Criminal Forfeiture Procedure in 2013: An Annual Survey of Developments in the Case Law

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A survey of the developments in the case law in the past year relating to the procedure for obtaining a forfeiture judgment as part of the sentence in a federal criminal case.

I. Introduction

This is another in a series of articles on developments in the federal case law relating to criminal forfeiture procedure. It covers the cases decided in 2012 and early 2013.

Like the earlier articles in this series, this one does not attempt to address every topic related to criminal forfeiture, nor all of the exceptions and nuances that apply to the topics that are addressed; rather, it covers only those matters on which there was a significant development in the case law in the past year. Thus a basic familiarity with federal criminal forfeiture procedure is assumed.[2]

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[2] For similar summaries of the developments in criminal forfeiture procedure from 2003 through 2012, *see* S. Cassella, "Criminal Forfeiture Procedure in 2012: An Annual Survey of Developments in the Case Law," 48 Criminal Law Bulletin 863 (2012); S. Cassella, "Criminal Forfeiture Procedure in 2011: An Annual Survey of Developments in the Case Law," 47 Criminal Law Bulletin 593 (2011); S. Cassella, "Criminal Forfeiture Procedure in 2010: An Annual Survey of Developments in the Case Law," 46 Criminal Law Bulletin 898 (2010); S. Cassella, "Criminal Forfeiture Procedure in 2009: An Annual Survey of Developments in the Case Law," 45 Criminal Law Bulletin 545 (2009); S. Cassella, "Criminal Forfeiture Procedure in 2008: A Survey of Developments in the Case Law," 44 Criminal Law Bulletin 3 (2008); S.

The article begins with the cases that illustrate the concept that criminal forfeiture is part of the defendant's sentence in a criminal case. It then takes the reader more or less chronologically through the litigation of a case, beginning with the seizure and restraint of the property and continuing through the trial and sentencing of the defendant and the adjudication of third-party issues in the post-trial ancillary proceeding. Except in instances where it is necessary to refer to the leading case in a given area for purposes of comparison or context, the citations are limited to the cases decided in 2012 and early 2013.[3]

II. The Scope of Criminal Forfeiture

Criminal forfeiture is part of the defendant's sentence

Forfeiture takes the profit out of crime, disrupts criminal organizations, lessens their economic influence, and serves as a deterrent.[4] Thus it serves the same purposes of punishment, incapacitation and general and specific deterrence as other aspects of the defendant's sentence.

Cassella, "Criminal Forfeiture Procedure in 2007: A Survey of Developments in the Case Law," 43 Criminal Law Bulletin 461 (2007); S. Cassella, "Criminal Forfeiture Procedure in 2006: A Survey of Developments in the Case Law," 42 Criminal Law Bulletin 515 (2006); S. Cassella, "Criminal Forfeiture Procedure: An Analysis of Developments in the Law Regarding the Inclusion of a Forfeiture Judgment in the Sentence Imposed in a Criminal Case," 32 American Journal of Criminal Law 55 (2004).

[3] A complete discussion of each of the issues covered in this article, along with the citations to the relevant cases, may be found in Chapters 15-24 of Stefan D. Cassella, *Asset Forfeiture Law in the United States* (2d Ed. 2013), Juris Publishing: New York (hereafter "*AFLUS*").

[4] *See United States v. Emor,* 850 F. Supp. 2d 176, 215 (D.D.C. 2012) ("the purpose of forfeiture is to punish the defendant by forcing him to disgorge the proceeds of his criminal activity").

Because it is part of the defendant's sentence, however, there can be no criminal forfeiture unless there is a criminal conviction for the offense giving rise to the forfeiture. If the defendant's conviction for that offense is vacated or overturned on appeal, the forfeiture order must be vacated as well.[5]

For example, in *United States v. Harris*, the Fifth Circuit reversed the defendant's money laundering conviction, which meant that the $1.5 million forfeiture money judgment that was premised on that conviction had to be reversed as well.[6] In *United States v. Lynch,* however, the defendant pled guilty and agreed to the administrative forfeiture of his property. When a subsequent change in the law required that his conviction be vacated, the defendant argued that he administrative forfeiture had to be vacated as well. But the court disagreed. *Criminal* forfeiture is part of the defendant's sentence, but *administrative* forfeiture is a separate proceeding that occurs when the defendant chooses not to contest the forfeiture of his property by a federal law enforcement agency. Because the administrative forfeiture *was not* dependent on the defendant's criminal conviction, vacating his conviction had no effect on the forfeiture.[7]

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[5] *See generally AFLUS, supra* note 3, § 15-3(a).

[6] *United States v. Harris*, 666 F.3d 905, 910 (5th Cir. 2012).

[7] *United States v. Lynch,* 2012 WL 6609010, *4 (E.D. Pa. Dec. 19, 2012).

The forfeiture also need not be vacated if there is an independent basis for it. For example, a forfeiture order premised on a conspiracy conviction would not have to be vacated, even if the conspiracy conviction were reversed, if the defendant were also convicted of substantive offenses that could have supported the forfeiture. Thus, in *United States v. Bader*, when the Tenth Circuit reversed the defendant's conspiracy conviction but not his convictions on other counts, it remanded the case to the district court to see if all or part of the forfeiture judgment could survive based on the other convictions.[8]

Because forfeiture is part of the defendant's sentence, it affects only those defendants who are convicted of the offense on which the forfeiture is based. Co-defendants who were *not* convicted at all, or who were convicted of a different offense, are third parties as far as the forfeiture order is concerned. In *United States v. Davenport,* a co-defendant was convicted only of a Section 1001 offense involving the making of a false statement to a law enforcement officer. Forfeiture is not authorized for violations of Section 1001, so when the principal defendant was convicted of a drug offense and the court entered a forfeiture

[8] *United States v. Bader*, 678 F.3d 858, 897 (10th Cir. 2012) (because forfeiture is limited to property involved in the offense of conviction, reversal of conspiracy conviction requires vacating forfeiture order to the extent it was based on the conspiracy, but remanding to determine if all or part of he forfeiture could have been based on convictions for substantive violations; quoting § 15-3(b) of *Asset Forfeiture Law in the United States*).

order based on that conviction, the co-defendant was entitled to file a claim in the ancillary proceeding contesting the forfeiture like any other third party.[9]

The nexus between the property and the offense of conviction

In addition to obtaining a conviction for an offense giving rise to the forfeiture, the Government must establish that there is a factual nexus between the property and that offense.[10] For example, in a fraud case, the Government must not only obtain a conviction under one of the fraud statutes, but must also establish that the property subject to forfeiture was derived from that offense.[11]

The forfeiture is not limited, however, to the particular *execution* of the fraud offense that was alleged in the indictment. In fraud cases, the "offense" giving rise to the forfeiture is the *scheme;* the individual substantive counts are only executions of the scheme. Thus, a defendant who is convicted of fraud is

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[9] *United States v. Davenport*, 668 F.3d 1316, 1320 n.7 (11th Cir. 2012) (if the defendant pleads to a crime that does not give rise to forfeiture, she is not subject to the forfeiture order, but becomes a third party with the right to oppose the forfeiture in the ancillary proceeding).

[10] *See generally AFLUS, supra* note 3, § 15-3(b).

[11] It should be noted that the Third and Seventh Circuits appear to have a broader rule, holding that forfeiture extends beyond the counts of conviction to all related conduct. *See United States v. Plaskett*, 355 Fed. Appx. 639, 644 (3d Cir. 2009) (the amount of a money judgment may include the amounts involved in counts on which the jury acquitted the defendant, if the court finds by a preponderance of the evidence that the conduct occurred); *United States v. Podlucky,* 2012 WL 1850931, *4 (W.D. Pa. May 21, 2012) (following *Plaskett*; applying the preponderance standard to find defendant jointly and severally liable for the full amount involved in a money laundering conspiracy even though she was acquitted on the conspiracy count and convicted only of three substantive acts).

liable for the full amount derived from the entire scheme even if he is convicted of only a few substantive counts.[12]

For these reasons, in *United States v. Hailey*, a defendant who obtained only $2.9 million from the eight substantive wire counts on which he was convicted, was required to forfeit the $9.1 million that he obtained from the entire scheme.[13] And in *United States v. Sigillito*, the defendant had to forfeit the proceeds of the entire scheme even though some of the proceeds were realized outside of the statute of limitations.[14]

Ownership of the property

It is a common misconception that the property forfeited in a criminal case must belong to the defendant. To be sure, third-party property *may not* be forfeited: if a third party establishes her ownership of the property in the ancillary proceeding, she will prevail; but the Government does not have to prove that the defendant was the owner of the property at any stage of the proceedings.[15] The

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[12] *See United States v. Venturella*, 585 F.3d 1013, 1015, 1016-17 (7th Cir. 2009). *See generally AFLUS, supra* note 3, § 15-3(b) at pp. 568-69.

[13] *United States v. Hailey*, 887 F. Supp. 2d 649 (D. Md. 2012). *See also United States v. Budden*, 2012 WL 1315366, *4 (D.S.C. April 17, 2012) (defendant convicted of mail fraud must forfeit the proceeds of the entire scheme, even if the scheme involved multiple victims, and even if the defendant used the mails only with respect to one victim; following *Venturella*); *United States v. Emor,* 850 F. Supp. 2d 176, 217 (D.D.C. 2012) (following *Venturella*; defendant must forfeit the proceeds of the entire fraud scheme).

[14] *United States v. Sigillito,* 899 F. Supp.2d 850, 861-62 (E.D. Mo. 2012).

[15] *See generally AFLUS, supra* note 3, § 15-3(f).

Second Circuit said this years ago in *United States v. DeAlmeida*,[16] and reaffirmed it last year in *United States v. Watts.*[17] In the forfeiture phase of the trial, the court said, 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.[18] At that point, however, the burden is on the third party to prove that she was the owner of the property; the Government is not required to prove that it belonged to the defendant.[19]

In *United States v. Dupree,* a related case, the district court acknowledged that there are older cases holding that the Government must prove that the defendant had an interest in the property. But those cases were based on former Rule 31(e) which was replaced by Rule 32.2 and are no longer good law.[20]

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[16] *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;" but the ancillary proceeding serves to ensure that property belonging to third parties who have been excluded from the criminal proceeding is not inadvertently forfeited).

[17] *United States v. Watts,* 477 Fed. Appx. 816, 817-18 (2d Cir. 2012) (following *De Almeida*).

[18] *Id.*

[19] *See United States v. Rosga,* 2012 WL 1854246, *7 & n.12 (E.D. Va. May 21, 2012) (whether the property belonged to the defendant is irrelevant in the ancillary proceeding; the only issue is whether the claimant has a sufficient interest to establish a claim).

[20] *United States v. Dupree*, ___ F. Supp.2d ___, 2013 WL 311403 (E.D.N.Y. Jan. 28, 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). *But see United States v. Watkins,* 2012 WL 2568145, *3 (W.D.N.C. July 2, 2012) (denying motion for preliminary order of forfeiture despite defendant's agreement to it in his plea agreement because the Government did not establish the property

Property held in a third party's name

Property owned by a third party may not be forfeited, but property held by a third party in name only, or property that has been transferred to a third party who was not a bona fide purchaser for value, may be forfeited because it is not considered property belonging to a third party. For example, in *United States v. Petters,* the court held that property purchased with the proceeds of the defendant's fraud could be forfeited in the defendant's criminal case even if it was titled in the name of a corporation.[21]

Moreover, if the defendant has only a partial interest, the property may be forfeited and the third party's interest sorted out in the ancillary proceeding. For example, in *United States v. Shanholtzer,* the defendant used the proceeds of his crime to obtain a secured interest in an airplane. The court ordered the forfeiture of the airplane, subject to the Government's use of the proceeds of the sale of the airplane to pay off the third party who held the equity in it.[22]

III. Criminal Forfeiture Procedure [23]

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belonged to the defendant).

[21] *United States v. Petters,* 857 F. Supp. 2d 841, 845 n.2 (D. Minn. 2012).

[22] *See United States v. Shanholtzer,* 492 Fed. Appx. 799, 800-01 (9th Cir. 2012) (where defendant used forfeitable funds to acquire a secured interest in an airplane, the Government stepped into defendant's shoes as secured creditor, and could sell the plane to recover that interest, while returning the equity to the third party owner).

[23] In *Davenport*, the Eleventh Circuit did a nice job of laying out criminal forfeiture procedure under Rule 32.2 and 21 U.S.C. § 853. If someone wanted to read just one case explaining how this all works, this might be the one. *See United States v. Davenport*, 668

Seizure Warrants—21 U.S.C. § 853(f)

If the property is not already in the Government's custody at the time the time the indictment is returned, and the Government's wants to take it into its custody pending trial, it may rely on the grand jury's finding of probable cause to obtain a seizure warrant under 21 U.S.C. § 853(f), or to justify a warrantless seizure if one of the exceptions to the warrant requirement applies.[24]

From the Government's perspective, the best practice when seizing property for forfeiture is to obtain a warrant based on both civil and criminal forfeiture.[25] Doing so gives the Government the flexibility of pursuing the forfeiture under either the civil or the criminal statutes without having to obtain the court's approval to switch from one procedure to the other after the property has been seized.[26]

There is one important difference between the showing that has to be made to obtain a criminal seizure warrant and the showing needed to obtain a civil warrant, however. Both require a finding of probable cause, but in addition, a

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F.3d 1316, 1320-21 (11th Cir. 2012).

[24] *See United States v. Savage*, 2012 WL 5881851, *5-6 (E.D. Pa. Nov. 20, 2012) (grand jury's finding of probable cause in returning an indictment, the inclusion of a non-specific forfeiture notice in the indictment, and the seizing officer's awareness of evidence linking a vehicle to the alleged offense, justified the warrantless seizure and inventory search).

[25] *See generally AFLUS, supra* note 3, § 3-2(c).

[26] *See United States v. Wiese*, 2012 WL 43369, *2 (E.D. Mich. Jan. 9, 2012) (when the Government uses a dual-purpose warrant it need not commence a civil forfeiture proceeding but may decide to pursue criminal forfeiture only).

criminal seizure warrant may be issued only if the court finds that a restraining order would be inadequate to preserve the property for forfeiture at trial.[27] If the Government is seeking a combined civil-criminal seizure warrant, it must satisfy that requirement with respect to the criminal aspect of the warrant.[28]

The question that most often arises in this context is whether the Government can show that a restraining order would be inadequate if what it is seeking to seize is the money in a bank account. Would it not be sufficient to serve the bank with the restraining order, directing it not to allow any disbursements from the account?

In *United States v. Wiese,* the court said that the answer to this question is, no, it not sufficient. Funds in a bank account can be easily moved, either before the restraining order is put into effect, or afterwards, if the bank does not take the necessary steps to ensure that all of its personnel are aware of the order. Thus, funds in a bank account may be seized for either civil or criminal forfeiture, or both.[29]

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[27] *See* 21 U.S.C. § 853(f).

[28] *See generally AFLUS, supra* note 3, § 3-2(b).

[29] *United States v. Wiese*, 2012 WL 43369, *2 (E.D. Mich. Jan. 9, 2012) (§ 853(f) warrant may be used to seize funds in a bank account because they may be easily moved; it is not necessary that the warrant contain an explicit finding that restraining order would be inadequate to preserve the property for forfeiture).

Effect of illegal seizure

A ruling that the seizure was illegal for any reason does not effect the Government's ability to forfeit the property as part of the defendant's sentence.[30]

Release of seized property pending trial

In civil forfeiture cases, there is a procedure that allows the property owner to recover possession of his property pending trial by demonstrating that the Government's custody of the property is causing him a hardship.[31]

In *Wiese,* the defendant asserted the hardship provision and argued that the property subject to forfeiture should be released to him pending trial, but the court held that the hardship provision does not apply in criminal forfeiture cases.[32]

Pre-trial restraining orders

For the Government, the alternative to preserving the property by seizing it pending trial is to ask the court to restrain the property pursuant to a pre-trial restraining order.[33]

In most circuits (the Fourth Circuit is the only exception), property may be restrained only if it was derived from or was otherwise directly involved in the

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[30] *See Winkelman v. United States*, 494 Fed. Appx. 217, 220 (3d Cir. 2012) (improper pre-trial restraint of asset has no effect on ultimate forfeitability); *AFLUS, supra* note 3, § 17-4(c).

[31] *See* 18 U.S.C. § 983(f).

[32] *United States v. Wiese,* 2012 WL 43369, *1 n.2 (E.D. Mich. Jan. 9, 2012) (§ 983(f) does not apply if the Government pursues only criminal forfeiture).

[33] *See* 21 U.S.C. § 853(e). *See generally AFLUS, supra* note 3, § 17-4.

commission of the offense; substitute assets, in other words, although subject to forfeiture at the conclusion of the trial, may not be restrained pending trial.[34]

In *Wiese*, the defendant argued that because his property was not traceable to the fraud scheme alleged in his indictment, it must have been improperly restrained as a substitute asset. But the court disagreed. The Government was not seeking the forfeiture of the property under a "proceeds" theory, the court said, but rather as property involved in a money laundering offense. Thus, it was directly-forfeiture property that could be restrained pending trial without violating the rule against the pre-trial restraint of substitute assets.[35]

Most restraining orders direct the defendant *not* to do something, but a restraining order may direct a defendant to take affirmative steps to preserve property and disclose assets.[36] For example, in *Hailey* the district court directed the defendant to disclose the source of funds that he had previously told the court he did not have.[37]

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[34] *See generally AFLUS, supra* note 3, § 17-14.

[35] *United States v. Wiese,* 2012 WL 43369, *3 (E.D. Mich. Jan. 9, 2012) (because the Government's theory was that the property was involved in a money laundering offense, funds not traceable to the underlying fraud, but commingled with the fraud proceeds, could be seized without violating the rule against seizing substitute assets).

[36] *See generally AFLUS, supra* note 3, § 17-9.

[37] *United States v. Hailey,* 840 F. Supp.2d 896, 897 (D. Md. 2012) (directing defendant, who previously advised the court that he had none of the alleged fraud proceeds in his possession, to disclose the source of $11,000 in $100 bills that he used to pay his property tax bill).

Post-restraint hearings: the Jones-Farmer *rule*

The appellate courts have different standards for determining whether the defendant is entitled to a post-restraint hearing regarding the continuation of a pre-trial restraining order, but the majority follow some variation of the *Jones-Farmer* rule.[38] Under the rule, the defendant has burden of showing that he has no funds other than the restrained assets with which to hire private counsel or to pay for living expenses, and that there is bona fide reason to believe the restraining order should not have been entered.[39] Three new cases spell out what the defendant must do to satisfy the first of those requirements.

In *United States v. Edwards,* the court held that the defendant asserting that he has no other funds with which to retain counsel must disclose his assets, liabilities, and sources of income; say how much he has already paid counsel and how much more he needs; and demonstrate that the property belongs to him so that it will be available to pay counsel if it is released.[40] In *United States v. Daugerdas,* the court denied the defendant's request for a hearing when his conclusory assertion that he lacked funds with which to retain counsel was unsupported by a "sworn declaration" to that effect.[41] And in *United States v.*

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[38] *See generally AFLUS, supra* note 3, § 17-6.

[39] *See United States v. Jones*, 160 F.3d 641, 647 (10th Cir. 1998); *United States v. Farmer*, 274 F.3d 800, 804-05 (4th Cir. 2001).

[40] *United States v. Edwards*, 856 F. Supp. 2d 42, 45-46 (D.D.C. 2012).

[41] *United States v. Daugerdas,* 2012 WL 5835203, *2 (S.D.N.Y. Nov. 7, 2012).

Reese, the court held that a defendant who has established a legal defense fund and retained a "cadre" of defense attorneys could not satisfy the first prong of *Jones-Farmer* because he obviously was not without funds with which to retain counsel.[42]

A defendant is entitled to a post-restraint hearing only if he satisfies both of the *Jones-Farmer* requirements. Thus, there is a two-step process: first the court determines if the defendant satisfies the *Jones-Farmer* requirements; then, if so, the court conducts a *Monsanto* hearing to determine if the Government has probable cause as to some, all, or part of the restrained property.[43] If the Government establishes probable cause at the hearing, the property remains restrained, even though the defendant has already demonstrated that he needs the money to retain counsel.[44]

All of this is familiar, but it played out in an unusual way in the *Watts* case in the Second Circuit. In *Watts*, the defendant was given a probable cause hearing at which the Government failed to establish probable cause. Thus, the defendant was able to recover the use of his property pending trial. The defendant was convicted, however, and the Government sought the forfeiture of

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[42] *United States v. Reese,* 858 F. Supp. 2d 1254, 1256 (D.N.M. 2012).

[43] *See United States v. Monsanto*, 491 U.S. 600, 615-16 (1989) (standard for issuance of restraining order is probable cause).

[44] *See United States v. Clarkson Auto Elec., Inc.*, 2012 WL 345911, *4-7 (W.D.N.Y. Feb. 1, 2012) (after finding defendants lacked other funds to retain counsel, court conducts *Monsanto* hearing, finds probable cause, and denies defendants' request to release funds).

the same property as part of his sentence. The defendant, quite reasonably, argued that if the Government could not establish probable cause for the forfeiture in support of the restraining order in the *Monsanto* hearing, it surely could not establish the forfeitability of the property by a preponderance of the evidence in the forfeiture phase of the trial. But the court held that the finding that the Government lacked probable cause for a restraining order did not automatically bar the later forfeiture of the property at trial, and that the additional evidence available following the conviction was sufficient to meet the preponderance standard.[45]

Procedure at the Monsanto *hearing*

In most circuits, even if the defendant is allowed to contest the probable cause for the restraining order, he may not challenge the grand jury's finding of probable cause as to the underlying crime; rather, he may only use the probable cause hearing to challenge the nexus between the property and the offense.[46] In *United States v. Kaley*, the Eleventh Circuit explained in detail why allowing a challenge to the probable cause for the underlying crime would be inconsistent

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[45] *United States v. Watts,* 477 Fed. Appx. 816, 817 (2d Cir. 2012). *See also United States v. Dupree*, ___ F. Supp.2d ___, 2013 WL 311403 (E.D.N.Y. Jan. 28, 2013) (same case, following *Watts;* defendant's successful challenge to probable cause for restraining order did not give third party right to argue in the ancillary proceeding that it had no reason to believe property was subject to forfeiture when it acquired its interest).

[46] *See generally AFLUS, supra* note 3, § 17-7.

with the legislative history of Section 853(e) and the Supreme Court's bar on pre-trial challenges to the factual sufficiency of the indictment.[47]

The Second and D.C. Circuits, however, allow the defendant to challenge the probable cause for the underlying offense as well as the forfeiture.[48] The Supreme Court has granted *cert.* in *Kaley* to resolve the split in the circuits.

As mentioned earlier, in the Fourth Circuit courts are permitted to restrain substitute assets prior to trial. If a court issues such an order and the defendant meets the requirements for a probable cause hearing, the issues at the hearing are whether the evidence supports the grand jury's finding of probable cause for the amount of the money judgment specified in the indictment, the value of the restrained property, and whether the Government will be able to satisfy the requirements for forfeiting substitute assets in 21 U.S.C. § 853(p).[49]

In all events, if there is a probable cause hearing, the defendant is allowed to call the case agent as a witness and subject her to cross-examination. In

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[47] *United States v. Kaley*, 677 F.3d 1316, 1322-30 (11th Cir. 2012) (*Kaley II*) (collecting the cases on both sides of the issue).

[48] *See United States v. Monsanto*, 924 F.2d 1186, 1200 (2d Cir. 1991) (grand jury determinations of probable cause—as to both the offense and the forfeitability of the property—may be reconsidered by the district courts in ruling upon the continuation of post-indictment restraining orders); *United States v. E-Gold, Ltd.*, 521 F.3d 411, 418 (D.C. Cir. 2008) (following *Monsanto;* defendant is entitled to challenge the probable cause for both the forfeiture and the underlying offense); *United States v. Clarkson Auto Elec., Inc.*, 2012 WL 345911, *5-7 (W.D.N.Y. Feb. 1, 2012) (requiring Government to establish probable cause as to both the underlying crime and the forfeitability of the property, and declining to allow the Government to rely solely on the indictment to do so).

[49] *See United States v. Patel,* 2012 WL 3629355, *9 (W.D. Va. Aug. 22, 2012).

United States v. Clarkson Auto, the court allowed this but held that because the Rules of Evidence do not apply in a *Monsanto* hearing, the defendants were not entitled to the notes the case agent used to refresh her recollection before testifying.[50]

Evidence needed to establish probable cause

Often, the issue at the *Monsanto* hearing is whether the Government is able to trace the restrained property to the crime giving rise to the forfeiture. In *United States v. Walsh,* for example, there was a hearing at which the Government had to trace the proceeds of the crime into a residence purchased with commingled funds. The court held that for probable cause purposes, the Government could rely on the "drugs-in, first-out" rule from the Second Circuit's decision in *Banco Cafetero.*[51]

Interlocutory sales

Another thing the Government can do to preserve the value of the property pending trial is to ask the court to order an interlocutory sale. The court's authority to do so has always been implicit in the court's general authority to preserve

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[50] *United States v. Clarkson Auto Electric, Inc.*, 2012 WL 345911, *1 n.4 (W.D.N.Y. Feb. 1, 2012).

[51] *United States v. Walsh,* 712 F.3d 119, 124 (2d Cir. 2013) (Government may rely on *Banco Cafetero's* accounting principles, such as "drugs-in, first-out" to establish probable cause to believe restrained property is traceable to the alleged offense, even if it was acquired with commingled funds), affirming *United States v. Greenwood*, 865 F. Supp. 2d 444, 450 (S.D.N.Y. 2012). *See United States v. Banco Cafetero Panama*, 797 F.2d 1154, 1160 (2d Cir. 1986).

property subject to forfeiture under 21 U.S.C. § 853(e),[52] but the authority was made explicit in Rule 32.2(b)(7) when it was amended in 2009.[53]

Indictment

Rule 32.2(a) provides that the Government must give the defendant notice of its intent to seek forfeiture by including a forfeiture notice in the indictment or information.[54] The notice usually tracks the language of the applicable forfeiture statute and includes a citation to the statute itself, but an incorrect statutory citation is harmless if the allegation otherwise adequately informs the defendant that his property will be subject to forfeiture.[55] For example, in *United States v. Joel*, the forfeiture notice in the indictment cited 18 U.S.C. § 982(a)(2) – a criminal forfeiture statute pertaining to certain fraud offenses that was not yet in effect when the defendant's criminal conduct took place. Realizing the potential *ex post facto* problem, when the time came to enter the forfeiture order the

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[52] *See United States v. Akamnonu,* 2012 WL 1450446 (N.D. Tex. Apr. 26, 2012) (§ 853(e)(1) permits the court to take any action necessary to preserve the value of property for forfeiture, including the interlocutory sale of restrained real property to a third party).

[53] *But see United States v. Boscarino*, 2012 WL 254129, *2 (D. Ariz. Jan. 27, 2012) (denying motion for sale of vehicles to avoid storage costs and depreciation where trial is only 6 months off, and losses will therefore not be significant in relation to the property's value).

[54] *See generally AFLUS, supra* note 3, § 16-2.

[55] *See United States v. Silvious*, 512 F.3d 364, 369 (7th Cir. 2008) (Government's acknowledged error in citing section 982(a)(2) instead of sections 981(a)(1)(C) and 2461(c) in a mail fraud case did not deprive defendant of his right to notice under Rule 32.2(a)); *United States v. Wall*, 285 Fed. Appx. 675, 684-85 (11th Cir. 2008) (indictment that improperly cited § 982(a)(2) instead of §§ 981(a)(1)(C) and 2461(c) was nevertheless sufficient to put defendants on notice that Government was seeking forfeiture of the proceeds of the mail and wire fraud offenses alleged in the indictment).

Government asked the court to do so under Section 981(a)(1)(C), another forfeiture statute pertaining to the same offense that was enacted earlier. The court granted the Government's request, holding that the change in statutory citations did not deprive the defendant of the notice required by Rule 32.2(a).[56]

Specifying the amount of the money judgment

While the indictment must give the defendant notice that the Government will be seeking forfeiture in the event of a conviction, Rule 32.2(a) does not require the listing of the particular assets subject to forfeiture.[57] Likewise, it is not necessary for the indictment to make any reference to a money judgment, or to specify a particular dollar amount.[58]

In *United States v. Poulin,* the Fourth Circuit held that because the Government is not required to specify *any* dollar amount in the indictment, a forfeiture notice that said the Government would forfeit *at least* $850,000 did not allow the defendant to claim surprise when the Government eventually sought the forfeiture of $1.3 million.[59]

Motion to dismiss the forfeiture notice

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[56] *United States v. Joel,* 2012 WL 2499424, *6 (M.D. Fla. June 5, 2012).

[57] *See United States v. Lazarenko*, 504 F. Supp. 2d 791, 796-97 (N.D. Cal. 2007) (Rule 32.2(a) requires only that the indictment give the defendant notice of the forfeiture in generic terms; that the Government did not itemize the property subject to forfeiture until much later was of no moment).

[58] *See generally AFLUS, supra* note 3, § 16-3.

[59] *United States v. Poulin,* 461 Fed. Appx. 272, 288 n.8 (4th Cir. 2012) (per curiam).

In *United States v. Durante*, the defendant moved to dismiss the forfeiture notice from the indictment on the ground that the Government failed to preserve evidence relating to the forfeiture, but the court held that absent a showing of bad faith, this was not a ground for dismissal.[60]

The Government, however, may move to dismiss the forfeiture notice from the indictment if it wishes to do so. Most often, the Government will do this once property named in the indictment has been forfeited administratively, but in *United States v. Anderson*, the Government did so because the prosecutor no longer thought the property was subject to forfeiture.[61]

Guilty Pleas

The defendant will often agree to the forfeiture as part of his plea agreement.[62] In *Libretti v. United States,* the Supreme Court held that because Rule 11(b)(3)) (formerly Rule 11(f)) does not apply to forfeiture, the district court need not make a finding that the forfeiture is supported by the evidence at the change-of-plea hearing.[63] One corollary to that rule is that if the defendant agrees

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[60] *United States v. Durante*, 2012 WL 2863490, *3 (D.N.J. July 11, 2012).

[61] *United States v. Anderson,* 2012 WL 6115030, *2 (W.D.N.Y. Nov. 16, 2012) (granting Government's motion to strike a particular asset from the indictment on the ground that the Government no longer believed it was derived from the offense).

[62] *See generally AFLUS, supra* note 3, § 18-3.

[63] *Libretti v. United States*, 516 U.S. 29, 38-39 (1995) (forfeiture "is an element of the sentence imposed following conviction . . . and thus falls outside the scope of Rule 11(f)").

to the forfeiture in his plea agreement, he cannot later challenge the factual basis for it.[64]

The plea agreement, however, must match the terms of the proposed forfeiture order. In *United States v. Lail*, the plea agreement said that the defendant agreed to forfeit specific assets. Later, when the Government asked for a forfeiture order in the form of a money judgment, the defendant was allowed to object because he had not agreed to the entry of a forfeiture order in that form.[65]

If the property belongs the defendant's spouse, it may be forfeited in the criminal case if she agrees to be a party to the plea agreement. The most famous example is the forfeiture order imposed in *United States v. Madoff.*[66]

There were some other miscellaneous issues regarding plea agreements in the recent cases that are worth mentioning in passing. In *United States v.*

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[64] *See United States v. Droganes,* 2012 WL 3613183, *8 (E.D. Ky. Aug. 21, 2012) (having agreed in his plea agreement to forfeit certain property, defendant cannot challenge the factual basis; under *Libretti* finding a factual basis is not required). *See also United States v. Bailey,* 2012 WL 5208588, *2 (W.D.N.C. Oct. 22, 2012) (a forfeiture order is based on the defendant's guilty plea, not on the language of the plea agreement; the correction of an error in the language of the plea agreement did not abrogate the guilty plea or the order of forfeiture that was based on it).

[65] *United States v. Lail,* 2012 WL 483827 (W.D.N.C. Feb. 14, 2012) (defendant's agreement to forfeit the specific assets listed in the indictment did not bind him to agree to the Government's proposed forfeiture order when the order took the form of a money judgment).

[66] *United States v. Madoff*, 2012 WL 1142292 (S.D.N.Y. Apr. 3, 2012) (if defendant's wife signs the plea agreement and agrees that property held in her name is subject to forfeiture as the proceeds of defendant's fraud, it is forfeitable like any other proceeds).

Siguenza, the Government drafted the forfeiture provision of a plea agreement in a way that conditioned the forfeiture of a substitute asset on the defendant's ability to pay restitution to the victims of her fraud. When the defendant was not able to pay the restitution, the court held that the provision was enforceable, and ordered the forfeiture of the substitute asset.[67]

In *United States v. One 1965 Chevrolet Impala Convertible*, a civil forfeiture case, the claimant argued that because the plea agreement he signed in his criminal case was silent as to forfeiture, the Government was foreclosed from pursuing forfeiture in a parallel civil case. But the court disagreed.[68]

Finally, a court in Nevada declined to issue a forfeiture order against $2890 found in drug dealer's car along with drugs, packaging materials and firearms even though the defendant agreed to the forfeiture in his plea agreement. There appears to be no legal basis for that decision.[69]

Rule 11(b)(1)(J)

Rule 11(b)(1)(J) requires the court to warn the defendant during the plea colloquy that his property may be forfeited, but the Fifth Circuit held in *United States v. Hernandez* that there was no "plain error" when the judge failed to do

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[67] *Siguenza v. United States*, 2012 WL 2884693 (W.D.N.C. July 13, 2012).

[68] *United States v. One 1965 Chevrolet Impala Convertible,* 2012 WL 3579957, *6 (N.D. Ohio Aug. 17, 2012).

[69] *See United States v. Wendfeldt,* 2012 WL 2681842, *2 (D. Nev. July 6, 2012).

so, given that the forfeiture notice was plain on the face of the indictment, and the defendant was apprized of the forfeiture at his arraignment.[70]

In *United States v. Canada*, the defendant argued that he had a right to be told at his change-of-plea hearing that his property could be forfeited administratively. But the Sixth Circuit held that Rule 11(b)(1)(J) does not apply where the property is forfeited administratively, and not as part of the criminal case.[71]

Agreement not to appeal the forfeiture

Most plea agreements contain a provision stating that the defendant agrees not to appeal the forfeiture judgment. In *United States v. Leitman*, the Eleventh Circuit said that such an agreement bars the defendant not only from raising substantive objections to the forfeiture, such as the amount of the money judgment, but also from raising procedural objections, such as whether the court followed the procedures in Rule 32.2 in imposing the forfeiture judgment.[72]

Consent Order of Forfeiture

As discussed below in more detail, Rule 32.2 requires the court to enter a forfeiture order *in advance of sentencing*. From the Government's perspective,

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[70] *See United States v. Hernandez*, 470 Fed. Appx. 333, 335 (5th Cir. 2012).

[71] *United States v. Canada,* 462 Fed. Appx. 512, 515 (6th Cir. 2012) (per curiam).

[72] *United States v. Leitman*, 477 Fed. Appx. 572, 574-75 (11th Cir. 2012) (defendant's agreement not to appeal the forfeiture bars him from appealing on the ground that the district court did not comply with the procedures in Rule 32.2 when it imposed a money judgment).

the easiest way to may sure the court complies with this requirement is to have the defendant agree to a Consent Order of Forfeiture at the rearraignment and to hand it up to the bench when the judge asks, "is there anything else?"[73]

In *Lail*, the court blamed the Government for failing to do this. If the Government had given the court a proposed forfeiture order at the Rule 11 hearing, the court said, much later confusion over the extent of the forfeiture would have been avoided.[74]

Third party interests generally cannot be resolved until the ancillary proceeding, but just as the defendant's wife may become a party to the plea agreement and agree to forfeit her interests in the property, she may also sign the consent order to waive her interests. The Government tried to have the defendant's wife do this in *United States v. Bradley* but the drafting of the relevant documents contained a fatal flaw.

The defendant's wife did sign the consent order, indicating that she "agreed to" its provisions, but the order provided that only "the defendant's interest" in the property was being forfeited. Thus the wife could plausibly argue that she was only agreeing to the forfeiture of *the defendant's interest* and not to the forfeiture

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[73] *See United States v. Bradley,* 484 Fed. Appx. 368, 372 (11th Cir. 2012) (preliminary order of forfeiture takes the form of a consent order if the parties agree; this satisfies Rule 32.2(b)(1) and (2)). *See generally AFLUS, supra* note 3, § 18-3(b).

[74] *United States v. Lail,* 2012 WL 483827, *2 n.2 (W.D.N.C. Feb. 14, 2012) (characterizing the Government's failure to submit a consent order at the Rule 11 hearing as "an omission and oversight" that caused the court to have to delay the entry of a forfeiture order when a dispute between the Government and the defendant arose at sentencing).

of any interest of her own. As a result, the wife was permitted to file a claim in the ancillary proceeding, contesting the forfeiture of the property the Government believed she had agreed not to contest.[75]

The lesson from this is clear: the forfeiture order should direct the forfeiture of "the property," not "the defendant's interest in" the property.[76] To be sure, property belonging to third parties cannot be forfeited in a criminal case, but it is the function of the ancillary proceeding to resolve such third party claims. If the order of forfeiture, however, appears to forfeit only the defendant's interest, third parties – like the wife in *Bradley* – may argue that *their* interest was not forfeited, and therefore that they are not required to file a claim in the ancillary proceeding.[77] Thus, for the ancillary proceeding to serve the purpose that Congress intended, all property derived from or otherwise implicated in the offense giving rise to the forfeiture must be included in the preliminary order of

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[75] *United States v. Bradley,* 484 Fed. Appx. 368, 377 (11th Cir. 2012) (holding that wife's signing the consent order, by itself, was ambiguous as to what rights she relinquished because the order referred only to the forfeiture of "the defendant's interest").

[76] *See generally AFLUS, supra* note 3, § 18-6.

[77] *See Pacheco v. Serendensky*, 393 F.3d 348, 355-56 (2d Cir. 2004) (because the Government sought forfeiture only of "the defendant's interest" in the real property, the portion owned by defendant's wife was not part of the forfeiture action for purposes of applying the bar on third party intervention in section 853(k)).

forfeiture without regard to what portion of the property might be held by a third party.[78]

Forfeiture Phase of the Trial

Rule 32.2(b)(1) requires that the forfeiture determination take place as soon as practicable following the return of a guilty verdict or the entry of a guilty plea. In *United States v. Marquez,* the Fifth Circuit chastised the Government and the district court for not having the forfeiture order entered immediately after the guilty plea, but held that although it was error, it caused no prejudice.[79] As we shall see in a moment, that was just one of many things the Fifth Circuit thought the district court did wrong in failing to follow Rule 32.2 in that case.

Standard of Proof: Preponderance of the Evidence

Because forfeiture is part of sentencing, the Government's burden is to establish the forfeitability of the property by a preponderance of the evidence.[80]

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[78] *See* Rule 32.2(b)(2)(A) (providing that all ownership issues regarding the forfeited property are deferred to the ancillary proceeding); *United States v. Cox,* 575 F.3d 352, 358 (4th Cir. 2009) ("Rule 32.2 *requires* the issuance of a preliminary order of forfeiture when the proper nexus is shown, whether or not a third party claims an interest in the property") (emphasis in original).

[79] *United States v. Marquez,* 685 F.3d 501, 510 (5th Cir. 2012).

[80] *See United States v. Bader*, 678 F.3d 858, 893-94 (10th Cir. 2012) ("a forfeiture judgment must be supported by a preponderance of the evidence"; quoting *AFLUS, supra* note 3, § 15-3(d)). *See generally id.* at § 18-5(d).

Likewise, the court will use the preponderance standard to determine the amount of any money judgment.[81]

Application of Apprendi *and* Southern Union *to criminal forfeiture*

This brings us to the question whether all of the cases holding that forfeiture is part of sentencing are still good law in light of the Supreme Court's decision in *Southern Union.*[82]

In *Apprendi v. New Jersey*, the Supreme Court held that factors that increase the maximum sentence for a criminal offense under the applicable statute are *not* sentencing issues that the court may decide on its own, but are facts that must be alleged in the indictment and found by the jury beyond a reasonable doubt.[83] In subsequent decisions, the Court extended this to the sentencing guidelines,[84] but the courts uniformly hold that neither *Apprendi* nor its progeny apply to criminal forfeiture.[85]

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[81] *See United States v. Prather*, 456 Fed. Appx. 622, 625 (8th Cir. 2012) ("The burden is on the Government to prove by a preponderance of the evidence the amount of the proceeds that should be subject to a personal money judgment").

[82] *Southern Union Company v. United States,* ___ U.S. ___, 132 S. Ct. 2344, 2012 WL 2344465 (U.S. June 21, 2012).

[83] *Apprendi v. New Jersey,* 530 U.S. 466 (2000).

[84] *See United States v. Booker*, 543 U.S. 220 (2005).

[85] *See, e.g., United States v. Fruchter*, 411 F.3d 377, 382 (2d Cir. 2005) (*Apprendi* and its progeny do not apply to criminal forfeiture for two reasons: because the Supreme Court expressly stated in *Booker* that its decision did not affect forfeiture under 18 U.S.C. § 3554, and because *Booker* applies only to a determinate sentencing system in which the jury's verdict mandates a sentence within a specific range; criminal forfeiture is not a determinate system). *See generally AFLUS, supra* note 3, § 18-5(d).

In *Southern Union*, however, the Court extended *Apprendi* to criminal fines, holding that because the amount of the fine that could be imposed for the defendant's offense depended on the number of days the defendant was in violation of the law, the number of days the defendant was in violation was a fact that had to be found by the jury beyond a reasonable doubt.

In light of *Southern Union,* it is natural to ask if the facts that determine the amount of a defendant's fine must be alleged in the indictment and found by the jury beyond a reasonable doubt, why doesn't the same apply to the facts necessary to determine the amount of a forfeiture. So far, there are two appellate decisions on this point — the Ninth Circuit's decision in *United States v. Phillips* and Fourth Circuit's decision in *United States v. Day* — both holding that *Southern Union* does not apply to criminal forfeiture for the same reasons that *Apprendi* and its progeny do not apply.[86]

First, in *Libretti*, the Supreme Court directly held that the criminal forfeiture is part of sentencing and is *not* subject to the Sixth Amendment right to a jury. Because it is not up to the lower courts to decide that subsequent Supreme Court decisions have undermined the rationale for an existing rule, the holding in

[86] *United States v. Phillips,* 704 F.3d 754, 770 (9th Cir. 2012); *United States v. Day,* 700 F.3d 713, 732-33 (4th Cir. 2012).

Libretti remains binding on the lower courts unless and until the Supreme Court overrules it.[87]

Second, *Apprendi* only applies to facts that increase the statutory maximum. Because there is no maximum for forfeiture, *Apprendi* simply does not come into play.[88]

It will be a while before the Supreme Court renders the final word on this, but when it does, it will not be constrained, as the lower courts are, by its prior holding in *Libretti*, and may well render a decision that profoundly changes the way criminal forfeitures are imposed.

It is true that there is no "maximum" that limits the forfeiture of things used to facilitate a crime or things directly derived from it. Thus, the rationale for not applying *Apprendi* to tangible assets is likely to survive. But there is a limit on the amount of a money judgment: it may not exceed the value of the proceeds realized by the defendant from the commission of the offense, or the property used to commit it. In *Southern Union*, the amount of the fine was similarly limited by the number of days the defendant was in violation of the law ($50,000 for each day). If the jury must determine the number of days the defendant was in

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[87] *Phillips,* 704 F.3d at 770; *Day,* 700 F.3d at 732-33. *Cf. United States v. Ursery*, 518 U.S. 267 (1996) (chiding the lower courts for assuming that the Supreme Court's Eighth Amendment decision in *Austin v. United States* had overruled the line of cases holding that the Double Jeopardy Clause does not apply to civil forfeiture just because it undermined the rationale for those cases).

[88] *Phillips,* 704 F.3d at 770; *Day,* 700 F.3d at 732-33.

violation of the law to set the amount of the fine, someone will ask, why shouldn't it also have to determine the gain to the defendant to set the amount of the forfeiture.

There are several answers to that question,[89] but if the Supreme Court chooses not to distinguish *Southern Union,* we could end up – some years from now – with a rule that the forfeiture of specific assets does not have to be determined by the jury, but the amount of the money judgment does, which is exactly the opposite of what Rule 32.2(b)(5) now provides.

The right to a jury under Rule 32.2(b)(5)

Assuming the law stays the same for the time being, the defendant's right to a jury is governed by Rule 32.2(b)(5).[90]

We know from *Libretti* that there is no constitutional right to a jury in the forfeiture phase of the trial,[91] but Rule 32.2(b)(5) gives both parties a limited right to have the jury determine the forfeiture in certain circumstances. Specifically, the rule provides that the court must ascertain, before the jury begins

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[89] *See* Richard E. Finneran & Steven K. Luther, Criminal Forfeiture and the Sixth Amendment: The Role of the Jury at Common Law, 35 *Cardozo L. Rev.* __ (forthcoming October 2013).

[90] *See generally AFLUS, supra* note 3, § 18-4.

[91] *Libretti v. United States*, 516 U.S. 29, 49 (1995) ("the nature of criminal forfeiture as an aspect of sentencing compels the conclusion that the right to a jury verdict on forfeitability does not fall within the Sixth Amendment's constitutional protection"); *United States v. Poulin,* 461 Fed. Appx. 272, 287 n.6 (4th Cir. 2012) (per curiam) ("there is no constitutional right to a jury determination of forfeiture matters," citing *Libretti*; the question is whether the court complied with Rule 32.2).

deliberating, whether either party will request that the jury be retained to determine the forfeitability of specific assets in the event the defendant is convicted.

When the current language was added to the rule in 2009, its purpose was to create a procedure that would force the defendant to make his election (or waiver) of the jury known before the jury began deliberating, so that the Government and the court would know if it would be necessary to prepare jury instructions and special verdict forms to be used in the forfeiture phase of the trial if the jury returned a guilty verdict.[92] What is unclear is whether the affirmative obligation that Rule 32.2(b)(5) places on the court to advise the defendant of his right to request the jury is simply a scheduling provision designed to increase the efficiency of the judicial process, or whether it creates a right to be advised of the option to have the jury retained such that the court's failure to inquire would be grounds to vacate the forfeiture judgment.

In *United States v. Mancuso*, the Ninth Circuit held that the rule places an affirmative duty on the court to ensure that the defendant does not inadvertently waive his right to have the jury determine the forfeiture; but it found that the trial court's failure to inquire was harmless error where the prosecutor stated on the

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[92] *United States v. St. Pierre,* 809 F. Supp. 2d 538, 541 (E.D. La. 2011) (noting that the court complied with Rule 32.2(b)(5) by confirming, before the jury began deliberating, that neither party was requesting that the jury be retained); *United States v. Reese,* 2012 WL 2861350 (D.N.M. July 9, 2012) (ordering defendant to make known his election under Rule 32.2(b)(5) five days before trial "to conserve judicial resources").

record, before the jury was excused, that defendant had not requested that the jury be retained, and the defendant did not say otherwise.[93]

In contrast, in *United States v. Williams,* the Eighth Circuit held that Rule 32.2(b)(5) is a "time-related directive," the violation of which does not override the mandatory nature of criminal forfeiture if the defendant is convicted.[94] All of the other courts that have flagged the issue have set it aside for another day.[95]

While that issue remains unresolved, another related issue has now been settled: Rule 32.2(b)(5) does not give either party the right to have the jury retained if all the Government is seeking is the entry of a money judgment. The latest case on that point is the Ninth Circuit's decision in *Phillips.*[96]

Conduct of the forfeiture phase of the trial

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[93] *United States v. Mancuso*, ___ F.3d ___, 2013 WL 1811276 (9th Cir. May 1, 2013).

[94] *United States v. Williams,* ___ F.3d ___, 2013 WL 3466840 (8th Cir. July 11, 2013) (following *Evick* and distinguishing *Mancuso*). *See United States v. Evick*, 286 F.R.D. 296, 299 (N.D. W. Va. 2012) (the judge's failure to ask the defendant if he will request that the jury be retained to determine the forfeiture, as Rule 32.2(b)(5) requires, does not preclude the court from entering a forfeiture order).

[95] *See United States v. Poulin,* 461 Fed. Appx. 272, 287-88 nn. 7-8 (4th Cir. 2012) (per curiam) (defendant who did not request jury before it was dismissed waived his right under former Rule 32.2(b)(4); but leaving open how that rule will be applied under new Rule 32.2(b)(5)(A) to the extent it places a burden on the court to inquire); *United States v. Grose*, 461 Fed. Appx. 786, 804-07(10th Cir. 2012) (there was no error in the district court's failure to advise the defendant of his right to a jury where the Government was seeking only a money judgment, but suggesting that Rule 32.2(b)(5) would require such affirmative notice if the Government were seeking to forfeit specific property).

[96] *United States v. Phillips,* 704 F.3d 754, 771 (9th Cir. 2012) (there is no statutory right to a jury under Rule 32.2(b)(5) when the Government is seeking only a money judgment). *See United States v. Bourne*, 2012 WL 526721, *1 (E.D.N.Y. Feb. 15, 2012) (same)

Because forfeiture is part of sentencing, hearsay is admissible in the forfeiture phase of the trial.[97]

The court may also rely on evidence from the "guilt phase" of the trial, supplemented by additional evidence.[98]

Determining the ownership of the property

As mentioned earlier, determining the extent of the defendant's ownership interest in the property vis à vis third parties is deferred to the ancillary proceeding.[99] In *United States v. Feger*, the defendant objected that a firearm should not be forfeited because it belonged to his brother, but the court held that it was required to enter a preliminary order of forfeiture without regard to ownership, and that the defendant's brother would have to file a claim in the ancillary proceeding if he wished to contest the forfeiture.[100]

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[97] *See United States v. Overstreet*, 2012 WL 5969643, *17 (D. Idaho Nov. 29, 2012). *See generally AFLUS, supra* note 3, § 18-5(a).

[98] *See United States v. Elder,* 682 F.3d 1065, 1073 (8th Cir. 2012) (computing the amount of a money judgment based on evidence already in the record supplemented by an agent's affidavit); *United States v. Farkas,* 474 Fed. Appx. 349, 360 (4th Cir. 2012) (under Rule 32.2(b)(1)(B), the court may base its forfeiture determination on evidence already in the record and on any additional evidence or information submitted).

[99] *See* Rule 32.2(b)(2)(A). *See generally AFLUS, supra* note 3, § 18-6.

[100] *United States v. Feger*, 2012 WL 1040181, *6 (W.D.N.Y. Mar. 28, 2012) (under Rule 32.2(b)(2)(A), the court must enter the preliminary order of forfeiture without regard to ownership; the brother may file a claim in the ancillary proceeding). *See also United States v. Overstreet,* 2012 WL 5969643 (D. Idaho Nov. 29, 2012) (because ownership issues must be deferred to the ancillary proceeding, defendant cannot oppose a forfeiture order on the ground that the property belongs to a third party).

Again, this brings us back to the point made earlier about the form of the order of forfeiture: it should state that *the property* is forfeited to the United States; it should not be limited to the interests "of the defendant."

Tracing analysis

Part of the Government's burden in the forfeiture phase of the trial – unless it is seeking only a money judgment or substitute assets – is to trace the property to the offense for which the defendant was convicted. In *United States v. Haleamau*, a district court explained how the Government may use accounting principles such as the lowest intermediate balance rule to do that when the case involves commingled funds.[101] In *In re Rothstein,* however, the Eleventh Circuit declined to permit the Government to do just that.[102]

Other cases explained how circumstantial evidence can be used to satisfy the tracing requirement. For example, in *United States v. Green,* the Third Circuit held that the defendant's purchase of a car while he was committing a fraud offense and had no other source of income would be circumstantial evidence that the car was derived from the fraud scheme.[103]

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[101] *United States v. Haleamau,* 2012 WL 3394952 (D. Hawaii Aug. 1, 2012).

[102] *In re Rothstein, Rosenfeldt, Adler, P.A.,* ___ F.3d ___, 2013 WL 2494980 (11th Cir. June 12, 2013) (declining to allow the Government to use LIBR to trace proceeds into a commingled bank account).

[103] *United States v. Green*, ___ Fed. Appx. ___, 2013 WL 1122632 (3rd Cir. Mar. 19, 2013). *See also United States v. Hailey*, 887 F. Supp. 2d 649 (D. Md. 2012) (the Government may rely on circumstantial evidence to establish that property acquired at the time the defendant was engaged in criminal activity is traceable to that activity, but without establishing

Money Judgments

It is now well-established that criminal forfeiture is not limited to the amount of money still in the defendant's possession at the time he is sentenced, or by the availability of substitute assets. To the contrary, if the defendant has neither the directly forfeitable property nor substitute assets in his possession at the time he is sentenced, the court must enter an order of forfeiture in the form of a money judgment for the value of the unavailable property.[104] As the Ninth Circuit held in *United States v. Newman,* forcing defendants to disgorge their ill-gotten gains, "even those already spent," ensures that defendants do not benefit from their crimes. Thus, when the Government seeks a money judgment, the district court's only role, under Rule 32.2(b), is to determine the amount of money that the defendant will be ordered to pay.[105]

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the dates when the property was acquired, the connection is too speculative); *United States v. Haleamau,* 2012 WL 3394952, *3 (D. Hawaii Aug. 1, 2012) (Government's effort to connect funds in defendant's bank account to the illegal sale of fireworks was too speculative, where it assumed that defendant sold 100 percent of the fireworks illegally imported for 10 times their cost).

[104] *See generally AFLUS, supra* note 3, § 19-4(c).

[105] *United States v. Newman*, 659 F.3d 1235, 1242-43 (9th Cir. 2011). *See United States v. Phillips,* 704 F.3d 754, 771 (9th Cir. 2012) (same)*; United States v. McGinty,* 610 F.3d 1242, 1246 (10th Cir. 2010) (same; joining all other circuits and collecting cases); *United States v. Grose,* 461 Fed. Appx. 786, 806-07 (10th Cir. 2012) (following *McGinty*; that defendant lost the proceeds of his wire fraud offense in a subsequent bad investment does not excuse him from liability for a money judgment any more than if he'd spent the money on wine, women and song); *United States v. Bourne*, 2012 WL 526721, *2 (E.D.N.Y. Feb. 15, 2012) (entry of money judgment is mandatory, even if defendant has no assets; defendant's statement on the CJA form that he has no assets establishes that a money judgment is appropriate).

There are some judges in Nevada who remain unconvinced, but the Ninth Circuit has been reversing those cases and ordering the lower courts to enter money judgments are required by law.[106]

Money judgments based on the value of facilitating property

Money judgments are typically used to forfeit the proceeds of the offense, but there is no reason a court could not enter a money judgment for the value of missing facilitating property. In *United States v. Crews,* the court issued a money judgment for the amount of money the defendants *spent buying drugs* on the ground that the money would have been forfeitable as facilitating property if it had been recovered.[107]

Enforcement of money judgments

Money judgments remain in effect until satisfied. As the Seventh Circuit held in *United States v. Navarrete,* if the defendant comes out of prison and gets a job, he is liable for both his restitution order and the forfeiture money judgment.[108]

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[106] *See United States v. Ganaway*, 2010 WL 5172909, *2 (D. Nev. Dec. 13, 2010) (holding that there is no statutory authority to issue a forfeiture order in the form of a money judgment, and that because forfeiture is punishment, the district court has the discretion to refuse to issue such an order), *vacated by United States v. Jackson*, 2012 WL 600681 (9th Cir. Feb. 24, 2012); *United States v. Parsons*, 2010 WL 5387474, *2 (D. Nev. Dec. 21, 2010) (same), *vacated by United States v. Jackson*, 2012 WL 600681 (9th Cir. Feb. 24, 2012).

[107] *United States v. Crews,* 885 F. Supp. 2d 791, 801-02 (E.D. Pa. 2012) defendants are jointly and severally liable for a money judgment equal to the value of the money they spent buying drugs, because that money was forfeitable as facilitating property).

[108] *United States v. Navarrete,* 667 F.3d 886, 887-88 (7th Cir. 2012).

Preliminary Order of Forfeiture

Rule 32.2(b)(2) provides that the court must enter a preliminary order of forfeiture "promptly" after determining what property is subject to forfeiture.[109] Moreover, as amended in 2009, Rule 32.2(b)(4)(B) requires the court to enter the order sufficiently in advance of sentencing to allow the parties to review it and suggest revisions.[110] Both rules are mandatory, and the Fifth Circuit has held that it is error for the court to ignore them — as judges often do.[111]

As mentioned earlier, the easiest way to comply with the rule is to have the preliminary order of forfeiture take the form of a "consent order" that the defendant agrees to at the time of his guilty plea.[112]

Order of Forfeiture / Sentencing

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[109] *See United States v. Haleamau,* 2012 WL 3394952, *3 (D. Hawaii Aug. 1, 2012) (noting that forfeiture is part of sentencing and describing the procedure under Rule 32.2(b) for determining what property is subject to forfeiture if the forfeiture is contested).

[110] *See generally AFLUS, supra* note 3, 19-2(a).

[111] *See United States v. Marquez,* 685 F.3d 501, 510 (5th Cir. 2012) (entering the preliminary order of forfeiture as soon a practical is mandatory and the district court's failure to do so was error, but there was no prejudice to defendant).

[112] *See United States v. Bradley,* 484 Fed. Appx. 368, 372 (11th Cir. 2012) (Rules 32.2(b)(1) and (2) are satisfied if the parties agree to a Consent Order of Forfeiture).

Criminal forfeiture is mandatory.[113] Therefore the defendant has no reasonable expectation that the proceeds of his offense will not be forfeited.

In *United States v. Nelson*, a corrupt public official argued that requiring him to forfeit the money that he had received as a bribe was unfair because he had voluntarily turned it over to the Government at the outset of the investigation to demonstrate his willingness to cooperate, and did not believe at that time that it would be forfeited, but the court held that a person has no reasonable expectation that property obtained by illegal means will not be forfeited.[114]

Including the forfeiture in the judgment

Rule 32.2(b)(4) provides that the court must "include the forfeiture when orally announcing the sentence or must ensure that the defendant knows of the forfeiture at sentencing." The court must also "include the forfeiture order, directly or by reference, in the judgment."[115] At a minimum, these provisions make clear that the forfeiture order must be issued at or prior to the time of sentencing: the Government cannot come back to the court after sentencing and ask it to amend

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[113] *See United States v. Newman*, 659 F.3d 1235, 1240 (9th Cir. 2011) ("When the Government has met the requirements for criminal forfeiture, the district court must impose criminal forfeiture, subject only to statutory and constitutional limits"); *id.* ("[T]he district court has no discretion to reduce or eliminate mandatory criminal forfeiture"); *United States v. Phillips,* 704 F.3d 754, 771 (9th Cir. 2012) (same, following *Newman*; district court had no discretion to refuse to impose money judgment because it thought it unnecessary). *See generally AFLUS, supra* note 3, § 20-2.

[114] *United States v. Nelson*, 2012 WL 555785, *2 (M.D. Fla. Feb. 21, 2012).

[115] Rule 32.2(b)(4). *See generally AFLUS, supra* note 3, § 20-3.

the sentence to include a forfeiture order that was not previously issued, unless it does so within the 7 days allowed for correcting the sentence under Rule 35. Accordingly, as a general rule, the failure to issue the forfeiture order at the time of sentencing is fatal.[116]

In *United States v. Shakur*, the Eighth Circuit blasted the Government and the district court for what it called the "wholesale violation of Rule 32.2(b)."[117] The errors included the failure to issue a preliminary order of forfeiture prior to sentencing, the failure to conduct an evidentiary hearing and to make a finding of forfeitability at sentencing, and the failure to issue any forfeiture order until 83 days after sentencing. These failures, the court said, deprived the defendant of his due process rights and right to appeal all aspects of his sentence at one time. So the forfeiture order was vacated.[118]

Errors of this nature are unfortunately quite common. For whatever reason, more than a decade after it was enacted, the district courts remain unfamiliar with even the most basic procedural steps required by Rule 32.2. But the errors do not always result in a windfall for the defendant. To the contrary, courts are reluctant to reward defendants for remaining silent while the court and

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[116] *See generally AFLUS, supra* note 3, § 20-3(d).

[117] *United States v. Shakur,* 691 F.3d 979, 988-89 (8th Cir. 2012).

[118] *Id. See also United States v. Podlucky,* 2012 WL 1850931, *1 n.1 (W.D. Pa. May 21, 2012) (once defendant is sentenced, the forfeiture order is final as to him; court may not amend first defendant's forfeiture order to include a money judgment when another defendant is sentenced seven months later).

the prosecutor ignored the requirements of the rule. For that reason there are a number of cases holding that failing to comply with Rule 32.2(b) is not fatal if the defendant was aware of the forfeiture at the time of sentencing, or if the error causes no prejudice.

For example, in *United States v. Schwartz,* the Sixth Circuit held that the entry of a preliminary order of forfeiture prior to sentencing is mandatory and the failure to enter one – even if the Government is seeking only a money judgment – is error, but that the error was harmless where there was notice of the forfeiture in the charging document, the defendant was aware of the amount the Government was seeking, and the court made a factual finding supported by the record at the sentencing hearing.[119]

Similarly, in *United States v. Marquez,* the Fifth Circuit held that (the provisions of Rule 32.2(b) are "not empty formalities;" they are mandatory; but if the defendant does not object, the district court's failure to enter any forfeiture order until three weeks after sentencing or to mention forfeiture in the oral announcement, while "plainly erroneous," does not render the forfeiture void in the absence of showing of prejudice to the defendant.[120]

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[119] *United States v. Schwartz,* 503 Fed. Appx. 443, 447-48 (6th Cir. 2012).

[120] *United States v. Marquez,* 685 F.3d 501, 509-10 (5th Cir. 2012). *See also United States v. Christensen,* 2012 WL 5354745, *4-5 (D. Neb. Oct. 29, 2012) (distinguishing *Shakur*; given defendant's agreement to the factual basis for the forfeiture in his guilty plea, the court's oral announcement at sentencing that there would be a forfeiture order, and its reference to forfeiture in the judgment, the entry of a preliminary order of forfeiture one month after sentencing did not violate defendant's rights); *Leech v. United States,* 2012 WL 4341760 (D.

Nevertheless, a showing that the defendant was aware that a forfeiture order would be entered at some time in the future is will not save a "wholesale violation" of the rule. As the Eighth Circuit held in *Shakur*, the trial court's statement that "there will be a forfeiture order" was not good enough where the defendant was not given a chance to contest it before it was entered.[121]

These problems generally arise when the court fails to enter a preliminary order of forfeiture prior to sentencing. As long as the court issues such an order, the failure to include it in the judgment may be corrected as a clerical error.[122] Older cases that refused to allow that correction were legislatively overruled by the 2009 amendment to Rule 32.2.[123]

Md. Sept. 20, 2012) (overruling objection to belated entry of forfeiture where defendant agreed to the forfeiture in his guilty plea); *United States v. Lail,* 2012 WL 483827, *2 (W.D.N.C. Feb. 14, 2012) (using Rule 36 to enter a forfeiture order that could not have been entered at sentencing because of a dispute between defendant and the Government as to the content of the order).

[121] *United States v. Shakur,* 691 F.3d 979, 987-89 (8th Cir. 2012).

[122] *See United States v. Shakur,* 691 F.3d 979, 987-88 (8th Cir. 2012) (distinguishing cases where court issues a preliminary order of forfeiture at sentencing but fails to include it in the judgment from cases where the court enters no forfeiture order at all until after sentencing; only the former are clerical errors).

[123] *See United States v. Ramos*, 467 Fed. Appx. 264 (5th Cir. 2012) (rejecting defendant's appeal based on failure to include the forfeiture order in the judgment as frivolous, and remanding for the district court to amend the judgment pursuant to Rules 32.2(b)(4)(B) and 36).

Frustrating the forfeiture / obstruction of justice

A defendant who tries to frustrate the entry of a forfeiture order may have his sentence enhanced under the obstruction of justice provision in Section 3C1.1 of the U.S. Sentencing Guidelines.[124] In *United States v. Dufresne*, the defendant pled guilty to a fraud offense and agreed to a $5.2 million money judgment. When agents came to seize some vehicles as substitute assets, the defendant claimed he had sold them to third parties and lost the proceeds while in a drunken stupor. The court declined to credit that story, enhanced the sentence under Section 3C1.1, and also denied the defendant the usual reduction in his offense level for accepting responsibility by entering a guilty plea.[125]

Amendments to the order of forfeiture

Rule 32.2(e) permits the Government to ask the court "at any time" to amend the order of forfeiture to include newly-discovered property.[126] The phrase "at any time" literally means "at any time." Thus, in *United States v. Duboc,* the Eleventh Circuit held that the Government could move to amend a forfeiture order to include additional property to satisfy a $100 million forfeiture judgment 12 years after the order was entered.[127]

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[124] *See generally AFLUS, supra* note 3, § 20-4.

[125] *United States v. Dufresne,* 698 F.3d 663, 665-66 (8th Cir. 2012).

[126] *See generally AFLUS, supra* note 3, § 20-11.

[127] *United States v. Duboc,* 694 F.3d 1223, 1227-29 (11th Cir. 2012) (Rule 32.2(e) permits the Government to move at any time to amend an order of forfeiture to include

Joint and Several Liability

It is well-established that co-defendants are jointly and severally liable for the forfeiture of the proceeds of the offense giving rise to forfeiture.[128] It is less well-understood that joint and several liability applies also to facilitating property and other non-proceeds forfeitures.

As mentioned earlier, the court in *United States v. Crews* entered a money judgment for the value of the money used to facilitate a drug offense. The co-defendants in that case were jointly and severally liable for the amount of the money judgment just as they would have been in any other case.[129]

Generally, all co-defendants are jointly and severally liable for the full amount of the money judgment, limited only by what was foreseeable to each of them.[130] But in *United States v. Taggert*, the court held that the liability could be

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additional property; an amendment made 12 years after the entry of the forfeiture order was not barred by the statute of limitations in 19 U.S.C. § 1621, which does not apply in criminal cases, by laches, or by any due process argument).

[128] *See generally AFLUS, supra* note 3, § 19-5.

[129] *United States v. Crews,* 885 F. Supp. 2d 791, 802-03 (E.D. Pa. 2012).

[130] *See United States v. Elder,* 682 F.3d 1065, 1073 (8th Cir. 2012) (the doctrine of joint and several liability comes from conspiracy law, in which each conspirator is liable for the acts of the others, but only to the extent that such acts are foreseeable); *United States v. Lyons,* 2012 WL 2104647 (D. Mass. June 11, 2012) (analyzing the record and holding each RICO defendant liable for the amount of gambling proceeds reasonably foreseeable to him).

apportioned among the defendants in accordance with their respective roles in the offense.[131]

However the forfeiture liability is apportioned among them, each of the co-defendants is entitled to credit for the amount forfeited by the others if they have been found jointly and severally liable for the forfeiture of the same property.[132]

IV. Substitute Assets

The criteria set forth in § 853(p) must be satisfied

If the property subject to forfeiture is unavailable due to an act or omission of the defendant, the court must order the defendant to forfeit substitute assets. *See* 21 U.S.C. § 853(p).[133]

Under the statute, there are four ways in which the Government can show that the property is unavailable.[134] For example, it can show that it has exercised due diligence in attempting to locate the property but was unable to do so. The Government's burden in that regard is not high; it is enough that the Government

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[131] *United States v. Taggert*, 484 Fed. Appx. 614 (2d Cir. 2012) (imposing money judgments in different amounts to different defendants is not an improper sentencing disparity under § 3553).

[132] *United States v. Sigillito,* ___ F. Supp.2d ___, 2012 WL 5188797 (E.D. Mo. Oct. 18, 2012) (defendant is jointly and severally liable for the entire $51.5 million in gross receipts from his fraud scheme but is entitled to credit for any amounts recovered from his co-defendants); *United States v. Nelson*, 2012 WL 555785, *2 (M.D. Fla. Feb. 21, 2012) (joint and several liability does not require that the defendant's bear the burden of forfeiture equally; one may be ordered to forfeit the lion's share, and other a small remainder).

[133] *See generally AFLUS, supra* note 3, Chapter 22.

[134] *See generally AFLUS, supra* note 3, 22-3.

reviewed the defendant's bank records and observed that he has spent the criminal proceeds,[135] or that it has determined that the criminal proceeds were commingled with other legitimately-derived property and could not be separated without difficulty.[136]

Moreover, the four alternative ways of satisfying Section 853(p) are disjunctive; if the Government cannot show that one of them applies, it may rely on another. In *United States v. Zorrilla-Echevarria*, for example, the court agreed with the defendant that the Government was able to locate the directly-forfeitable property, but it held that Section 853(p) was satisfied because the money had been "deposited with a third party."[137]

Regardless of which alternatives apply, the Government must show that the property is unavailable due to an act or omission of at least one defendant.[138] In *United States v. Podlucky*, the defendant objected to the forfeiture of a substitute asset on the ground that it was not he but a co-defendant who was

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[135] *See United States v. Hailey*, 887 F. Supp.2d 649 (D. Md. 2012) (analysis of defendant's bank accounts, showing that he has spent the proceeds of his crime, satisfies § 853(p) and allows the Government to recover substitute assets).

[136] *See United States v. Poulin*, 461 Fed. Appx. 272, 288 (4th Cir. 2012) (per curiam).

[137] *United States v. v. Zorrilla-Echevarria,* 2012 WL 359745, *3 (D.P.R. Feb. 2, 2012) (the criteria in § 853(p)(1) are disjunctive; while the Government could not show that it could not locate the property because it was in fact in Government custody, the fact that it was in Government custody meant that it had been "deposited with a third party" as required by § 853(p)(1)(B)).

[138] *See generally AFLUS, supra* note 3, 22-3(a).

responsible for making the property unavailable. But the court held that each defendant is liable for the foreseeable acts of his co-defendants, and therefore it did not matter which of the defendants was the one who caused the directly forfeitable property to be unavailable.[139]

Any property of the defendant may be forfeited as a substitute asset

Obviously, a substitute asset may be forfeited without showing any connection between the property and the offense. So in *United States v. Turner*, the Fifth Circuit held that the district court was not required to conduct a hearing on the Government's Rule 32.2(e) motion to amend the forfeiture order to include the substitute asset to determine if the property was traceable to defendant's offense.[140] Similarly, in *United States v. Akwei,* a district court held that if the defendant was jointly and severally liable to forfeit the value of smuggled drugs, and the only asset the Government was able to locate was $3,200 found in the defendant's house at the time of his arrest, the Government was not required to show a connection between the money and the offense, but was entitled to forfeit the money as a substitute asset.[141]

On the other hand, if the property *is* directly traceable to the offense, there is no need to invoke a substitute assets theory. In *Haleamau,* the court applied

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[139] *United States v. Podlucky,* 2012 WL 1850931, *3 (W.D. Pa. May 21, 2012).

[140] *United States v. Turner,* 460 Fed. Appx. 346, 347 (5th Cir. 2012) (per curiam).

[141] *United States v. Akwei,* 2012 WL 1869205, *5 (E.D. Va. May 22, 2012).

the lowest intermediate balance rule and found that the money was traceable to the defendant's structuring offense, and so did not have to determine whether Section 853(p) was satisfied.[142]

Changing theories of forfeiture

Most courts hold that the Government has the option of forfeiting property as a substitute asset even if it may be directly forfeitable. Typically, this issue arises when there are a large number of assets and it would be burdensome to have to establish that each one was traceable to the offense. Instead, the Government may suggest that because the whole lot would be forfeitable as substitute assets to satisfy a money judgment in any event, there is no point in going through the exercise of tracing each asset to the underlying crime.[143]

Not all courts are in agreement with this approach, however.[144] In particular, the Eighth Circuit has suggested that forfeiting property as a substitute asset merely to avoid having to prove its nexus to the defendant's offense deprives the defendant of his right to have the jury determine the forfeiture under Rule 32.2(b)(5).[145]

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[142] *United States v. Haleamau,* 2012 WL 3394952 (D. Hawaii Aug. 1, 2012).

[143] *See United States v. Hailey*, 887 F. Supp. 2d 649 (D. Md. 2012) (rather than require the Government to trace each of 119 items to the fraud proceeds, the court may order the forfeiture of the same items as substitute assets).

[144] *See generally AFLUS, supra* note 3, 22-3(b).

[145] *United States v. Gregoire,* 638 F.3d 962, 972 (8th Cir. 2011) (Government not allowed to forfeit stolen merchandise as substitute assets when the merchandise was

Attorney's fees

In *Turner,* the Fifth Circuit also held that there is no exemption from the forfeiture of substitute assets for funds the defendant says he needs to pay his attorney's fees.[146]

Application of the relation back doctrine to substitute assets

The Fourth Circuit and some district courts hold that the Government's interest in substitute assets vests at the time of the offense,[147] but the Sixth Circuit has declined to follow those cases. In *United States v. Erpenbeck,* it held that the Government's interest in a substitute asset does not vest until it fails to recover the directly forfeitable property, which is not until the defendant is convicted.[148]

The ruling is likely to have a adverse impact on the Government's ability to use forfeiture to recover money for victims in fraud cases in the Sixth Circuit because the defendant will be able to protect property that would have been available for that purpose as a forfeited substitute asset merely by transferring it to a family member on the eve of his criminal conviction — which is precisely what the relation back doctrine was designed to avoid.

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recovered and available for forfeiture directly).

[146] *United States v. Turner,* 460 Fed. Appx. 346, 347 (5th Cir. 2012) (per curiam).

[147] *See United States v. McHan*, 345 F.3d 262, 271 (4th Cir. 2003). *See generally AFLUS, supra* note 3, § 21-3.

[148] *United States v. Erpenbeck,* 682 F.3d 472, 477-78 (6th Cir. 2012).

V. Right of Third Parties To Object to the Forfeiture

Seeking return of property pre-trial

Third parties are not permitted to intervene in any aspect of a criminal case to assert their interests in property subject to forfeiture until the defendant has been convicted and the Government has commenced an ancillary proceeding pursuant to Rule 32.2(c). In particular, third parties cannot seek the release of property seized or restrained for criminal forfeiture prior to trial.[149]

Third parties frequently attempt to do this by filing motions under Rule 41(g), but in *United States v. Lugo* and *United States v. Vincent,* district courts held that that practice is barred by 21 U.S.C. § 853(k), which prohibits a third party from commencing any action against the United States regarding the property subject to forfeiture once an indictment has been filed.[150]

Objections to the entry of the forfeiture order

Section 853(k) also bars third parties from objecting to the entry of the forfeiture order, but the most recent case on this point actually presents the mirror image of that rule. In *United States v. Hodgson,* the third party objected to the

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[149] *See generally AFLUS, supra* note 3, 21-6.

[150] *United States v. Lugo*, 2012 WL 32452, *2 (E.D.N.Y. Jan. 5, 2012) (§ 853(k) bars a third party from seeking the return of property subject to criminal forfeiture by filing a Rule 41(g) motion pre-trial; that there was no forfeiture notice in the indictment when the motion was filed did not matter because the Government filed a superseding information that did contain such notice); *United States v. Vincent,* 2012 WL 1978038 (E.D. La. June 1, 2012) (applying *Holy Land*; even if third party had standing, it could not use Rule 41(g) to seek the release of property subject to criminal forfeiture in a pending case).

Government's motion *to vacate* the forfeiture order to allow competing claims to be resolved privately in state court, but the court held that he lacked standing to do so.[151] If the Government determines that there is little or no equity in the property, or it otherwise determines that it would be in the interests of justice to step aside and allow competing claims to be resolved privately, a third party who sees some strategic advantage in litigating his claim in the ancillary proceeding has no right to insist that the Government offer him that opportunity.

Another novel attempt to block the entry of the forfeiture order arose in *United States v. Davenport.* In that case, a former co-defendant who had pled guilty to another crime and was no longer involved in the instant criminal case moved to quash the forfeiture order that was entered when the remaining defendant was convicted, but the court held that she could not do so. Former defendants are no different from other third parties, the court said. They have no right to move to quash the forfeiture order but must file a claim in the ancillary proceeding as any other third party would have to do.[152]

Other attempts to intervene

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[151] *United States v. Hodgson*, 2012 WL 3222312, *7 (S.D.N.Y. Aug. 7, 2012) (third party lacks standing to object to Government's decision to vacate the forfeiture order when it realized there was no equity in the property; if there are competing claims to the forfeited property, Government may opt to vacate the forfeiture order and let the parties resolve their differences in state court).

[152] *United States v. Davenport*, 668 F.3d 1316, 1321-23 (11th Cir. 2012).

Third parties have attempted to circumvent the ancillary proceeding and the bar on intervening in the criminal case prematurely in myriad other ways as well.[153] In *Sovereign Bank v. Saraceno,* for example, the court granted the Government's motion to dismiss an interpleader action filed by potential claimant immediately after the property was seized and before any civil or criminal forfeiture action was commenced.[154] In *Schwartz v. United States*, the court declined to allow a third party to use the Federal Tort Claims Act to attack the validity of a forfeiture order.[155] And in *Marzouca v. GFG Realty Fund,* a third party attempted to foreclose on a mortgage on the property in state court. In that case, the court allowed the Government to remove the private foreclosure action to federal court and then granted the Government's motion to dismiss it under Section 853(k)(2). The post-indictment filing of the foreclosure action was barred as an "action against the United States," the court said, even though the Government was not named as a party because the United States had a vested interest in the property under the relation back doctrine. Again, the mortgagee's remedy was to wait to file a claim in the ancillary proceeding.

VI. Procedure in the Ancillary Proceeding

Overview

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[153] *See generally AFLUS, supra* note 3, § 21-6.

[154] *Sovereign Bank v. Saraceno*, 2012 WL 768207 (D. Mass. Mar. 9, 2012).

[155] *Schwartz v. United States*, 2012 WL 3070789, *4-5 (N.D. Cal. July 25, 2012).

The purpose of the ancillary proceeding is to ensure that property belonging to a third party is not inadvertently forfeited as part of the defendant's criminal case. As discussed in the previous section, third parties are barred from intervening in the criminal trial by Section 853(k). Because it would violate the due process rights of the third party to forfeit his property in a proceeding from which he was excluded, the ancillary proceeding provides third parties with a complete defense: if the third party establishes that he is the owner of the property in terms of Section 853(n)(6), he will prevail. On the other hand, if he is not the owner of the property, he has no cause to complain about the forfeiture and will not prevail.[156] Thus, the ancillary proceeding is all about ownership: it is the only issue.[157]

The procedure in the ancillary proceeding is set forth in 21 U.S.C. § 853(n) and Rule 32.2(c). As explained by the court in *United States v. Sigillito,* the claimant's burden in the ancillary proceeding has three parts: he must file a claim that comports with the pleading requirements in Section 853(n)(3), establish that he has a "legal interest" in the property sufficient to satisfy the standing requirement in Section 853(n)(2), and show that she satisfies one of the grounds

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[156] *United States v. Andrews*, 530 F.3d 1232, 1237 (10th Cir. 2008) ("a third party has no right to challenge the preliminary order's finding of forfeitability;" the only issue in the ancillary proceeding is ownership; it is a complete defense to the forfeiture; "if the property really belongs to the third party, he will prevail and recover his property whether there were defects in the criminal trial or the forfeiture process or not; and if the property does not belong to the third party, such defects in the finding of forfeitability are no concern of his").

[157] *See generally AFLUS, supra* note 3, § 23-2.

for recovery in Section 853(n)(6).[158] The following discussion begins with the procedural requirements and then turns to standing and the substantive grounds for recovery on the merits.

Sending notice to potential claimants

To commence an ancillary proceeding, the Government must publish notice of the order of forfeiture on its internet website, www.forfeiture.gov, and send direct notice of the forfeiture to potential claimants.[159] These requirements are set forth in Rule 32.2(b)(6), which was amended in 2009 to incorporate the publication and notice requirements in Rules G(4)(a) and (b) of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions — the rules that govern publication and notice in civil forfeiture cases.

In *Davenport* and *Erpenbeck,* the Eleventh and Sixth Circuits held that the 2009 amendment merely codified what has been the rule in criminal forfeiture

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[158] *United States v. Sigillito,* ___ F. Supp.2d ___, 2013 WL 1448749 (E.D. Mo. Apr. 1, 2013). *See also United States v. Oregon*, 671 F.3d 484, 491-93 (4th Cir. 2012) (explaining the procedures in the ancillary proceeding); *United States v. Dupree*, ___ F. Supp.2d ___, 2013 WL 311403 (E.D.N.Y. Jan. 28, 2013) (same).

[159] *See generally AFLUS, supra* note 3, § 23-3.

cases all along.[160] If challenged, the burden is on the Government to show that it complied with the notice requirements.[161]

There has been a fair amount of litigation over who is entitled to receive direct notice and to whom the notice may be sent. For example, in *United States v. Alvarez,* the Fifth Circuit held that if the titled owner of the property is a minor child, notice may be served on the child's parent.[162] In *Erpenbeck,* the Sixth Circuit said that if the property is part of a bankruptcy estate that was created before the Government's interest vested in the forfeited property, the Government must send notice to the bankruptcy trustee.[163] And two district courts in the Fourth Circuit held that the Government does not have to send notice to fraud victims or other third parties who appear to lack standing to contest the forfeiture.[164]

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[160] *United States v. Davenport*, 668 F.3d 1316, 1322-23 (11th Cir. 2012) (because the ancillary proceeding is civil in nature, it has always been appropriate to use the notice procedures that apply in civil forfeiture cases when giving notice in the ancillary proceeding; the 2009 amendment to Rule 32.2(b)(6) merely codified that practice); *United States v. Erpenbeck,* 682 F.3d 472, 476-77 (6th Cir. 2012) (Rule 32.2(b)(6) merely codified a pre-existing due process requirement that the Government send direct notice to interested parties; it may rely on publication only when it "knows not whom the forfeiture affects").

[161] *See United States v. Devlin,* 2013 WL 275968, *9 (M.D. Fla. Jan. 22, 2013).

[162] *United States v. Alvarez*, 710 F.3d 565, 567 (5th Cir. 2013).

[163] *Erpenbeck,* 682 F.3d at 476-78.

[164] *See United States v. Hanson*, 2012 WL 5033235 (W.D.N.C. Oct. 17, 2012) (Government not required to send notice to fraud victims who lack standing as unsecured creditors); *United States v. Rosga,* 2012 WL 1854246, *4 (E.D. Va. May 21, 2012) (Government is not required to send notice to third parties who do not appear to have an interest in the property sufficient to establish standing; applying *Phillips* to Rule 32.2(b)(6)(A)).

In *Davenport,* the Eleventh Circuit said that sending notice to the potential claimant's attorney satisfies both Rule G(4) and the requirements of due process.[165] As that case illustrates, however, the Government must be prepared to explain why it thought that the attorney to whom it sent the notice was representing the claimant at the time the notice was sent. Unfortunately, it is not unusual for the attorney or the claimant to say that he was not. In *Davenport,* the attorney's call to the U.S. Attorney's Office after receiving the notice, inquiring about the need to file a claim, belied the claimant's later contention that the attorney was no longer representing her when the Government sent the notice to him.[166]

In all events, a person with actual notice of the forfeiture order cannot complain that the Government's attempts to provide notice in accordance with the rules were inadequate. That point is codified in Rule G(4), and now that the civil rule applies in criminal cases, it applies in criminal cases as well.[167]

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[165] *United States v. Davenport*, 668 F.3d 1316, 1322-23 (11th Cir. 2012).

[166] *Davenport*, 668 F.3d at 1323. *See also United States v. Gallion*, 2012 WL 3913086, *3 (E.D. Ky. Sept. 7, 2012) (notice sent to defendant's attorney, but not to defendant's father who was a potential claimant, was sufficient under Rule G(4)(b)(iii)(B) where the attorney had told the AUSA that he represented defendant and his family members).

[167] *See United States v. Rosga,* 2012 WL 1854246, *4 (E.D. Va. May 21, 2012) (under Rule G(4)(b), a potential claimant who had actual notice may not complain that the Government failed to send the required notice; applying Rule G(4)(b) in a criminal forfeiture case); *United States v. Gallion*, 2012 WL 3913086, *3 (E.D. Ky. Sept. 7, 2012) (applying Rule G(4)(b)(v); person with actual notice cannot complain that Government's efforts to provide him direct notice were insufficient).

Finally, taking these last two points together, if the claimant's *attorney* had actual notice of the order of forfeiture, the claimant cannot complain that the notice was inadequate even if the Government failed to send direct notice to *either* the claimant *or* the attorney.[168]

Pleading requirements under § 853(n)(3)

Section 853(n)(3) governs the content of the third party's claim.[169] First, it provides that the claim must be filed under penalty of perjury: a claim that does not comply with that requirement is subject to immediate dismissal pursuant to Rule 32.2(c)(1) for that reason alone.[170]

Second, the claim must assert the legal basis for asserting a claim in terms of the applicable statute. For example, the claimant must say whether he is making a claim under Section 853(n)(6)(A) (asserting an interest in the property that pre-dates the Government's interest) or Section 853(n)(6)(B) (asserting that he is a bona fide purchaser for value).[171]

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[168] *See United States v. Lyons,* 2013 WL 1694865 (D. Mass. Apr. 12, 2013) (admission by its counsel that he had seen notice of the forfeiture order on the Government's forfeiture website meant that claimant had actual notice, and thus could not complain of lack of actual notice).

[169] *See generally AFLUS, supra* note 3, 23-5.

[170] *See United States v. Klemme,* 894 F. Supp.2d 1113, 1117 (E.D. Wis. 2012) (dismissing the claim and noting that the pleading requirements in § 853(n)(3) "require strict compliance").

[171] *See United States v. Hailey*, ___ F. Supp.2d ___, 2013 WL 632246 (D. Md. Feb. 20, 2013) (ordering claimant to specify whether she was asserting a pre-existing interest under § 853(n)(6)(A) or that she was a bona fide purchaser for value under § 853(n)(6)(B)); *Klemme,*

Third, the claim must state the time and circumstances of the claimant's acquisition of an interest in the forfeited property, and must do so in sufficient detail to allow the court to determine if a motion to dismiss for failure to state a claim should be granted, and to provide guidance as to what discovery is needed. A claim that simply asserts that the claimant is the owner of the property does not answer that requirement.[172]

There have been a number of cases in the past year on this last point. In *Sigillito,* for example, the court said that the bare legal assertion of a marital interest in defendant's property, or that property was received as a gift, did not satisfy the "time and circumstances" requirement. If the claim does not say when the marriage occurred or when the gift was made, the court reasoned, it is impossible to know whether it was before the Government's interest vested under the relation back doctrine or after — which is the critical point for determining if the claim is cognizable under Section 853(n)(6)(A) or (B).[173] Similarly, in *United States v. Phillips,* the court said that to state a claim under Section 853(n)(6)(A),

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894 F. Supp.2d at 1117 (granting motion to dismiss where claim did not adequately state the time and circumstances of claimant's acquisition of her interest, leaving it unclear if she was making a claim under 853(n)(6)(A) or (B)).

[172] *See Hailey*, 2013 WL 632246 (claim must do more than state that claimant is the owner of the forfeited property; motion for more definite claim granted); *United States v. Church & Dwight Company*, 510 Fed. Appx. 55 (2d Cir. 2013) (third-party petition must provide "enough facts to state a clam to relief that is plausible on its face," quoting *Bell Atlantic Corp. v. Twombly*).

[173] *United States v. Sigillito,* ___ F. Supp.2d ___, 2013 WL 1448749 (E.D. Mo. Apr. 1, 2013).

the claim must plead both the date when the interest was acquired *and* the date when the act giving rise to the forfeiture took place so that the court could determine whether the facts, if true, would state a claim under the statute.[174]

Time for filing claim

A claimant who is sent direct notice of the forfeiture has 30 days from the date of the notice to file a claim.[175] Alternatively, a claimant who receives notice only by publication has 30 days from the last day of publication.[176] If the claimant receives direct notice, and the deadline based on the direct notice is different from deadline determined by the last day of publication, the deadline in the direct notice controls, even if it is later than then deadline based on publication.[177] A

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[174] *United States v. Phillips,* 2013 WL 428557, *3-4 (E.D. Va. Feb. 1, 2013). *See also United States v. Fabian,* 2013 WL 150361, *5 (W.D. Mich. Jan. 14, 2013) (claim stating only that defendant's family members acquired the forfeited property by gift or transfer did not comply with § 853(n)(3); such claims do not adequately sent forth the nature and extent of the claimant's interest or the time and circumstances of the acquisition of that interest); *United States v. Glenn,* 2012 WL 3775965, *2 (E.D. Okla. Aug. 28, 2012) (claim asserting only that the forfeited property was obtained through claimant's "labor and effort" was insufficient, but court allows claimant opportunity to amend his claim to set forth the time and circumstances).

[175] *See United States v. Devlin,* 2013 WL 275968, *10 (M.D. Fla. Jan. 22, 2013) (for purposes of computing the start date for the 30-day deadline, court presumes that notice sent by regular mail was received within 5 days of the mailing). *See generally AFLUS, supra* note 3, § 23-4.

[176] *See United States v. Dupree*, ___ F. Supp.2d ___, 2013 WL 311403 (E.D.N.Y. Jan. 28, 2013) (claimant's deadline for filing a claim did not expire until 32 days after final publication, counting the weekend on which the 30th day fell).

[177] *See United States v. Phillips,* 2013 WL 428557, *2 (E.D. Va. Feb. 1, 2013) (if Government sends direct notice informing claimant he has 30 days to submit claim, even though the time to file a claim based on last date of publication already expired, court will toll the deadline).

claim filed after the expiration of the applicable filing deadline is subject to a motion to dismiss.[178]

If there are multiple forfeiture orders in the same case, each listing its own set of forfeited assets, and the Government sends notice of the respective forfeiture orders at different times, each set of assets has its own deadline for filing a claim. Thus, the claimant cannot wait until the court issues a second forfeiture order to claim property that was listed in the first forfeiture order, or wait for a third forfeiture order to claim property listed in the first or second.[179]

Moreover, all of the claimant's grounds for recovery must be stated within the 30-day period; thus, a claimant may not file a claim setting forth one theory of recovery, wait until the 30-day period has expired, and then attempt to amend the claim to assert additional grounds thereafter.[180] For example, in *United States v.*

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[178] *See United States v. Alvarez*, 710 F.3d 565, 567-68 nn.10 & 11 (5th Cir. 2013) (declining to establish more flexible rule where claimant is a minor child; claim filed by child's guardian on 74th day dismissed as untimely; claimant could have moved for an extension of time under F.R.Civ.P. 6(b)(1) but did not do so); *United States v. Sharma*, 509 Fed. Appx. 381, (5th Cir. 2013) (affirming dismissal of claim filed 10 months after receiving notice and rejecting claimant's contention that he did not initially appreciate the scope of the order).

[179] *See United States v. Fabian,* 2013 WL 150361, *6 (W.D. Mich. Jan. 14, 2013) (dismissing claim as untimely where claimant waited until the court issued a second amended order of forfeiture to claim property named in the first amended order); *United States v. Rosga,* 2012 WL 1854246, *5 (E.D. Va. May 21, 2012) (claim that was timely as to last set of assets forfeited was untimely as to other assets forfeited earlier in the same case).

[180] *See United States v. Soreide*, 461 F.3d 1351, 1355 (11th Cir. 2006) (third party petition contesting a criminal forfeiture must be filed within the 30-day period set forth in § 853(n)(2), and must state the grounds upon which the third party is asserting an interest in the property; once the 30 days expires, the claimant may not amend the petition that was based on § 853(n)(6)(B) to include grounds for recovery under section 853(n)(6)(A)).

Klemme, the court barred the claimant from filing a supplemental pleading adding a BFP claim under Section 853(n)(6)(B) after the 30-day deadline expired.[181]

Motion to dismiss the claim

No hearing is necessary on the merits of the third party's claim where the court can dismiss the claim on the pleadings. *See* Rule 32.2(c)(1)(A).[182] For example, the Government may move under Rule 32.2(c)(1)(A) to dismiss a claim for lack of standing, or for failure to comply with the pleading requirements, or for failure to state a claim.[183]

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[181] *United States v. Klemme,* 894 F. Supp.2d 1113, 1116-17 (E.D. Wis. 2012) (following *Soreide*; claimant could not file supplemental pleading after the 30-day deadline expired adding new grounds for recovery). *See also United States v. Hoffman,* 2012 WL 5351797, *3 (D. Minn. Oct. 30, 2012) (claimant must state all of the legal bases for his claim in the 30-day period set forth in Section 853(n); he may not recover on a legal basis raised for the first time in response to a motion to dismiss his claim).

[182] *See United States v. Oregon,* 671 F.3d 484, 489 n.4 (4th Cir. 2012) (noting that considering motions to dismiss filed by the Government is the second step, after the filing of the claim, in the ancillary proceeding, but that the district court "skipped this step" and moved directly to the merits). *See generally AFLUS, supra* note 3, § 23-6.

[183] *See United States v. Sigillito,* ___ F. Supp.2d ___, 2013 WL 1448749 (E.D. Mo. Apr. 1, 2013) (Government may move under Rule 32.2(c)(1)(A) to dismiss for failure to comply with the pleading requirements, lack of standing, or failure to state a claim on which claimant could prevail even if all factual allegations are true); *United States v. Dupree*, ___ F. Supp.2d ___, 2013 WL 311403 (E.D.N.Y. Jan. 28, 2013) (denying motion to dismiss for lack of standing where assuming all facts alleged in the claim to be true, claimant has "barely" alleged a valid assignment under state law); *United States v. Negron-Torres*, 876 F. Supp. 2d 1301 (M.D. Fla. 2012) (granting Rule 32.2(c)(1)(A) motion to dismiss for lack of standing); *United States v. Petters,* 857 F. Supp. 2d 841, 844 (D. Minn. 2012) (Rule 32.2(c)(1)(A) is the proper vehicle for moving to dismiss a claim if the Government believes that even if all of claimant's factual allegations were true, the claim must be rejected as a matter of law); *United States v. Madoff*, 2012 WL 1142292, *3 (S.D.N.Y. Apr. 3, 2012) (Government entitled to dismissal of claim pursuant to Rule 32.2(c)(1) if it fails to state enough facts to state a plausible claim); *United States v. Chu,* 2012 WL 6082451 (S.D.N.Y. Dec. 4, 2012) (granting Rule 32.2(c)(1)(A) motion to dismiss for lack of standing where claim, on its face, stated that claimant gave the forfeited property to defendant as a gift).

A motion to dismiss for failure to state a claim essentially says, assuming the facts alleged in the complaint are true, the claim fails to set forth grounds on which the claimant could prevail. For example, in *United States v. Hailey,* the Government moved to dismiss a claim in which the defendant's wife claimed that the forfeited property was given to her as a gift. Because the recipient of a gift cannot recover under either Section 853(n)(6)(A) or (B), a claim stating on its face that the property was received as a gift must be dismissed for failure to state a claim on which relief could be granted.[184]

If the claim is insufficient on its face, the claimant is not entitled to conduct discovery nor to a hearing on the merits; rather, the purpose of the motion to dismiss under Rule 32.2(c)(1)(A) is to dispose of claims that have no merit without investing judicial resources.[185] But to withstand a motion to dismiss, the

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[184] *United States v. Hailey*, ___ F. Supp.2d ___, 2013 WL 632246 (D. Md. Feb. 20, 2013) (purpose of Rule 32.2(c)(1)(A) is to allow courts to dismiss claims without a hearing if, assuming all facts alleged in the claim are true, claimant is not entitled to relief as a matter of law; dismissing claim where claim did not dispute that assets were purchased with fraud proceeds but asserted they were given to claimant as gifts). *See also United States v. Allmendinger,* 2012 WL 966615 (E.D. Va. Mar. 21, 2012) (under Rule 32.2(c), court dismisses claim alleging that defendant "gave me the truck as a gift" because a donee cannot recover under § 853(n)(6)(B), and because the truck was purchased with criminal proceeds, claimant could not have a pre-existing interest under § 853(n)(6)(A)). *Cf. United States v. Eckenberg,* ___ F. Supp. 2d ___, 2013 WL 264778 (D. Or. Jan. 16, 2013) (denying defense attorney's Rule 60(b) motion to reopen the ancillary proceeding to allow him to file a claim; because the forfeited property was proceeds, Government's interest vested before attorney could have acquired an interest).

[185] *See United States v. Fabian,* 2013 WL 150361, *6 (W.D. Mich. Jan. 14, 2013) (claimant cannot object to Rule 32.2(c)(1)(A) motion on the ground that she has not yet conducted discovery or had a hearing on the merits).

claimant need only show that the facts asserted in support of his claim are plausible, and that he would prevail if the facts turn out to be true.[186]

Motion for summary judgment

Rule 56 of the Federal Rules of Civil Procedure applies in the ancillary proceeding, allowing either party to file a motion for summary judgment.[187]

Burden of proof in the ancillary proceeding

As mentioned earlier, the claimant bears the burden of proof as to all three stages of the ancillary proceeding: the sufficiency of his claim, standing, and the ability to prevail on the merits. In *United States v. Pennington,* for example, the claimant was unable to prove by a preponderance of the evidence that the money seized during a drug raid along with drugs and guns belonged to her and not to her grandson, and therefore failed to establish that she had a legal interest in the money.[188]

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[186] *See United States v. Smith,* 2012 WL 1080477, *2 (E.D. Ky. Mar. 30, 2012) (to survive a motion to dismiss under Rule 32.2(c), claimant need only have alleged facts that, if taken to be true, states a basis for standing and claim to relief that is "facially plausible").

[187] *See United States v. Coffman,* 2012 WL 5611510, *1 (E.D. Ky. Nov. 15, 2012) (Rule 56 applies to claimant's motion for summary judgment in the ancillary proceeding).

[188] *United States v. Pennington,* 2012 WL 1246525 (D. Ariz. Apr. 13, 2012) (given the circumstances surrounding the seizure of $5,285 during a drug search – e.g., money found throughout the house in proximity to drugs and guns – defendant's grandmother failed to meet her burden of proving that that money belonged to her).

Right to Attorney's fees

In contrast to the statutes governing civil forfeiture cases that were enacted by the Civil Asset Forfeiture Reform Act, there is no statutory right to attorney's fees for a claimant who prevails in the ancillary proceeding.[189] The claimant may, however, petition for attorney's fees under the Equal Access to Justice Act, but the petition will be denied if Government's position in opposing the claim was substantially justified.[190]

Re-opening ancillary proceeding pursuant to Rule 60(b)

Claimants' attorneys frequently argue that they did not understand how the ancillary proceeding works and so should be able to use Rule 60(b) to reopen the case to permit arguments they should have made the first time around. For the most part, the courts have been unsympathetic to such requests. To the contrary, most courts hold that an attorney's lack of familiarity with the applicable law is not "excusable neglect" within the meaning of the rule, and that consequently the client bears the burden of his attorney's mistake.[191]

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[189] *See United States v. Shanholtzer,* 492 Fed. Appx. 799, 801 (9th Cir. 2012) (28 U.S.C. § 2465(b) applies only to civil forfeiture, not to the ancillary proceeding). *See generally AFLUS, supra* note 3, § 23-10.

[190] *Shanholtzer,* 492 Fed. Appx. at 801 (where Government knew airplane was purchased with forfeitable funds, but claimant established that defendant had obtained only a secured interest after giving claimant the forfeitable funds as a loan, defendant was able to retain his equity but not EAJA fees because Government was substantially justified).

[191] *See United States v. Davenport*, 668 F.3d 1316, 1324-25 (11th Cir. 2012) (attorney's failure to review and appreciate the requirements of filing a claim in the ancillary proceeding does not constitute excusable neglect; that the client bears the burden of the

VII. Standing

Choice of law: the role of state, federal and foreign law

Determining standing to contest a forfeiture order in the ancillary proceeding involves both state and federal law. State law – or more accurately, the law of the jurisdiction that created the property interest being asserted – determines what interest the claimant has in the forfeited property; federal law – in particular, 21 U.S.C. § 853(n)(2), determines whether that interest is sufficient to establish standing.[192]

When a claim is filed in the ancillary proceeding, the court must look first to the law of the jurisdiction that created the property right being asserted to determine the nature of the claimant's interest in the property.[193] For example, in

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attorney's mistake of law is not a reason to overturn a district court's refusal to grant a Rule 60(b) motion to reopen the ancillary proceeding (citing *Pioneer Inv. Servs. v. Brunswick Assocs.*, 507 U.S. 380, 396 (1993))); *United States v. Minor*, 457 Fed. Appx. 119, 121-22 (3d Cir. 2012) (per curiam) (affirming denial of Rule 60(b) motion; while sympathetic to claimants whose attorney failed to contest the Government's motion to dismiss their claim, "clients must be held accountable for the acts and omission of their attorneys" (quoting *Pioneer Inv. Servs. v. Brunswick Assocs.,* 507 U.S. 380, 396 (1993))). *Cf. United States v. Aguirre*, 476 Fed. Appx. 333, 334-35 (5th Cir. 2012) (district court did not abuse discretion in denying Rule 60(b) motion; that defendant's wife is struggling with the demands of single motherhood while defendant is in prison applies to a great many defendants' wives and does not excuse filing a claim 2 months late).

[192] *See generally AFLUS, supra* note 3, § 23-12.

[193] *See United States v. Oregon,* 671 F.3d 484, 490 n.8 (4th Cir. 2012) ("The court looks to the law of the jurisdiction that created the claimant's interest to see what interest the claimant has in the property"), quoting *Asset Forfeiture Law in the United States,* § 23-12 (2007).

United States v. Oregon, the claimant's interest was determined by the terms of an escrow agreement that was created under North Carolina law.[194]

In *United States v. Brinton*, the issue was whether a malpractice insurer who claimed the right to indemnity from the defendant's property had a present interest in the property. Applying state law, the court held that because the right of indemnity does not accrue or vest until damage occurs, the malpractice insurer had no present interest in defendant's property, even though it may have an indemnity claim in the future.[195]

And in *United States v. Pokerstars,* the issue was whether a bailment was destroyed, as a matter of state law, when the bailee deposited the money in a general bank account.[196] There are many other examples.[197]

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[194] *Id.*

[195] *United States v. Brinton,* 880 F. Supp. 2d 1158, 1160 (D. Utah 2012).

[196] *United States v. Pokerstars,* 2012 WL 1659177, *3 (S.D.N.Y. May 9, 2012).

[197] *See United States v. Basurto,* 2013 WL 1331983 (D. Minn. Mar. 29, 2013) (dismissing claim to forfeited real property where claimant, although possibly the true owner, lacked a legal interest under state law because the property was not titled in her own name); *United States v. Butler,* 2012 WL 5386039, *5 (E.D.N.Y. June 27, 2012) (under New York law, wife had no legal interest in husband's bank account if she has not deposited any funds of her own); *United States v. Gutierrez,* 2012 WL 3291976, *3 (S.D. Fla. Aug. 13, 2012) (under state divorce law, ex-spouse who is awarded alimony and other benefits is only an unsecured creditor unless she obtains a judgment lien; in the absence of such a lien, claimant has no legal interest in defendant's forfeited property); *United States v. Madoff*, 2012 WL 1142292 (S.D.N.Y. Apr. 3, 2012) ("the forfeitability of third party interests is determined by federal law, while their existence is determined by state law;" looking to N.J. law to determine if attorney took the steps necessary to acquire an attorney's lien on the forfeited property).

The law governing the creation of the property interest is not always state law but may be foreign law or federal law. In *United States v. Starcher,* whether the claimant had an interest in an airplane pursuant to an oral contract turned on the provisions of the Federal Aviation Act.[198]

Two areas where the choice of law question seems to generate a lot of litigation involve bona fide purchasers and beneficiaries of a constructive trust. In *United States v. Petters*, the court said that although the federal statute gives bona fide purchasers the right to recover, the statute leaves it to state law to define what a BFP is.[199] The Sixth Circuit, however, stated the rule a bit differently. In *United States v. Huntington National Bank,* the court held that the meaning of the term "bona fide purchaser" in Section 853(n)(6)(B) is a question of federal law, but the court may look to state commercial law for "persuasive guidance."[200]

The same analysis applies in cases where the claimant asserts a constructive trust as his basis for recovery under Section 853(n)(6)(A). A claimant who asserts a constructive trust does not automatically prevail but must show that he satisfies the elements of a constructive trust under state law.[201]

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[198] *United States v. Starcher*, 883 F. Supp. 2d 1175, 1180 (M.D. Fla. 2012).

[199] *United States v. Petters,* 857 F. Supp. 2d 841, 846-47 (D. Minn. 2012).

[200] *United States v. Huntington National Bank,* 682 F.3d 429, 435-36 (6th Cir. 2012).

[201] *See United States v. Bailey,* 2013 WL 681826, *3 (W.D.N.C. Feb. 25, 2013) (applying North Carolina law to determine if claimant was entitled to a constructive trust);

State law also determines if there was a valid assignment of a legal interest in the forfeited property, or if the transfer was a fraudulent conveyance.[202]

If the claimant has no interest in the property under state law, the inquiry ends and the claim fails for lack of standing.[203]

Standing Under Section 853(n)(2)

Having an interest in the property under state law is a necessary condition but it is not dispositive; the claimant still must satisfy the standing requirements in Section 853(n)(2).[204]

Section 853(n)(2) provides that any person, other than the defendant, asserting a "legal interest in the property which has been ordered forfeited to the United States," may petition the court for a hearing to adjudicate the validity of the alleged interest. Thus, establishing standing in terms of Section 853(n)(2) is a threshold hurdle that the claimant must overcome before the court will consider

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United States v. Bailey, 2012 WL 569744, *11 (W.D.N.C. Feb. 22, 2012) (same); *United States v. Pokerstars,* 2012 WL 1659177, *3 (S.D.N.Y. May 9, 2012) (granting motion to dismiss for lack of standing where claimant failed to satisfy the elements of a constructive trust under state law).

[202] *See United States v. Dupree*, ___ F. Supp.2d ___, 2013 WL 311403 (E.D.N.Y. Jan. 28, 2013).

[203] *See United States v. White,* 675 F.3d 1073, 1077 (8th Cir. 2012) (if claimant fails to establish a legal interest under state law, the inquiry ends and the claim fails for lack of standing). *But see United States v. Smith,* 2012 WL 1080477, *3 (E.D. Ky. Mar. 30, 2012) (although state law requires buyer of water craft to have title transferred to his name, purchaser who failed to do so nevertheless had standing because he paid valuable consideration for the property).

[204] *See generally AFLUS, supra* note 3, 23-13.

his or her claim on the merits.[205] A person who has an interest in the property under state law may nevertheless not have standing if his interest is not the kind of interest that Section 853(n)(2) recognizes. In *United States v. Oregon,* for example, the Fourth Circuit said that this might be the case if the claimant "has manipulated state law property rights to shield property assets from the reach of forfeiture law."[206]

Notice that the term "legal interest" appears in both Section 853(n)(2) – the standing provision – and Section 853(n)(6)(A) – the provision describing the substantive right to recover based on a pre-existing interest in the forfeited property.[207] Logically, the "legal interest" needed to establish standing under Section 853(n)(2) should be the same "legal interest in the property" needed to prevail on the merits under Section 853(n)(6)(A). To be sure, to prevail on the merits, the claimant must do more than establish standing: to have standing the claimant only needs to have a legal interest, while to prevail on the merits, she must have a legal interest that existed before the act giving rise to the forfeiture so that her claim trumps the Government's interest under the relation back

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[205] *See United States v. Masilotti,* ___ Fed. Appx. ___, 2013 WL 646375 (11th Cir. Feb. 22, 2013) (because a third party who relinquished all interest in the forfeited property did not have standing to contest the forfeiture, the court did not need to address any of the substantive challenges he raised).

[206] *United States v. Oregon,* 671 F.3d 484, 490 n.8 (4th Cir. 2012) (explaining why the Fourth Circuit departed from state law in *Morgan* but followed it in *Schecter* and *Buk*).

[207] *See generally AFLUS, supra* note 3, § 23-15(c).

doctrine. But the "legal interest" is the same under either statute; there is no daylight between the legal interest needed to establish standing and the legal interest needed to prevail on the merits.

That is certainly the rule in the Second Circuit. In *United States v. Church & Dwight Company*, the panel held that Section 853(n)(2)'s requirement of a legal interest "must be read as identical to § 853(n)(6)'s reference to a right, title or interest in the property."[208] But the rule in the Fourth Circuit may be different. In *United States v. Oregon,* the panel held that an interest sufficient to establish standing that was not sufficient to prevail on the merits. In that case, however, the panel did not cite the similarity between Sections 853(n)(2) and (n)(6)(A) and appeared to base its holding on an unexplained distinction between statutory standing under Rule 32.2(c)(1) and Article III standing.[209]

Right of co-defendant to challenge forfeiture as a third party

What happens if there are two or more defendants: does the Government have to prove which one of them is the owner of the property?

Prior to the enactment of Rule 32.2, this was an issue: courts held that if the Government sought the forfeiture of property in the criminal case on the

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[208] *United States v. Church & Dwight Company*, 510 Fed. Appx. 55, 57 (2d Cir. 2013). *See also United States v. Madoff,* 2012 WL 1142292, *3 (S.D.N.Y. Apr. 3, 2012) (§ 853(n)(6)'s reference to a right, title, or interest in the property is the same as § 853(n)(2)'s requirement of a legal interest in the property, which is necessary for standing", quoting *United States v. Ribadeneira,* 105 F.3d 833, 835 (2nd Cir. 1997)).

[209] *United States v. Oregon,* 671 F.3d 484, 490 n.6 (4th Cir. 2012).

ground that it belonged to Defendant A, Defendant B could challenge the forfeiture in the ancillary proceeding, even if he was convicted of the same offense.[210]

Rule 32.2 was enacted to fix that. Now, the district court simply orders the forfeiture of the property based on its connection to the offense and without regard to which defendant had an interest in it. Thus, it no longer matters which defendant was the owner of the property, and no co-defendant has standing to contest the forfeiture in the ancillary proceeding if all were convicted of the crime giving rise to the forfeiture.[211]

But, what happens if one defendant is convicted of the crime giving rise to the forfeiture and the co-defendant is convicted of something else. In that case, as discussed earlier, the second defendant has the same right to contest the forfeiture as any other third party. In *Davenport*, one defendant was convicted of drug dealing but his co-defendant pled to a violation of Section 1001. Therefore the co-defendant was entitled to file a claim in the ancillary proceeding.[212]

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[210] *See United States v. Gilbert*, 244 F.3d 888, 910 n.54 (11th Cir. 2001) (defendant whose property has been forfeited cannot contest forfeiture in the ancillary proceeding, but co-defendant, whose property was not forfeited, is a third party for purposes of the ancillary proceeding); *United States v. Real Property. in Waterboro*, 64 F.3d 752, 756-57 (1st Cir. 1995) (if court determines that defendant A is the owner of the property, defendant B may challenge the forfeiture in the ancillary proceeding).

[211] *See* Advisory Committee Note (noting that Rule 32.2 resolves the "difficulties" presented under the old rule when codefendants were permitted to file claims as third parties in the ancillary proceeding).

[212] *United States v. Davenport*, 668 F.3d 1316, 1320-21 (11th Cir. 2012).

Taking this issue one step further, what happens if the two defendants do not go to trial at the same time? Suppose, for example, that Defendant A is convicted of an offense and there is a forfeiture order, and Defendant B is awaiting trial on the same offense. We know that Defendant B could not file a claim in the ancillary proceeding if he were convicted of that offense, but can he file a claim *before* he is convicted?

The answer is yes, but if he wins (by establishing that he is the owner of the property), the property will remain subject to forfeiture a second time if he is convicted when his case comes to trial.[213] And if he loses, as occurred in *United States v. Watts,* the property remains forfeited and there will be no reason to forfeit it again in the second trial.[214]

General creditors do not have a legal interest in the forfeited property

The rule excluding general unsecured creditors from the ancillary proceeding based on lack of standing is well-established.[215] There were a number of new cases reiterating that view in the past year.[216]

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[213] *See United States v. Watts,* 477 Fed. Appx. 816, 817-18 (2d Cir. 2012) (when property is forfeited in co-defendant's case, yet-to-be-tried co-defendant has the right to file a claim in the ancillary proceeding).

[214] *Id.*

[215] *See generally AFLUS, supra* note 3, § 23-13(c).

[216] *See United States v. White,* 675 F.3d 1073, 1080-81 (8th Cir. 2012) (agreeing with other circuits holding that general unsecured creditors lack standing because they do not have an interest in any particular asset); *United States v. Dupree*, ___ F. Supp.2d ___, 2013 WL 311403 (E.D.N.Y. Jan. 28, 2013) (dismissing claim for back wages for lack of standing

The point is that the ancillary proceeding is not a liquidation proceeding conducted for the benefit of the defendant's victims and other creditors. Even the Ninth Circuit, which has been uncommonly accommodating to fraud victims' attempts to circumvent the limitations on standing in the ancillary proceeding, agrees that its decision in *Boylan* did not change that.[217] In *United States v. Kornhauser*, the court said that *Boylan* created a limited exception for beneficiaries of a constructive trust who can trace their losses, but did not abrogate the rule that unsecured creditors lack standing to file a claim in the ancillary proceeding.[218]

The claimant must have a present interest in the forfeited property

Third parties who can trace the forfeited property to property they once owned often act as if they should automatically prevail in the ancillary proceeding.

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because claimant was only a general creditor); *United States v. Negron-Torres*, 876 F. Supp. 2d 1301, 1305 (M.D. Fla. 2012) (third party who claimed she loaned portion of forfeited funds to defendant to buy auto parts and expected to be repaid was an unsecured creditor and lacked standing); *United States v. Madoff*, 2012 WL 1142292, *4 (S.D.N.Y. Apr. 3, 2012) (explaining why unsecured creditors lack standing to file claims in the ancillary proceeding; following *Ribadeneira* and declining to follow *Reckmeyer*); *United States v. Moses*, 2012 WL 458494, *2 (D. Vt. Feb. 10, 2012) (defendant's father and ex-wife lacked standing as unsecured creditors to contest forfeiture of property traceable to drug proceeds, even if they loaned defendant money to improve the property).

[217] In *United States v. $4,224,958.57*, 392 F.3d 1002, 1005 (9th Cir. 2004) (*Boylan*) commonly referred to as the *Boylan* case, the Ninth Circuit held that fraud victims have standing to contest the forfeiture of the fraudster's property as potential beneficiaries of a constructive trust and are entitled to notice of the forfeiture proceeding. No other court follows that rule.

[218] *United States v. Kornhauser,* 496 Fed. Appx. 723 (9th Cir. 2012) (citing *$20,193.39* and 18 U.S.C. 983(d)(6) and holding that the Ninth Circuit's decision in *Boylan* did not abrogate either the rule that unsecured creditors lack standing or the tracing requirement for imposing a constructive trust).

But while tracing is a *necessary* condition, it is not *sufficient.* The claimant's ability to trace the forfeited assets to property he once owned is irrelevant if he has no interest in the property at the time he files his claim. To prevail in the ancillary proceeding, the claimant must have a *present* interest in the forfeited property.

In *United States v. Hanson,* the former owner of a farm, who sold it to the defendant without retaining an interest to secure a loan, lacked standing to contest the farm's forfeiture when the defendant used the property to commit a crime and defaulted on the loan. That the claimant was once the owner of the farm was irrelevant.[219]

The same is true of persons who voluntarily transfer their property to a fraudster: the ability to trace one's losses to forfeited fraud proceeds does not automatically result in a meritorious claim in the ancillary proceeding if the victim transferred his property voluntarily and did not retain an interest in it.[220]

Persons with an inchoate or contingent interest also lack standing because they lack a *present* interest in the forfeited property.[221]

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[219] *United States v. Hanson*, 2012 WL 5033235 (W.D.N.C. Oct. 17, 2012).

[220] *See United States v. Hoffman,* 2012 WL 5351797, *2 (D. Minn. Oct. 30, 2012) (person who voluntarily transfers property to a fraudster becomes an unsecured creditor without standing to contest the forfeiture of the property even if he can trace his lost property to the forfeited asset).

[221] *See United States v. Church & Dwight Company*, 510 Fed. Appx. 55, 57-8 (2d Cir. 2013) (claimant with a contingent interest based on the settlement of a private lawsuit lacked standing because the contingency – the Government's acquiescence – was not satisfied).

Standing to contest the forfeiture of corporate assets

Shareholders do not have standing to challenge the forfeiture of corporate assets because the assets belong to the corporation, not the shareholders.[222]

In *United States v. Boscarino* and *United States v. Tyrrell*, claims were filed in the ancillary proceeding by the defendants' wives who had an interest in the corporations that owned the forfeited assets, but unfortunately for them, not an interest in the assets themselves.[223]

The rule is the same for lien holders who have a lien on the corporation, but not on the corporation's assets.[224]

Lien holders / Judgment creditors

But see United States v. Oregon, 671 F.3d 484, 491 (4th Cir. 2012) (obligee on an escrow account with no right to access the escrow funds unless a contingency occurs, nevertheless has standing based on its right to sue defendant in the event defendant allows the account to become depleted).

[222] *See generally AFLUS, supra* note 3, § 23-13(d).

[223] *United States v. Boscarino,* 2013 WL 1833018, *2 (D. Ariz. Apr. 30, 2013) (where defendant's wife claimed assets held by a corporation of which she was merely a shareholder, claim dismissed for lack of standing); *United States v. Tyrrell,* 2012 WL 5989344 (M.D. Fla. Nov. 29, 2012) (granting summary judgment where defendant's wife claimed only a community property interest in defendant's interest in a corporation; such interest did not give her standing to contest forfeiture of the corporation's assets). *Cf. United States v. All Funds in the Account of Property. Futures, Inc.*, 820 F. Supp. 2d 1305, 1326-29 (S.D. Fla. 2011) (like shareholders in a corporation, members of an LLC lack standing to contest the civil forfeiture of the LLC's assets), aff'd *United States v. ADT Security Services,* ___ Fed. Appx. ___, 2013 WL 2631435 (11th Cir. June 13, 2013).

[224] *See United States v. Petters,* 857 F. Supp. 2d 841, 845 (D. Minn. 2012) (bank with lien on defendant's ownership interest in an LLC has no interest in the LLC's assets, and thus lacks standing to contest their forfeiture).

As the Sixth Circuit held in *United States v. Huntington National Bank,* lien holders and other secured creditors who have an interest in the forfeited assets themselves have standing to contest the forfeiture of the property,[225] but until the person has perfected the lien, he is merely an unsecured creditor with no interest in a particular asset.[226] For example, in *United States v. Gutierrez,* the court dismissed for lack of standing a claim filed by the defendant's ex-wife, to whom the defendant owed alimony, because she was merely an unsecured creditor until she obtained a judgment lien against the forfeited property.[227]

For the same reason, a person alleging a breach of contract is merely a person with an unsecured, inchoate interest until she converts her cause of action into a judgment lien. Thus, in *United States v. White*, the Eighth Circuit held that the defendant's ex-wife, who alleged that the defendant had promised her compensation for her work for his corporation, had only a cause of action for

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[225] *United States v. Huntington National Bank,* 682 F.3d 429, 436 (6th Cir. 2012) (person with a secured interest in defendant's property – including intangible assets such as a bank account – has a "legal interest" for purposes of § 853(n)).

[226] *See United States v. Madoff*, 2012 WL 1142292, *4 (S.D.N.Y. Apr. 3, 2012) ("To have a claim in the specific property, a creditor . . . must secure a judgment or perfect a lien against a particular item").

[227] *United States v. Gutierrez,* 2012 WL 3291976, *3 (S.D. Fla. Aug. 13, 2012. *But see United States v. Oregon,* 671 F.3d 484, 490 (4th Cir. 2012) (obligee on an escrow agreement has standing to contest the forfeiture of the escrowed funds, even though he has no present interest in them, because he could file a lawsuit against the obligor if he allowed the account to become depleted).

breach of contract, not a legal interest in the corporation or any of the forfeited assets, and that she therefore she lacked standing.[228]

Titled owners / assignees

Legal title is not necessary to establish standing.[229] Thus in *United States v. Smith*, the court held that the buyer of a water craft who failed to comply with state law requiring having title transferred to his name, nevertheless had standing because he paid valuable consideration for the forfeited property.[230] But the simplest way to establish standing is to demonstrate that the claimant has legal title, as long as the title was not fraudulently acquired, and the claimant was not merely a nominee or straw owner.[231]

VIII. Grounds for Recovery in the Ancillary Proceeding

Section 853(n)(6) requires more than proof of standing

A person can recover in the ancillary proceeding only if he has standing and satisfies the requirements of either Section 853(n)(6)(A) or Section 853(n)(6)(B).[232] These are separate requirements: a person may satisfy the

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[228] *See United States v. White,* 675 F.3d 1073, 1078-81 (8th Cir. 2012).

[229] *See United States v. Oregon*, 671 F.3d 484, 488 n.1 (4th Cir. 2012) (holding that there are ways to satisfy statutory standing without having legal title).

[230] *United States v. Smith,* 2012 WL 1080477, *3 (E.D. Ky. Mar. 30, 2012).

[231] *See United States v. Dupree*, ___ F. Supp.2d ___, 2013 WL 311403 (E.D.N.Y. Jan. 28, 2013) (assignee of legal interest has standing, but he must show that the assignment was valid, and was not a fraudulent conveyance under state law).

[232] *See generally AFLUS, supra* note 3, § 23-14(a).

standing requirements in Section 853(n)(2) yet fail to establish grounds for recovery under Section 853(n)(6)(A) or (B).[233] For example, an attorney may have standing to contest the forfeiture of the defendant's property because he has obtained a valid attorney's lien against it, but if he acquired the lien after learning that the property was subject to forfeiture, he will not recover on the merits because he had no pre-existing interest in the property within the meaning of Section 853(n)(6)(A), and he cannot satisfy the bona fide purchaser requirement in Section 853(n)(6)(B).[234]

The only issue in the ancillary proceeding is ownership

As mentioned at the outset of this discussion, the purpose of the ancillary proceeding is to determine the ownership of the forfeited property; it is not a forum for relitigating the merits of the underlying case.[235] Thus, except when doing so is coincident with proving ownership, third parties cannot challenge the finding that the property was subject to forfeiture.[236]

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[233] *See United States v. Petters,* 857 F. Supp. 2d 841, 845 (D. Minn. 2012) (establishing a legal interest under § 853(n)(2) is only half the battle; claimant must still show he can prevail on the merits under § 853(n)(6)(A) or (B)). *See generally AFLUS, supra* note 3, § 23-14(b).

[234] *See United States v. MM MR RM Corporation,* 880 F. Supp. 2d 1109, 1112 (W.D. Wash. 2012).

[235] *See generally AFLUS, supra* note 3, § 23-14(c).

[236] *See United States v. Porchay*, 533 F.3d 704, 710 (8th Cir. 2008) (the Government establishes the forfeitability of the property in the criminal case against the defendant; "there is no provision in § 853(n) to relitigate the outcome of those proceedings"); *United States v. Davenport*, 668 F.3d 1316, 1321 (11th Cir. 2012) (following *Andrews* and *Porchay;* third party

Likewise, the claimant has no reason to argue that the district court erred in finding that the property belonged to the defendant. Under Rule 32.2(b)(2)(A), the district court was required to defer the ownership issue to the ancillary proceeding. Thus, at the point when the ancillary proceeding is commenced, no finding of ownership has yet been made. But even if the district court did make such a finding, the third party has standing only to argue that the property "belongs to *me*"; he has no right to argue that the property "did not belong to *him.*"[237]

Similarly, the claimant cannot argue that the court committed a procedural error in issuing the forfeiture order, or that the forfeiture was barred by another provision of law. As the Fourth Circuit said in *United States v. Oregon,* the ancillary proceeding is not concerned with procedural errors in the forfeiture

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– including a former co-defendant who pled guilty to a different offense – cannot challenge the forfeitability of the property in the ancillary proceeding; if she is the owner, she will prevail, but otherwise she lacks standing to contest the forfeiture); *United States v. White,* 675 F.3d 1073, 1077-78 (8th Cir. 2012) (following *Porchay*; ex-wife cannot contest the forfeiture on the ground that the forfeited property is not traceable to the defendant's crime); *United States v. Hoffman,* 2012 WL 5351797, *3 (D. Minn. Oct. 30, 2012) (third parties can recover in the ancillary proceeding only by establishing a legal interest in the property; they may not relitigate the outcome of the forfeiture proceedings or attack the validity of the forfeiture order; following *White* and *Porchay*); *United States v. Gutierrez,* 2012 WL 3291976, *2 (S.D. Fla. Aug. 13, 2012) (the only issue in the ancillary proceeding is ownership; the district court may not relitigate whether the property is forfeitable; citing Advisory Committee Note 2(b) (2000) to Rule 32.2).

[237] *See United States v. Rosga,* 2012 WL 1854246, *7 & n.12 (E.D. Va. May 21, 2012) (third party who lacked standing cannot complain of a procedural defect in the issuance of the forfeiture order; whether the property belonged to the defendant and defendant therefore had the right to agree to its forfeiture is no concern of his); *United States v. Petters,* 857 F. Supp. 2d 841, 844-45 (D. Minn. 2012) (following *White*; claimant lacks standing to object to the forfeiture order on the ground that the property did not belong to the defendant).

process, but only with whether the claimant has a legal interest that entitles it to recover the forfeited property.[238] Unfortunately, the Ninth and Sixth Circuits may have confused the issue in *dicta* in two cases by suggesting that a third party *could* raise procedural challenges to the criminal trial in the ancillary proceeding.[239] Any such suggestion was incorrect.

Superior Legal Interest Under Section 853(n)(6)(A)

Under the relation back doctrine, which is codified in Section 853(c), the Government's interest in the forfeited property vests at the time of the offense giving rise to the forfeiture. With only one exception,[240] the only way that a third party can trump the Government's interest under the relation back doctrine is by showing that he had a *pre-existing interest* in the property — that is, an interest that existed before the offense and hence before the Government's interest vested. Section 853(n)(6)(A) embodies this point: it complements the relation back doctrine by providing that a person must demonstrate that he had a pre-

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[238] *United States v. Oregon*, 671 F.3d 484, 492 n.12 (4th Cir. 2012).

[239] *United States v. Liquidators of European Fed. Credit Bank,* 630 F.3d 1139, 1150 (9th Cir. 2011) (suggesting that third parties could raise procedural defects where defendant had no incentive to contest the forfeiture and third party could not prevail on the merits under § 853(n)(6)(A) or (B)); *Brown v. United States*, __ F.3d __, 2012 WL 3834657 (6th Cir. Sept. 5, 2012) (following *European Fed.;* claimant was not deprived of due process by being made to withhold her procedural challenges to the criminal forfeiture process until the ancillary proceeding, instead of filing a Rule 41(g) motion, because she will be able to raise such challenges there, once she establishes a legal interest under § 853(n)(2)).

[240] As discussed below, Section 853(n)(6)(B) was included in the statute to serve as an exception to the relation back doctrine.

existing interest in the forfeited property to prevail in the ancillary proceeding.[241] If the claimant obtained his interest in the property *after* the offense giving rise to the forfeiture – *i.e.,* after the Government's interest vested, his claim under Section 853(n)(6)(A) must fail.[242]

As the Ninth Circuit held in *United States v. Hooper* years ago, that means that a third party can *never* assert an interest under Section 853(n)(6)(A) in the proceeds of the crime: the proceeds did not exist until the crime was committed, so no one could claim a *pre-existing* interest in the proceeds.[243]

The same rule applies to property traceable to the proceeds of the crime.

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[241] *See United States v. Madoff*, 2012 WL 1142292, *4 (S.D.N.Y. Apr. 3, 2012) (§ 853(n)(6)(A) reflects the relation back doctrine; to prevail, a third party must have had an interest that "predated commission of the acts giving rise to the forfeiture;" third party who acquired an interest in the forfeited property more than a decade after the fraud began cannot recover under § 853(n)(6)(A)). *See generally AFLUS, supra* note 3, § 23-15(a).

[242] *See United States v. Dupree*, ___ F. Supp.2d ___, 2013 WL 311403 (E.D.N.Y. Jan. 28, 2013) (claimant could not recover under § 853(n)(6)(A) because it acquired its interest after the onset of the conspiracy, which is when the Government's interest vested); *United States v. Smith,* 2012 WL 1080477, *3 (E.D. Ky. Mar. 30, 2012) (third party who purchased forfeited property from defendant after the date of the offense giving rise to forfeiture cannot claim under § 853(n)(6)(A); he must claim under § 853(n)(6)(B)).

[243] *United States v. Hooper*, 229 F.3d 818, 821-22 (9th Cir. 2000) (to prevail under § 853(n)(6)(A), the claimant must have a preexisting interest in the forfeited property; because proceeds do not exist before the commission of the underlying offense, § 853(n)(6)(A) can never be used to challenge the forfeiture of proceeds); *United States v. Dupree*, ___ F. Supp.2d ___, 2013 WL 311403 (E.D.N.Y. Jan. 28, 2013) (following *Hooper;* jury having found the forfeited property was the proceeds of the offense, claimant could not possibly have a claim under § 853(n)(6)(A)). *Cf. United States v. Erpenbeck,* 682 F.3d 472, 478 (6th Cir. 2012) (if defendant's property had been forfeited under a proceeds theory, bankruptcy trustee would not have had a cognizable claim under § 853(n)(6)(A) because the estate was created after the crime giving rise to the forfeiture, but that rule does not apply to substitute assets). *See generally AFLUS, supra* note 3, § 23-15(b).

For example, in *United States v. Hailey*, the defendant's wife could not make a claim under Section 853(n)(6)(A) to the jewelry that the defendant bought with the proceeds of his crime.[244] And in *United States v. Allmendinger*, the claimant could not make a claim under Section 853(n)(6)(A) to the truck that the defendant purchased with criminal proceeds.[245] There are many other examples in the recently-decided cases.[246]

Actual interest versus communal Interest

The claimant must have an actual legal interest in the forfeited property; there is no such thing as a "communal interest" or "collective ownership" that is sufficient to establish standing or to satisfy the "legal interest" requirement in Section 853(n)(6)(A). In *United States v. Rosga,* the members of a motorcycle club tried to assert a communal interest in the property that other members of the club had agreed to forfeit, but the district court denied the claim. To prevail in the

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[244] *United States v. Hailey*, ___ F. Supp.2d ___, 2013 WL 632246 (D. Md. Feb. 20, 2013) (applying *Hooper*; defendant's wife could not assert a claim to luxury items purchased with fraud proceeds because Government's interest vested before she acquired any interest of her own)

[245] *United States v. Allmendinger*, 2012 WL 966615, *2 (E.D. Va. Mar. 21, 2012) (following *Hooper*).

[246] *See United States v. Brinton,* 880 F. Supp. 2d 1158, 1160-61 (D. Utah 2012) (third party cannot assert a pre-existing interest in residence that defendant purchased with the proceeds of his crime; applying *Hooper*); *United States v. Petters,* 857 F. Supp. 2d 841, 845 (D. Minn. 2012) (lien holder can never have a claim under § 853(n)(6)(A) to property purchased with criminal proceeds because the lien was necessarily acquired after the property became subject to forfeiture); *United States v. King,* 2012 WL 2261117, *7 (S.D.N.Y. June 18, 2012) (collecting cases applying *Hooper* and holding that defendant's attorney could not assert attorney's lien in property traceable to proceeds of defendant's crime because he could not show he had a pre-existing interest under § 853(n)(6)(A)).

ancillary proceeding, the court said, the claimant must have exercised dominion and control over the forfeited property; otherwise criminal organizations would be able to insulate their property from forfeiture by declaring that all of their non-defendant members had a communal interest in it.[247]

Constructive trusts

Claimants who voluntarily surrendered title to, or for some other reason no longer have a legal interest in the forfeited property often resort to the constructive trust theory to make a claim under Section 853(n)(6)(A). This has become the favored way of working around the bar on general creditors using the ancillary proceeding to collect what they are owed by the defendant.[248]

There are several recurring issues in constructive trust cases. The first is called the temporal issue – *i.e.,* when does the constructive trust arise. Some courts hold that a constructive trust can *never* give a third party the right to recover under Section 853(n)(6)(A) because it does not arise until imposed by a court, and thus is not a pre-existing interest within the meaning of Section 853(n)(6)(A) and the relation back doctrine.[249]

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[247] *United States v. Rosga,* 2012 WL 1854246, *8 (E.D. Va. May 21, 2012).

[248] *See generally AFLUS, supra* note 3, § 23-15(g).

[249] *See United States v. BCCI Holdings (Luxembourg) S.A. (Petition of Chawla)*, 46 F.3d 1185, 1190-91 (D.C. Cir. 1995) (constructive trusts are "legal interests," but they do not exist until they are imposed by the court, and so cannot support a claim under § 1963(l)(6)(A)).

That is the minority view. Other courts hold that a constructive trust arises by operation of law when the property is obtained by fraud, and so relates back to that date.[250] *United States v. Bailey,* the most recent case on this issue, follows the majority view.[251]

Assuming the temporal requirement is satisfied, the beneficiary of a constructive trust can recover under Section 853(n)(6)(A) if all of the elements of a constructive trust are satisfied.[252] That last point should be emphasized: despite the language in some of the cases, particularly in the Ninth Circuit's decision in *Boylan*, a constructive trust does not arise automatically but is imposed only if a court finds that the elements of a constructive trust are satisfied. If they are not satisfied, the court must decline to impose the trust, and the claim under Section 853(n)(6)(A) must fail.[253]

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[250] *See United States v. Shefton*, 548 F.3d 1360, 1366 (11th Cir. 2008) (disagreeing with *BCCI* and following the Ninth Circuit's decision in *Boylan* holding that a constructive trust exists at the moment of the fraud); *Willis Mgmt. (Vt.), Ltd. v. United States*, 652 F.3d 236, 245 (2d Cir. 2011) (same); *United States v. Wilson*, 659 F.3d 947, 953 (9th Cir. 2011) (following *Boylan*).

[251] *United States v. Bailey*, 2012 WL 569744, *13 (W.D.N.C. Feb. 22, 2012) (holding that under South Carolina law, a constructive trust arises when the property is fraudulently obtained; following *Willis Mgmt.*).

[252] *Bailey*, 2012 WL 569744 at *11 ("A constructive trust constitutes a superior legal, right, title or interest in property under § 853(n)(6)(A) and thus may invalidate a criminal forfeiture order").

[253] *See United States v. Kornhauser,* 496 Fed. Appx. 723, 725 (9th Cir. 2012) (affirming the district court's holding that a constructive trust does not arise automatically but may be imposed only if the claimant can trace and otherwise satisfy the requirements of equity); *United States v. Butler,* 2012 WL 5386039, *5 (E.D.N.Y. June 27, 2012) (constructive trust is an equitable remedy; claimant must satisfy the requirements of a constructive trust under

A constructive trust is an equitable remedy.[254] Therefore, the elements that the claimant must satisfy include the ability to trace the forfeited property to property to which the claimant formerly held title, the absence of an adequate remedy at law, a transfer in reliance on a promise, unjust enrichment, and a confidential relationship with the wrongdoer.[255] Moreover, the claimant must show that imposition of the trust would not result in the unfair treatment of similarly situated parties, such as other victims of the same fraudulent scheme.[256] There were cases in the past year dealing with most of these elements.

The tracing requirement is often the claimant's biggest hurdle. In *United States v. Pokerstars,* for example, the customer of online poker company, whose funds were commingled with those of other poker players, was not entitled to a

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state law); *United States v. Pokerstars,* 2012 WL 1659177, *3 (S.D.N.Y. May 9, 2012) (granting Government's motion to dismiss for lack of standing where claimant could not satisfy the requirements of a constructive trust under state law).

[254] *See United States v. Ramunno*, 599 F.3d 1269, 1274 (11th Cir. 2010) (constructive trust is creature of equity; therefore all of the principles of equity apply even though they are not itemized in the State constructive trust statute; the imposition of a constructive trust is not automatic just because claimant can trace).

[255] *See AFLUS, supra* note 3, § 23-15(g) (listing the elements of a constructive trust); *United States v. Ovid,* 2012 WL 2087084, *5 (E.D.N.Y. June 8, 2012) (the elements of a constructive trust under NY law are a confidential or fiduciary relation, a transfer in reliance on a promise, and unjust enrichment, plus the claimant must be able to trace and lack an adequate remedy at law).

[256] *See United States v. Andrews,* 530 F.3d 1232, 1238 (10th Cir. 2008) (district court did not abuse its discretion in refusing to impose a constructive trust on behalf of a victim who could trace his losses to the forfeited property where doing so would have been unfair to the victims who could not trace; in that situation, it is better to allow the Government to forfeit the property and distribute it to all of the victims on a pro rata basis).

constructive trust because he could not satisfy the tracing requirement.[257] The same problem bars recovery under a constructive trust theory for most fraud victims – except, as often happens, for the person fortunate enough to have been the last victim who parted with his money immediately before the defendant's scheme was uncovered.[258]

The claimant also has to show that he lacks an adequate remedy at law. In *Pokerstars,* the court held that ability to sue the wrongdoer was an adequate remedy and declined to impose the constructive trust on that basis as well.[259] But not all courts take the same broad view of what constitutes an adequate remedy at law. In *Bailey,* for example, the court held that the claimant's ability to seek relief from the Attorney General through the remission of the forfeited property did not qualify as a legal remedy.[260]

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[257] *United States v. Pokerstars,* 2012 WL 1659177, *3 (S.D.N.Y. May 9, 2012).

[258] *See United States v. Bailey,* 2013 WL 681826, *4 (W.D.N.C. Feb. 25, 2013) (rejecting constructive trust claim of claimant who could not trace her loss to the forfeited property). *But see United States v. Bailey*, 2012 WL 569744, *11-12 (W.D.N.C. Feb. 22, 2012) (claimant must be able to trace to satisfy the requirements of a constructive trust, but allowing claimants to use the "lowest intermediate balance rule" to show that all of them were able to trace).

[259] *United States v. Pokerstars,* 2012 WL 1659177, *4 (S.D.N.Y. May 9, 2012).

[260] *United States v. Bailey*, 2012 WL 569744, *15 (W.D.N.C. Feb. 22, 2012) (agreeing with *Willis Mgmt.* that the remission process is not an adequate legal remedy because it is at of executive discretion not subject to judicial review). *See Willis Mgmt. (Vt.), Ltd. v. United States*, 652 F.3d 236, 242 (2d Cir. 2011) (holding that because the remission authority is discretionary, it is not a remedy "at law").

The claimant must also show that there was a confidential relationship between the claimant and the defendant;[261] a purely commercial relationship does not qualify.[262]

Next, as mentioned earlier, because it is an equitable remedy, a court will not impose a constructive trust where it would work an unfairness to others who are similarly situated: this is often the case where one victim can trace his losses to the defendant's property and other victims cannot,[263] or where the creation of the trust would reduce the pool of funds available to the actual victims of the criminal offense by allowing other creditors to claim a share.[264]

There are many forfeiture cases in which the court declined to impose a constructive trust because of the "fairness" issue. In the past year, however,

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[261] *See United States v. Butler,* 2012 WL 5386039, *6 (E.D.N.Y. June 27, 2012) (among other things, a constructive trust requires a "fiduciary or confidential relationship").

[262] *See United States v. Pokerstars,* 2012 WL 1659177, *3 (S.D.N.Y. May 9, 2012) (following *Kahn*; constructive trust requires a confidential or fiduciary relationship; a purely commercial relationship does not qualify); *United States v. All Funds on Deposit…in the Name of Kahn*, 129 F.3d 114, 1997 WL 701366, *6-7 (2d Cir. 1997) (Table) (constructive trust requires a confidential relationship and thus is usually imposed in family law cases, not commercial cases; moreover, claimant had an adequate remedy at law in the remission process).

[263] *See United States v. Bailey,* 2013 WL *4, (W.D.N.C. Feb. 25, 2013) (collecting cases and holding that even if claimant could trace, court would not impose a constructive trust because doing so would be unfair to similarly situated victims).

[264] *See United States v. Rothstein (Petition of Comm. of Unsecured Creditors)*, 2010 WL 3396765, *2 (S.D. Fla. Aug. 26, 2010) (applying *Ramunno*; where creating constructive trust in favor of all of defendant's unsecured creditors would reduce the funds available to the fraud victims by letting his trade creditors also claim a share would be unjust).

there were two cases in which the court found that the victims were not similarly situated because they were actually the victims of different fraud schemes.[265]

Finally, the court will not impose a constructive trust unless the claimant can show that the defendant was unjustly enriched through fraud. In *United States v. Butler*, the court denied the constructive trust claim when it found that the claimant – the defendant's wife – had not been induced by fraud to commingle her money in the defendant's bank account, but did so to pay family expenses.[266]

Bona Fide Purchasers Under Section 853(n)(6)(B)

A claimant who cannot satisfy the requirements of Section 853(n)(6)(A) may instead attempt to challenge forfeiture as a bona fide purchaser for value under Section 853(n)(6)(B).[267]

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[265] *See United States v. Bailey*, 2012 WL 569744, *16 (W.D.N.C. Feb. 22, 2012) (agreeing with *Ramunno* that a trust should not be imposed if doing so would be unfair to similarly situated parties, but holding that victims of one facet of a fraud scheme are not similarly situated with victims of another facet); *United States v. Ovid,* 2012 WL 2087084, *8 (E.D.N.Y. June 8, 2012) (agreeing with *Bailey* that court may impose a constructive trust on behalf of a tracing victim, even if it would leave the other victims empty-handed, if there were really two separate frauds involving different victims at different times).

[266] *United States v. Butler,* 2012 WL 5386039, *6 (E.D.N.Y. June 27, 2012) (defendant's wife could not satisfy the elements of a constructive trust where there was no showing that she had been induced to deposit money into defendant's bank account by fraud; wife's voluntary commingling of her money in husband's account for family expenses does not give rise to constructive trust because there is neither fraud nor unjust enrichment).

[267] *See generally AFLUS, supra* note 3, § 23-16.

Section 853(n)(6)(B) is an exception to the relation back doctrine. As the Sixth Circuit explained in *Huntington National Bank,* its purpose is to protect innocent purchasers of the forfeited property.[268]

To recover an interest that was acquired after the Government's interest vested, the claimant must show three things:

(1) a legal interest in the property;

(2) that was acquired as a bona fide purchaser for value; and

(3) at a time when the claimant was reasonably without cause to believe that the property was subject to forfeiture.[269]

The court does not reach the bona fide purchaser element if the claimant does not first establish a legal right, title, or interest, and it does not reach the "cause to believe" element if the claimant does not establish that he acquired the property through a "purchase" – *i.e.,* through an arm's length commercial transaction.[270]

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[268] *United States v. Huntington National Bank,* 682 F.3d 429, 434 (6th Cir. 2012) (explaining that the BFP provision in § 853(n)(6)(B) is an exception to the relation back doctrine that comes from commercial law and is intended to protect innocent purchasers of the forfeited property).

[269] 21 U.S.C. § 853(n)(6)(B).

[270] *See United States v. Allmendinger*, 2012 WL 966615, *2 (E.D. Va. Mar. 21, 2012) ("If the claimant is a not a bona fide purchaser for value, it is unnecessary to decide whether the claimant was reasonably without cause to believe that the property was subject to forfeiture").

In *United States v. Madoff,* the court held that an attorney who never perfected an attorney's lien against the forfeited property not only lacked standing but also could not satisfy the first element of Section 853(n)(6)(B). Accordingly, the court did not have to address whether he was a bona fide purchaser, or if he had knowledge of the source of the forfeited property.[271]

In *United States v. Allmendinger*, the court held that because the claimant received the forfeited property as a gift, she was not a "purchaser," and it therefore did not have to determine whether she was aware that the property was subject to forfeiture at the time she obtained her interest in it.[272] Similarly, in *United States v. 5910 South Ogden Court,* a civil forfeiture case, the court held that a drug dealer's wife, who obtained her interest in the defendant's property by quit-claim deed for no consideration after it was purchased with drug proceeds, was not a bona fide purchaser for value.[273]

Creditors and victims are not bona fide purchasers

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[271] *United States v. Madoff*, 2012 WL 1142292, *5 (S.D.N.Y. Apr. 3, 2012).

[272] *United States v. Allmendinger,* 2012 WL 966615, *2 (E.D. Va. Mar. 21, 2012) (defendant's mother, who received forfeited truck as a gift, could not be a bona fide purchaser for value). *See also United States v. Klemme,* 894 F. Supp.2d 1113, 1117 (E.D. Wis. 2012) (defendant's mother could not be a BFP if she received the forfeited property as a gift).

[273] *United States v. 5910 South Ogden Court,* 2012 WL 6634793, *7 (D. Col. Dec. 20, 2012).

To be a purchaser, the claimant must give something of value and receive something in return.[274] A tort victim, for example, is not a purchaser because he does not give value to the defendant expecting something in return.[275]

Likewise, an unsecured creditor is not a purchaser because he did not receive anything other that the debtor's promise to pay when the debt was created. In *United States v. Starcher,* the claimant alleged that, pursuant to a verbal agreement, he had invested some money in the airplane in return for a legal interest. If that were true, he might have been able to persuade the court that he had "purchased" the legal interest with his investment. But because he did not record the interest as the FAA requires, the court held that the claimant did not complete the "purchase" and thus was only an unsecured creditor of the owner.[276]

The claimant must give something of value

The thing given in exchange for the property must have real value; the transaction cannot be a fraudulent conveyance or gift disguised as a business

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[274] *See generally AFLUS, supra* note 3, § 23-16(b).

[275] *United States v. Lavin*, 942 F.2d 177, 185-87 (3d Cir. 1991) (tort victims are not bona fide purchasers); *United States v. Brinton,* 880 F. Supp. 2d 1158, 1161 (D. Utah 2012) (same, following *Lavin*).

[276] *United States v. Starcher*, 883 F. Supp. 2d 1175, 1180-81 (M.D. Fla. 2012) (purchaser of airplane who did not record his interest as required by federal law was only an unsecured creditor of the seller and not a BFP within the meaning of § 853(n)(6)(B)).

transaction. Thus, courts typically require proof that the claimant acquired the property in an arm's length commercial transaction.[277]

Acquiring a secured interest in exchange for a loan or line of credit is a "purchase." Thus, in *Huntington National Bank,* the Sixth Circuit held that a bank that obtained a secured interest in defendant's bank account in exchange for a loan and line of credit was a purchaser within the meaning of § 853(n)(6)(B).[278] But the courts are divided as to whether a person receiving payment on an antecedent debt, or acquiring a judgment lien to satisfy such a debt, is a "purchaser." Most hold that if a person is an unsecured creditor who reduces the debt to a judgment, and then files a judgment lien on the debtor's property, he has acquired a legal interest (so he has standing), but he is not a "purchaser." The idea is that unlike a person who obtains a lien in exchange for something when he extends a loan to the property owner, a person who simply files a judgment lien gives nothing of value when he attaches his lien to the defendant's property.[279] But the district court in *United States v. Petters* thought otherwise,

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[277] *See United States v. Coffman,* 2012 WL 5611510, *2 (E.D. Ky. Nov. 15, 2012) (denying claimant's motion for summary judgment where there is dispute as to whether she paid fair market value in an arm's-length transaction for the forfeiture property).

[278] *United States v. Huntington National Bank,* 682 F.3d 429, 434 (6th Cir. 2012) (distinguishing the bank's exercising right of setoff from acquiring a secured interest in exchange for a loan).

[279] *See United States v. BCCI Holdings (Luxembourg) S.A. (Final Order of Forfeiture and Disbursement),* 69 F. Supp. 2d 36, 62 (D.D.C. 1999) ("A creditor who attempts to satisfy the debt by obtaining a judgment lien, or exercising a right of set-off, against specific property is not a bona fide purchaser of that property because he has given nothing of value in

holding that under state law, a person who obtains a lien to secure a pre-existing debt is a "purchaser for value."[280]

Reasonably without cause to believe

Even if the claimant gave something of value in exchange for the forfeited property, he cannot recover unless he was reasonably without cause to believe that the property was subject to forfeiture at the time he acquired his interest[281]. For that reason, a claimant who is aware that the property has been named in an indictment, or that the Government has filed a *lis pendens* on it, when he acquires the property cannot be a bona fide purchaser under Section 853(n)(6)(B).

In *United States v. White*, this requirement prevented the defendant's wife from claiming property awarded to her in divorce proceedings because by the time the award occurred, she knew the property had been forfeited.[282] Similarly, in *Starcher,* the court held that even if the claimant, who did not qualify as a "purchaser" because his purchase of the airplane was incomplete, were to

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exchange for the property interest. This is so irrespective of how the antecedent debt came into existence."); *United States v. Caro*, 2010 WL 680939, *5-6 (S.D. Fla. Feb. 23, 2010) (creditor has no interest until he records a lien, and at that point is not a "purchaser" as that term is used in commercial law; following *BCCI Holdings*).

[280] *United States v. Petters,* 857 F. Supp. 2d 841, 846 (D. Minn. 2012).

[281] *See generally AFLUS, supra* note 3, § 23-16(c).

[282] *United States v. White,* 675 F.3d 1073, 1081 (8th Cir. 2012) (under state law, wife did not acquire an interest in defendant's property until she commenced divorce proceedings; by that time, property was already ordered forfeited, so claimant could not satisfy the "without cause to believe" requirement of § 853(n)(6)(B)).

complete the purchase so that he satisfied the "purchaser" requirement, he would still not prevail because, now that notice of the forfeiture order has now been published, he could not show that he was without reason to know the property was forfeitable.[283]

The "without cause to believe" requirement makes it particularly difficult for defense attorneys to contest the forfeiture as bona fide purchasers, even if they legitimately expected to receive the property in exchange for their legal services. As the Supreme Court held in *Caplin & Drysdale,* the only way a criminal defense lawyer could be a BFP would be to fail to read the indictment.[284]

In *United States v. King*, the court said that an attorney who is retained after his client is indicted has a "duty to inquire" whether the client's property is subject to forfeiture before he attaches an attorney's lien. Having failed to do so, the attorney could not satisfy the "reasonably without cause to believe"

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[283] *United States v. Starcher*, 883 F. Supp. 2d 1175, 1181 (M.D. Fla. 2012). *See also United States v. Petters,* 857 F. Supp. 2d 841, 847-48 (D. Minn. 2012) (finding that claimant was a purchaser for value does not end the inquiry; claimant must still show that despite media attention to the investigation of defendant, it did not have reason to know defendant's property was subject to forfeiture when it acquired its liens).

[284] *Caplin & Drysdale v. United States*, 491 U.S. 617, 633 n.10 (1989) ("given the requirement that any assets which the Government wishes to have forfeited must be specified in the indictment, the only way a lawyer could be a beneficiary of section 853(n)(6)(B) would be to fail to read the indictment of his client"). *See FTC v. Assail, Inc.*, 410 F.3d 256, 266 (5th Cir. 2005) ("[T]he mere fact that an attorney has read the indictment against his client is enough to put him on notice that his fees are potentially tainted and to destroy his status as a bona fide purchaser for value."); *United States v. Dupree*, ___ F. Supp.2d ___, 2013 WL 311403 (E.D.N.Y. Jan. 28, 2013) (law firm that acquired interest after learning defendant's assets were seized and defendant was indicted was on notice; quoting *Caplin & Drysdale:* only an attorney who did not read his client's indictment could be a BFP under § 853(n)(6)(B)).

requirement even though the property was not listed as subject to forfeiture in the indictment.[285]

Whether there is a generally-applicable duty to inquire that applies to all claimants in all cases is a question that has divided the courts. In *United States v. Coffman*, the court denied the claimant's motion for summary judgment because she had not established that she satisfied her affirmative duty to conduct a reasonable inquiry to determine if the property she purchased was subject to forfeiture.[286] But in *Petters*, the court held that a bank had no affirmative duty to inquire as to the forfeitability of property in which it was acquiring a lien, despite media reports that the defendant / property owner was the subject of a criminal investigation.[287]

The temporal requirement: when is the interest acquired

The person must be without reason to know that the property is subject to forfeiture *at the time she acquires her interest.* In *White,* the Eighth Circuit held that the temporal question – *when* the third party acquired the interest – is a question of state law.[288]

Eviction from forfeited property

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[285] *United States v. King,* 2012 WL 2261117, *9 (S.D.N.Y. June 18, 2012) (following *Assail*).

[286] *United States v. Coffman,* 2012 WL 5611510, *2 (E.D. Ky. Nov. 15, 2012).

[287] *United States v. Petters,* 2013 WL 269028 (D. Minn. Jan. 24, 2013).

[288] *United States v. White,* 675 F.3d 1073, 1081 (8th Cir. 2012).

Once a person residing on forfeited real property has failed to file a successful claim in the ancillary proceeding, she may be evicted.[289]

IX. Forfeiture and Restitution[290]

Forfeiture and restitution serve different purposes

The purpose of criminal forfeiture is punishment; the purpose of restitution is to reimburse the victim. Thus, forfeiture is measured by the gain to the defendant, while restitution is measured by the victim's loss.[291] For that reason, the amount of forfeiture and the amount of restitution will often be different.[292]

In *United States v. Navarrete,* the court provided an excellent illustration of how this can happen. If the defendant uses bribery to get a contract, the victim is the person who ends up paying more than he would have if the contract had been awarded fairly to defendant's competitor. To reimburse him for his loss, he is

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[289] *See United States v. Singleton,* 867 F. Supp. 2d 564, 571 (D. Del. 2012) (third party who failed to file claim in the ancillary proceeding, and has been evicted, cannot use Rule 41(g) to regain possession; her remedy was to file a claim pursuant to § 853(n)).

[290] *See generally AFLUS, supra* note 3, § 20-8.

[291] *See United States v. Torres,* 703 F.3d 194, 203 (2d Cir. 2012) ('restitution is loss based, while forfeiture is gain based"); *United States v. Navarrete*, 667 F.3d 886, 887-88 (7th Cir. 2012) (forfeiture is measured by the gain to the defendant; restitution is limited to the victim's loss).

[292] *See United States v. Adetiloye,* ___ F.3d ___, 2012 WL 1845520 (8th Cir. May 3, 2013) (forfeiture and restitution are different concepts; one is based on defendant's gain and the other on the victim's loss; district court erred in assuming forfeiture in a fraud case is limited to the amount of measurable loss to the victims); *United States v. Torres,* 703 F.3d 194, 203 (2d Cir. 2012) (the measures of forfeiture and restitution are different as their purposes are distinct; in a given case, the amounts may be identical, but they may often be different).

entitled *only to the incremental difference* between the two contracts, but the defendant *must forfeit the entire amount realized from the contract* as part of his sentence for the offense.[293]

An inconsistent jury calculation of the amount subject to forfeiture does not limit the amount of restitution.[294]

Restitution and forfeiture are both mandatory

As a general rule, the defendant is not entitled to an offset against a restitution order to reflect the amount forfeited, or *vice versa*.[295] Restitution and forfeiture are cumulative, and a defendant who has the resources to pay both must do so. In *United States v. Torres,* for example, the defendant who defrauded the housing authority had to pay restitution to the city agency that was

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[293] *United States v. Navarrete,* 667 F.3d 886, 889-90 (7th Cir. 2012).

[294] *See United States v. Read,* 710 Fed. Appx. 219, 231-32 (5th Cir. 2012) (rejecting defendant's argument that restitution to victims of health care fraud could not logically exceed the jury's calculation of the proceeds of the offense in returning a forfeiture verdict).

[295] *See United States v. Navarrete,* 667 F.3d 886, 888 (7th Cir. 2012) (restitution and forfeiture are cumulative; that are "a form of punitive damages piled on top of the other penalties for the defendant's crime"); *United States v. Powe*, 458 Fed. Appx. 569, 571 (7th Cir. 2012) (except where the same party would benefit, "restitution does not need to be offset by any forfeiture amount); *United States v. Emor,* 850 F. Supp. 2d 176, 215 (D.D.C. 2012) ("Although defendants in some cases must pay both restitution and criminal forfeiture, that result is not impermissible double recovery;" courts do not offset one against the other, though the prosecutor may recommend to the Attorney General that forfeited funds be applied to restitution"); *United States v. Marimon,* 507 Fed. Appx. 5 (2d Cir. 2012) (noting without discussion that defendant was ordered to pay restitution to theft victim and identical amount as forfeiture money judgment).

defrauded *and* forfeit the amount she saved on her rent as a result of the fraud.[296]

Likewise, the defendant is not entitled to a reduction in the forfeiture to reflect amounts his victims may have been able to recover. In *United States v. Wiese,* the court held that a defendant who defrauded banks was liable for the gross proceeds of the fraud with no offset for the amount the banks were able to recover by foreclosing on real property.[297]

If the defendant lacks sufficient funds to pay both the forfeiture and the restitution order, the Government may decide to apply the forfeited funds to satisfy the restitution order. Whether to do so is a matter that Congress left to the Attorney General's discretion.[298] But if the Government decides to apply forfeited funds to restitution, it may, in so doing, waive its right to make the defendant satisfy the restitution order out of other funds.[299]

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[296] *United States v. Torres,* 703 F.3d 194, 204 (2d Cir. 2012) (collecting cases holding that forfeiture and restitution both are mandatory).

[297] *United States v. Wiese*, 2012 WL 43369, *3 (E.D. Mich. Jan. 9, 2012).

[298] *See United States v. Pescatore*, 637 F.3d 128, 131 (2d Cir. 2011) (the U.S. Attorney may "recommend" that forfeited funds be applied to restitution, but final decision rests with the Attorney General; AFMLS did not abuse the discretion Congress gave to the Attorney General in 18 U.S.C. § 981(e)(6) when it denied an AUSA's recommendation on the ground that the defendant had sufficient assets to pay the restitution order out of his own funds).

[299] *See United States v. Brown*, 2012 WL 1952272, *1 (E.D.N.Y. May 30, 2012) (court restrains Government from attempting to satisfy restitution order out of defendant's other property once it has recommended that the Attorney General apply the forfeited funds to restitution).

Finally, if the Government agrees to use forfeited property to satisfy a restitution order, the defendant may have an interest in ensuring that it gets fair market value when it liquidates the property.[300] But in *United States v. Beyond Belief,* the court held that the defendant did not have the right to insist that the Government oppose a third party's claim even though recognizing the claim reduced the value of the property the Government agreed to apply to restitution. The Government, in other words, has no obligation to oppose a third party's meritorious claim just to maximize the value of the forfeited property that may be applied to restitution.[301]

X. Conclusion

Criminal forfeiture is a routine part of the prosecution of most federal crimes that were committed to make money, and there is now a large body of law describing what may be forfeited and the procedures that apply. The case law has settled some issues, however, a great many – including those arising as a result of the recent amendments to Rule 32.2, and those created by the Supreme Court's decisions in *Apprendi* and its progeny – remain unresolved. Several new cases are decided every day, a trend that is likely to continue for the foreseeable

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[300] *See United States v. Stewart*, 1999 WL 551891, *2-3 (E.D. Pa. June 25, 1999) (although defendant cannot object to the sale of forfeited property, where court orders that defendant receive credit against restitution order for the amount realized from the sale of the property, defendant may seek additional credit if he establishes that the property was sold below market value).

[301] *United States v. Beyond Belief*, 2013 WL 1426890 (S.D. Miss. Apr. 8, 2013).

future, making in necessary for courts and practitioners to continue to stay abreast of the law as it evolves.