

# WEBINAR: UNDERSTAND HOW LAW ENFORCEMENT USES ASSET FORFEITURE TO FIGHT CRIMINALS

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## Introduction

I was a federal prosecutor in the U.S. Department of Justice for 30 years

- I specialized in asset forfeiture and money laundering cases and was the Chief of the Asset Forfeiture and Money Laundering Section in the U.S. Attorney's Office in Baltimore, MD when I retired

During the time I was in Government I –

- prosecuted criminal money laundering cases
- Brought many civil forfeiture actions to recover the proceeds of crime and other laundered property
- Issued a great many subpoenas for bank records to financial institutions and worked with compliance officers
- Trained hundreds of federal prosecutors and agents in the use of the money laundering and forfeiture laws
- And drafted much of the legislation, as well as the policies, that govern the use of the money laundering and forfeiture laws today

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Since leaving Government, I have continued to work with law enforcement agencies in the United States and throughout the world in enacting and implementing money laundering and forfeiture legislation

- Essentially, I'm a consultant who helps law enforcement agents, governments, financial institutions, private law firms, and crime victims understand how the money laundering and forfeiture laws work
- And what they need to do to use them

What I'm going to talk about today is asset forfeiture in the United States<sup>2</sup>

In the first segment, I will talk about --

- Why forfeiture is an important law enforcement tool – particularly in international cases
- And without going into too much detail, how it works under federal law
- And I'll give a few examples

Then, after we take some time for questions, I'll get into some more detail in a few areas

- We'll talk about why it is important for law enforcement agents to include the financial aspects of a case in their investigation from the beginning
- We'll talk about the importance of getting bank records, and getting them promptly and in electronic form
- We'll talk about how SARs and Currency Transaction Reports are used to start investigations and as historical records

And we'll talk about particular problems that arise in complex international cases such as

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<sup>2</sup> For further information on this topic, see Stefan D. Cassella, *Asset Forfeiture Law in the United States* (2d ed.) (Juris 2013).

- What authority the United States has to recover money from a foreign bank account
- what authority it has to issue a subpoena to a foreign bank
- And what authority it has to seize or freeze money moving through the correspondent account of such a bank

Finally, we'll talk about third party rights in forfeiture cases, including the rights of lien holders, and the right of a financial institution to take a setoff against the seized funds to satisfy the account holder's debt.

## II. WHY DO FORFEITURE

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

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

### 1. Punish the wrongdoer

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

### 2. Deter other wrongdoers

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

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

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

### 4. Disrupt the organization

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

### 5. Get money back to the victim

- forfeiture is a more effective way of recovering money for victims than ordering the defendant to pay restitution
  - *United States v. Blackman*, 746 F.3d 137, 143 (4<sup>th</sup> Cir. 2014) (“The Government’s ability to collect on a [forfeiture] judgment often far surpasses that of an untutored or impecunious victim of crime . . . Realistically, a victim’s hope of

getting paid may rest on the Government's superior ability to collect and liquidate a defendant's assets" under the forfeiture laws);

- *United States v. Bennett*, 986 F.3d 389 (4th Cir. 2021) (following *Blackman* and rejecting defendant's argument that the forfeiture order impinges on her ability to provide restitution to her victims; to the contrary, the forfeiture order is likely the only vehicle by which the Government will recover assets to be used to satisfy the restitution order);

## 6. Protect the community / Public policy

- we don't want organized crime (US or Russian) or drug organizations that have acquired great wealth use it to control markets or institutions
- shutting down the crack house or meth lab removes a hazard to public health and safety and gives law enforcement the opportunity to convince the community that they're not letting the bad guy's profit from their crimes
- We don't want to let corrupt leaders of developing countries use the US financial system to loot their treasuries and safeguard a nest egg to use when they have to go into exile
- and forfeiture ensures that the playing field is level, so that people trying to run businesses honestly don't have to compete with capital from illegal sources

## 7. Recycle the money

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

## **III. OVERVIEW OF FORFEITURE PROCEDURE**

### **A. Administrative and Civil Forfeiture**

In the US there are three kinds of forfeiture: administrative, civil and criminal

## Administrative forfeiture<sup>3</sup>

Most forfeitures start out as administrative forfeitures handled by the seizing agency;

- the agents seize the property – generally with a warrant – based on probable cause to believe that it was derived from or used to commit a crime
- the agency sends out notice to the property owner and anyone else who appears to have an interest in the property (such as a spouse or lien holder) telling them that they have 5 weeks (35 days) to make a claim contesting the forfeiture
- and if no one files a claim to the property, it is forfeited by default;
- there is no prosecution; no court or prosecutor gets involved
  - *see* 18 U.S.C. § 983(a)(1) and (2), and 19 U.S.C. § 1602, *et seq.*, setting forth the procedures governing administrative forfeitures
- in 80 percent of the cases, no one files a claim to the property – often because there is a parallel criminal prosecution
- in short, administrative forfeiture is the way the Government obtains clear title to criminally-tainted property that no one wants to claim without tying up the courts

Administrative forfeiture cannot be used to forfeit real property however

- it can only be used to forfeit personal property,
- and aside from currency seized as bulk cash, it can only be used if the property is worth less than \$500,000

A bank account is not considered cash

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<sup>3</sup> For more detail on administrative forfeiture procedure and its history *see* Cassella, “Administrative Forfeiture in the United States,” a presentation at the 13th National Symposium on Money Laundering and Financial Crimes at the Osgoode Hall Law School, York University, in Toronto, May 21, 2021, available at <http://assetforfeiturelaw.us/?p=2676>.

- so, if a bank account has a balance of, say, \$499,000, it can be forfeited administratively (if no one files a claim)
- but if it contains \$501,000, it cannot.

For example, if FBI agents are investigating an investment fraud scheme and they determine that the bank guy has \$300,000 in fraud proceeds in his bank account

- they can apply for a warrant to seize the \$300,000 if they have probable cause to believe that the \$300,000 is traceable to the fraud, or was involved in the laundering of the fraud proceeds
- they would serve the warrant on the bank, seize the funds, and send notice to the account holder of his right to contest the forfeiture
- if no one files a claim, the agency would declare the money forfeited to the Government *even if there is a pending criminal case*
- but if someone does file a claim, the administrative forfeiture has to stop
- and the case must be referred to the U.S. Attorney's Office to commence a forfeiture action in court

### **Civil judicial forfeiture<sup>4</sup>**

If someone does contest the forfeiture the Government has the option of doing it civilly or criminally, see 18 U.S.C. § 983(a)(3)

- civil forfeiture cases (often called “non-conviction-based” or “NCB” forfeitures) are *in rem* actions against the property; that’s why they have funny names
- civil forfeiture is simply a procedural device designed to get everyone with an interest in the property in the courtroom at the same time

For example: A drug dealer has been murdered and the police find \$90,000 in cash in his car or in his bank account:

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<sup>4</sup> For a full discussion of this topic, see Cassella, “Nature and Basic Problems of Non-Conviction-Based Confiscation in the United States,” available at <http://assetforfeiturelaw.us/?p=2346>.

- the Government would file a forfeiture action called *United States v. \$90,000* and ask, “who claims this?”
- if no one files a claim, it is forfeited by default
- but if someone files a claim, the case proceeds through the judicial process like any other civil case
- with pre-trial discovery, motions, attempts to reach a settlement, and eventually trial by jury if necessary

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

- but it is a law enforcement tool
- and the Government still has to prove that a crime was committed *and* that the property was derived from or used to commit that crime

Notice, it is the Government that has the burden of proof on both of these points

- it has to prove that a crime was committed and that the property was derived from or used to commit that crime by a preponderance of the evidence.

So, in my example of the \$90,000 found in the dead guy's bank account, the Government would have to prove that he (or whoever put the money in the account) was a drug dealer

- and that *this money* was the proceeds of his crime, not some other money that he earned mowing lawns or inherited from his grandmother
- and whoever claimed the money – say, his wife who was a joint account holder – would have the right to put the Government to its proof

### **Criminal Forfeiture**

The third option for pursuing forfeiture is to make it part of a criminal case

The Government obtains an indictment charging a defendant with a crime, and includes a forfeiture notice telling him that if he is convicted, the Government will seek the forfeiture of his property as part of his sentence

If the property has not already been seized and is not already in the Government's possession, the court may issue a restraining order telling the property custodian – like a bank – to freeze the account pending the outcome of the criminal case

- then, if the defendant is convicted, the court will hold a hearing to determine if the property was derived from or used to commit his crime
- and if it finds that it was, it will enter a forfeiture order as part of the defendant's sentence.

#### **IV. WHEN TO USE CIVIL VS. CRIMINAL FORFEITURE**

It is important to understand that the Government has a choice of pursuing the forfeiture criminally or civilly.

Criminal forfeiture is generally easier:

- the parties are already in court, the defendant's crime has already been proven, and all the court has to do is to make a forfeiture order part of the defendant's sentence
- moreover, in a criminal case, the Government does not have to prove that the particular dollars in a bank account are traceable to the defendant's crime
- if it finds that the defendant, as in my example, committed a \$300,000 fraud, and he has \$300,000 in his bank account, it can order the forfeiture of the \$300,000 to satisfy a forfeiture judgment *regardless of where the money came from*
- a court could not do that in a civil forfeiture case because the money has to be traceable to the crime giving rise to the forfeiture

So, criminal forfeiture is generally easier

- but there are times when it is not possible

For example:

1. when the wrongdoer is dead or is incompetent to stand trial; or when he has been pardoned (Paul Manafort);
2. when the defendant is a fugitive or a foreign national beyond jurisdiction of the United States;

Examples:

- doctor commits health care fraud in Ohio, is indicted, leaves the money behind in his bank account and flees to Pakistan
- corrupt foreign public officials steal money and invest in U.S. real estate or launder money through U.S. banks
- money flows through U.S. correspondent accounts to North Korea in violation of UN sanctions
- defendant is indicted for sex trafficking with young women and commits suicide before trial, leaving behind millions in investments and real estate

In all of these cases, tracing the money through financial institutions with bank records is critical to proving the criminal offense – including a money laundering offense committed by a third party – and to recovering the assets through asset forfeiture.

## **BREAK**

### **Why it is important for law enforcement agents to include the financial aspects of a case in their investigation from the beginning**

- if you want to recover assets, you have to be paying attention to the assets – and the paper trail that leads to assets – from the beginning of the case
- otherwise, if you wait until the indictment, the assets will be gone

Also, if you are not looking at the financial transactions, you're going to miss the money laundering offenses that occurred when the proceeds of the crime were moved

- money laundering charges can greatly expand the scope of a criminal case

- by adding defendants, expanding the admissible evidence, extending the statute of limitations, increasing the sentence, and expanding the property subject to forfeiture
- but if you're not looking at the movement of the money, you're not going to find the money laundering

For example, take an investment fraud scheme

- as soon as the victim complains that his money was taken under false pretenses, the agent should be looking at the bank records to see
  - where the victim's money went
  - what assets the defendant acquired
  - what other victims' money were commingled with it
  - to what extent was Victim B's money used to pay off Victim A to keep the scheme going (proof of a Ponzi scheme)
  - what steps were taken to commingle the money with other assets to conceal or disguise it
  - and who else was involved in the movement of the money

### **The importance of getting bank records, and getting them promptly and in electronic form**

To do this, the agent needs the bank records, and need them quickly

- if the scheme is ongoing, the agent needs records in real time
- agents want to do forensic analysis, not forensic archaeology
- to get records, the agent needs to ask the prosecutor for a grand jury subpoena

- too often, the response from the bank is, “we need more time”
- and when the agent says, “I need another month’s records,” the bank says, “we need another subpoena,” and “we’ll need more time”
- then the records come in a box of photocopies that have to be input and scheduled manually, when we all know the bank kept the records electronically

To cut through all of this, agents and bank compliance officers need to work together to understand what each other needs and the form in which they need it.

- For example, if an agent is working an ongoing fraud, or distribution of terrorist assets, or the sending of money to North Korea, and he needs monthly or weekly updates on the activity in a bank account, maybe there is a way to draft a grand jury subpoena that permits the bank to provide that information
- If so, the agent needs to know what the bank needs so that he can ask the prosecutor to issue the subpoena in that form
- Otherwise, we’re in an endless round of “we can’t do that” bank and forth while the money disappears

## **SARs and Currency Transaction Reports**

SARs are used to start investigations into suspicious activity

- To be useful, they need to tell the agent what it is that makes the bank think that the transaction is suspicious
- I saw thousands of SARs, hundreds every month, and too often it looked like the bank was filing just to be able to say it did so and protect itself from being accused of *not* filing

- The worst example was when we'd send a grand jury subpoena to a bank and the bank would file a SAR, saying that it was doing so because the Government had served it with a grand jury subpoena

SARs should not be a seemingly pointless list of transactions but should say, "we, as bankers, thought this was suspicious because ..."

SARs, like CTRs, also served as an historical record.

- Compliance officers should not feel that the effort they put into filing these reports is wasted if they never hear back from law enforcement
- What they need to know is that in almost every investigation – whether prompted by an arrest, the seizure of cash from a courier, a victim's complaint or whatever
- One of the first steps is for the prosecutor or a supervisor to say to the agent, "let's see if anyone has ever filed a SAR or CTR on this guy"

### **Complex international cases**

In the time that's left, I want to talk about some issues that arise in complex international money laundering cases

- For example, what authority does the United States have to recover money from a foreign bank account

Suppose a defendant has defrauded victims in the US and put the money in a foreign bank

- And suppose the US and the foreign country do not have MLA agreement that allows the foreign country to freeze the account and enforce a US forfeiture order
- What can the US do to recover the money? Is it simply out of luck?

There is a statute – 18 U.S.C. § 981(k) – that says this:

- If forfeitable money – whether drug proceeds, or fraud proceeds, or whatever – is in a foreign bank account
- And the foreign bank has a correspondent account in a US bank
- The Government may seize an equivalent amount of money from the correspondent account and treat it as if it were the criminal proceeds on deposit in the foreign bank

The idea is to force the criminal to contest the forfeiture in the US by treating the money in the correspondent account as if it were the criminal's money

- Recognizing that if the US succeeds in forfeiting the money from its correspondent account, the foreign bank can make itself whole by debiting the customer's account at the foreign bank

This technique has been used multiple times over the past 20 years to recover criminal proceeds in foreign bank accounts.

- *United States v. Union Bank for Savings and Investment (Jordan)*, 487 F.3d 8, 17 (1st Cir. 2007) (if forfeitable funds are deposited into a foreign bank, and the foreign bank has a correspondent account at a U.S. bank, the forfeitable funds are deemed to be deposited into the correspondent account and may be seized and forfeited);
- *United States v. \$1,879,991.64 Previously Contained in Sberbank of Russia's Interbank or Correspondent Bank Account*, 185 F. Supp.3d 493 (D.N.J. 2016) (summarizing and explaining the purpose of § 981(k) and how it works);
- *United States v. \$70,990,605*, 305 F.R.D. 20 (D.D.C. 2015) (explaining how § 981(k) allows the Government to recover funds deposited into a bank in Afghanistan by filing a civil forfeiture action against the Afghan bank's account at a bank in New York); *United States v. Sum of \$70,990,605*, 128 F. Supp.3d 350, 354-55 (D.D.C. 2015) (explaining the purpose and legislative history of § 981(k) and how it operates);

The predicate to doing this, of course, is that the US needs to know that the criminal proceeds are in the foreign bank

- what authority does the US have to issue a subpoena to a foreign bank?

If the foreign bank has branches in the United States, the Government can serve a US branch with a subpoena for the foreign bank records

- this is commonly known as a *Bank of Nova Scotia* subpoena after one of the first cases in which the Government did this

But what if the foreign bank has no US branches

- there is a statute and a recent case dealing with that
- the case involved money allegedly moving through a Chinese bank
- and the law enforcement agents wanted to know where the money came from and where it was going

The China declined all MLA requests for records from the Chinese bank

- but a statute – 31 U.S.C. § 5318(k) – says that if a foreign bank wants to conduct dollar-denominated transactions – as virtually all large foreign banks do – and it has a correspondent account in the US for that purpose
- it must appoint a representative to receive subpoenas in the US for the records of foreign bank transactions
- and if it does not comply with the subpoena, it may be barred from using the US financial system and thus must close its a correspondent account
  - *In Re Grand Jury Investigation*, 381 F. Supp.3d 37 (D.D.C. 2019) (granting motion to compel compliance with *Bank of Nova Scotia* subpoena served on US branch of foreign bank and § 5318(k) subpoena served on foreign bank with no US branch but that has a US correspondent account; use of correspondent account to process transactions for entity under investigation satisfies “minimum contacts” and comity does not outweigh US interest in enforcing subpoena), *aff’d sub nom. In Re: Sealed Case*, 932 F.3d 915 (D.C. Cir. 2019);

### **Authority to seize or freeze money moving through the correspondent account**

One other point relating to correspondent bank accounts

Money moving from one country to another in dollars will almost always move at some point through a correspondent account at an intermediary bank in New York

Suppose the Government has probable cause to believe that people in other countries are buying coal from North Korea and paying for it in dollars by sending money through correspondent accounts in New York in violation of UN sanctions

- does the US have an interest in this even though the sender may be in Africa and the recipient may be in China?
- Does the passage of the money through a US correspondent account give the US the right to seize the money?
- The answer is yes.
- Any money moving through the US in violation of UN sanctions is subject to seizure and forfeiture in the US
- And banks maintaining correspondent accounts for foreign banks and facilitating such international transfers have received, and will continue to receive, seizure warrants for the funds as they pass through the correspondent accounts.
  - *United States v. All Wire Transactions Involving Dandong Zhicheng Metallic Material Co.*, 2017 WL 3233062 (D.D.C. May 22, 2017) (approving damming warrants for funds flowing through US correspondent account to companies fronting for North Korea), default judgment entered, *United States v. \$4,083,935.00 of Funds Associated with Dandong Chengtai Trading, Ltd.*, 2018 WL 8108633 (D.D.C. Sep. 17, 2018);
  - *United States v. Oil Tanker Bearing International Maritime Organization Number 9116512*, 2020 WL 4569424 (D.D.C. Aug. 7, 2020) (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. All Assets Held at Bank Julius Baer & Co.*, 251 F. Supp.3d 82 (D.D.C. 2017) (under RJR Nabisco, there is extraterritorial jurisdiction for a forfeiture action based on § 981(a)(1)(A) or (C) if there is extraterritorial jurisdiction over the offense giving rise to the forfeiture; if the offense is money laundering, there is extraterritorial jurisdiction if the offense occurred in part in the U.S. – which is satisfied by showing there was a transfer through a correspondent bank account in the U.S.; likewise if the offense is a violation of § 2314-15; but there is no extraterritorial jurisdiction under § 981(a)(1)(C) if the

underlying crime is wire fraud or Hobbs Act occurring entirely outside of the US with no US nexus except for the use of the wires or the effect on commerce);

## Third-party Rights

Finally, we'll talk about third party rights in forfeiture cases

Suppose the Government brings an action – criminal or civil – to forfeit property in which an innocent third party has an interest

- For example, suppose it brings an action against a drug dealer's truck, and there is a lien on the truck from a lender
- Or suppose it brings an action against the vacation home that a corrupt public official bought with bribe money, but there is a mortgage on the property

In such cases, is the lien holder protected?

- Yes, the secured interest held by the lender is exempt from forfeiture assuming that when it was acquired the lender had no reason to believe that it was acquiring an interest in property subject to forfeiture

So, for example, if a defendant uses his beach house as a place to sell drugs, and there is a pre-existing mortgage on the house, the lender is protected because it acquired the lien before the crime giving rise to the forfeiture occurred

Or suppose the corrupt official buys a beach house with \$500,000 down representing bribe money and borrows another \$1 million to finance the purchase

- Again, the lender is protected because it was not acquiring an interest in the portion of the property traceable to the underlying crime

But suppose someone is named in an indictment and charged with laundering the proceeds of his crime by buying a beach house

- And suppose there has been a great deal of publicity in the media about this
- And suppose that despite all of this, a lender lends the defendant \$1 million to finance his defense, secured by the beach house

— Is the lender protected then? Probably not, because it was on notice when it obtained its secured interest in the property that it was subject to forfeiture

- *In Re: Petitions for Relief Concerning Consent Order of Forfeiture (Manafort)*, 466 F. Supp.3d 22 (D.D.C. 2020) (granting motion to conduct discovery in the ancillary proceeding as to what lender knew when it acquired a secured interest in the forfeited property where it was widely reported in the press that defendant was under investigation at the time the lender acquired its interest);
- *United States v. BCCI Holdings (Luxembourg) S.A. (Petition of Am. Express Bank II)*, 961 F. Supp. 287, 296 (D.D.C. 1997) (given extensive public record of defendant's misconduct, claimant knew or should have known that defendant's assets were subject to forfeiture; standard is objective reasonableness);

Finally, suppose the Government seizes the bank account of a customer who owes a lot of money to the bank

— Under banking law, a bank would have a right of set-off against the funds in the customer's account to satisfy the customer's debt

— But can the bank exercise that right of set-off after it learns that the customer's money is subject to forfeiture?

— Probably not

— The Government's right to seize and forfeit the money would trump the right of set-off if it were not exercised until after the bank learned that it would be acquiring criminally-tainted money

- *United States v. One Silicon Valley Bank Account*, 549 F. Supp. 2d 940, 959 (W.D. Mich. 2008) (bank cannot assert interest in funds in defendant's bank account under a right of set off because the account contained fraud proceeds in which the Government's interest vested under the relation back doctrine before the right of set off was exercised);
- *United States v. BCCI Holdings (Luxembourg) S.A. (Petition of Am. Express Bank II)*, 961 F. Supp. 287, 292-93 (D.D.C. 1997) (bank that did not exercise right of set-off against defendant's assets until after property was subject to forfeiture could not prevail under § 1963(l)(6)(A), regardless of when order of forfeiture was issued);
- *United States v. Huntington National Bank*, 682 F.3d 429, 434-35 (6th Cir. 2012) (distinguishing setoff cases: statutory or common-law right of setoff is not a legal interest, but a bank that acquires a secured interest in exchange for a loan or line of credit has a legal interest in a particular asset);