Money Laundering and Forfeiture Digest

Summaries and Analyses of Recent Money Laundering and Asset Forfeiture Cases
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Property Involved in Money Laundering / Money Judgments / Substitute Assets / Application of *Honeycutt* / Excessive Fines

Criminal forfeiture in a money laundering case is mandatory; the district court may not decline to impose a forfeiture order based on its view that it is unnecessary in a particular case.

Criminal forfeiture is punitive, not remedial; therefore, the property involved in money laundering case is subject to forfeiture whether or not the victim of the underlying crime suffered any loss.

The defendant in a money laundering case is personally liable for the amount laundered, whether or not the money belonged to him or he retained any of it for himself.

Honeycutt *did not affect the case law holding that forfeiture orders may take the form of a personal money judgment.*

Because the criteria for forfeiting substitute assets are satisfied if the forfeitable property has been transferred to a third party, the defendant is liable to forfeit substitute assets even if he has returned the criminal proceeds to the victim.

For Eighth Amendment purposes, the court must look not just to the impact of the money laundering offense on a particular victim, but to the scope and duration of the offense, the maximum statutory fine, and the harm to society in general when criminals launder criminal proceeds.

United States v. Waked, ___ F.3d ___, 2020 WL 4590542 (11th Cir. Aug. 11, 2020).

Eleventh Circuit * Defendant owned an electronics wholesale and export business with operations in Miami and Panama. As part of an elaborate bank fraud and money laundering scheme, he had the Miami business send false invoices to the Panama business which paid the invoices by drawing on its line of credit at a Panama bank. Once the money was in Miami, Defendant had the Miami company send it back to the Panama company.

In this fashion, Defendant caused $10.4 million to be drawn on the line of credit based on the false representation that the money was needed to pay for imported merchandise when in fact the money was cycled through the Miami business and sent back to Panama. It was established that if the bank had known the true nature of the transactions, it would not have approved the draws on the line of credit in Panama or the transfers of the money to Miami.

Defendant repaid the line of credit in full, so the Panama bank did not suffer any loss. The Government nevertheless charged Defendant with a money laundering

conspiracy alleging that the money drawn on the line of credit was the proceeds of bank fraud, and that each time he sent those proceeds to Miami and back to Panama he committed a violation of 18 U.S.C. § 1957. The Government also sought a forfeiture money judgment of $10.4 million as the value of the property involved in the money laundering offense.

Defendant pled guilty to the money laundering conspiracy but reserved the right to oppose the Government's request for a forfeiture order. At sentencing, the district court held that because the bank, as the victim of the underlying fraud, suffered no loss, there was nothing for the Government to recover through forfeiture and thus held that no forfeiture order was required. In the alternative, it held that even if the forfeiture of amount involved in the money laundering conspiracy was required by statute, the forfeiture of $10.4 million in a case where the victim suffered no loss would violate the Excessive Fines Clause of the Eighth Amendment. The Government appealed.

On appeal, Defendant's principal argument was that there is nothing to forfeit in a money laundering case where the underlying specified unlawful activity (SUA) did not result in any loss to the victim or any gain to the defendant. But the court held that Defendant (and the district court) had misapprehended the nature of criminal forfeiture in general and as applied in money laundering cases.

Criminal forfeiture orders are punitive, not remedial, the court said. Their purpose is to punish the defendant for laundering money, not to make the victim whole. Therefore, that the victim of the underlying crime suffered no loss does not relieve the defendant of his liability for forfeiting the property involved in the money laundering offense.

Second, the court noted that forfeiture under 18 U.S.C. § 982(a)(1) – the forfeiture statute for money laundering – is mandatory. Thus, to the extent that the district court thought that it had discretion to decline to enter a forfeiture order based on "equitable considerations" – *viz.,* that the victim suffered no loss – its "ruling was in error."

Third, Defendant argued that criminal forfeiture, as an *in personam* punishment, must be limited to the defendant's interest in the laundered money. Because the money at all times belonged to his businesses and not to him personally, Defendant said, he had no interest in the money to forfeit. But the court held that in enacting Section 982(a)(1), Congress intended to hold a money launderer liable to forfeit the money that he laundered for a third party. The only exception applies to "mere intermediaries" as defined in Section 982(b)(2). As Defendant was not a "mere intermediary," he was liable to forfeit the amount involved in the money laundering offense whether the money belonged to him or not.

Relatedly, Defendant argued that the Supreme Court's decision in *Honeycutt* limited criminal forfeiture to property that the defendant personally obtained. But the court held that *Honeycutt* does not apply to forfeitures in money laundering cases under Section 982(a)(1) which contains no limitation to property "obtained" by the defendant.

Also relying on *Honeycutt,* Defendant argued that the cases authorizing the entry of forfeiture orders in the form of personal money judgments are no longer good law. But the court held that *Honeycutt* did not overrule any of those cases, and that accordingly a forfeiture order may still take the form of a money judgment.

Next, Defendant argued that the entry of a money judgment is dependent on the Government's ability to satisfy the criteria for forfeiting substitute assets under 21 U.S.C. § 853(p), and that those criteria were

not satisfied here. The court responded, however, that assuming Defendant's premise was correct, the Government did satisfy Section 853(p) by showing that due to Defendant's actions, the property subject to forfeiture had been transferred to a third party – *viz.,* the bank. There is no reason, the court said, why the "third party" referred to in Section 853(p) cannot be the victim to whom the criminal proceeds have been returned.

Finally, Defendant argued that even if the district court were correct in finding that forfeiture was required under Section 982(a)(1), forfeiture of the entire amount laundered would be grossly disproportional to the gravity of an offense in which no one suffered any loss. But the court held that the pecuniary loss to the victim is only one factor in the Eighth Amendment analysis. Among other things, the district court should have considered the scope and duration of the money laundering scheme, and the fact that the maximum fine for money laundering is "twice the amount of criminally derived property involved in the [money laundering] transaction."

For this purpose, the "amount of criminally derived property" is not the amount of the victim's ultimate loss, but the value of the SUA proceeds involved in the money laundering offense. As Defendant had laundered $10.4 million in bank fraud proceeds, the maximum fine for purposes of the Eighth Amendment analysis was $20.8 million – well in excess of the amount the Government sought to forfeit.

Finally, the court held that the district court erred in considering the harm caused by the offense only in terms of the impact on the particular victim. Criminals launder money, the court said, "to cover up criminal conduct," and when they do, it is "society in general" that suffers, not just the victim of the underlying crime. Thus, when applying the Excessive Fines analysis in a money laundering case, the "harm" caused by the offense includes the social harm that occurs "when criminally derived funds are laundered to allow the criminal unfettered, unashamed and camouflaged access to the fruits of [his] ill-gotten gains."

So, the judgment of the district court was reversed and remanded with instructions to determine the precise amount laundered and to impose a forfeiture judgment in that amount. *SDC*

Contact: AUSAs Daniel Matzkin, Karen Moore and Emily Smachetti (S.D. Fla.)

Comment: This case involves a host of issues that are fundamental to the established understanding of criminal forfeiture, of the scope of forfeiture in a money laundering case, and of the application of the Excessive Fines Clause of the Eighth Amendment in such cases. An adverse decision by the Eleventh Circuit on any of these issues would have overturned decades of case law and radically altered the way the forfeiture laws are applied in money laundering cases. But that did not happen; to the contrary, in a clear and well-reasoned opinion, the court lays to rest a panoply of existential challenges to forfeiture in money laundering cases, and provides prosecutors with a case to cite on each of those issues.

In particular, the court holds that because criminal forfeitures are intended to be punitive not remedial, the absence of loss to a victim or gain to a defendant is irrelevant; that because forfeiture in money laundering cases is mandatory, the district court lacks the discretion to withhold entering a forfeiture order based on "equitable considerations;" that notwithstanding the *in personam* nature of criminal forfeiture and the Supreme Court's decision in *Honeycutt*, the defendant in a money laundering case is liable to forfeit the value of the property that he laundered whether or not he obtained or re-

tained any of it for himself; and that *Honeycutt* did not change the prevailing case law upholding the entry of forfeiture orders in the form of personal money judgments.

Further, with respect to the Eighth Amendment issues, the court echoes other cases holding that money laundering is an inherently serious offense that merits imposition of the penalties authorized by Congress whether or not the offense resulted in significant injury to a particular victim.

For the other cases on all of these points, I recommend searching on the citation to this case in the Criminal Forfeiture, Money Laundering Forfeiture, and Eighth Amendment Case Outlines. *SDC*

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

Honeycutt *did not affect the case law holding that forfeiture orders may take the form of a personal money judgment.*

Under Honeycutt*, the ringleader of a drug organization remains liable for the gross proceeds of the conspiracy; that he reinvested the money in running the drug operation does not mean that he did not "obtain" the proceeds.*

Notwithstanding Apprendi *and* Southern Union, *the Sixth Amendment does not give the defendant the right to have a jury determine the amount of the forfeiture money judgment.*

Sixth Circuit finds no support for the argument that the Eighth Amendment bars forfeitures orders that would be "financially ruinous" to the defendant.

United States v. Bradley, ___ F.3d. ___, 2020 WL 4579391 (6th Cir. Aug. 10, 2020).

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 and five parcels of real property. 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 arguing that the Supreme Court's decision in *Honeycutt* rendered the finding of joint and several liability invalid. He also argued for the first time that the Court's decisions in *Apprendi* and *Southern Union* meant that he had a Sixth Amendment right to have the amount of the forfeiture judgment determined by a jury.

The panel vacated the forfeiture order in light of *Honeycutt* and remanded the case to the district court to determine what amount Defendant personally obtained from the drug offense. It also directed the parties to brief the Sixth Amendment issue so that the district court could address it in the first instance.
United States v. Bradley, 897 F.3d 779 (6th Cir. 2018) (September 2018 *Digest*).

On remand, the district court imposed the same forfeiture order and rejected Defendant's Sixth Amendment argument. He appealed once again.

First, the court considered Defendant's argument that *Honeycutt* had silently overruled the case law holding that forfeiture orders may take the form of a money judgment. It noted that *Honeycutt* was itself a money judgment case and that the Court's decision had expressly recognized the *in personam* nature of criminal forfeiture. In

those circumstances, the panel said, it was hard to believe that the Court meant to hold that forfeiture orders could not take the form of a money judgment.

Next, the court held that the district court was justified in holding Defendant liable for the $1 million forfeiture order notwithstanding *Honeycutt.* Defendant was the ringleader of his drug organization. Accordingly, the court said, all of the money the organization obtained was obtained by him. That he "chose to reinvest it in the conspiracy's overhead costs, saved it for a rainy day, or spent it on 'wine, women, and song'" did not mean that he did not personally obtain the money for purposes of forfeiture under Section 853.

Moreover, the court said, "proceeds means more than just profits. It means the gross receipts from the criminal activity." Thus, "it is beside the point whether the money stayed in [Defendant's] pocket (*e.g.,* kept as profits) or went towards the costs of running the conspiracy (*e.g.,* used to pay conspirators)." He obtained the gross proceeds and remains liable for their forfeiture.

The court then rejected Defendant's argument that the Sixth Amendment entitled him to have the amount of the forfeiture judgment determined by a jury. The Supreme Court's decisions in *Apprendi* and *Southern Union* held only that there is a Sixth Amendment right to a jury where a finding of fact could lead to an increase in the statutory maximum or minimum sentence. But there is no statutory maximum for criminal forfeiture; to the contrary, "criminal forfeiture requires a defendant to forfeit the property he used in or received from his crime," whatever that happens to be.

Next, Defendant argued that the district court erred in forfeiting the parcels of real property, arguing that he had sufficient income from his party-promoting business to have purchased the properties. But the court held that the district court did not err in relying on his tax returns – which showed that his business operated at a loss – to conclude that Defendant lacked sufficient legitimate income to have purchased the properties.

Finally, Defendant challenged the $1 million money judgment on the ground that it was "financially ruinous." The court was not impressed.

Defendant, the court noted, had distributed "jaw-dropping quantities of opioids" while living a lavish lifestyle despite his modest salary as a medical technician. "He rented privates jets. He owned a $33,000 Rolex watch and collected 60-plus pairs of expensive shoes. He threw himself a $20,000 birthday party. He spent $11,000 on a single night's entertainment in Las Vegas."

The court found no support for the argument that the Eighth Amendment bars forfeiture orders that are "financially ruinous," but even if there were authority for that proposition, the court said, in the circumstances of this case there was no error in holding Defendant liable for the forfeiture of $1 million, with credit for the value of the forfeited real properties.

So, the forfeiture order was affirmed. *SDC*

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

Comment: First, this case and the Eleventh Circuit's decision in *Waked, supra,* are just the latest in the chorus of unanimous appellate cases holding that *Honeycutt* did not affect the rule that forfeiture orders can take the form of a personal money judgment. *See* Section IX.L of the Criminal Forfeiture Case Outline.

Second, this case likewise joins the now-extensive body of case law holding that the ringleader of an organization "personally obtains" all the proceeds of the offense, and that a court may therefore hold him liable for the forfeiture of those proceeds without having to rely on joint and several liability. To the defendant's objection that he could not have "obtained" money if he had to spend it to keep his scheme going, the court responds that criminal forfeitures are directed at gross proceeds, not net profits. *See id.* Section XII.A.5.

Third, the court joins all others in holding that there is no Sixth Amendment right to have a jury determine the amount of a forfeiture money judgment. As all other courts have held, the Supreme Court's decisions in *Apprendi* and *Southern Union* only apply where there is a statutory maximum – which is not applicable to criminal forfeiture orders – and that in any event, the Court's earlier decision in *Libretti* holding that the Sixth Amendment does not apply to the forfeiture phase of a trial remains binding on the lower courts until the Supreme Court itself reconsiders it.

Finally, the defendant's "financially ruinous" argument echoes the First Circuit's holding in *United States v. Levesque*, 546 F.3d 78, 83-84 (1st Cir. 2008), that a forfeiture order might be unconstitutionally excessive if it deprived the defendant of her ability to earn a livelihood. *See* Section VIII.A.2 of the Eighth Amendment Case Outline. The Sixth Circuit in this case seems disinclined to adopt that view, but in any case, holds that such a complaint rings hollow when made by a person who lived the lifestyle that this defendant was able to afford from his life of crime. The next case deals with the same issue. *SDC*

Excessive Fines

Where the defendant caused his victims at least $25 million in losses, a forfeiture order limited to the $640,000 that he obtained from the scheme is not excessive even if it deprives him of his future ability to earn a living.

United States v. Duncan, 2020 WL 4345730 (S.D.N.Y. Jul. 29, 2020).

S.D.N.Y. * Defendant was convicted of perpetrating fraud schemes against businesses and insurance companies by recruiting individuals to stage fake slip-and-fall accidents. The schemes resulted in losses to the victims of between $25 million and $65 million.

The Government submitted a proposed forfeiture order holding Defendant liable for a $640,000 money judgment which was an estimate of what Defendant derived from the offense. Defendant objected that a forfeiture judgment in that amount would violate the Excessive Fines Clause of the Eighth Amendment in that he was unlikely to be able to pay such an amount in his lifetime, and that accordingly the proposed order would unconstitutionally deprive him of his livelihood.

The court acknowledged that a forfeiture order that is limited to the value of the proceeds that a defendant obtained from an offense may nevertheless be unconstitutionally excessive if it deprives a defendant of his future ability to earn a living. But the court held that even so, a forfeiture order will not be considered excessive if it is proportional to the gravity of the defendant's conduct and the extent of the harm that he caused.

Here, the court held that in light of the losses suffered by the victims and the extended duration of Defendant's fraud schemes, the forfeiture of $640,000 would not be excessive and entered the Government's proposed forfeiture order. *SDC*

Contact: AUSA Nick Chiuchiolo

Comment: The Second Circuit, like the First Circuit in *Levesque,* accepts, as a general proposition, that a forfeiture order that deprives a defendant of his ability to earn a living could be unconstitutionally excessive. *United States v. Viloski*, 814 F.3d 104, 111 (2nd Cir. 2016) (agreeing with *Levesque* that a forfeiture that deprived the defendant of his future ability to earn a living could be unconstitutional; but the "livelihood" factor is only part of the proportionality analysis; a forfeiture that did deprive a defendant of his livelihood might still be constitutional depending on his culpability and other circumstances).

Courts rarely if ever refuse to enter a forfeiture order on loss-of-livelihood grounds where the order is based solely on the proceeds that the defendant derived from his offense. This is another case that falls into that category. *SDC*

Money Judgment / Gross v. Net Proceeds / Rule 32.2 / Excessive Fines

The timing requirements for entering a forfeiture order in Rule 32.2 are "time-related directives" the violation of which does not deprive the court of the authority to enter a forfeiture order as long as the defendant was given notice and an opportunity to be heard.

Cigarette trafficking is an inherently unlawful activity, for which a defendant must forfeit the gross proceeds under Section 981(a)(2)(A);

A $45 million forfeiture judgment in a fraud case is not unconstitutionally excessive where it is less than the maximum statutory fine.

United States v. Maddux, 2020 WL 4453745 (E.D. Ky. Aug. 3, 2020).

E.D. Ky. * Defendants were convicted of conspiring to commit mail and wire fraud in connection with trafficking in untaxed cigarettes. One Defendant was sentenced to 10 years in prison and ordered to pay a $45 million forfeiture money judgment; the other Defendant was sentenced to 60 months in prison and ordered to pay $17.5 million.

The Court of Appeals affirmed the convictions but vacated the forfeiture judgments on jurisdictional grounds, holding that it was improper for the district court to enter the forfeiture orders after Defendants had noticed appeals from their convictions. *United States v. Carman,* 933 F.3d 614 (6th Cir. 2019) (October 2019 *Digest*). Accordingly, on remand, the Government asked the court to reinstate the forfeiture orders.

Defendants objected on several grounds. First, they argued that the court failed to comply with Rule 32.2 when it entered the forfeiture orders after sentencing instead of entering a preliminary order of forfeiture *prior to sentencing* and including the forfeiture in the judgment *at sentencing* as Rule 32.2 requires. The court held, however, that "the deadlines in Rule 32.2 are 'time-related directives'" the violation of which does not deprive the court of the authority to enter a forfeiture order.

The question, the court said, is not whether the directives were followed, but whether Defendants were denied procedural due process. Here, the parties and the court discussed the Government's request for forfeiture money judgments multiple times before and at sentencing, with the court requesting briefing on the forfeiture issues and ultimately stating at sentencing that it would rule on forfeiture after sentencing. In that case, the court concluded, "While the niceties of Rule 32.2 were not observed, both Defendants had ample notice of the United States' intention to seek a forfeiture money judgment and were not deprived of the opportunity to be heard in that regard."

Next, Defendants argued that the forfeiture orders should be limited to the net profits from their offense pursuant to the definition of "proceeds" in 18 U.S.C. § 981(a)(2)(B). But the court agreed with the Government that illegal cigarette trafficking is an inherently unlawful activity, and that therefore the applicable definition of "proceeds" was the "gross receipts" provision in Section 981(a)(2)(A).

Finally, Defendants argued that the magnitude of the forfeiture orders was grossly disproportional to the gravity of their offense in violation of the Excessive Fines Clause of the Eighth Amendment. The court noted that some courts hold that the forfeiture of the proceeds of a criminal offense can *never* be disproportional to the offense, but ultimately held that the forfeiture survived constitutional challenge because it was less than the maximum statutory fine, which is set at twice the proceeds of the offense.

So, the court reinstated the forfeiture money judgments as to both Defendants. *SDC*

AUSA Laura Voorhees

Money Judgments / Substitute Assets / Rule 32.2(e)

The forfeiture of substitute assets is mandatory if a defendant is unable to pay a forfeiture money judgment, and any property of the defendant may be forfeited as a substitute asset.

That the Government was aware of the substitute assets when the court entered its original forfeiture order does not bar the Government from moving to forfeit the assets later pursuant to Rule 32.2(e).

There is no right to have a jury determine the forfeitability of substitute assets.

United States v. Manlapaz, ___ Fed. Appx. ___, 2020 WL 4815837 (4th Cir. Aug. 19, 2020).

Fourth Circuit * Defendant, a tax preparer, was convicted of helping clients to prepare and file thousands of false tax returns. He was sentenced to 108 months in prison and ordered to forfeit $7.2 million in proceeds derived from his offense.

Sometime after sentencing, the Government moved under Rule 32.2(e) to amend the forfeiture order to include Defendant's residence, bank accounts and jewelry as substitute assets. The court granted the motion and Defendant appealed, raising several objections.

The panel began by noting that it is well-established that the Government is entitled to forfeit substitute assets when the defendant "does not have the money to satisfy a money judgment," that the forfeiture of substitute assets is mandatory, and that "there are no limits on what property may be substituted for the proceeds" of the defendant's offense.

The court then rejected Defendant's objection that he was entitled to have a jury decide whether the Government had satisfied the requirements in 21 U.S.C. § 853(p) regarding the forfeiture of substitute assets. Rule 32.2(e) is clear, the court said, "that there is no right to a jury trial when the Government seeks the forfeiture of substitute property."

The court also held that a Rule 32.2(e) motion to forfeit substitute assets is not limited to "newly discovered" assets. Thus, that the Government was aware of the substitute assets before it entered the original forfeiture order is irrelevant. What *is* relevant, the court said, is the unavailability of the property directly traceable to Defendant's offense.

Finally, the court rejected Defendant's objection that some of the substitute property belonged to his wife. The wife's interest, if any, the court said, would be litigated in the ancillary proceeding if she chose to contest the forfeiture and file a claim.

So, the order forfeiting the substitute assets was affirmed. *SDC*

Contact: Tax Division Attorney Robert Lyons

Repatriation Order / Fifth Amendment Issues / Use Immunity / Interlocutory Appeal

A pre-trial order directing a defendant to repatriate the proceeds of the crimes alleged in an indictment violates the Fifth Amendment to the extent that it reveals information about the location of funds or the defendant's knowledge and control over them that the Government did not already know.

An informal promise not to use the defendant's repatriation of his property as evidence in the Government's case-in-chief is not adequate to protect the defendant's Fifth Amendment rights.

A pre-trial repatriation order is subject to interlocutory appeal.

United States v. Oriho, ___ F.3d ___, 2020 WL 4579478 (9th Cir. Aug. 10, 2020).

Ninth Circuit * Defendant was a provider of non-emergency medical transportation services for Medicaid recipients. An indictment charged him with health care fraud and alleged that he had submitted 105,000 false claims and received $7,287,000 in fraudulent Medicaid payments in a three-year period. It also alleged seven instances in which Defendant had transferred a total of $760,000 in fraud proceeds to banks in Kenya and Uganda in violation of 18 U.S.C. § 1957.

The Government believed that Defendant may have transferred much more of the $7,287,000 in fraud proceeds to those countries and moved under 21 U.S.C. § 853(e)(4) for a pre-trial order directing Defendant to repatriate any funds currently in Africa to the United States and to deposit them with the U.S. Marshals Service to preserve them for forfeiture. Defendant opposed the motion, arguing that the order would compel him to provide incriminating information in violation of his Fifth Amendment rights.

The district court granted the Government's motion and issued the repatriation order. It held that because the Government was already aware that Defendant had transferred fraud proceeds to Africa, it would not gain any new information from Defendant's compliance. It also held that the Government's promise not to introduce evidence that Defendant had repatriated funds in its case-in-chief protected Defendant's Fifth Amendment rights. Defendant filed an interlocutory appeal.

On appeal, the panel first considered whether a pre-trial repatriation order is a "restraining order or injunction" that is subject to an interlocutory appeal under 28 U.S.C. § 1291(a)(1). It held that is.

Turning to the merits, the court first considered whether Defendant's compliance with the repatriation order would constitute an act of production that would disclose incriminating information to the Government. Insofar as the order directed Defendant to transfer funds from any bank in any African country and was not limited to the two banks in Kenya and Uganda that were named in the indictment, the court said, Defendant's compliance could potentially provide the Government with information about bank accounts of which it is not already aware. Such information could

lead to new charges against Defendant involving the transfer of criminal proceeds.

Moreover, even if limited to the money transferred to the banks identified in the indictment, Defendant's act of production "could communicate to the jury that [Defendant] controlled those funds, helping to prove the Government's case."

The Government responded that such Fifth Amendment concerns do not apply where the Government is already aware the information that a defendant's act of production would provide. Here, the Government said, it was already aware that Defendant had transferred fraud proceeds to Africa and was in control of those funds. The court held, however, that the Government had not produced evidence to support its belief that Defendant had transferred more than $760,000 to Africa, and that even if it had such evidence, Defendant's compliance could still reveal the existence and location of specific bank accounts holding additional funds and demonstrate Defendant's control over them.

Finally, the court held that the Government's promise not to introduce evidence that Defendant repatriated funds in its case-in-chief did not go far enough to assuage Defendant's Fifth Amendment concerns. The Fifth Amendment privilege, the court said, extends not just to evidence that might be used in the Government's case-in-chief, but to all evidence that could be used in rebuttal, in cross-examination, or to bring new charges. Only "full use immunity" would be adequate to protect Defendant from such use of his compliance with the repatriation order.

Accordingly, the court vacated the repatriation order and remanded the case to the district court to hold an evidentiary hearing to determine what the Government already knew about the Defendant's transfer of funds to Africa and his control over African bank accounts, to limit the repatriation order to the amount of money that could be transferred without revealing information that the Government did not already possess, and to determine whether the Government should be required to provide full use immunity under 18 U.S.C. §§ 6001-03 to protect Defendant's Fifth Amendment rights. *SDC*

Contact: AUSAs Rachel Hernandez and Mark Wenker (D. Ariz).

Comment: Section 853(e)(4) provides that a court may issue an order directing a defendant to repatriate property subject to forfeiture prior to trial. As its inclusion in Section 853(e) suggests, such a repatriation order is a species of pre-trial restraining order designed to preserve property for forfeiture in the event the defendant is convicted.

The Government's view has been that if it knows the defendant has committed a crime and knows that he has transferred the proceeds of that crime overseas, an order directing him to repatriate such proceeds to the United States simply preserve the *status quo* so that the funds will be available for forfeiture (and eventual repatriation to victims), and does not implicate the Fifth Amendment either because the Government already knows the defendant has transferred funds overseas, or because its promise not to use the evidence in its case-in-chief protects his Fifth Amendment rights. This case holds, to the contrary, that any act of repatriation from a specific location that the Government does not already know about – or even from a location that the Government does know about – implicates the Fifth Amendment because it reveals the defendant's knowledge and control over such funds, and could lead to additional money laundering charges.

Thus, under this decision, it appears that the Government could never obtain an order

directing a defendant to repatriate "all of the proceeds of the crimes alleged in the indictment" if there is any chance that the defendant's compliance would tell the Government something that it did not already know. Rather, at most, it could obtain an order directing a defendant to repatriate funds from specific locations that the Government can demonstrate it already knows about, and even then, it may be required to grant full use immunity preventing it from using the information in any way in a criminal case.

There are no other appellate cases discussing the Fifth Amendment implications of such a repatriation order, so this case will have enormous influence over the Government's ability to use such orders to recover and preserve criminal proceeds in future cases. The few district court cases on point either found that the Fifth Amendment was not implicated (because repatriation of the funds would not reveal anything the Government did not already know), or that the promise not to use the act of production in the Government's case-in-chief was adequate to protect the defendant's Fifth Amendment rights. But the panel in this case was unimpressed with those decisions. *See United States v. Adams,* 782 F. Supp. 2d 229, 233-34 (N.D. W. Va. 2011) (repatriation order does not violate defendant's Fifth Amendment rights where the issue in his criminal case is not whether defendant obtained the funds, and not where the funds are located, but whether he obtained them through fraud); *United States v. Morrison,* 2006 WL 2990481, *4 (E.D.N.Y. Oct. 19, 2006) (where defendant has already revealed the existence of his foreign accounts, the act of repatriating the foreign assets does not involve testimonial self-incrimination); *United States v. Sellers,* 848 F. Supp. 73, 77 (E.D. La. 1994) (no Fifth Amendment violation if the Government does not use evidence of the repatriation in its case-in-chief). *SDC*

Jurisdiction and Venue

In a civil forfeiture case, the court is required only to have in rem *jurisdiction over the property; it does not need to have* in personam *jurisdiction over the property owner.*

Thus, the "minimum contacts" requirement of International Shoe *and* Shaffer v. Heitner *do not apply in civil forfeiture cases.*

Venue for a civil forfeiture case lies in any district where an act giving rise to the forfeiture occurred; that act need not be the criminal offense on which the forfeiture is based but may be any act in furtherance of a conspiracy to commit that offense.

United States v. Obaid, ___ F.3d ___, 2020 WL 4931503 (9th Cir. Aug. 24, 2020).

Ninth Circuit * Claimant, a citizen of Saudi Arabia, was one of the participants in the theft of more than $1 billion in public funds from Malaysia in the 1MDB case. According to the Government, Claimant received $153 million of the stolen funds in his Swiss bank account, and then wired $2 million from that account to a bank in California to purchase shares of stock in a California corporation.

The Government filed a civil forfeiture action in the Central District of California against the shares of stock, alleging that they were traceable to the proceeds of the fraud scheme and the laundering of those proceeds. Claimant filed a claim and moved to dismiss the complaint for lack of jurisdiction and improper venue.

The Government asserted that the court had jurisdiction because in an *in rem* action, it is only necessary to show that the court has jurisdiction over the property. Claimant argued, however, that the forfeiture action was really an action *against him* in which his interest in the property served only as a proxy, and that accordingly the

court had to have *in personam* over him for the forfeiture case to proceed. Because he lacked the "minimum contacts" with the United States required by the Supreme Court's decision in *International Shoe,* he said, the court did not have *in personam* jurisdiction and thus the case should be dismissed. He also argued that venue was improper in the Central District of California because none of the criminal acts giving rise to the forfeiture occurred there.

The district court denied Claimant's motion on both grounds and Claimant took an interlocutory appeal.

The panel acknowledged that there is a category of cases called *quasi in rem* cases in which the action involves a personal claim against a person but the person's interest in property is used as a lever to force the person to appear personally in court. Under the Supreme Court's decision in *Shaffer v. Heitner*, the panel said, a court must have *in personam* jurisdiction over the property owner in such cases.

Civil forfeiture actions, however, are not *quasi in rem* cases; they are true *in rem* cases in which the action is brought against the property not as a stand-in for an action against the property owner, but because the property itself was involved in or used to commit a crime. In such cases, the district court's jurisdiction over the property owner is irrelevant as long as it has jurisdiction over the property. Thus, the court held that notwithstanding *Shaffer*, the "minimum contacts" requirement in *International Shoe* has no application in *in rem* forfeiture proceedings.

Turning to the venue issue, the panel noted that under 28 U.S.C. § 1355(b)(1)(A), venue for a civil forfeiture action lies in any district in which any of the acts giving rise to the forfeiture occurred. Claimant argued that the complaint did not allege that his purchase of the stock in California was a criminal act, and that because the forfeiture action was based on criminal acts that occurred elsewhere, venue was improper in the Central District of California. But the court held that because the purchase of the stock was an act in furtherance of the conspiracy to launder the proceeds of the 1MDB scheme, the activity in the Central District was sufficient to support venue in that district.

So, the order denying Claimant's motion to dismiss for lack of jurisdiction and venue was affirmed. *SDC*

Contact: MLARS Trial Attorney Joshua Sohn

Comment: This was a 2-1 decision that, if it had gone the other way, would have upended the well-settled understanding of civil forfeiture as an *in rem* action against the property in which the court need only have *in rem* jurisdiction over the property itself, and need not have *in personam* jurisdiction over the property owner.

The claimant made a forceful argument – accepted by the dissenting judge – that the Supreme Court's decision in *Shaffer v. Heitner,* 433 U.S. 186 (1977), holding that a court must have *in personam* jurisdiction over the property owner in *quasi in rem* cases, applies equally to purely *in rem* cases. But the majority held that other Supreme Court cases, including *Tennessee Student Assistance Corp. v. Hood,* 541 U.S. 440 (2004), have maintained the distinction between *in rem* and *quasi in rem* cases with respect to the need for *in personam* jurisdiction, and that the longstanding rule that *in personam* jurisdiction is not required in *in rem* forfeiture cases thus was not overruled *sub silentio* in *Shaffer.*

The only other civil forfeiture case to touch on this issue was the Fourth Circuit's decision several years ago in *United States v. Batato*, 833 F.3d 413 (4th Cir. 2016), which

dealt with exercise of jurisdiction over property located abroad. It held that under 28 U.S.C. § 1355(b)(2) courts in the U.S. have jurisdiction over such property if the acts giving rise to civil forfeiture occurred, at least in part, in the district, even if the perpetrators themselves acted entirely from abroad and never physically entered the United States. If there is a due process requirement, the court said, the acts that occurred in the district over the internet satisfied the minimum contacts requirement of *International Shoe.*

The claimants in the instant case argued that *Batato* requires sufficient minimum contacts to satisfy the due process concerns in *International Shoe,* but the majority declined to read *Batato* that way. The *Batato* court, the panel said, "assumed without deciding" that a "minimum contacts approach" is appropriate in a civil forfeiture action.

In all events, the panel expressly held that *Shaffer* "is limited to *quasi in rem* proceedings," and that accordingly, there is no "minimum contacts" requirement in civil forfeiture proceedings which are purely *in rem* actions against the property. This resolves the issue in the Ninth Circuit, at least until the claimants argue that there is now a split in the circuits that the *en banc* court or the Supreme Court itself must resolve.

The venue issue appears to have been made more complicated than necessary by the way the Government alleged the basis for the forfeiture.

Apparently, the shares of stock were not located in California, so the Government could not base venue on 28 U.S.C. § 1395. Instead, it argued that venue was based on Section 1355(b)(1)(A) which allows a forfeiture action to be brought in any district in which any of the acts giving rise to the forfeiture occurred. That provision was added to the statute in 1991 to allow the Government to consolidate forfeiture actions against multiple assets in a single district instead of having to file separate actions in each district where the property happened to be found. *See* 137 Cong. Rec. 31536, *et. seq.* (Nov. 13, 1991) (ghost-written by yours truly for Sen. Alphonse D'Amato).

What the claimants argued was that the reference to "any of the acts giving rise to the forfeiture" was to the *criminal offenses* giving rise to the forfeiture, and because the Government did not allege that the purchase of the stock in California was the crime giving rise to forfeiture, the venue provision did not apply.

The Government could easily have alleged that the purchase of the stock was a money laundering offense in violation of Section 1957. Instead, it alleged that the stock was merely traceable to the fraud scheme and to earlier money laundering offenses. That gave the claimants the opening to make their argument, but the court ultimately rejected it on the ground that the purchase of the stock, if not itself a criminal offense, was an act in furtherance of the conspiracy that gave rise to the forfeiture, and that that was good enough. *SDC*

Fugitive Disentitlement / Forfeiture of Real Property in Customs Cases

The fugitive disentitlement statute, 28 U.S.C. § 2466, applies equally to individuals and corporation that fail to appear to face charges in a related criminal case.

For purposes of the statute, a corporation will be considered a "fugitive" if it has been served with a summons to appear, fails to appear, and is held in civil contempt for failing to appear.

Claimant whose claim is stricken under the fugitive disentitlement statute may move for reconsideration and have the claim reinstated if it voluntarily terminates its fugitive

status.

United States v. Real Property Located at 2323 Main Street, 2020 WL 4373414 (C.D. Cal. Mar. 11, 2020); *United States v. Real Property Located at 2323 Main Street,* 2020 WL 4373412 (C.D. Cal. May 12, 2020).

C.D. Cal. * The Government filed civil forfeiture complaints against a quantity of aluminum that was illegally imported into the United States and against four warehouses where the aluminum was stored. The complaints alleged that the aluminum was subject to forfeiture pursuant to 19 U.S.C. § 1595a(c) as merchandise introduced into the United States "contrary to law," and that each of the warehouses was subject to forfeiture pursuant to Section 1595a(a) as a "thing" used to facilitate the illegal importation of the aluminum.

Five foreign entities -- a corporation and four LLCs -- filed claims asserting ownership of the aluminum and the warehouses, respectively, and contesting their forfeiture. The cases were stayed pending the conclusion of a criminal investigation.

Ultimately, all five entities were indicted, served with criminal summonses to appear, and were found in civil contempt when they did not respond to an order to show cause why they should not be held in contempt for failing to appear in the criminal case. At that point, the Government moved to lift the stay in the civil forfeiture cases, and moved to strike all five claims under the fugitive disentitlement statute, 28 U.S.C. § 2466. Claimants opposed the motion on the ground that the statute applies only to individuals who may be fugitives, not to corporate entities.

The court held that the plain language of the statute permits a court to dismiss the claim of any *person* that falls within its scope; it is not limited to natural persons and does not exclude corporations or LLCs. Because corporations and LLCs are legal "persons," the court concluded, their claims may be dismissed if the requirements of Section 2466 are satisfied.

Claimants pointed to Section 2466(b) which provides that the claim of a corporation may be dismissed if the owner or majority shareholder of the corporation is a fugitive. But the court held that this does not mean that a corporate claim may *only* be dismissed in those circumstances. Rather, it was added to the statute to prevent an individual defendant in a criminal case from circumventing the fugitive disentitlement statute by filing a claim in a civil forfeiture case in the guise of a corporation. It was not intended to exempt corporations from the application of the fugitive disentitlement statute when the corporation itself is the defendant in a related criminal case.

The court then examined the requirements of Section 2466 and found that each was satisfied. The requirement that "a warrant or process has been issued" for the defendant's apprehension was satisfied, the court said, because the corporate claimants were each served with summonses to appear in the criminal case, failed to appear, and were held in civil contempt when they failed to respond to notice to show cause. As applied to a corporation, the court said, this was the functional equivalent of showing that a warrant has been issued for the arrest of an indicted individual.

As to the remaining requirements, the court held that Claimants' oppositions to the motion to dismiss indicated that they were aware of the summonses, the criminal case was a "related" proceeding based on the same facts, the corporations "cannot be and are not confined or held in custody," and claimants "purposefully evaded the jurisdiction" of the court in the criminal case by failing to appear despite being held in civil contempt.

So, the court granted the Government's motion to dismiss all five claims. Shortly thereafter, however, all five entities appeared in the criminal case, ending their fugitive status, and moved to reconsider the order striking their claims. The court held that the change in Claimants' fugitive status warranted reconsideration, granted Claimants' motion, and reinstated their claims. *SDC*

Contact: AUSA Steve Welk

Comment: This is a case of first impression on several fronts. No other case has discussed the application of the fugitive disentitlement statute to a corporate criminal defendant. Nevertheless, as the court holds, the intent of the statute was to bar *any* criminal defendant from using the resources of the federal courts to defend a civil forfeiture action while flouting the jurisdiction of another court in a criminal case. There is no distinction in the statute between natural persons and corporations.

The more difficult question was how to determine whether a corporation that is indicted in a criminal case is a "fugitive." Corporations, after all, cannot be arrested and do not flee the jurisdiction of the United States or refuse to reenter it. But the court directly addressed that issue by holding that a corporation may be deemed to be the functional equivalent of an individual fugitive if it has been indicted, served with a summons to appear in the criminal case, fails to appear, fails to respond to an order to show cause why it should not be held in civil contempt, and is held in contempt.

The decision is novel also in the sense that it is the first to consider whether a claim stricken under the fugitive disentitlement statute may be reinstated once the claimant voluntarily ends its fugitive status. Here, the court held that once the claimants agreed to appear in the criminal case to face the criminal charges, the circumstances had changed, and they were entitled to reconsideration under Rule 59. *SDC*

Forfeiture of Bribe Money

Bribe money paid to the campaign finance account of a corrupt public official is subject to forfeiture under § 981(a)(1)(C) as the "proceeds" of the bribery offense.

The bribe payer remains liable to forfeit the bribe money because it was seized from an account over which he maintained control even after the bribe was paid.

United States v. Lindberg, 2020 WL 4518881 (W.D.N.C. Aug. 4, 2020).

W.D.N.C. * Defendant, the owner and executive officer of an insurance company, was convicted of attempting to bribe the North Carolina Insurance Commissioner who agreed to remove the regulator overseeing Defendant's company in exchange for a $2 million campaign contribution. Unknown to Defendant, the Insurance Commissioner was working with the FBI and was not corrupt.

As part of Defendant's sentence, the Government moved to forfeit the $1.45 million that remained in the campaign finance accounts at the time Defendant was indicted, arguing that the money constituted the proceeds of the bribe and that it was therefore subject to forfeiture under 18 U.S.C. § 981(a)(1)(C). Defendant opposed the forfeiture on several grounds.

First, he argued that the bribe money in a bribery case may be the property *used to commit* the offense but is not the *proceeds* of the offense. As only "proceeds" are subject to forfeiture under Section 981(a)(1)(C), he said, there was nothing to forfeit in this case.

The court held, however, that the terms "property used to commit" and "proceeds" are not mutually exclusive, and that in a bribery case the same money can be both. Applying the "but for" test, the court then held that the money would not have been deposited into the campaign finance accounts "but for" the bribe, and that the $1.45 million remaining in those accounts was therefore forfeitable as the proceeds of the offense.

Defendant argued, however, that even if the bribe money was the "proceeds" of the bribe, he was not liable for its forfeiture because it was not money that he, as the bribe payer, acquired. But the court rejected this argument for two reasons.

First, it held that Section 981(a)(1)(C) does not limit forfeiture to property that a particular defendant acquired or obtained. To the contrary, the Government is required only to show that the property was the proceeds of the offense. In addition, the court held that to the extent a criminal forfeiture order must be limited to "the defendant's interest" in the property, that requirement was satisfied because Defendant retained control over the campaign finance account and the disbursements from it even after he deposited the bribe money into it.

Finally, Defendant argued that the jury's acquittal of a co-defendant who was the principal manager of the campaign finance accounts meant that the jury must not have believed that the funds in the account were the proceeds of a bribe. But the court held that if Defendant wanted to have the jury determine the nexus between the $1.45 million and the bribery offense, he should not have waived his right to have the jury retained and asked that the forfeiture issue be resolved by the court.

So, the court rejected all of Defendant's arguments and ordered the forfeiture of the $1.45 million. *SDC*

Contact: AUSA Ben Bain-Creed

Comment: The court's ruling that bribe money constitutes the "proceeds" of the bribe, within the meaning of Section 981(a)(1)(C), is consistent with the holdings of other courts. The defendant's argument that bribe money is more accurately categorized as property used to commit the bribery offense is interesting, but the court's analysis is straightforward: but for the bribe, there would be no bribe money; therefore the bribe money is the proceeds of the bribe.

What is unusual about this opinion is the court's apparent acceptance of the defendant's argument that he, as the bribe payer, could not be held liable for the forfeiture of the proceeds unless the Government could show that the money remained under his control. The court finessed that issue by finding that the bribe money *did remain under the defendant's control,* but its acceptance of the premise of the defendant's argument seems to be wrong.

First, the other courts that have ruled on this issue have held that the bribe payer remains liable to forfeit the amount of the bribe *even if he did not retain control over it. See United States v. Tanner,* 942 F.3d 60 (2nd Cir. 2019) (payor and recipient of a bribe are jointly and severally liable to forfeit the amount of the bribe because it is the proceeds of the offense); *United States v. Genova,* 333 F.3d 750, 761 (7th Cir. 2003) (because all codefendants are liable for the sum of the proceeds realized by each other, the payer of a kickback to a city official is liable for what he received from the city as well as the amount of the kickback, and the city official is liable for the same); *United States v. St. Pierre,* 809 F. Supp. 2d 538, 546 (E.D. La. 2011) (payor of bribe is liable for value of bribe received by co-conspirator payee).

Two of those cases base the bribe payer's

liability on the doctrine of joint and several liability, and whether they remain good law after *Honeycutt* remains to be seen, but certainly the majority view is that *Honeycutt* does not apply to the forfeiture of proceeds under Section 981(a)(1)(C). Thus, the court could have based its forfeiture judgment on those grounds, but for whatever reason, it did not cite these cases.

Instead, the court accepted the defendant's assertion that forfeiture orders in criminal cases must be limited to the defendant's interest in the property, and then held that the defendant did indeed have an interest. That premise appears to be wrong.

As the Second Circuit held in *De Almeida v. United States*, 459 F.3d 377, 381 (2d Cir. 2006), criminal forfeiture is *not limited* to property owned by the defendant; "it reaches any property that is involved in the offense." The limitation to the "property of the defendant" comes into play not at the time the forfeiture order is entered, but in the ancillary proceeding which serves to ensure that property belonging to third parties who have been excluded from the criminal proceeding is not inadvertently forfeited). *Accord. United States v. Watts*, 477 Fed. Appx. 816, 817-18 (2d Cir. 2012) (following *De Almeida*; property may be forfeited based on its nexus to the offense, regardless of ownership; the purpose of the ancillary proceeding is to allow third parties to challenge the forfeiture on ownership grounds); *United States v. Molina-Sanchez,* 298 F.R.D. 311, 314 (W.D.N.C. 2014) (because the property was derived from the offense for which the defendant was convicted, "the fact that defendant has no legal ownership interest in the . . . property does not bar criminal forfeiture"); *United States v. Dupree*, 919 F. Supp.2d 254, 274-275 (E.D.N.Y. 2013) (criminal forfeiture is not limited to property of the defendant; it reaches any property derived from or used to commit the offense; in the case of proceeds, the *in personam* nature of forfeiture is satisfied if the property is the proceeds of the crime the defendant committed; older cases such as *O'Dell* and *Gilbert* were based on former Rule 31(e) which was replaced by Rule 32.2 and are no longer good law); *United States v. Zai*, 2013 WL 625762, *4 (N.D. Ohio Feb. 20, 2013) (same; *Gilbert* superseded by Rule 32.2).

In the same vein, see the discussion of a money launderer's liability to forfeit an amount of money equal to the value of the property that he laundered in *United States v. Waked* at page 1 of this issue of the *Digest.*

At one point in its opinion, the court seemed to accept this proposition when it held that Section 981(a)(1)(C) does not limit criminal forfeiture to the property that a particular defendant obtained, and that under Rule 32.2, the Government is required only to establish the requisite nexus between the property and the offense. If it had stopped there, its opinion would have been consistent with precedent. As it is, it creates an opening for other defendants to argue that a bribe payer is not liable to forfeit the amount of the bribe money once it leaves his hands. *SDC*

Concealment Money Laundering

In a concealment money laundering case, the Government does not have to show that the transaction concealed all of the attributes of the laundered money; proof that it concealed any one of them will suffice.

A financial transaction that conceals the nature of the transaction – such a check stating that it constitutes the repayment of a loan when there was no loan -- may constitute concealment money laundering even though it does not conceal the source of the money.

United States v. Millender, ___ F.3d ___, 2020 WL 4745571 (4th Cir. Aug. 17, 2020).

Fourth Circuit * Defendant, the pastor of a small church, perpetrated an investment fraud scheme aimed at the members of his congregation. Instead of investing the members' money as promised, he and his wife spent it on a lavish lifestyle including the purchase of a $1.75 million residence and $92,000 in furnishings.

Defendant and his wife were found guilty by a jury of wire fraud and concealment money laundering offenses, but the district court granted the wife's motion for a judgment of acquittal on all counts. With respect to the money laundering charges, the court held that no reasonable jury could have found that the purpose of the alleged money laundering transactions was to conceal or disguise the source of the money. The Government appealed.

The alleged money laundering charges involved three checks drawn on the account containing the investors' funds and made payable to the pastor's wife. In each case, the checks contained a false notation as to the purpose of the payment. For example, in one case the check said, "loan repayment," and in another it contained a notation relating to reimbursement for an office party. In fact, the checks were the means by which the pastor diverted the investors' funds to his wife to fund their personal expenses: there was no "loan" and no office party.

The district court granted the judgment of acquittal upon finding that the checks, being drawn on the account containing the investors' funds, did not conceal the source of the money. But the panel held that "transactions need not conceal the *source* of the proceeds if they conceal the *nature* of the proceeds."

"A jury could reasonably find that the false purposes noted on the checks were designed to make the transferred funds look like lawful reimbursements for legitimate business expenses rather than unlawful transfers of lenders' money for [Defendants'] personal use."

So, the judgment of acquittal was reversed, and the jury's verdicts were reinstated. *SDC*

Contact: AUSA Kim Pedersen (E.D. Va.)

Comment: The attributes of the laundered money that a defendant may be guilty of concealing – the "source, nature, location, ownership or control" – are listed in the disjunctive, which means that the Government may prevail by proving that the purpose of the transaction was to conceal or disguise any one of them. *See* Section XII.S. of the Money Laundering Case Outline. *SDC*

International Money Laundering / Foreign Bribery / Intent to Promote

Sending money into the United States for the purpose of bribing a foreign public official in violation of the foreign anti-corruption act is a violation of 18 U.S.C. § 1956(a)(2)(A).

While concealment is not an element of promotional money laundering, defendant's extensive efforts to conceal his connection to a bribe payment and to falsify the nature of the transaction was circumstantial evidence that the purpose of the transaction was to promote bribery.

United States v. Inniss, 2020 WL 4261181 (E.D.N.Y. Jul. 24, 2020).

E.D.N.Y. * Defendant, a public official in Barbados, solicited bribes from a company seeking a contract with the Barbados Government. The company paid the bribes by wiring money from Barbados to a bank account in New York designated by Defendant

and held by Defendant's associate.

A jury found Defendant guilty of international money laundering with the intent to promote a violation of the Prevention of Corruption Act of Barbados. 18 U.S.C. § 1956(a)(2)(A). But Defendant moved for a judgment of acquittal, arguing that there was insufficient evidence that the purpose of the payments was to pay a bribe.

The court found that there was ample evidence to support the jury's verdict. Among other things, it noted that although Defendant met personally with representatives of the victim company to solicit the payments, he went to great lengths to conceal his connection to the money. For example, he directed the victim to send the money to an associate's bank account in New York even though Defendant had multiple U.S. bank accounts in his own name, and provided fake invoices from the associate's company to support the solicited payments.

The court also noted that the Prevention of Corruption Act of Barbados does not require proof that the defendant actually performed an act, or refrained from performing an act, in exchange for the bribe.

So, the motion for a judgment of acquittal was denied. *SDC*

Contact: AUSA Sylvia Shweder

Comment: This case is a good illustration of the application of the international promotional money laundering statute where the offense being promoted is a violation of foreign law. Simply sending money into the United States is a violation of Section 1956(a)(2)(A) if the payment is intended to bribe a foreign public official and there is a foreign statute that makes such payments illegal. The Government's burden at trial is simply to show that money was sent from a foreign country to the United States, and that its purpose was to violate a foreign anti-corruption statute. (Foreign public corruption is a "specified unlawful activity" under 18 U.S.C. § 1957(c)(7)(B).)

This case does not dwell on the issue, but other courts have noted that it is only necessary to show that the defendant's intent was to facilitate a corruption offense as it is defined in the foreign anti-corruption statute. That the facts might not have satisfied the elements of a similar anti-corruption statute in the United States is irrelevant. *See United States v. Chi,* 936 F.3d 888 (9th Cir. 2019) (as long as the foreign bribery offense falls within the scope of the ordinary, contemporary and common meaning of "bribery of a public official" at the time the money laundering statute was enacted, the Government need only allege and prove the elements of that offense, and not the elements of § 201, the analogous federal bribery statute); *United States v. Thiam,* 934 F.3d 89 (2nd Cir. 2019) (declining to reverse conviction because trial court did not interpret "official act" in a case where the SUA was bribery under Guinean law in accord with the Supreme Court's decision in *McDonnell;* terms in foreign statute should be interpreted as foreign court would interpret them).

Hence, the court notes only that that because the Barbados statute does not require proof that the defendant actually performed a corrupt act, proof of such performance was not required to establish a violation of § 1956(a)(2)(A).

That rule, however, applies only to the proof of the elements of the foreign offense, not to the procedure for proving them. In an earlier decision in this case, the Government conceded that it had to prove each element of the foreign offense, notwithstanding a provision of the foreign statute shifting the burden of proof to the defendant as to one of those elements. *United States v. Inniss,* 2019 WL 6117987 (E.D.N.Y. Nov. 18,

2019).

Finally, it is worth noting that although promotion money laundering does not require proof of concealment, the defendant's extensive efforts to conceal the nature and purpose of the financial transaction was circumstantial evidence of his intent to promote. *SDC*

International Money Laundering / Terrorist Assets / Money Transmitting Business / Virtual Currency / Arrest Warrant in Rem

Court finds that any asset of North Korea, wherever located, is subject to forfeiture under § 981(a)(1)(G) as an asset of a state sponsor of terrorism.

United States v. 113 Virtual Currency Accounts, 2020 WL 4515361 (D.D.C. Aug. 4, 2020).

D.D.C. * The Government filed a civil forfeiture action against more than one hundred virtual currency accounts, located overseas. It alleged that persons acting on behalf of North Korea had stolen the virtual currency by hacking South Korean virtual currency exchanges, and violated U.S. law by sending the virtual currency into and out of the United States to promote the hacking and theft offenses.

The forfeiture complaint alleged that the virtual currency accounts were subject to forfeiture under 18 U.S.C. § 981(a)(1)(A) as property involved in international promotional money laundering in violation of Section 1956(a)(2)(A) and property involved in the operation of an unregistered money transmitting business in violation of Section 1960, and under 18 U.S.C. § 981(a)(1)(G) as the assets of North Korea, a designated state sponsor of terrorism.

The Government then moved under Rule G(3) for the issuance of an arrest warrant *in rem* for the defendant accounts. Based on the Government's detailed probable cause affidavit, the court found probable cause for the forfeiture of the accounts under all three theories and issued the warrant. *SDC*

Contact: AUSA Zia Faruqui

Comment: The underlying facts are not spelled out in detail in the opinion granting the motion for the arrest warrant *in rem*, so I have posted the 45-page probable cause affidavit on my website, http://assetforfeiturelaw.us.

The most significant part of this case is that it is the first to find that *any* asset of North Korea, wherever located, is subject to forfeiture as an asset of a state sponsor of terrorism under 18 U.S.C. § 981(a)(1)(G). The point, as discussed in the next case summary, is that a court will find probable cause for the forfeiture of any asset of any entity that has been designated by the State Department as a foreign terrorist organization without making further inquiry into the grounds for the designation. *SDC*

Terrorist Assets / Standing / *In Rem Jurisdiction* / Default Judgment

Under § 981(a)(1)(G), a court may order the forfeiture of the assets of any entity designated by the State Department as a Foreign Terrorist Organization; the Department's finding that the entity is engaged in terrorism is entitled to deference and the court therefore need not engage in any fact-finding on that issue.

The property of a business serving as a "front" for a terrorist organization is subject to forfeiture as property affording the business a "source of influence" over the organization.

A federal court may exercise in rem *jurisdiction over the foreign assets of a terrorist organization without having either constructive possession or control over the assets.*

If money involved in an international wire transfer is blocked in a correspondent bank account, only the correspondent bank has standing to contest the forfeiture; the sender and beneficiary are mere creditors and are not entitled to notice of the forfeiture action.

United States v. Oil Tanker Bearing International Maritime Organization Number 9116512, 2020 WL 4569424 (D.D.C. Aug. 7, 2020).

D.D.C. * The Government filed a civil forfeiture action under 18 U.S.C. § 981(a)(1)(G) against an Iranian oil tanker, its load of 2.1 million barrels of crude oil, and $1 million that was being transferred through a correspondent bank account at a U.S. bank when it was blocked by the Office of Foreign Asset Control (OFAC).

The complaint alleged that the tanker and oil were subject to forfeiture as the foreign assets of Islamic Revolutionary Guards Corp (IRGC), an entity designated by the State Department as a Foreign Terrorist Organization, and that the $1 million was subject to forfeiture as property "affording a source of influence" over a terrorist organization because it was being transferred to a front company acting on behalf of the IRGC. When no one filed a claim, the Government moved for a default judgment.

Before addressing the sufficiency of the complaint, the court had to determine if it had jurisdiction over the assets and if the Government had provided proper notice to potential claimants.

The tanker and its cargo were detained in Gibraltar *en route* to Syria and thus were not in the possession, nor under the control, of the United States. But the court held that neither constructive nor actual possession is necessary for a court to exercise *in rem* jurisdiction if the defendant property in a civil forfeiture case is overseas. Rather, such jurisdiction is conferred by statute, 28 U.S.C. § 1355. (The court also noted that it had issued an arrest warrant *in rem* pursuant to Rule G(3) after making a finding of probable cause, but it did not say if the warrant had been executed.)

With respect to the notice requirement, the court held that although the Government had not sent direct notice to the IRGC, the Iranian Government had actual notice of the forfeiture action against the tanker and the oil, and thus had no grounds to complain of the failure to comply with the direct notice requirement in Rule G(4)(b).

Regarding the $1 million that was blocked in the correspondent bank account, the court applied New York law (Art. 4 of the UCC) and held that because funds in a correspondent bank account belong to the correspondent bank and not to either the sender or the receiver, no party other that the correspondent bank had standing to contest the forfeiture, and accordingly it was unnecessary to send direct notice to any party other than the correspondent bank, which expressed no interest in contesting the forfeiture.

Turning to the merits, the court held that all assets, wherever found, of any entity designated as a Foreign Terrorist Organization are subject to forfeiture under Section 981(a)(1)(G)(i) without any fact-finding by a court. Rather, the court said, a court may simply defer to the expertise of the State Department and OFAC in such matters. Thus, because the tanker and the oil were the property of the IRGC, they were subject to forfeiture.

Finally, the court held that the $1 million in the correspondent bank account

was subject to forfeiture as property "affording a source of influence" over a terrorist organization because when it was blocked, it was being transferred to an entity that served as a front for the IRGC. Property "affording a source of influence," the court said, is any property that makes the "prohibited conduct less difficult." Because using the front company made it easier to conceal the scheme to sell Iranian oil notwithstanding international sanctions, the money being sent to the front company was property affording it a source of influence over the IRGC.

So, the court held that all of the requirements for bringing a civil forfeiture action were satisfied, and granted the motion for a default judgment. *SDC*

Contact: AUSA Zia Faruqui

Comment: There are several issues in this case that would most likely have been contested if someone had filed a claim to the property.

With respect to the exercise of *in rem* jurisdiction over property abroad, the majority rule is that Section 1355(b)(2) gives the court in the district where the offense giving rise to the forfeiture occurred *in rem* jurisdiction whether or not the Government obtained possession or constructive control over the property with the assistance of foreign authorities. *United States v. Approximately $1.67 Million (U.S.)*, 513 F.3d 991 (9th Cir. 2008). *See also United States v. All Funds in Account Nos. 747.034/278 (Banco Espanol de Credito)*, 295 F.3d 23, 27 (D.C. Cir. 2002) (§ 1355(b)(2) gives the district court *in rem* jurisdiction over property located abroad; the foreign country's compliance and cooperation "determines only the effectiveness of the forfeiture orders of the district courts, not their jurisdiction to issue those orders"). *See also* Section VIII.F.5 of the Civil Forfeiture Case Outline.

This case, however, involves assets that are subject to forfeiture simply because they are the property of a Foreign Terrorist Organization. There is no allegation that any specific offense giving rise to the forfeiture occurred in the district where the action was filed. So, in this context, the rule that neither possession nor constructive control over foreign assets is required to give the court *in rem* jurisdiction might not be applicable.

On the other hand, it may be sufficient for the court to issue an arrest warrant *in rem* and for the Government to request a foreign country to execute it. As noted in the summary, the court did issue an arrest warrant pursuant to Rule G(3) and it was sent to Gibraltar to be served on the property pursuant to an MLAT request, but the case does not say what happened thereafter. As the court reads the case law, whether Gibraltar executed the warrant does not matter.

With respect to the notice requirements in Rule G(4), the court accepts the Government's view that neither the sender nor the beneficiary of an international wire transfer is entitled to notice of a civil forfeiture action if the money is intercepted while in a correspondent bank account. It is true that only parties with standing to contest a forfeiture are entitled to direct notice, *see United States v. Ferro,* 473 Fed. Appx. 789 (9th Cir. 2012) (a person without Article III standing cannot complain that he was not sent notice), and there is case law supporting the view that money in a correspondent bank account belongs to the correspondent bank, not to the sender or the beneficiary.

For example, in the *BCCI* cases where the bank itself was the defendant and its assets were subject to forfeiture, the court held that funds that the bank held as the intermediary in an aborted international wire transfer belonged to the bank, and the sender and beneficiary of the transfer were merely un-

secured creditors without standing to contest the forfeiture of the bank's funds. *See United States v. BCCI Holdings (Luxembourg) S.A. (Petition of State Trading Organization),* 977 F. Supp. 12, 18-19 (D.D.C. 1997) (intended beneficiary of incomplete wire transfer has no interest in funds that defendant/intermediary bank improperly retained; at most, sender of the funds is an unsecured creditor of the intermediary bank); *id. (Petitions of Zaman and Bhandari),* 977 F. Supp. 20, 25-26 (D.D.C. 1997) (originator and beneficiary of incomplete wire transfer are both general creditors of defendant bank that unlawfully retained the money).

It may be a different matter, however, when the funds in the bank's possession are subject to forfeiture not because the bank itself is "dirty," but because the funds are being transferred to a beneficiary that is "dirty." If the funds are being forfeited, in other words, because they belong to an entity that is using them to facilitate the activities of a terrorist organization, it seems strange to say that that same entity lacks standing to contest the forfeiture.

With respect to the merits of the Government's forfeiture complaint, this case and the one described in the previous summary, may be the first to hold that the State Department's designation of an entity as a Foreign Terrorist Organization is all that is required to establish that the entity in question is a terrorist organization subject to the forfeiture sanctions in Section 981(a)(1)(G). In so holding, these two cases are saying, in essence, that the court has no role in determining whether the factual predicate for the forfeiture – *i.e.,* that the assets are the property of an "entity or organization engaged in planning or perpetrating any federal crime of terrorism against the United States …" – is satisfied because it sufficient that the State Department has so found.

Finally, as the court in this case notes, there is no other case law interpreting the "affording a source of influence" language in Section 981(a)(1)(G). That phrase, however, was taken from the RICO statute, 18 U.S.C. § 1963(a)(2), where it has been interpreted to include any property that made the RICO offense easier to commit. *See, e.g., United States v. Neff,* 303 F. Supp.3d 342 (E.D. Pa. 2018) (property affording a source of influence is the same thing as "facilitating property" and is subject to the same substantial connection test; defendant's residence satisfies that test because he used his home office to do legal work in support of the RICO enterprise). Other RICO cases on the same point are collected in Section XXXVII.E.3 of the Criminal Forfeiture Case Outline.

Thus, it made sense for the court to use the RICO cases to determine what property is forfeitable in a terrorism case as property affording someone a source of influence over a terrorist organization even if there is a conceptual difference between forfeiting the property *of the RICO defendant* as property the defendant used to facilitate the RICO offense, and the property *of a third party* that allowed the third party to facilitate the activities of a terrorist organization. *SDC*

Criminal Forfeiture – Maintaining Custody of Property Pending Trial

When the Government switches from civil to criminal forfeiture, it must obtain a court order allowing it to maintain custody of the seized property pending trial.

But such an order is merely a "housekeeping" order; it is not an opportunity for the defendants to challenge the probable cause for the initial seizure of the property.

United States v. Zazueta-Hernandez, 2020 WL 5016940 (S.D. Ohio Aug. 25, 2020).

S.D. Ohio * Federal agents executing a search warrant seized a quantity of jewelry from a business suspected of laundering money for a large-scale drug trafficking organization. When several individuals filed claims contesting the administrative forfeiture of the jewelry, the Government obtained an indictment listing the jewelry as property subject to forfeiture.

Having elected to switch from civil to criminal forfeiture, the Government was required by 18 U.S.C. § 983(a)(3) to "take the steps necessary to preserve its right to maintain custody of the property as provided in the applicable criminal forfeiture statute." The Government did so by applying for a "housekeeping" order, authorizing it to maintain custody of property already in its possession.

Defendants opposed the motion, arguing that the Government did not have probable cause to restrain the jewelry. But the court held that the Government was not seeking a restraining order; it was merely seeking an order allowing it to maintain custody of property already in its possession. In that case, the court said, there is no need for a finding of probable cause. Rather, "all that is required to comply with Section 983(a)(3)(B)(ii)(II) is an order from the Court stating that the United States may continue to maintain custody of the seized assets until the criminal case is concluded."

So, the court rejected Defendants attempt to use the application for a housekeeping order as an opportunity to contest the probable cause for the seizure, and granted the Government's motion. *SDC*

Contact: AUSA Christy Muncy

Comment: Section 983(a)(3)(B)(ii)(II) is an anomaly in the forfeiture statutes that was inserted as part of CAFRA. In short, it provides that when the Government starts a case as an administrative forfeiture but switches to criminal forfeiture when someone files a claim, it must take steps to maintain lawful custody of the property under the criminal forfeiture laws. *See United States v. Martin,* 460 F. Supp. 2d 669, 675-76 (D. Md. 2006) (Government's failure to take steps to maintain its possession of defendant's property with criminal process after it switched from civil to criminal forfeiture meant that once the 90 days under § 983(a)(3) expired, its possession was unlawful).

Early on, however, courts realized that it made no sense to require the Government to obtain a new seizure warrant seizing the property from itself, or to obtain a restraining order restraining itself from disposing of the property. Accordingly, the courts held that all that was required to allow the Government to comply with the (arguably unnecessary) requirement in Section 983(a)(3) was a "housekeeping" order stating that the Government could maintain custody of property that was already in its possession.

The leading case on this point is *United States v. Scarmazzo*, 2007 WL 587183 (E.D. Cal. 2007), and the housekeeping order is accordingly often called a *Scarmazzo* order. *See also United States v. Abrahams,* 2013 WL 285719 (D. Md. Jan. 24, 2013) (if someone contests the administrative forfeiture of property and the Government elects to pursue only criminal forfeiture, it may comply with § 983(a)(3)(C) by including the property in an indictment or bill of particulars within 90 days and obtaining a "housekeeping" order allowing it to maintain custody pending the conclusion of the criminal case); *United States v. $16,072.00 in U.S Currency*, 2019 WL 1229827 (N.D.N.Y. Mar. 15, 2019) (listing obtaining a "housekeeping" order as in *Scarmazzo* as one of the ways the Government could have complied with § 983(a)(3)(B)(ii), must noting that it did not do so).

Here, the defendants attempted to use the Government's obligation to request the housekeeping order as an opportunity to contest the probable cause for the seizure. But the court properly refused to allow them to do so. The defendants, the court said, will have ample opportunity in the forfeiture phase of their trial to contest the forfeiture under Rule 32.2. *SDC*

Ancillary Proceeding / Standing / Equitable Interests

Recipient of a gifted vehicle purchased with criminal proceeds cannot contest its forfeiture under § 853(n)(6)(A) even if she paid the maintenance on the vehicle; at most she would have an equitable interest which is not cognizable under the statute.

To have standing to contest a forfeiture in the ancillary proceeding, the claimant must have a present legal interest in the property; claimant whose interest was extinguished when the mortgage lender foreclosed on the property lacked standing.

United States v. Haning, 2020 WL 4759948 (E.D. Mo. Aug. 14, 2020).

E.D. Mo. * Defendant pled guilty to money laundering and introducing adulterated food into interstate commerce, and agreed to forfeit a Mercedes and a ranch (or the proceeds of the sale thereof). Two family members filed claims in the ancillary proceeding contesting the forfeitures.

Defendant's daughter filed a claim to the Mercedes. She acknowledged that Defendant purchased the vehicle with the proceeds of his offense and then gifted it to her, but she argued that because she had paid the maintenance expenses on the vehicle for two years, she had an equitable interest in it.

The court held that under 21 U.S.C. § 853(n)(6)(A), a third party cannot have a legal interest in property purchased with the proceeds of the defendant's crime because, under the relation back doctrine, the Government's interest in the proceeds of a crime vests as soon as the crime is committed, and its interest in property purchased with such proceeds therefore vests as soon as the purchase occurs. Moreover, Section 853(n)(6)(A) protects only legal interests, so any equitable interest the daughter may have falls outside the scope of the statute.

Another family member and the LLC of which he was a member filed a claim to the ranch. The court held that the individual claimant lacked standing because the members of an LLC lack any legal interest in the LLC's assets.

As to the LLC itself, the court held that its interest in the ranch was extinguished when the bank that held the mortgage on the ranch foreclosed and became the titled owner. Therefore, the LLC lacked standing to contest the forfeiture as well.

Accordingly, the court dismissed both claims without a hearing pursuant to Rule 32.2(c)(1)(A). *SDC*

Contact: AUSA Kyle Bateman

Comment: The ruling that third parties cannot assert a pre-existing interest in forfeited property that was purchased with the proceeds of the defendant's crime is familiar. *See* Section XX.B.5 of the Criminal Forfeiture Case Outline. The ruling that claims in the ancillary proceeding must be based on legal interests, not equitable interests, is more controversial but is well-supported in the case law. *Id.* § XX.L.

The most interesting aspect of this decision is the holding that the LLC that owned the ranch lacked standing to contest its forfeiture in the ancillary proceeding because its

legal interest was extinguished when the mortgage lender foreclosed on the property. This a special case of the rule that the claimant in the ancillary proceeding must have a *present* interest in the property; that it was formerly the owner of the property is irrelevant. *Id.* § XVIII.I.1. *SDC*

Health Care Fraud / Gross Proceeds

Chiropractic clinic that recruited and paid kickbacks to patients so that it could bill their insurance companies, is required to forfeit all insurance reimbursements without deduction for services that may have been legitimate.

United States v. Luna, ___ F.3d ___, 2020 WL 4577178 (8th Cir. Aug. 10, 2020).

Eighth Circuit * Defendant ran a chiropractic clinic that recruited and paid kickbacks to accident victims, and billed the cost of the services provided to insurance companies. He was convicted of mail and wire fraud and was ordered to pay $1,553,500 in restitution to the insurance companies, and to forfeit $1,180,66 in gross proceeds of the offense.

On appeal, Defendant challenged both the restitution and forfeiture orders. With respect to restitution, the panel agreed with Defendant that the district court erred in failing to make an allowance for the legitimate, compensable services provided by the clinic. Restitution is measured by the victim's loss, the court said, and "anything the insurance companies would have had to pay, regardless of the defendants' actions, cannot be a loss caused by the fraud."

The court, however, viewed the forfeiture issue differently. While restitution focuses on the victim's losses," the court said, forfeiture focuses on the "gross proceeds traceable to the commission of the offense." The payments Defendant received from the insurance companies represented the gross proceeds of the fraud scheme whether some portion of those payments were for legitimate services or not.

So, the court reversed the restitution order but affirmed the forfeiture order. *SDC*

Contact: AUSA Michael Cheever (D. Minn.)

Comment: The court devotes a single paragraph to the forfeiture issue, leaving its rationale a bit unclear. The court's citation, however, to the Eleventh Circuit's decision in *United States v. Hoffman-Vaile*, 568 F.3d 1335, 1344 (11th Cir. 2009) provides an important clue.

In that case, the court held that a health care provider who was convicted of Medicare fraud was liable to forfeit the funds she received from Medicare as well as the funds she received from private insurers because she would not have received either but for her fraudulent billings. In other words, the court said, if a business was established for the purpose of committing fraud, and it would have had no revenue of any kind but for the fraud, a court may order the business to forfeit all of its revenue, including that derived from legitimate services, as the proceeds of the fraud. *See United States v. Vico,* 2016 WL 233407, *6 (S.D. Fla. Jan. 20, 2016) (following *Hoffman-Vaile*).

In this case, the court may be saying the same thing – *i.e.,* that the chiropractic clinic was so pervaded by fraud that all of its revenue was forfeitable as the proceeds of the scheme, even if some of it was for legitimate services. *SDC*

Forfeiture of Real Property / Section 985 / Scope of Good Hearing

A pre-seizure hearing under § 985(d) is a probable cause hearing; claimants may not use it to conduct a dress rehearsal for trial

by forcing the Government to call witnesses so that they may be cross-examined, or by raising defenses that do not relate to probable cause.

In Re: 650 Fifth Avenue and Related Properties, 2020 WL 4676740 (S.D.N.Y. Aug. 12, 2020).

S.D.N.Y. * The Government filed a civil forfeiture action against real property in New York and moved for an order allowing it to restrain the rental income from the property pending trial. The court had previously held that restraining the rental income constituted the "seizure" of an "interest in real property" that could not occur without prior notice and a hearing pursuant to 18 U.S.C. § 985(d). *In re: 650 Fifth Avenue and Related Properties*, 2020 WL 995886 (S.D.N.Y. Mar. 2, 2020) (April 2020 *Digest*). Accordingly, the issue before the court was the scope of the hearing that the court believed it was required to conduct.

In *United States v. James Daniel Good Real Property,* the Supreme Court held that absent exigent circumstances, the Due Process Clause bars the seizure of real property without affording the property owner a pre-seizure hearing. Congress codified this holding in Section 985(d), which provides that "real property may be seized prior to the entry of an order of forfeiture if the court . . . conducts a hearing in which the property owner has a meaningful opportunity to be heard." The statute does not make clear, however, what constitutes a "meaningful opportunity to be heard."

Claimants argued that the court must conduct an evidentiary hearing where they could challenge the Government's evidence, present evidence of their own, put on witness testimony, and present affirmative defenses. In particular, Claimants asked to be allowed to cross-examine the Government's witnesses regarding their purported anti-Muslim bias, their financial interest in the case, their exposure to illegally-seized evidence, and Claimants' statute of limitations defense, and to be allowed to conduct discovery on these issues prior to the hearing. The Government responded that the hearing was only a probable cause hearing and should not be used to conduct a "dress-rehearsal for trial."

The court agreed that the Government had the better argument.

The purpose of the pre-seizure hearing is simply to establish whether there is probable cause to believe that the property is subject to forfeiture. For that purpose, the court said, it is unnecessary to address issues such as the statute of limitations defense that, while important at trial, are "far afield from the narrower issue of probable cause."

Accordingly, applying the due process considerations in *Matthews v. Eldridge,* the court held that a full-blown evidentiary hearing was unnecessary. Among other things, the court held that Claimants' interest in the rental income from commercial property was not the sort of private interest that merited "a fulsome hearing," that the risk of erroneous deprivation was minimal, and that the Government had a strong interest in not expending resources on an unnecessary proceeding.

"Allowing a preliminary determination of probable cause to balloon into a trial-like proceeding," the court said, "would undermine the Government's strong interest in efficient enforcement of the forfeiture law."

Accordingly, the Government held that the Government could rest on the evidence and arguments that it submitted in connection with its original application for a restraining order, and that Claimants could then put on their own witnesses to rebut the Government's evidence of probable cause.

In particular, Claimants may be allowed to put on testimony relating to their innocent owner defense to the extent that it is "probative of probable cause." *SDC*

Contact: AUSA Anna Arreola

Comment: The premise of this case is that Section 985(d) requires a pre-seizure hearing when the Government requests a pre-trial order restraining the rental income from property subject to civil forfeiture. In my view, it does not, and that the court's March decision on that point is incorrect.

The Government did not seek a seizure warrant for the rental income; it sought only a restraining order preventing the property owner from alienating the income generated by the real property pending trial. Section 985(f)(3) expressly states that the provisions in Section 985 – including the hearing requirements in Section 985(d) – "shall not affect the authority of the court to enter a restraining order relating to real property." So, no adversary hearing in this case is required at all.

In any event, the court has held that there must be a hearing, so the question becomes, what is the hearing about and what is its scope.

All parties agreed that a Section 985 hearing – also called a *Good* hearing – is merely a probable cause hearing. *See United States v. James Daniel Good Real Property,* 510 U.S. 43, 78 (1993) (O'Connor, J., concurring) ("at any hearing—adversary or not—the government need only show probable cause that the property has been used to facilitate a drug offense in order to seize it; it will be unlikely that giving the property owner an opportunity to respond will affect the probable-cause determination"). Thus, the court was correct insofar as it held that the Government could rest on the evidence of probable cause that it had already submitted with its request for the restraining order, and that while the claimants could put on evidence refuting the probable cause, they could not turn the hearing into a dress rehearsal for the trial.

My only quibble with the court's holding is its suggestion that the claimants' innocent owner defense "could be probative on probable cause." The innocent owner defense is an affirmative defense. The probable cause to believe that the property is subject to forfeiture – *i.e.*, that the Government will be able to meet its burden of proof at trial – has nothing to do with whether the claimants' may be able to establish an affirmative defense once the Government meets its burden.

Thus, for the same reason that the court held that the claimants' statute of limitations defense fell outside the scope of the probable cause hearing, it should have said the same thing about the innocent owner defense. *SDC*

Anti-Money Laundering Program / SARS

Federal law shields a bank from liability to a fraud victim for failing to file a SAR.

But it does not shield the bank from liability for failing to maintain an anti-money laundering program.

In re Woodbridge Investments Litigation, 2020 WL 4529739 (C.D. Cal. Aug. 5, 2020).

C.D. Cal. * Plaintiffs, the victims of a Ponzi scheme, filed a lawsuit against Comerica Bank, alleging that the bank's failure to file Suspicious Activity Reports (SARs) and its failure to maintain an anti-money laundering (AML) program allowed the bank's customer to perpetrate the illegal scheme that resulted in Plaintiffs' losses.

Among other things, Plaintiffs alleged

that the bank's fraud-alert system repeatedly flagged suspicious transactions in the alleged fraudster's account and that the bank's analysts noticed the suspicious transactions but that the bank "brushed aside the warnings" and failed to file SARs.

The bank responded that under the Bank Secrecy Act, 31 U.S.C. § 5318(g), it was shielded from liability to private lawsuit for actions regarding the filing of a SAR.

The court noted that Section 5318(g)(3)A) – commonly known as the "safe harbor" provision of the BSA – "protects financial institutions from liability for *making disclosures* required under the BSA, [but] it does not explicitly protect them from the *failure* to make a disclosure." Nevertheless, the court agreed with the bank that it was shielded from liability for failing to file a SAR.

The BSA and related regulations, the court said, prohibit banks from disclosing the existence of a SAR, even if doing so would aid their case in litigation. Thus, if a bank is sued for failing to file a SAR, it would be barred by federal law from defending itself by disclosing that *it did* file a SAR. To avoid this unfairness, the court concluded, federal law must be read to shield a bank from liability for failing to file a SAR just as it is shielded from liability for filing one.

Nevertheless, the court held that while Plaintiff's lawsuit was barred to the extent that it relied on the bank's failure to file a SAR, there was no such bar on its allegation that Plaintiffs' losses resulted from the bank's failure to maintain an AML program. Thus, Plaintiffs' lawsuit was dismissed in part but otherwise allowed to proceed. *SDC*

Firearms / Felon in Possession

Proof that defendant, a convicted felon, was in possession of a firearm included finding his fingerprints on the inserted magazine; so, the firearm was subject to forfeiture under § 924(d).

United States v. Evans, 2020 WL 4530721 (W.D.N.C. Aug. 6, 2020).

W.D.N.C. * Defendant was convicted by a jury of carjacking and being a felon in possession of a firearm. He contested the forfeiture of the firearm allegedly used to commit the offense but waived his right to have the forfeiture determined by the jury. So, the Government's motion for a preliminary order of forfeiture was determined by the court.

The issue was whether a firearm found in Defendant's apartment was the firearm used in the commission of the offenses for which Defendant was convicted. Based on the testimony of a forensic examiner, who found Defendant's fingerprints on the magazine inserted in the firearm, the court found that Defendant had been in possession of the firearm, and granted the Government's motion on the ground that the firearm was involved in the felon-in-possession offense. *SDC*

Contact: AUSA David W. Kelly

Notice

As long as the Government exercises diligence in attempting to locate potential claimants, its failure to identify a particular claimant is not grounds for reopening a closed case.

United States v. 2014 Nissan Altima, 2020 WL 4284799 (N.D. Ind. Jul. 27, 2020).

N.D. Ind. * The Government seized a vehi-

cle from First Claimant during a drug investigation, sent him notice of its intent to forfeit the vehicle, and ultimately completed the forfeiture pursuant to an agreed-upon judgment.

Sometime thereafter, Second Claimant filed a late claim to the vehicle, asserting that he was its true owner and that the case should be reopened because the Government failed to send him notice of the forfeiture action. The case turned on whether the Government should have been aware of Second Claimant's interest while the forfeiture action was pending and accordingly should have sent him notice pursuant to Rule G(4).

Second Claimant argued that his interest in the vehicle should have been apparent from the Bill of Sale naming him as the owner that was found among First Claimant's papers when the Government searched his residence. In response, the court ordered the Government to produce evidence relating to what the investigating agents knew about the Bill of Sale including 1) any investigation reports that mention the Bill of Sale; 2) any documents that describe the items collected from First Claimant's residence; and 3) any other documents found in the residence relating to the ownership of the vehicle. *United States v. 2014 Nissan Altima*, 2020 WL 3097462 (N.D. Ind. Jun. 11, 2020) (July 2020 *Digest*).

The evidence produced by the Government showed that neither the Bill of Sale, which named a corporation as the purchaser of the vehicle, nor any of the other documents recovered during the search would have alerted investigators to Second Claimant's interest. Moreover, the court found that the Government had made further efforts to identify anyone with an interest in the vehicle, including checking CARFAX and search VIN records and interviewing an employee of the dealership that sold the vehicle.

Based on this evidence, the court concluded that the Government's investigation, "while not necessarily perfect, was adequate under the circumstances," and thus denied Second Claimant's motion to reopen the case. SDC

Contact: AUSA Kathleen Trzyna

Attorney's Fees

Court awards attorney's fees to claimants who prevailed on the innocent owner defense in a civil forfeiture trial.

In determining whether the number of hours expended was reasonable, the court takes into account the novelty of civil forfeiture trials and the complexity of civil forfeiture law.

United States v. Approximately $299,873.70 Seized from Bank of America Account, 2020 WL 4808891 (S.D. Ala. Aug. 18, 2020).

S.D. Ala. * The Government filed a civil forfeiture action against bank accounts in the United States held in the names of Chinese nationals residing in China. It alleged that the money was sent from China to the United States as part of a visa fraud scheme intended to facilitate immigration into the US by making it appear that the immigrants were part of a legitimate business venture.

Each of the account holders contested the forfeiture asserting innocent owner defenses. The case went to trial before a jury, and after a four-day trial, the jury found that the Government had met its burden of proving that the money was subject to forfei-

ture but that five of the claimants had established an innocent owner defense. Accordingly, the court entered judgment for the United States with respect to some of the bank accounts, and judgment for Claimants with respect to others. *United States v. Approximately $299,873.70, Seized from Bank of America Account*, 2020 WL 390897 (S.D. Ala. Jan. 22, 2020) (March 2020 *Digest*) (denying motion for judgment as a matter of law filed by the unsuccessful claimants).

The successful claimants then moved under 28 U.S.C. § 2465(b) for pre- and post-judgment interest on the seized funds, and for attorney's fees and costs. The court awarded the interest payments as provided in the statute and then considered the request for attorney's fees using the "lodestar" method, which multiplies the number of hours reasonably expended on the case by the "customary hourly rate for similar legal services" in the jurisdiction.

The court found that given the complexity of the case, the four-day trial, the novelty of the issues, and Claimants' lack of proficiency in English, the number of hours expended by Claimants' counsel – ranging from 102 to 139 hours – were reasonable. In particular, the court held that "civil forfeiture actions rely upon a narrow, specific and complex body of law, and that civil asset forfeitures trials are not common." Moreover, it found that "the number of lawyers with experience in CAFRA litigation is limited," and that "CAFRA is not a mainstream area of practice."

The court also held that fees on the order of $200 to $350 per hour, depending on the attorney's years of experience, were appropriate in the Southern District of Alabama.

Accordingly, the court awarded attorney's fees – plus costs for transportation and lodging for out-of-town counsel – of between $35,000 and $45,000 for each of the five successful claimants. *SDC*

Contact: AUSA Christopher Bodnar

Comment: The judge in this case is well-acquainted with the "narrow, specific and complex body of law" involved in civil forfeiture cases under CAFRA as she was the key staffer for one of the senators who sponsored the Justice Department's version of CAFRA in 2000. She went on to become a federal judge; the DOJ attorney who drafted the legislation was never heard from again, but does publish a certain *Money Laundering and Forfeiture Digest. SDC*

Notes

Money Judgment

United States v. Ayala, ___ Fed. Appx. ___, 2020 WL 4333445 (9th Cir. Jul. 28, 2020).

Defendant asserted the district court erred in imposing a money judgment against her for the proceeds of a theft, without regard to whether those proceeds are still in her possession. But the panel held that her argument was foreclosed by *United States v. Nejad*, 933 F.3d 1162, 1165–66 (9th Cir. 2019).

Contact: AUSA Amy Potter (D. Or.)

Ancillary Proceeding

United States v. Hillman, 2020 WL 4341128 (N.D. Tex. Jun. 15, 2020).

N.D. Tex. * Defendant pled guilty to money laundering and was ordered to forfeit the

funds in 30 bank accounts. His mother ("Claimant") filed a claim asserting that she had loaned Defendant $100,000 and had not been repaid. The court granted the Government's motion to dismiss the claim, holding that Claimant was, at best, an unsecured creditor with no legal interest in any of the forfeited funds.

Contact: AUSA Chad Meacham

Ancillary Proceeding / Discovery / Rule 60(b)

United States v. Mills, 2020 WL 4589860 (E.D. Ark. Aug. 10, 2020).

E.D. Ark. * Claimant filed a claim in the ancillary proceeding of a criminal case, contesting the forfeiture of banks accounts containing the proceeds of Defendant's fraud. When Claimant did not respond to the Government's discovery requests, the court entered summary judgment for the Government. Claimant then filed a Rule 60(b) motion to reopen the case, asserting that her non-response was due to her attorney's lack of diligence. But the court held that "an attorney's carelessness or busy schedule does not constitute excusable neglect," and denied the motion.

Contact: AUSA Cameron McCree

Concealment Money Laundering

United States v. Culver, ___ Fed. Appx. ___, 2020 WL 4371250 (11th Cir. Jul. 30, 2020).

Eleventh Circuit * Defendant appealed his conviction for concealment money laundering arguing that his use of a third party to conduct financial transaction was part of his underlying scheme to defraud, and not a separate effort to conceal or disguise the fraud proceeds. But the court held that transferring money from the victim through a third party in two amounts was sufficient to support the jury's verdict for concealment money laundering.

Contact: AUSA Michelle Schieber (M.D. Ga.)

Money Laundering / Willful Blindness

United States v. Henderson, ___ Fed. Appx. ___, 2020 WL 4728711 (6th Cir. Aug. 14, 2020).

Sixth Circuit * Defendant accepted a $500,000 commission for brokering a bond deal after being told by an FBI agent that his client was under investigation for financial fraud and had no legitimate source of income. He was convicted of multiple violations of Section 1957 when he spent the commission on luxury items immediately after receiving it. He appealed asserting lack of evidence that he knew the commission was derived from illegal activity, but the court held that the evidence was sufficient to show that Defendant "remained deliberately ignorant" of the nature of the money used to pay the commission.

Contact: Daniel Ranke (N.D. Ohio)

Claim and Answer / Special Interrogatories

United States v. 8 Pieces of Assorted Jewelry, 2020 WL 4350197 (D. Col. Jul. 29, 2020).

D. Col. * Claimant filed a *pro se* claim con-

testing the forfeiture of assorted jewelry, asserting only that she had been "adversely affected by the behavior of the prior owner." She also filed no answer to the complaint and did not respond to the Government's special interrogatories. So, the court dismissed her claim for lack of statutory standing.

Contact: AUSA Tonya Shotwell

Application of *Honeycutt* / Section 2241

Beras v. Warden, ___ Fed. Appx. ___, 2020 WL 4917898 (3rd Cir. Aug. 21, 2020).

Third Circuit * Defendant was sentenced to 292 months in prison and ordered to forfeit $10 million in a money laundering case. *United States v. Dinero Express,* 313 F.3d 803 (2nd Cir. 2002). He moved under § 2241 for relief from the forfeiture order on the ground that its joint and several liability provision violated the Supreme Court's decision in *Honeycutt,* but the district court denied the petition and the Third Circuit affirmed, holding that *habeas corpus* relief applies only to the custodial aspects of a criminal sentence.

Contact: AUSA Laura Irwin (W.D. Pa.)

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