

THE IMPORTANCE OF CIVIL FORFEITURE AS A LAW ENFORCEMENT TOOL

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I. INTRODUCTION

My topic is the critical role that civil (or non-conviction based) asset forfeiture plays in the enforcement of the criminal laws

- and why it is important for all countries to enact legislation making it possible to recover property in this fashion

I am going to talk about what I mean by civil or NCB forfeiture,

- how it works in the United States and other countries
- and the instances where it is useful – and often *necessary* – to commence a forfeiture action civilly rather than making it part of a criminal case

Along the way, I will try to provide some examples of NCB forfeiture cases to illustrate the important role that they play in enforcing the criminal laws

My Background

First, a bit about my background

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

- I specialized in money laundering and asset forfeiture cases and became the Chief of the Money Laundering and Asset Forfeiture Section in the federal prosecutor's office in Baltimore, Maryland

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- I handled a great many asset forfeiture cases – both criminal and non-conviction-based
- But in addition to that, I drafted much of the federal legislation on forfeiture and money laundering, and I was responsible for training our federal prosecutors with respect to the application of the money laundering and forfeiture laws

Since leaving Government, I have been working with foreign Governments and NGOs to enhance their asset forfeiture and money laundering laws

- For example, I helped to draft the NCB forfeiture laws in Malta and am presently engaged in training the prosecutors and judges there and in Latvia in how those laws work
- And in the past year, I've attended seminars in Brazil and Jordan explaining how NCB forfeiture works in other countries

In all of this, my goal has been to assist other countries in implementing and using a tool – non-conviction-based forfeiture – that is essential to combatting

- corruption,
- international money laundering,
- terrorist financing,
- currency smuggling and the smuggling of cultural property,
- wildlife trafficking,

and a host of other crimes where criminal prosecution is often not feasible

II. ASSET FORFEITURE IN THE UNITED STATES

In the United States, as in most countries, we can recover, or “forfeit”, two categories of property:

- the proceeds of a criminal offense
- and property used to commit, or to facilitate the commission, of a criminal offense

And we can do this for most federal crimes, regardless of where the property is located, if the crime occurred in the United States

— and for some foreign crimes as well, if the property is found in the US

By the “proceeds of the crime” I mean any property that the defendant would not have but for having committed the crime

— If he commits fraud or sells drugs, the money he gets is the proceeds

— if he steals money from the public treasury, that money is the proceeds

— If he accepts a bribe or a kickback, the money he gets is the proceeds

— If he pays a bribe to get a contract, the payments he receives on the contract are the proceeds because he would not have the contract but for having paid the bribe

And “proceeds” also includes anything traceable to the proceeds of the crime

— So, if someone steals public money and uses it to buy a condominium in Miami, the condominium is the proceeds

By property used to commit the offense I mean both the instrument by which the crime was committed -- like the gun used to commit an armed robbery, or the airplane used to smuggle drugs

— and any other property that made the crime easier to commit

— like the get-away car used to flee the scene of the robbery, or the warehouse that they used to hide the drugs

— In a money laundering case, it could be untainted money in a bank account with which the criminal money was commingled so that the criminal money seemed to be legitimate

— or it could be the business that was the front for a money laundering operation

In the United States, as in many countries, we can recover such property in either of two ways

— As part of the sentence if the property owner is convicted of a criminal offense: what we call criminal forfeiture

— Or in a separate civil action that is not part of any criminal case: what we call civil or NCB forfeiture

Criminal forfeiture is familiar to most people:

- if the defendant is convicted, the court orders him to forfeit the proceeds of his criminal and the property that he used to commit it
- in the US as in most countries, if the defendant no longer has the money
- because he spent it, or hid it, or sent it overseas
- the court can enter a value-based judgment, ordering him to pay a sum of money equal to what he gained from the offense

Civil forfeiture

Non-conviction-based (NCB) forfeiture may be less familiar

- NCB forfeiture cases are actions against the property;
- In the US, we actually name the property as the subject of the case
- that's why our NCB cases have funny names, like *United States v. \$125,000*, or *United States v. Property Located at 123 Main Street*

Naming the property as the subject of the proceeding doesn't mean that the property has done something wrong or that it has to defend itself in court

- it is just a convenient way of letting the world know that this is the subject of the forfeiture action
- that it is the property that the Government believes was derived from or was otherwise involved in a criminal offense
- if the Government wants to confiscate \$1 million as drug proceeds, it brings an action naming the \$1 million
- if it wants to forfeit a building as property involved in money laundering or as property traceable to corruption, it brings an action naming the building

In short, NCB confiscation is simply a procedural device designed to get everyone with an interest in the property in the courtroom at the same time

- *United States v. Ursery*, 518 U.S. 267, 295-96 (1996) (Kennedy, J. concurring) (proceedings *in rem* are simply structures that allow the Government to quiet title to criminally-tainted property in a single proceeding in which all interested persons are required to file claims contesting the forfeiture at one time);
- *United States v. Real Property Located at 475 Martin Lane*, 545 F.3d 1134,1144 (9th Cir. 2008) (“*in rem* actions are generally considered proceedings against the world” in which “the court undertakes to determine all claims that anyone has to a thing in question”);

For example: Suppose a drug dealer has been murdered and the police find \$90,000 in cash in his car:

- There isn’t going to be a criminal case because the person who committed the crime is dead
- So, the Government files an action against the \$90,000 and asks, “who claims this?”
- And anyone who responds – anyone who claims the \$90,000 – comes into court and litigates his claim against the govt

Maybe his widow will claim that the money was marital property

- Maybe his child will claim the money as the drug dealer’s heir
- Maybe his business partner will claim that they were in the landscaping business, not the drug business, and the money was the proceeds of their legitimate activity

In idea behind NCB forfeiture is to get all of these people into the courtroom at the same time to litigate their claims when there is no criminal proceeding

In such a case,

- the Government is the plaintiff,
- the property is the *res* or thing subject to confiscation, and
- anyone wishing to contest the action is an intervener who can intervene to contest the action by showing that he has an ownership interest in the property

- *United States v. \$822,694.81 in U.S. Currency*, 2019 WL 4369936, *1 n.1 (D. Conn. Sep. 12, 2019) (“In a civil forfeiture case, the Government is the plaintiff, the property is the defendant and the claimant is an intervenor seeking to challenge the forfeiture”, quoting *Asset Forfeiture Law in the United States* at 324 (2d ed. 2013);

So, in the case of the \$90,000, the Government would be the plaintiff, the \$90,000 would be the *res* subject to confiscation, and if the dead drug dealer’s widow, or child, or business partner – or all of them – wanted to lay claim to the money, they would be interveners

History

This is just one example of an instance where NCB forfeiture would be used to fill a gap in the law when there is no criminal prosecution

- It is not a new concept in the United States

Civil forfeiture grew out of the American experience in the 18th Century with vessels being used for piracy and slave trafficking

- It was often possible to lay hands on the vessel and its crew, but not on the vessel’s owner
- To prevent the vessel from being used again to commit a criminal offense, but without the possibility of obtaining a conviction against the vessel’s owner in a criminal case, the Government would bring an action in court against the vessel itself, and invite anyone who wished to lay claim to the vessel to come into court and do so
- If someone did file a claim, we would litigate the merits of the case in court
- If no one filed a claim, the Government would acquire title to the property by default

That is still how civil forfeiture works in the US today

- As in most common law countries – and in an increasing number of civil law countries – NCB forfeiture is used to recover the proceeds and the instrumentalities of crime in virtually all categories of cases

- From drug trafficking to public corruption, fraud and other white collar crimes, sex trafficking and child pornography and so forth
- It's the tool the Government is using right now to seize yachts and airplanes owned by Russian oligarchs and maintained in violation of international sanctions
- It is used any time recovering the property through a criminal prosecution is not possible or feasible for one reason or another
- It is a gap filler

Procedure

I will talk about the instances where NCB forfeiture is necessary to fill that gap in a moment, but first I should talk about how it works

NCB forfeiture cases generally begin with the seizure of property – generally with a warrant issued by a judge

- The warrant gives the Government the right to temporarily maintain custody of the property while the forfeiture action is pending
- It is not the end of the process; it is the beginning

Once the property is in the Government's possession, the Government files an action naming the property (a boat, an airplane, a gun, a pile of cash, a bank account, or whatever) as the property to be forfeited

- It then sends notice of the forfeiture proceeding to all persons with a potential claim to the property, inviting them to file a claim
- If someone files a claim, the case has to go to court where the Government must prove that the property should be forfeited
- If no one files a claim, the property may be forfeited to the Government by default

The important thing to know about such a forfeiture proceeding is that it does not require a conviction or even a criminal case,

- The Government could bring an NCB forfeiture action before it begins a criminal case, after the criminal case is over, or if there is no criminal case at all
- but the Government still has to prove two things: that a crime was committed *and* that the property was derived from or used to commit that crime

I should emphasize that point: 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 drug dealer's car, the Government would have to prove that he (or whoever put the money in the car) 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

Standing

Now, as you can imagine, there are instances in which persons who have no connection to the property attempt to intervene and contest the forfeiture action

- maybe someone who happened to be walking down the road when the police were searching the dead drug dealer's car saw them find the \$90,000 and says, if anyone can lay claim to the money and put the Government to its proof, why not me
- that is indeed a significant problem
- all sorts of people who have no real interest in the property might file claims

- these can range from mere passers-by to the property owner's creditors who say, hey, that money didn't belong to me, but that guy owed me money and here's my chance to collect the debt

The Government should not have to litigate with a person who has no interest in the property,

- so there is usually a procedure in NCB forfeiture actions for challenging such claims as a threshold matter
- In the US, we call that a motion to dismiss for lack of standing
- It puts the burden on the person attempting to intervene to show that he or she really has some interest in the property
- Only after the intervenor establishes that interest does the case go to trial

The merits: establishing forfeitability

Once the court is satisfied that one or more interveners has standing, it turns to the merits of the case

- It must order the property confiscated if the Government proves, on a balance of the probabilities, that a crime occurred and that the property was derived from or was otherwise involved in that crime

All of the due process safeguards that apply in any other non-criminal proceeding involving property apply in such a case

- The forfeitability of the property must be determined by a neutral arbiter (in the United States, there is a right to have civil forfeiture cases tried to a jury)
- Both parties have the right to call and cross-examine witnesses and to compel the production of evidence
- The property owner has the right to move to exclude evidence that was illegally seized
- And in the United States, if the property owner prevails, the Government must pay his attorney's fees

Affirmative defenses

Moreover, even if the Government succeeds in establishing that the property was subject to forfeiture, -- *i.e.*, that it was derived from or used to commit a criminal offense

- the property owner has the right to put on an affirmative defense

In most countries, there are two possible affirmative defenses

The first is that the intervener acquired the property from the defendant as a **bona fide purchaser for value**;

- For example, maybe the defendant committed fraud, used the fraud proceeds to buy a yacht, and sold the yacht to the intervenor
- The Government may establish that the yacht was traceable to the fraud, but if the intervener can show that he paid fair market value for the yacht in an arm's length transaction, and did not know that it was derived from a crime, he would have an affirmative defense
- But he would have had to show that he paid fair market value in an arm's length transaction
- This defense cannot be used by someone who received the tainted property as a gift, bought it for a dollar in a fraudulent transaction, or inherited it as an heir.
 - *United States v. 10503 Campus Way South*, 2018 WL 6834355 (D. Or. Dec. 27, 2018) (transfer of residence from brother to sister for \$10 was not a purchase; because the purchase must be an arm's length transaction, "love and affection" cannot be considered part of the consideration);
 - *United States v. 1309 Fourth Street*, 2015 WL 670572, *9 (D. Or. Feb. 17, 2015) (transfer from brother to sister for "love and affection" and for savings bonds that remained in buyer's name and possession was not an arm's length transaction);

The second affirmative defense is called the "innocent owner" defense

- The intervener says, "even if the property was criminally tainted, it belonged to me at the time it was used to commit the crime, and
 - 1) I did not know it was being so used, or

2) I did know but I did everything I could to stop it;

So, for example, suppose someone uses his wife's car to rob the bank

- She could say, I knew my husband was borrowing my car, but I did not know he was going to use it to rob the bank
- Or she could say, “when I realized he was going to use my car to rob the bank, I called the police”
 - *United States v. 16328 South 43rd E. Ave.*, 275 F.3d 1281, 1286-87 (10th Cir. 2002) (woman who failed to call police, evict her son, or more thoroughly investigate his marijuana grow operation could not possibly show by a preponderance of the evidence that she had taken all reasonable steps; bond between mother and son is not enough to create triable issue for a jury on the reasonableness of her inaction);

If she proves one or the other, she will prevail as an innocent owner and would recover the car

- But if she does not, the car would be confiscated even though it belonged to the wife and she was not convicted of any crime.
- That's because before even reaching this stage of the case, the Government will have already proved that the bank was robbed and that this particular car was used to rob it.

As we'll discuss in a moment, that is one of the instances in which NCB forfeiture is useful to the Government

- The property was undeniably used to commit a crime, but it did not belong to the perpetrator
- It belonged to someone who knew it was being used to commit a crime and allowed that to happen
- Instead of having to charge that third party with a crime in a criminal case, the Government can simply bring an NCB forfeiture action
- And it will prevail if the third party was not an innocent owner.

Proportionality

There is one other defense that an intervener can raise – assuming that he has standing

- He can say, “even if the property was used to commit an offense, and even though I am not an innocent owner, the confiscation of the property would be “grossly disproportional to the gravity of the offense giving rise to the confiscation order”

For example, suppose the dead or fugitive drug dealer used his girlfriend’s house to store a quantity of drugs worth 10 euros, and the girlfriend knew all about it

- The house would be subject to confiscation as facilitating property
- And the girlfriend would not be an innocent owner
- But the confiscation of her house because of its role in concealing drugs worth 10 euros would be “grossly disproportional to the gravity of the offense”

In short, the proportionality requirement is another way in which the due process rights of property owners are protected in an NCB forfeiture case.

Burden of Proof

As is now apparent, there are three distinct phases to an NCB case

- First, the intervener must establish a sufficient ownership interest to have standing; this must be determined before anything else
- Second, the Government must establish that the property is subject to confiscation; that is, it must show that a crime occurred and that the property is connected to that crime
- And Third, the intervener must show that he has an affirmative defense: that he is either a bona fide purchaser for value or an innocent owner

Thus, there is what we might call a shifting burden of proof

- the burden is on the intervener to establish his ownership interest
- The burden is on the Government to establish that the property is subject to forfeiture
- And the burden is on the intervener to establish an affirmative defense

In each case, the burden is by the civil standard: balance of the probabilities

III. WHY DO CIVIL FORFEITURE

At this point, it would be reasonable for you to ask, when does the Government bring forfeiture actions as civil forfeiture actions, and when does it instead forfeit the property as part of the sentence in a criminal case

Or stated differently, if civil forfeiture is so wonderful, why doesn't the Government forfeit everything civilly instead of including it as part of a criminal case?

- first, it's a lot of extra work for something that can be done easily if there is a criminal case
- also, civil forfeiture has a serious limitation
- recall the second requirement: that the Government must prove the property was derived from or used to commit the crime
- because it is an *in rem* action against specific property, there are no substitute assets or money judgments in civil forfeiture cases
- so, if the criminal proceeds have already been spent on wine, women and song
- Or if the Government cannot establish the connection between the particular asset and the underlying crime,
- there can be no forfeiture

So civil forfeiture should be reserved for cases where there is not likely to be a criminal case, or where a criminal case is not ready to indict

When would you use civil forfeiture?

Here are some of the instances in which the United States would typically bring a civil forfeiture action instead of seeking the forfeiture as part of a criminal prosecution

1. when the property is seized but the forfeiture is unopposed
2. when the wrongdoer is dead or is incompetent to stand trial, or if he has been pardoned;

- recently in the United States, Jeffrey Epstein, a person accused of running a sex-trafficking operation, committed suicide while awaiting trial
 - if the Government wants to recover the property that he used to run his operation – including a mansion in New York, a ranch in New Mexico, and an island in the Caribbean – it will have to bring a civil forfeiture case
 - similarly, if it wants to recover the property that it intended to confiscate from Paul Manafort, a political operative who was convicted but pardon by the former President, it will have to use civil forfeiture
3. when the defendant is a fugitive or a foreign national beyond jurisdiction of the United States;
- recall my example of the first civil forfeiture cases from the 1700s when the pirates or the slave traffickers were beyond the jurisdiction of the courts in the US
 - the same is true today: money or other property may be in the US that was derived from public corruption in Nigeria or the theft of money in Russia,
 - or it may have been left behind in the US by a person who committed a crime in the US and then fled to Mexico or Pakistan
 - I will give you a number of examples of the use of NCB forfeiture in the United States to recover the proceeds of foreign public corruption in a few minutes
4. when the statute of limitations has run on the criminal case;
5. when we have recovered the property but do not know who committed the crime giving rise to the forfeiture;
- If weapons, flight simulators, contraband electronics, or money is intercepted while on the way to a country designated as a supporter of terrorism, but it is unclear who the exporter or recipient of the property might be, there is no one to prosecute and hence no one to convict.
 - The same is true if money is seized from a courier who is unable (or unwilling) to identify the owner of the property

- Or if a cultural artifact or work of art is recovered from an auction house but no one knows who stole it or imported it
 - In all of those instances, a non-conviction-based order will reach the property and force the property owner to come forward to contest the forfeiture proceeding.
6. when the defendant pleads guilty to a crime different from the one giving rise to the forfeiture;
- In the US, the courts have not fully adopted the concept of ‘extended confiscation’ whereby a conviction for a given offense will give rise to a forfeiture order directed at the proceeds of all other crimes that the same defendant has committed.
 - To the contrary, because criminal forfeiture is regarded as part of the defendant’s sentence relating to the commission of a given offense, only property connected to the commission of that offense is subject to criminal forfeiture.
 - In those cases, the Government must bring a non-conviction-based forfeiture action to recover any property involved in other offenses.
7. when there is no federal criminal case because the defendant has already been convicted in some other court;
- suppose the crime was committed outside of the United States, the perpetrator has been convicted in the foreign country, but the property is now in the United States and the foreign country has not (for whatever reason) been able to obtain a confiscation order that the US is able to enforce.
 - In that instance, either because they lacked jurisdiction over the foreign crime or because there was no reason to prosecute the offender a second time for the same offense, prosecutors in the US would not be able to obtain a conviction-based forfeiture order against the foreign defendant,
 - but with a non-conviction-based order they could recover the proceeds of the foreign crime and return them to the foreign state. Indeed, cases in which the US brings civil forfeiture actions to recover the proceeds of foreign crimes – including public corruption – at the behest of the victim country are quite common.

8. when there is no criminal case because the interests of justice do not require a conviction even though there was a clear violation of a criminal law;
 - suppose a convicted felon persuades his 70-year old mother to purchase a firearm on his behalf, in a situation where both of them know that it is a violation of federal law for a convicted felon to possess such a weapon.
 - And suppose the mother not only buys the firearm but lies on the required document when asked if she is buying it for herself or for a third party.
 - In that case, the mother has clearly violated federal law and would be subject to criminal prosecution, but faced with the choice between doing nothing (and allowing the felon to retain the weapon) and bringing criminal charges against the aged woman, the Government might decide that confiscating the weapon pursuant to a non-conviction-based forfeiture order is the right thing to do.
9. when the evidence is insufficient to prove that the defendant committed the offense beyond a reasonable doubt;
 - in a criminal case, the Government not only has to prove that a crime was committed but also that *the defendant* is the one who committed the crime
 - if the police find three people in possession of stolen money and it is not clear which of them is the thief, but they can prove the money is stolen
 - they can confiscate the money in an NCB forfeiture action
10. when the defendant uses someone else's property to commit the crime and that person is not an innocent owner.
 - I have already given the example of the defendant who used his wife's car to rob a bank
 - there are many other examples
 - the defendant may have laundered his money through a third party's bank account, concealed women forced into the sex trade as

employees of a third party's business, or distributed drugs using a third party's airplane.

Conviction-based forfeiture cannot reach the property of third parties;

— it would be a violation of the due process rights of third parties to attempt to confiscate their property in a proceeding in which they were not able to participate;

— but non-conviction-based forfeiture can reach third-party property, because in that setting the third party has the right to intervene and defend his property interest by contesting the Government's proof on the merits and/or by asserting that he is an innocent owner of the property.

— the key disadvantage to civil forfeiture is that there is no possibility of obtaining a money judgment or forfeiting substitute assets

— we can only forfeit property that is traceable to the offense

11. When the criminal investigation will take a long time, and there is a danger that the property will disappear

— This turns out to be a key reason for enacting NCB forfeiture provisions in civil law jurisdictions, where the investigation of politically exposed persons involved in corruption cases can take years to resolve

Conclusion

The bottom line is that NCB forfeiture is an essential law enforcement tool

— It fills a gap that exists when it is not possible to recover property as part of a criminal prosecution

— It comports with all of the requirements of due process and proportionality

— And it makes it possible in international cases to recover property invested in your country that is derived from a foreign crime

— And to recover property in another country that is derived from a domestic crime

For these reasons, NCB forfeiture legislation has been enacted throughout the world

- I thank you for the opportunity to assist in advancing such legislation in your countries