming this this was an oversight in the drafting of the statute.

Finally, Art. 93 provides that the court may nullify any agreement or contract if its purpose was to avoid a freezing or confiscation order

- In other words, the court has the power to declare a contract to sell a house in exchange for criminal proceeds null and void if it determines that the purpose of the contract was to place the property in the hands of a third party so that it could not be confiscated.