

Criminal Forfeiture Procedure: 2006

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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.

Introduction

This article is intended to bring the reader up to date on developments in the federal case law relating to criminal forfeiture procedure. It does not cover every topic related to criminal forfeiture, nor all of the exceptions and nuances that apply to the topics that are discussed; 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

The article begins with the law on the scope of criminal forfeiture and the seizure and restraint of property prior to trial. It then continues more or less chronologically through the trial, sentencing, ancillary proceeding and post-trial phases of a criminal forfeiture case. 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 2005 and early 2006.

I. The Scope of Criminal Forfeiture

Every lecture on criminal forfeiture begins with the elementary point that because forfeiture is part of the sentence in a criminal case, the forfeiture is limited to the property involved in the offense for which the defendant was convicted. If the defendant is convicted of Crime X, the Government may forfeit the property involved in X, not the property involved in Crime Y. If the prosecutor wants to forfeit what is involved in Crime Y, he must convict the defendant of

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² For a similar analysis of the changes in the case law in 2003 and 2004, see 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).

Crime Y or file a separate civil forfeiture action. This point seems obvious but turns out to be far more subtle than was once thought.

Criminal forfeiture is limited to property involved in the offense of conviction

We start with the obvious: forfeiture may be ordered only with respect to the offense for which the defendant was convicted. As a district court held in *United States v. Wingerter*,³ if the defendant is convicted only of fraud, and is not convicted of money laundering, the Government can forfeit the property involved in the fraud, but not the property involved only in the money laundering offense that was committed by his co-defendants.⁴

Moreover, the property forfeited must be connected in some way to the *specific offense* for which the defendant was convicted; in a criminal case, it is not enough to show that the property was derived from a general course of conduct of which the offense of conviction was a part.

In *United States v. Juluke*,⁵ law enforcement agents pursued the defendant as he pulled from the driveway of his residence in his car. Realizing that he was being followed, and hoping to distance himself from any incriminating evidence, the defendant tossed a bag of heroin from the car window, but watched to his dismay as the bag exploded on the windshield of the agents' vehicle, dusting it with white powder. A subsequent search of the residence yielded evidence of on-going drug trafficking activity, including a quantity of currency, firearms and jewelry.

The defendant was charged with a drug offense and convicted. As part of his sentence, he was ordered to forfeit his residence as property used to facilitate the commission of his offense, as well as the firearms, currency and jewelry.⁶ On

³ *United States v. Wingerter*, 369 F. Supp. 2d 799 (E.D. Va. 2005).

⁴ *United States v. Wingerter*, 369 F. Supp. 2d 799, 809 n.19 (E.D. Va. 2005) (because defendant can only be liable to forfeit the property involved in the offenses for which he was convicted, he can only be liable for the amounts involved in the fraud offenses for which he was charged and not for the amounts involved in the money laundering offenses committed by his codefendants).

⁵ *United States v. Juluke*, 426 F.3d 323, 325 (5th Cir. 2005).

⁶ See 21 U.S.C. § 853(a) (authorizing criminal forfeiture of any property derived from or used to commit a drug trafficking offense).

appeal, the Fifth Circuit had little problem with most of the forfeiture; the house, firearms, and currency were all forfeitable as property involved in the offense for which the defendant was convicted; but the panel held that the Government had not established the requisite nexus between that offense and the jewelry. That property, the court said, appeared to have been purchased with the proceeds of earlier drug crimes, not the proceeds of the specific offense involved in the instant case.⁷

The Ninth Circuit said the same thing in *United States v. Nava*.⁸ If the defendant is convicted of drug dealing that started in 1997, he may be ordered to forfeit property derived from that offense, but not property derived from drug dealing that occurred back in 1991.⁹

There are several ways in which the Government can work around this limitation on the scope of criminal forfeiture. The most common is simply to file a civil forfeiture complaint against the property involved in the uncharged conduct. In the criminal case itself, however, the Government may forfeit all of the property involved in a series of offenses by charging the defendant with a conspiracy or other overarching offense.

For example, several years ago the Eleventh Circuit held that if a defendant is convicted of a money laundering conspiracy, he must forfeit all of the money he conspired to launder, including amounts involved in uncharged conduct or conduct alleged in substantive counts on which he was found not guilty.¹⁰

⁷ *United States v. Juluke*, 426 F.3d 323, 328-29 (5th Cir. 2005) (the Government must prove that the property subject to forfeiture was the proceeds of the drug activity that formed the basis for the defendant's conviction, not of the defendant's drug trafficking generally).

⁸ *United States v. Nava*, 404 F.3d 1119 (9th Cir. 2005)

⁹ *United States v. Nava*, 404 F.3d 1119, 1129 n.5 (9th Cir. 2005) (even though defendant was engaged in drug dealing as long ago as 1991, Government's interest in his property did not vest until 1997 because the only offense for which he was convicted began in that year; there can be no forfeiture based on earlier conduct that was not charged).

¹⁰ *United States v. Hasson*, 333 F.3d 1264, 1279 n.19 (11th Cir. 2003) (the court in a money laundering case may not impose a forfeiture order based on a money laundering offense with which defendant was not charged or for which he was acquitted, but if he is convicted of a conspiracy, the forfeiture may be based on amounts defendant conspired to launder, including amounts derived from uncharged substantive conduct, or substantive counts for which he has been acquitted).

Similarly, this year, in *United States v. Hively*,¹¹ the Eighth Circuit held that a defendant convicted of a RICO offense must forfeit all of the proceeds of the offense, including property derived from substantive predicate acts on which he was personally acquitted.¹²

A district court reached a similar result in *United States v. Rodriguez*.¹³ In that case, the defendant was convicted of six substantive counts of structuring currency transactions in violation of 31 U.S.C. § 5324. Because the jury found the offense to be part of a pattern involving more than \$100,000 in a 12-month period, the defendant was subject to the enhanced penalty provision in Section 5322(b).

In the same vein, the Government argued that because the crime was part of a continuing offense, the forfeiture should not be limited to the amounts involved in the six substantive offenses on which the defendant was found guilty, but should include all of the funds involved in the entire scheme. The district court agreed with the Government and ordered the forfeiture of \$1.2 million.¹⁴

The scope of forfeiture in fraud cases

The interesting question is how this principle applies in fraud cases in which the Government is required to prove that the defendant engaged in a “scheme or plan.”¹⁵ If the Government proves the existence of the scheme but the defendant is convicted of only 10 representative counts of fraud involving, say, 10 mailings or 10 victims, must the forfeiture be limited to the amount involved in those 10 counts, or must the defendant forfeit the amount involved in the entire scheme? The law has been unclear on that for some time, but the Seventh Circuit has now upheld the pre-trial restraint of the amount involved in an

¹¹ *United States v. Hively*, ___ F.3d ___, 2006 WL 305515 (8th Cir. Feb. 10, 2006).

¹² *Id.*, at *8 (RICO defendant is liable for the proceeds of the entire scheme, not just the proceeds of the two predicate acts on which he was convicted).

¹³ *United States v. Rodriguez*, Cr. No. 03-789 (FLW) (D.N.J. June 6, 2005).

¹⁴ *United States v. Rodriguez*, Cr. No. 03-789 (FLW), slip op. at 4-5 (D.N.J. June 6, 2005) (forfeiture in a structuring case is not limited to the amounts involved in the substantive offenses on which the defendant was convicted; if the jury finds that the offenses were part of a course of conduct involving more than \$100,000 in a 12-month period, the Government is entitled to the forfeiture of property involved in that course of conduct).

¹⁵ See, e.g., 18 U.S.C. §§ 1341 and 1343.

entire fraud scheme even though the defendant was charged with substantive counts involving only a fraction of the money.

In *United States v. Phillips*,¹⁶ the original indictment charged the defendant – a health care professional involved in providing psychotherapy to nursing home patients – with five substantive health care fraud violations involving a total of \$47,947.87 in proceeds. When the Government sought the pre-trial restraint of a larger amount, the defendant objected, arguing that because only the smaller amount could be forfeited, only that amount could be restrained. In response, the Government obtained a superseding indictment which alleged the same five substantive counts but also alleged that the defendant had obtained a total of \$1,165,000 in fraud proceeds in the course of the scheme.

Relying on the allegations in the superseding indictment, the district court entered an order restraining the larger amount that the Government wanted preserved for forfeiture in the event of conviction. The defendant continued to object, but on appeal, the panel held that as long as the indictment alleged that the larger amount was obtained in the course of the scheme, it could be restrained pre-trial.¹⁷

Property of third parties cannot be forfeited in a criminal case

In *Nava*, the Ninth Circuit also reiterated the general proposition that property belonging to third parties cannot be forfeited in a criminal case. In that case, the Government was seeking the forfeiture of property used to facilitate the distribution of methamphetamine. Because the defendant's daughter was the real owner of the property, the court said, the property could not be forfeited as part of the defendant's sentence. In such cases, if the Government wants to forfeit the property, it must commence a parallel civil forfeiture case in which the daughter would have to establish an "innocent owner" defense under 18 U.S.C. § 983(d).¹⁸

¹⁶ *United States v. Phillips*, 413 F.3d 913 (7th Cir. 2005)

¹⁷ *United States v. Phillips*, 434 F.3d 913, 915 (7th Cir. 2005) (pretrial restraint of defendant's assets is not limited by the amount involved in the specific substantive health care fraud counts alleged in the indictment as long as the amount of proceeds derived from the entire scheme is alleged as well).

¹⁸ *United States v. Nava*, 404 F.3d 1119, 1124 (9th Cir. 2005) (explaining the difference between civil and criminal forfeiture; because criminal forfeiture is in personam, only the defendant's property can be forfeited; because defendant's daughter was the true

A district court in Ohio made the same point in *United States v. Holden*.¹⁹ Criminal forfeiture, the court said, puts the Government in the shoes of the defendant, “acquiring only the rights of the defendant at the time of the criminal acts, and nothing more.”²⁰ In that case, however, the court held that the family members who challenged the forfeiture of the property in the criminal case had no ownership rights in the property and thus could not prevail.²¹

Property involved in money laundering

If property belonging to third parties cannot be forfeited in a criminal case, can anything be forfeited in a money laundering case in which the defendant is convicted of laundering money on behalf of someone else? As the district court held in *United States v. Tedder*,²² the answer is yes: property involved in money laundering, like criminal proceeds, can always be forfeited in a criminal case based on its nexus to the offense.

Criminal forfeiture does not require proof that the defendant has acquired an interest in the property; the rule is only that property belonging to a third party *cannot* be forfeited. A defendant may never acquire a legal interest in the proceeds of crime, yet he may be required to forfeit those proceeds if he is convicted. Similarly, a defendant may never acquire a legal interest in the property he is laundering for a third party, but the forfeiture of the property may be ordered in the criminal case.²³

As discussed later, forfeiture in a criminal case is based on the nexus of the property to the offense, not on the ownership of the property. The ownership

owner and not merely a nominee, she was entitled to prevail in the ancillary proceeding).

¹⁹ *United States v. Holden*, 2005 WL 1593911 (N.D. Ohio Jul. 7, 2005).

²⁰ *Id.*, at 2.

²¹ *Id.*, at 4.

²² *United States v. Tedder*, 2003 WL 23204849, at *2-3 (W.D. Wis. Jul. 28, 2003), *aff'd*, 403 F.3d 836 (7th Cir. 2005).

²³ *See United States v. Tedder*, 2003 WL 23204849 (W.D. Wis. Jul. 28, 2003) (the laundered money may be forfeited in a money laundering case in which the money launderer is convicted without having to show that the defendant was the owner of the money); *aff'd*, 403 F.3d 836 (7th Cir. 2005).

issue comes into play only in the ancillary proceeding if a third party objects to the forfeiture on the ground that the property really belongs to him. Thus, in a money laundering case, the third party owner of the property may make a claim to it in the ancillary proceeding if he wants to, but barring such a successful claim, the property is subject to forfeiture.²⁴

II. Criminal Forfeiture Procedure

Most criminal forfeiture statutes describe the property subject to forfeiture in connection with a given offense but do not contain any procedural provisions. Rather, most statutes incorporate the procedures from 21 U.S.C. § 853.²⁵ Section 853 contains several references, however, to property subject to forfeiture “under subsection (a).”²⁶ In a drug case where § 853 applies directly, the references to “subsection (a)” are to § 853(a), which describes the property subject to forfeiture in a drug case. The question addressed by the district court in *United States v. Ivanchukov*²⁷ was what do those references mean when the provisions of § 853 are incorporated into another forfeiture statute.

The district court explained that in those instances, the references to “subsection (a)” in § 853 should be read as referring the to the substantive portion of the statute into which the procedures are incorporated.²⁸ So, when the procedures in § 853 are incorporated into § 982, for example, the references to “subsection (a)” are to the applicable provisions in § 982(a), which describes the

²⁴ Moreover, as discussed later, if it cannot recover the laundered property itself, the Government is entitled to a money judgment against the defendant for the amount laundered.

²⁵ 28 U.S.C. § 2461(c) provides that the procedures in 21 U.S.C. § 853 serve as the procedures for all criminal forfeiture cases, whether they are incorporated into the forfeiture statute by reference or not. Some statutes nevertheless incorporate the procedures by reference. *See, e.g.*, 18 U.S.C. § 982(b).

²⁶ *See, e.g.*, §§ 853(c) and (e).

²⁷ *United States v. Ivanchukov*, 405 F. Supp.2d 708 (E.D. Va. 2005).

²⁸ *Id.* at 711-12 (for forfeitures governed by § 982, § 982(b) incorporates all of the procedures from 21 U.S.C. § 853 – including those relating to pre-trial restraint and substitute assets – and the references to “subsection (a)” in § 853 are meant as references to § 982(a)).

property subject to forfeiture in connection with money laundering,²⁹ alien smuggling,³⁰ and numerous other federal crimes.

III. Pre-Trial Seizure of Assets

In *Baranski v. Fifteen Unknown Agents*,³¹ the Fifth Circuit had to determine what effect the illegal pre-trial seizure of the defendant's property might have on the ability of the court to order the criminal forfeiture of that property as part of the defendant's sentence. The court's answer was that it would have no effect at all. The defendant's remedy for the illegal seizure is to move to suppress the use of the seized property as evidence at trial. But because pre-trial seizure is not required for criminal forfeiture, an illegal seizure will not bar the forfeiture of the property once the defendant is convicted.³²

IV. Pretrial Restraint of Assets

The criteria for issuing a post-indictment restraining order

All courts that have addressed the issue hold that the defendant has no right to a pre-restraint hearing when the Government seeks a pre-trial restraining order to preserve his property for forfeiture pending trial; thus the Government may apply for, and the court may issue, the restraining order *ex parte*.³³ In *United States v. Jamieson*,³⁴ the Sixth Circuit followed the general rule, holding that the

²⁹ See § 982(a)(1).

³⁰ See § 982(a)(6).

³¹ *Baranski v. Fifteen Unknown Agents*, 401 F.3d 419 (6th Cir. 2005).

³² *Baranski v. Fifteen Unknown Agents*, 401 F.3d 419 (6th Cir. 2005) (it is not necessary for the Government to have seized the property prior to obtaining a criminal forfeiture order; therefore, an illegal seizure has no effect on a criminal forfeiture).

³³ See, e.g., *United States v. Monsanto*, 924 F.2d 1186, 1193 (2d Cir. 1991); ("notice and a hearing need not occur before an *ex parte* restraining order is entered pursuant to section 853(e)(1)(A)"). But some courts consider this an open question. See *United States v. Kirschenbaum*, 156 F.3d 784, 792 (7th Cir. 1998) (whether pre-restraint hearing is required is an open question); *United States v. Melrose East Subdivision*, 357 F.3d 493, 499 n.3 (5th Cir. 2004) (same, but noting authority for the proposition that due process does not require a pre-restraint hearing in the context of post-indictment restraining orders).

³⁴ *United States v. Jamieson*, 427 F.3d 394 (6th Cir. 2005).

restraining order was properly issued based on the grand jury's finding of probable cause in the indictment, and that the defendant's due process rights were adequately protected by his right to a post-restraint hearing under the *Jones-Farmer* rule.³⁵

In *Wingter*, the district court made the same point regarding the issuance of the restraining order based on the grand jury's finding of probable cause.³⁶ Moreover, the court reiterated what the Supreme Court held in *Monsanto*: issuance of a pretrial restraining order is not discretionary; if the Government makes the requisite showing, the court must enter the order.³⁷ That rule, the court emphasized, applies equally in the Fourth Circuit whether the property subject to pre-trial restraint is directly traceable to the underlying offense or is forfeitable only as a substitute asset.³⁸

Restraining orders under 28 U.S.C. § 2461(c): the Razmilovic issue

As already mentioned, most criminal forfeiture statutes borrow their forfeiture procedures from § 853. In the older provisions, this was done by direct incorporation of the § 853 procedures into whatever statute needed them.³⁹ In 2000, however, Congress enacted 28 U.S.C. § 2461(c) to make the procedures

³⁵ *United States v. Jamieson*, 427 F.3d at 405-06 (restraining order may be entered upon the filing of the indictment; post-restraint hearing under the *Jones-Farmer* rule is sufficient to protect defendant's right to due process). The *Jones-Farmer* rule is discussed in the text, *infra*.

³⁶ *United States v. Wingter*, 369 F. Supp. 2d 799, 806 n.10 (E.D. Va. 2005) (the listing of the property in the forfeiture allegation in the indictment reflects the grand jury's finding of probable cause regarding the forfeitability of the property; the restraining order may be issued based on the showing of probable cause alone; there is no need to show, as there is for preindictment orders, that the property is likely to disappear).

³⁷ *United States v. Wingter*, 369 F. Supp. 2d 799, 811 (E.D. Va. 2005) ("there is no discretion to permit a defendant to spend assets that are subject to forfeiture, including substitute assets. They must be preserved for forfeiture."), citing *United States v. Monsanto*, 491 U.S. 600, 612-13 (1989) (the word "may" in section 853(e) means only that the district court may enter a restraining order if the Government requests it, but not otherwise, and that it is not required to enter the order if a bond or other means exists to preserve the property; it "cannot sensibly be construed to give district court[s] discretion to permit the dissipation of the very property that section 853(a) requires to be forfeited upon conviction").

³⁸ *Id.*

³⁹ See e.g. 18 U.S.C. § 982(b).

in § 853 the default for any criminal forfeiture statute that did not have procedures of its own. Because of an ambiguity in the drafting of § 2461(c), however, the courts were divided over whether that statute incorporated the pre-trial restraining order provision in section 853(e).

In 2004, two district courts, one of them in the Enron case, held that § 2461(c) incorporates *all* of the provisions of § 853, including the restraining order provision in § 853(e).⁴⁰ But in 2005 the Second Circuit went the other way, holding in *United States v. Razmilovic* that there is no authority to issue a pre-trial restraining order in a fraud case or any other case where the forfeiture depends on § 2461(c).⁴¹ In the court's view, the phrase "upon conviction" in § 2461(c) referred not only to the time when the order of forfeiture must be entered but also limited the incorporation of the procedures from § 853 to those that applied in the post-conviction context.⁴²

In 2006, Congress acted quickly to rectify this problem, rewriting § 2461(c) to make clear that the procedures in § 853 apply to all stages of a criminal forfeiture case.⁴³

Post-restraint hearings: the Jones-Farmer rule

The emerging rule is that a post-restraint, pretrial hearing is required only if the Sixth Amendment is implicated (because the defendant has no other funds with which to hire counsel), and only if the defendant makes a prima facie showing that there is no probable cause for the forfeiture of the restrained

⁴⁰ See *United States v. Causey*, 309 F. Supp. 2d 917, 922 (S.D. Tex. 2004) (section 2461(c) incorporates the restraining order provision in section 853(e); if Congress meant to exclude that subsection, it would not have expressly excluded only subsection (d)); *United States v. Wittig*, 2004 WL 1490406, at *2 (D. Kan. Jun. 30, 2004) (section 2461(c) incorporates pretrial restraining order provision in section 853(e)).

⁴¹ *United States v. Razmilovic*, 419 F.3d 134, 137-38 (2d Cir. 2005) (section 2461(c) incorporates only the post-conviction procedures in section 853; because section 853(e) is not a post-conviction procedure, it is not incorporated, and there was no need for Congress to expressly exclude it).

⁴² *Id.* at 137.

⁴³ See USA PATRIOT Improvement and Reauthorization Act of 2005, Pub.L. 109-____, § 410 (2006).

property. This is the *Jones-Farmer* rule.⁴⁴ In 2005, there were a number of new cases applying this rule.

In *Jamieson*, the district court applied the rule, holding that the defendant had no right to a post-restraint hearing unless he showed that he had no access to funds from friends or family that he could use to hire counsel.⁴⁵ Then, when the defendant made that showing, the court conducted a probable cause hearing but refused to release the restrained funds when the Government satisfied the probable cause requirement. On appeal, the Sixth Circuit said it had “no quarrel” with what the district court had done.⁴⁶

In *United States v. Varner*,⁴⁷ the district court followed *Farmer*, denying the defendant’s request for a probable cause hearing for failure to show that he was “completely unable to afford counsel without resorting to the restrained assets.”⁴⁸ Similarly, in *United States v. 250 Lindsay Lane*,⁴⁹ the district court, following *Jones*, *Farmer* and *Jamieson*, conducted a *Jones* hearing, determined that the defendant had satisfied both requirements, and then a probable cause hearing at which it determined that a fraction of the restrained assets had to be released.⁵⁰

⁴⁴ See *United States v. Jones*, 160 F.3d 641, 647 (10th Cir. 1998) (defendant has initial burden of showing that he has no funds other than the restrained assets 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); *United States v. Farmer*, 274 F.3d 800, 804-05 (4th Cir. 2001) (defendant entitled to pretrial hearing if property is seized for civil forfeiture if he demonstrates that he has no other assets available; following *Jones*).

⁴⁵ *United States v. Jamieson*, 189 F. Supp. 2d 754, 757 (N.D. Ohio 2002) (following *Jones*; to satisfy Sixth Amendment requirement, defendant must show he has no access to funds from friends or family; Government has right to rebut showing of lack of funds if hearing is granted).

⁴⁶ *United States v. Jamieson*, 427 F.3d 394, 406-07 (6th Cir. 2005) (approving district court’s decision to apply *Jones*, and noting that court gave defendant second chance to satisfy *Jones* and then had Government put on a witness to establish probable cause).

⁴⁷ *United States v. Varner*, 2005 WL 2206083 (W.D. Va. Sept. 9, 2005).

⁴⁸ *Id.*, at *1.

⁴⁹ *United States v. 250 Lindsay Lane*, 2005 WL 1994762 (W.D. Ky. Aug. 16, 2005).

⁵⁰ *Id.*, at *7.

It is worth noting that the district courts in the Fourth Circuit hold that *Jones-Farmer* applies to substitute assets that have been restrained pretrial.⁵¹

Jones-Farmer is still not universally accepted as the procedure governing post-restraint hearings, however. In *Phillips*, for example, the Seventh Circuit reserved judgment on whether to adopt it, but held that whatever the standard might be for triggering the defendant's right to a post-restraint hearing, she certainly had to do more than make a conclusory statement that she needed the money for her defense.⁵²

The important thing to remember is that satisfying the *Jones* requirements just gets the defendant a probable cause hearing; if the Government establishes probable cause, the property remains restrained, even if the defendant needs the money to retain counsel.⁵³ 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.

In *Jamieson*, the court found that the Government satisfied the probable cause requirement and therefore held that the property would remain under restraint. To preserve the defendant's Sixth Amendment rights, it appointed counsel under the CJA and authorized \$100,000 for investigative expenses and expert witnesses. The defendant complained that that wasn't enough, but the Sixth Circuit affirmed the conviction.⁵⁴

⁵¹ See *United States v. Wingerter*, 369 F. Supp. 2d 799, 809 (E.D. Va. 2005) (in districts that permit the pretrial restraint of substitute assets, the defendant may challenge the restraint at a *Monsanto* hearing only if he first satisfies both criteria under the *Jones-Farmer* rule); *United States v. Benyo*, 384 F. Supp. 2d 909, 911 (E.D. Va. 2005) (scheduling a *Monsanto* hearing on the continuation of pretrial restraint of substitute assets after defendants satisfy both *Jones* requirements).

⁵² *United States v. Phillips*, 434 F.3d 913, 915 (7th Cir. 2005) (finding it unnecessary to decide under what circumstances due process requires a post-restraint probable cause hearing because whatever the standard may be, defendant must do more than make a conclusory statement that she needs the money for her defense). See also *United States v. Jamieson*, 427 F.3d 394, 406 n.3 (6th Cir. 2005) (collecting cases following *Jones-Farmer* and other procedures).

⁵³ See *United States v. Monsanto*, 491 U.S. 600, 615 (1989).

⁵⁴ *United States v. Jamieson*, 427 F.3d 393, 405 (6th Cir. 2005) (Government established probable cause at *Monsanto* hearing, so property remained restrained and court

In *United States v. Prejean*,⁵⁵ a defendant who was charged with distributing unnecessary prescription pain medications complained that the district court had restrained the funds that he needed to retain counsel. The court applied *Jones-Farmer*, determined that the defendant had a right to a hearing, and then, after the hearing, agreed to release \$300,000. The defendant said that that wasn't enough, that he needed more money for counsel and living expenses; but the court explained that defendant did not understand the process.

His showing that he needed the restrained money for counsel and living expenses meant that the defendant satisfied the *Jones* requirements and was entitled to a probable cause hearing, but if the Government established probable cause as to all but \$300,000, then \$300,000 was all that defendant was entitled to have released. That he needed more money than that was irrelevant; if the Government had established probable cause as to the entire amount restrained he would have been entitled to the release of nothing at all.⁵⁶

The district court's decision in *250 Lindsay Lane* is to the same effect: because the Government established probable cause as to 82 percent of the restrained property, the court held, only 18 percent could be released for attorneys fees. The amount the defendant claimed he needed for attorneys fees was irrelevant at that point.⁵⁷

Procedure at the probable cause hearing

appointed Criminal Justice Act counsel to represent defendant at trial and authorized \$100,000 for investigative expenses and expert witnesses).

⁵⁵ *United States v. Prejean*, 2005 WL 3543817 (E.D. La. Oct. 21, 2005).

⁵⁶ *Id.*, at *2 (applying *Jones* and *Melrose East*: defendants' showing that they have no other funds with which to hire counsel or pay living expenses means that they have a due process right to a probable cause hearing, but it does not determine the amount of money to be released; whether defendants are entitled to the release of some, all, or none of the restrained property depends on the Government's ability to show probable cause to believe the property is forfeitable, not on the extent of the defendants' financial need).

⁵⁷ *United States v. 250 Lindsay Lane*, 2005 WL 1994762, at *7 (W.D. Ky. Apr. 16, 2005) (following *Melrose East*; because Government established probable cause as to 82 percent of the restrained property, only 18 percent could be released for attorney's fees and living expenses).

If the defendant is entitled to a hearing, the Government's burden is to establish probable cause.⁵⁸ Generally, while the court may rely on the grand jury's finding of probable cause to issue the restraining order, if the defendant is entitled to a probable cause hearing, he can challenge the grand jury's finding *ab initio* at the hearing.⁵⁹

Evidence needed to establish probable cause for restraint at the Monsanto hearing:

What evidence must the Government put on to establish probable cause that the restrained property is criminal proceeds? In *Jamieson*, it satisfied the requirement with a witness who testified that the defendant's only source of income was his fraud scheme.⁶⁰ In *Lindsay Lane*, it showed that 82 percent of defendant's income was from fraud, which allowed the court to conclude that 82 percent of the property he acquired during that time was from fraud proceeds.⁶¹

If the court has ordered the restraint of substitute assets, the question at the probable cause hearing is whether there is probable cause to believe the

⁵⁸ See *United States v. Monsanto*, 491 U.S. 600, 615-16 (1989) (standard for issuance of restraining order is probable cause); *United States v. Wingerter*, 369 F. Supp. 2d 799 (E.D. Va. 2005) (issue at the *Monsanto* hearing is whether there is probable cause to believe the property is subject to forfeiture; if Government's theory is that defendants are jointly and severally liable, there must be probable cause to believe amount to be forfeited was foreseeable to defendant); *United States v. Jamieson*, 189 F. Supp. 2d 754, 756 (N.D. Ohio 2002) (Rule 65 does not apply to post-indictment restraining orders), *aff'd*, 427 F.3d 394 (6th Cir. 2005).

⁵⁹ See *United States v. Jamieson*, 427 F.3d 394, 406 (6th Cir. 2005) (initial issuance of restraining order may be based on grand jury's finding of probable cause; probable cause may be challenged in post-restraint hearing if defendant satisfies *Jones* requirements); *United States v. 250 Lindsay Lane*, 2005 WL 1994762, at *6 (W.D. Ky. Aug. 16, 2005) (after defendant satisfies *Jones* requirements, he may challenge the probable cause for the forfeiture, but not the probable cause for the underlying criminal offense).

⁶⁰ *United States v. Jamieson*, 427 F.3d 394, 407 (6th Cir. 2005) (testimony of witness who said defendant's only source of income during the time he acquired the restrained assets was his fraud scheme was sufficient to establish probable cause).

⁶¹ *United States v. 250 Lindsay Lane*, 2005 WL 1994762, at *7 (W.D. Ky. Aug. 16, 2005) (if 82 percent of defendant's income was from fraud, then there is probable cause to believe that 82 percent of the property acquired during that period is subject to forfeiture as property traceable to the fraud).

defendant committed the offense and whether the value of the property subject to forfeiture exceeds the value of the restrained funds.⁶²

Filing a lis pendens

A *lis pendens* is not a restraint. Thus, courts in circuits that do not permit the pre-trial restraint of substitute assets nevertheless allow the Government to file a *lis pendens* on assets that are named as subject to forfeiture in the indictment, whether they are directly traceable to the underlying offense or not.⁶³

Restraining assets of third parties

Courts continue to hold that property held by third parties may be restrained to preserve the Government's interest in the property pending trial. For example, in *United States v. Bailey*,⁶⁴ a defense attorney dissipated the forfeitable property that had been transferred to him by his client before the Government could recover it through forfeiture. The Eleventh Circuit explained that the Government could have avoided this result by requesting a pre-trial restraining order preventing the attorney from dissipating the assets.⁶⁵

Several years ago, the Seventh Circuit appeared to hold that a court could not restrain property held by the defendant's wife because she was not a party to the criminal case.⁶⁶ But in *Phillips* the court explained that there is no problem

⁶² See *United States v. Wingerter*, 369 F. Supp. 2d 799, 809-10 (E.D. Va. 2005) (*Monsanto* applies to the pretrial restraint of substitute assets in districts that permit such restraint; notwithstanding defendant's need to use restrained funds to hire counsel, substitute assets remain restrained if there is probable cause to believe defendant committed the offense and that the value of the property subject to forfeiture does not exceed the value of the restrained funds).

⁶³ See *United States v. Lebed*, 2005 WL 2495843, at *9-10 (E.D. Pa. Oct. 7, 2005) (*lis pendens* is not a restraint; therefore, the Government may file *lis pendens* on substitute assets).

⁶⁴ *United States v. Bailey*, 419 F.3d 1208 (11th Cir. 2005).

⁶⁵ *Id.* at 1218 (noting that the Government is not without remedy when the forfeitable property is in the hands of a third party: it can request a pretrial restraining order).

⁶⁶ See *United States v. Kirschenbaum*, 156 F.3d 784, 795 (7th Cir. 1998) (court has no jurisdiction over defendant's wife and so cannot restrain her property, but court may restrain property held in name of defendant's wife after finding defendant was the true owner).

restraining property held in the name of a third party if the Government has probable cause to believe that the property will be forfeited from the defendant under the relation back doctrine once he is convicted.⁶⁷

In the same case, the court also held that the defendant lacked standing to object to the restraining order on the ground that the property belonged to her husband.⁶⁸ Property rights are personal; the defendant has the right to object to the restraint of her own property but not that of a third party.

Violating the restraining order

Several years ago, in *United States v. Saccoccia*,⁶⁹ the First Circuit held that a defense attorney who accepts a fee from a defendant after the defendant's property has been restrained may be held in contempt of court. The case involved a Rhode Island gold dealer who was convicted of money laundering and ordered to forfeit nearly \$140 million in laundered funds. Following up on the court's suggestion, the Government brought a civil contempt action against several defense attorneys who had accepted fees from the defendant after he was found guilty and while a restraining order against his property was still in effect. The district court entered the contempt order, but in 2005 the First Circuit vacated the order on appeal.

The decision turned not on forfeiture law but on the law governing civil contempt. For a person to be found in contempt of a restraining order, the panel said, the court must find that the order was "clear and unambiguous." In this case, the order restrained the defendant and his associates from transferring \$140 million to any third party, but it did not say that *all* of the defendant's assets were restrained. There was evidence in the record indicating that the defense

⁶⁷ *United States v. Phillips*, 434 F.3d 913, 916 (7th Cir. 2005) (following *Kirschenbaum*; property held in third party's name may be restrained pretrial if there is probable cause to believe property will be forfeited from the defendant under the relation back doctrine). See 21 U.S.C. § 853(c) (providing that the Government's interest in forfeitable property relates back to the time of the offense giving rise to the forfeiture, thus rendering void any post-offense transfer of the property from the defendant to a third party).

⁶⁸ *Id.* at 916 (defendant lacked standing to object to restraining order on ground that property belonged to her husband).

⁶⁹ *United States v. Saccoccia*, 354 F.3d 9, 14 (1st Cir. 2003) (if defense counsel accepted a fee paid with forfeitable property when such property was subject to a pretrial restraining order, counsel may be held in civil or criminal contempt)

attorneys might have been under the impression that the defendant had other, unrestrained funds with which he could pay his attorneys. Accordingly, the court held, the defense attorneys were not clearly on notice that accepting hundreds of thousands of dollars in fees from the defendant violated the restraining order.⁷⁰

Pretrial restraint of substitute assets

In 2005, the courts in the Fourth Circuit continued to hold that all property subject to forfeiture may be restrained pending trial, whether or not it is directly traceable to the offense.⁷¹ For the most part, courts in the other circuits limit pre-trial restraining orders to traceable property.⁷²

V. Indictment

Rule 32.2(a)

Rule 32.2(a) says that there can be no forfeiture unless the defendant was given notice of the forfeiture in the indictment.⁷³ In *United States v. Dolney*,⁷⁴ the defendant moved to dismiss the forfeiture allegation on the ground that it was

⁷⁰ *United States v. Saccoccia*, 433 F.3d 19, 29-30 (1st Cir. 2005) (a person may not be found in civil contempt of a restraining order unless it clearly and unambiguously identifies the property restrained; defense attorney who accepted fees from defendant after court issued order restraining “\$140 million in U.S. Currency” could not be found in contempt because the order did not clearly state that all of defendant’s assets were restrained or that the attorney was required to prove that the fee came from unrestrained assets).

⁷¹ See *In Re Billman*, 915 F.2d 916, 921 (4th Cir. 1990); *United States v. Bollin*, 264 F.3d 391, 421 (4th Cir. 2001); *United States v. Ivanchukov*, 405 F. Supp.2d 708, 713 n.9, (E.D. Va. 2005) (substitute assets may be restrained before they are paid to attorney as attorneys fees); *United States v. Wingerter*, 369 F. Supp. 2d 799, 806-07 (E.D. Va. 2005) (describing split in the circuits and explaining the Fourth Circuit rule as consistent with the holding that the relation back doctrine applies to substitute assets).

⁷² *Id.*

⁷³ F.R.Crim.P. 32.2(a).

⁷⁴ *United States v. Dolney*, 2005 WL 1076269 (E.D.N.Y. Mar. 3, 2005).

surplusage, but the court held that the allegation was required by the Rule and thus could not be considered surplusage.⁷⁵

The property subject to forfeiture need not be itemized

Dolney also held that the Government does not have to list the forfeitable property in the indictment. A forfeiture allegation that simply tracks the language of the forfeiture statute without itemizing the property subject to forfeiture is not unconstitutionally vague, the court said. All the Government is required to do is to notify the defendant that it will be seeking forfeiture in accordance with the statute.⁷⁶

Another court said the same thing in *United States v. Borich*.⁷⁷ In that case, the court held that as long as the indictment put the defendant on notice that the Government would be seeking to forfeit the proceeds of the offense, it was unnecessary to list specifically the two vehicles that the Government intended to forfeit as property traceable to the proceeds of the offense.⁷⁸

Specifying the amount of the money judgment

Similarly, it has long been the rule that the indictment need not inform the defendant that the indictment could take the form of a money judgment.⁷⁹ If the Government does not have to mention the possibility of a money judgment, then surely it does not have to specify the amount of the money judgment either. But

⁷⁵ *Id.*, at *9 (denying motion to dismiss forfeiture allegation as surplusage; Government is required by Rule 32.2(a) to include a forfeiture allegation if it intends to seek forfeiture).

⁷⁶ *Id.*, at *7 (following the Advisory Committee Note; there is no need to itemize the property subject to forfeiture; the Government need only inform the defendant that it will be seeking forfeiture in accordance with the statute).

⁷⁷ *Borich v. United States*, 2005 WL 1668411 (D. Minn. Jul. 18, 2005).

⁷⁸ *Id.*, at *2 (forfeiture allegation stating that Government would seek forfeiture of proceeds of defendant's drug trafficking activity was sufficient; it was not necessary to name two vehicles as subject to forfeiture).

⁷⁹ See *United States v. Navarro-Ordas*, 770 F.2d 959, 969 n.19 (11th Cir. 1985) (Rule 7(c)(2) does not require notice to defendant that he will be subject to a money judgment); *United States v. Tedder*, 2003 WL 23204849, at *2 (W.D. Wis. Jul. 28, 2003) (forfeiture allegation need not make specific reference to the possibility that the forfeiture will take the form of a money judgment), *aff'd*, 403 F.3d 836 (7th Cir. 2005).

a district court decision from Pennsylvania provides a cautionary note to prosecutors: if the Government does choose to specify the amount of the money judgment, the court said, it may be stuck with the number it chose.⁸⁰

Statute of limitations

An indictment charging a defendant with an offense must be returned within the statute of limitations. In *United States v. Liersch*,⁸¹ the indictment was returned within that period, but the Government then decided to supersede the indictment to add a forfeiture allegation after the limitations period expired. The court held that that was proper because the forfeiture was only part of the punishment for the offense already charged and not a new substantive offense.⁸²

VI. Trial

Bifurcated Proceeding

Under Rule 32.2(b), the criminal trial must be bifurcated into guilt and forfeiture phases.⁸³ In *Dolney*, the defendant who wanted the forfeiture allegation dismissed as surplusage also wanted to combine the guilt and forfeiture phases of the trial. His argument was that combining the forfeiture with the guilt phase would mean that the reasonable doubt standard would have to apply to the forfeiture, but the court held that the Rule requires a bifurcated proceeding.⁸⁴ As

⁸⁰ See *United States v. Pantelidis*, 2005 WL 1320135, at *2 (E.D. Pa. Jun. 1, 2005) (if the Government specifies an amount subject to forfeiture in the indictment, it is “stuck with the number it chose” and cannot seek a different amount following conviction). *But see United States v. Descent*, 292 F.3d 703, 706 (11th Cir. 2002) (because forfeiture is part of sentencing, modification of amount Government is seeking as money judgment is not an improper amendment to the indictment).

⁸¹ *United States v. Liersch*, No. 04CR02521 (N.D. Cal. May 2, 2005).

⁸² *United States v. Liersch*, No. 04CR02521, slip op. at 18 (N.D. Cal. May 2, 2005) (a prosecution for an offense must be brought before the applicable statute of limitations expires, but because forfeiture is not a separate offense, but is only part of the punishment for an offense, a forfeiture allegation may be added by way of a superseding indictment after the statute of limitations has expired).

⁸³ F.R.Crim.P. 32.2(b)(1).

⁸⁴ *United States v. Dolney*, 2005 WL 1076269, at *10 (E.D.N.Y. May 3, 2005) (denying defendant’s motion to combine guilt and forfeiture phases; Rule 32.2(b) makes clear that the

the court explained, bifurcation simplifies the jury instructions and makes sure that the jury determining the defendant's guilt is not influenced by the potential punishment.⁸⁵

Burden of Proof

Courts continue to hold that because forfeiture is part of sentencing, the Government's burden is to establish the forfeitability of the property by a preponderance of the evidence, unless the statute says otherwise.⁸⁶ One example of the exception to the rule was noted by the district court in *United States v. Reiner*,⁸⁷ where the Government was required to establish the forfeitability of property under the child pornography statute beyond a reasonable doubt.⁸⁸

Application of Apprendi, Blakely, and Booker to criminal forfeiture

A year ago, it was unclear whether the case law upholding the preponderance standard would survive the Supreme Court's decision in *Booker*.⁸⁹ We now have the answer: every court addressing the question has held that *Booker* does not apply to criminal forfeiture.

trial must be bifurcated).

⁸⁵ *Id.*, at *10 ("bifurcating the determinations of guilt and forfeiture ensures that the jury is neither distracted nor influenced by considerations of the defendants' potential punishment").

⁸⁶ See *United States v. Schlesinger*, 396 F. Supp. 2d 267, 271 (E.D.N.Y. 2005) ("it is well-settled in the Second Circuit that once the defendant is convicted of an offense on proof beyond a reasonable doubt, the Government is only required to establish the forfeitability of the property...by a preponderance of the evidence").

⁸⁷ *United States v. Reiner*, 397 F. Supp. 2d 101 (D. Me. 2005).

⁸⁸ *United States v. Reiner*, 397 F. Supp. 2d 101, 108-09 (D. Me. 2005) (in cases where criminal forfeiture is sought under 18 U.S.C. § 981(a)(1)(C), the standard of proof is preponderance of the evidence, but the standard for forfeiture of prostitution proceeds under 18 U.S.C. § 2253 is beyond a reasonable doubt).

⁸⁹ 543 U.S. 220 (2005)

The case that analyzed the issue most thoroughly was the Second Circuit's decision in *United States v. Fruchter*.⁹⁰ In *Booker*, the panel noted, the Supreme Court expressly stated that its decision would not affect criminal forfeiture under 18 U.S.C. § 3554 – the forfeiture provision for drug and racketeering offenses.⁹¹ Moreover, *Booker* and the Supreme Court's earlier decision in *Blakely v. Washington*,⁹² the panel said, apply only to "determinate sentencing" systems – *i.e.*, situations where the jury verdict of guilt limits the court to imposing a sentence within a narrow range determined by the legislature. In contrast, criminal forfeiture is the quintessential "indeterminate sentencing" system; the jury's finding of guilt renders *all* of the property involved in the offense is subject to forfeiture.⁹³

⁹⁰ *United States v. Fruchter*, 411 F.3d 377 (2d Cir. 2005).

⁹¹ *Fruchter*, 411 F.3d at ____, citing *Booker*, 543 U.S. 220, 258. In its 2006 amendment to 28 U.S.C. § 2461(c), Congress made § 3554 applicable to all criminal forfeitures.

⁹² 542 U.S. 296 (2004)

⁹³ *United States v. Fruchter*, 411 F.3d at 383. See *United States v. Hively*, 437 F.3d 752, ____ (8th Cir. Feb. 10, 2006) (*Booker* does not apply to criminal forfeiture); *United States v. Tedder*, 403 F.3d 836, 841 (7th Cir. 2005) (same); *United States v. Hall*, 411 F.3d 651, 654-55 (6th Cir. 2005) (same, following *Tedder*; *Booker* merely extended *Apprendi* to the sentencing guidelines and redefined what constitutes the statutory maximum, but the guidelines do not apply to forfeiture, and the forfeiture statutes contain no statutory maximum; forfeiture is a form of indeterminate sentencing "which has never presented a Sixth Amendment problem"); *United States v. Washington*, 131 Fed. Appx. 976, 977 (5th Cir. 2005) (neither *Blakely* nor *Booker* overrule the holding in *Libretti* that there is no Sixth Amendment right to a jury on the forfeiture issues in a criminal case); *United States v. Swanson*, 394 F.3d 520, 526 (7th Cir. 2005) (following *Messino* and *Vera*; forfeiture and restitution do not fall within *Apprendi* because there is no statutory maximum); *United States v. Heldeman*, 402 F.3d 220, 224 (1st Cir. 2005) (remanding for resentencing in light of *Booker*, but affirming the forfeiture); *United States v. Melendez*, 401 F.3d 851, 856 (7th Cir. 2005) (same; under *Vera*, forfeitures are open-ended so that all property representing drug proceeds is forfeitable); *United States v. Reiner*, 393 F. Supp. 2d 52, 57 (D. Me. 2005) (following *Fruchter* and *Hall*; because criminal forfeiture has no statutory maximum, and because the sentencing guidelines expressly state that they do not apply to forfeiture, *Apprendi* and *Booker* do not apply); *United States v. McKinnon*, 2005 WL 2035227, at *16 (M.D. Pa. Jul. 26, 2005) (following *Fruchter* and *Messino*; *Apprendi* and *Booker* do not apply to criminal forfeiture); *United States v. Anderson*, 2005 WL 1027174, at *1 (D. Neb. May 2, 2005) (nothing in *Apprendi*, *Blakely*, or *Booker* alters the holding in *Libretti* that there is no constitutional right to a jury with respect to the forfeiture in a criminal case); *United States v. Dolney*, 2005 WL 1076269, at *11 (E.D.N.Y. Mar. 3, 2005) (because forfeiture is mandatory following the finding of guilt, the process of identifying assets for forfeiture does not threaten to exceed the statutory maximum but rather "will impose a punishment that has already been authorized by the jury's verdict;" thus, *Apprendi*, *Blakely*, and

Right to a Jury

The Supreme Court held in *Libretti v. United States* that there is no Sixth Amendment right to have the forfeiture determined by a jury.⁹⁴ Whatever right the defendant has to have the jury determine the forfeiture is statutory. The statute, of course, is Rule 32.2(b)(4).⁹⁵

To invoke his right to have the jury retained under the Rule, the defendant must make a specific request. If he sits on his hands while the jury is being excused, he waives his right to have the jury determine the forfeiture.⁹⁶ As it turns out, in most cases the parties agree to waive the jury.⁹⁷

That much is clear; what is not clear is whether the right to a jury under Rule 32.2(b)(4) applies to all aspects of the forfeiture, including determining the amount of the money judgment, or only to the “nexus” question – i.e., to determining whether the specific property subject to forfeiture was derived from or used to commit the offense. In 2005, two courts took the narrower view, holding that Rule 32.2(b)(4) does not apply to the calculation of the amount of the money judgment.

In *United States v. Tedder*,⁹⁸ the defendant complained that the court had deprived him of his statutory right to have the jury determine the amount of the money judgment when it recalculated the amount without sending the case back

Apprendi do not apply to forfeiture); *United States v. Upton*, 352 F. Supp. 2d 92, 99 (D. Mass. 2005) (following *Messino*; *Blakely* does require reasonable doubt instruction for criminal forfeiture under section 982(a)(1)).

⁹⁴ *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”).

⁹⁵ F.R.Crim.P. 32.2(b)(4).

⁹⁶ See *United States v. Anderson*, 2005 WL 1027174, at *1 (D. Neb. May 2, 2005) (defendant waived his statutory right to a jury when he remained silent while the jury was excused).

⁹⁷ See *United States v. Schlesinger*, 396 F. Supp. 2d 267, 270 (E.D.N.Y. 2005) (noting without discussion that the parties waived the jury).

⁹⁸ *United States v. Tedder*, 403 F.3d 836 (7th Cir. 2005).

to the jury. On appeal, Seventh Circuit held that because Rule 32.2(b)(4) applies only to the nexus question, the defendant had no right to have the jury determine the money judgment and hence no such right was violated when the district court made the calculation itself.⁹⁹

In *United States v. Reiner*,¹⁰⁰ the defendant requested that the jury be retained to determine the amount of the money judgment. Following *Tedder*, the court denied the request.¹⁰¹

No other court has addressed this issue.

Use of hearsay

There still is very little law regarding the rules of evidence that apply in the forfeiture phase of the trial. The leading case is the Second Circuit's affirmance in 2004 of the district court's decision in *United States v. Gaskin*,¹⁰² holding that because forfeiture is part of sentencing, the forfeiture may be based on reliable hearsay. In 2005, a district court reached the same conclusion in *United States v. Ivanchukov*.¹⁰³

Reliance on evidence from "guilt phase"

⁹⁹ *United States v. Tedder*, 403 F.3d at 841 (the defendant's right under Rule 32.2(b)(4) is to have the jury determine if the Government has established the required nexus between the property and his crime; the rule does not give the defendant the right to have the jury determine the amount of a money judgment).

¹⁰⁰ *United States v. Reiner*, 393 F. Supp. 2d 52 (D. Me. 2005).

¹⁰¹ See *United States v. Reiner*, 393 F. Supp. 2d 52, 54-57 (D. Me. 2005) (Rule 32.2(b)(4) applies only when the Government is required to establish a nexus between the property and the offense; when the Government is seeking only a money judgment, there is no nexus requirement and thus no nexus for the jury to find).

¹⁰² *United States v. Gaskin*, 2002 WL 459005, at *9 (W.D.N.Y. Jan. 8, 2002) (in the forfeiture phase of the trial, the parties may offer evidence not already in the record; because forfeiture is part of sentencing, such evidence may include reliable hearsay), *aff'd*, 364 F.3d 438 (2d Cir. 2004).

¹⁰³ *United States v. Ivanchukov*, 404 F. Supp.2d 708, 709 n.1 (E.D. Va. 2005) (because forfeiture is part of sentencing, reliable hearsay is admissible to establish the forfeitability of the property).

Another issue on which there is little law is the extent to which the court can rely on evidence from the guilt phase of the trial to determine the forfeiture.¹⁰⁴ In *United States v. Schlesinger*,¹⁰⁵ the district court addressed the issue and held that under Rule 32.2(b)(1), the court may determine the forfeiture based on evidence already in the record or on evidence presented in the forfeiture phase of the trial.¹⁰⁶

“Ownership” vs. “nexus”

Rule 32.2 makes clear that determining the extent of the defendant’s ownership interest in the forfeited property vis à vis third parties is deferred to the post-trial ancillary proceeding. Thus, in the forfeiture phase of the trial the jury determines the nexus between the property and the offense, but it does not determine whether the defendant was the owner of the property. As the First Circuit explained in *United States v. Yeje-Cabrera*,¹⁰⁷ this conserves judicial resources by avoiding the duplicative litigation that would occur if the defendant, or a third party, could contest the entry of the forfeiture order on ownership grounds at trial and the third party could raise the same issues again in the ancillary proceeding.¹⁰⁸

Thus, in *United States v. Nava*, the Ninth Circuit held that the district court properly instructed the jury that questions of ownership were not before them.¹⁰⁹

¹⁰⁴ See *United States v. Merold*, 46 Fed. Appx. 957 (Table)(11th Cir. 2002) (affirming district court’s conclusion that jury may rely on evidence admitted in the guilt phase of the trial).

¹⁰⁵ *United States v. Schlesinger*, 396 F. Supp. 2d 267 (E.D.N.Y. 2005).

¹⁰⁶ *United States v. Schlesinger*, 396 F. Supp. 2d 267, 271 (E.D.N.Y. 2005) (under Rule 32.2(b)(1), the court determines the amount of the money judgment, or whether there is a sufficient nexus between the property and the offense of conviction, based on evidence in the record of the criminal trial or evidence presented at a hearing after the verdict).

¹⁰⁷ *United States v. Yeje-Cabrera*, 430 F.3d 1 (1st Cir. 2005).

¹⁰⁸ *Id.* at 15 (explaining that the primary purpose of Rule 32.2(b)(2) was to preserve the resources of the court and third parties by deferring the ownership issue to the ancillary proceeding, thus avoiding duplicative litigation).

¹⁰⁹ *United States v. Nava*, 404 F.3d 1119, 1132 (9th Cir. 2005) (district court properly instructed jury that questions of ownership “were not before them”; therefore, jury’s return of special verdict of forfeiture says nothing about the ownership of the property).

And in *United States v. Schlesinger*, the district court held that the defendant could not object to the forfeiture on the ground that the property did not belong to him at the time he used it to commit a money laundering offense.¹¹⁰

Motion for judgment of acquittal

Few courts have discussed whether a forfeiture verdict is subject to a motion for a judgment of acquittal under Rule 29. In *United States v. McKinnon*,¹¹¹ the district court seems to have assumed that such a motion was proper, but held that the verdict was supported by the evidence. The defendant drug dealer's lavish lifestyle, lack of legitimate income, and his efforts to conceal his money from law enforcement, the court said, amply supported the jury's verdict that \$17,500 in seized currency constituted drug proceeds.¹¹²

VII. Money Judgments

It is well-established that a forfeiture order may take the form of a judgment for a sum of money. Such orders are common in cases where the defendant did not retain, or the Government is unable to locate, the property involved in the underlying offense. For example, in *United States v. Huber*,¹¹³ a massive fraud and money laundering case from North Dakota, the Eighth Circuit held that the Government was entitled to a money judgment for the amount of money that the

¹¹⁰ *United States v. Schlesinger*, 369 F. Supp. 2d 267, 273 (E.D.N.Y. 2005) (defendants cannot object that the property did not belong to them; the extent of the defendants' interest in the property and any other party's interest is decided in the ancillary proceeding, not when the court is deciding whether to issue a preliminary order of forfeiture). Cf. *Borich v. United States*, 2005 WL 1668411, at *2 (D. Minn. Jul. 18, 2005) (denying defendant's section 2255 petition on the ground that defendant lacked standing to object to a forfeiture on the ground that the forfeited vehicles had been transferred to a third party).

¹¹¹ *United States v. McKinnon*, 2005 WL 2035227 (M.D. Pa. Jul. 26, 2005).

¹¹² *Id.*, at *15 (denying motion for judgment of acquittal on the forfeiture allegation on the ground that the jury's special verdict was against the weight of the evidence). See *United States v. Wittig*, 2006 WL 13158, at *8 (D. Kan. Jan. 3, 2006) (granting in part and denying in part defendant's Rule 29(c) motion to set aside the forfeiture verdict on the ground that the forfeiture was not supported by the evidence; the question is whether a reasonable jury could conclude that the Government has proven, by a preponderance of the evidence, that the property is subject to forfeiture).

¹¹³ *United States v. Huber*, 404 F.3d 1047 (8th Cir. 2005).

defendant conspired to launder, even if some of the laundered money ended up in the hands of third parties.¹¹⁴ There were a plethora of such cases in 2005.¹¹⁵

In *United States v. Croce*,¹¹⁶ however, a district court in Pennsylvania questioned the wisdom of the established law and held that a forfeiture judgment must be limited to the value of the assets in the defendant's possession at the time the judgment is entered.¹¹⁷ That case is still pending on appeal, but defendants in other cases have urged the court to follow *Croce* and decline to enter a forfeiture order in the form of a money judgment if the defendant no longer has possession of the property derived from the offense or other property that may be forfeited as substitute assets.

¹¹⁴ *Id.* at 1056 (“Forfeiture under section 982(a)(1) in a money laundering case allows the Government to obtain a money judgment representing the value of all property ‘involved in’ the offense, including the money or other property being laundered (the corpus) and any property used to facilitate the laundering offense”; in a conspiracy case, the corpus is the funds the defendant conspired to launder, including commingled clean money).

¹¹⁵ See *United States v. Bermudez*, 413 F.3d 304, 306-07 (2d Cir. 2005) (court orders money launderer to pay \$14.2 million—the value of the funds laundered—even though he forwarded the money to third parties); *United States v. Tedder*, 403 F.3d 836, 840-41 (7th Cir. 2005) (affirming order of forfeiture comprising \$1.7 million in property involved in money laundering and \$1.1 million in the form of a personal money judgment); *United States v. Ryder*, 414 F.3d 908, 913 (8th Cir. 2005) (noting without discussion that defendant convicted of money laundering was ordered to pay \$136,301 money judgment per section 982(a)(1) and Rule 32.2(b)(3)); *United States v. Schlesinger*, 396 F. Supp. 2d 267, 280 (E.D.N.Y. 2005) (Government is entitled to a money judgment for the total amount of money defendant laundered through his business); *United States v. Reiner*, 393 F. Supp. 2d 52, 55 n.9 (D. Me. 2005) (noting that notwithstanding the footnote in the Advisory Committee Note to Rule 32.2 that the committee takes no position on the availability of a money judgment, the rule clearly spells out the procedure for obtaining a money judgment, and the First Circuit has just as clearly affirmed one in *Candelaria-Silva*); *United States v. Weiss*, 2005 WL 1126663, at *13 (M.D. Fla. May 6, 2005) (jury returns special verdict for \$3.1 million money judgment reflecting the proceeds of defendant's racketeering activity).

¹¹⁶ *United States v. Croce*, 334 F. Supp. 2d 781 (E.D. Pa. 2004) (*Croce I*).

¹¹⁷ *Id.* at 794 (disagreeing with all precedents and holding that section 982(a)(1) authorizes the forfeiture of specific assets only), *on reconsideration*, 345 F. Supp. 2d 492, 495-96 (E.D. Pa. 2004) (*Croce II*) (section 982(a)(1) authorizes money judgments but only up to the value of assets that may be forfeited as substitute assets; it does not authorize money judgments that exceed the defendant's net worth).

In *United States v. Hall*,¹¹⁸ for example, the defendant in a drug case contested the district court's authority to impose a \$511,000 money judgment on the ground that it greatly exceeded the amount of money he had available to satisfy the judgment at the time of sentencing. The district court rejected the argument and the First Circuit affirmed the decision on appeal.

Expressly rejecting the analysis in *Croce*, the panel said that the authority to impose a money judgment follows from the nature of criminal forfeiture as a sanction against the individual defendant and not against the property. If the court did not have the authority to impose a money judgment, the court said, there would be no effective sanction against a defendant who had spent the proceeds on wine, women and song.¹¹⁹ Moreover, the court held that there is nothing wrong with a forfeiture order that includes both a money judgment and an order forfeiting specific assets in the same order.¹²⁰

Most important, the Court of Appeals expressly rejected the view in *Croce* that a money judgment cannot remain hanging over the defendant's head indefinitely and must therefore be limited to the value of the defendant's assets at the time the judgment is entered. The money judgment places the Government in the same position as any other judgment creditor, the court said, and it remains in effect until satisfied.¹²¹ This is consistent with what the Seventh Circuit said several years ago in *United States v. Baker*.¹²²

¹¹⁸ *United States v. Hall*, 434 F.3d 42 (1st Cir. 2006).

¹¹⁹ *Id.* at 59 (the district court may order the defendant to forfeit a sum of money equal to the drug proceeds that he earned but did not retain; this reflects the nature of criminal forfeiture as "a sanction against the individual defendant rather than a judgment against the property itself," and is the only way to truly separate the wrongdoer from the fruits of his crime once he has spent them on "wine, women and song").

¹²⁰ *Id.* at 60 n.8 (rejecting defendant's argument that district court could not enter a money judgment and order forfeiture of specific assets as part of the same order, order that included a money judgment for \$511,321 and ordered the forfeiture of specific items of personal and real property in accordance with the jury's special verdict was proper).

¹²¹ *United States v. Hall*, 434 F.3d 42, 59 (1st Cir. 2006) ("a money judgment permits the Government to collect on the forfeiture order in the same way that a successful plaintiff collects a money judgment from a civil defendant;" "even if a defendant does not have sufficient funds to cover the forfeiture at the time of the conviction, the Government may seize **future assets** to satisfy the order; rejecting *Croce*) (emphasis added).

¹²² *United States v. Baker*, 227 F.3d 955, 970 (7th Cir. 2000) (a forfeiture order may include a money judgment for the amount of money involved in the money laundering offense;

VIII. Preliminary Order of Forfeiture

Rule 32.2(b)(2)¹²³ provides that the court must enter a preliminary order of forfeiture “promptly” after determining what property is subject to forfeiture. Two new cases describe the history and purpose of the Rule. In *United States v. Yeje-Cabrera*,¹²⁴ the First Circuit explained that the predecessor to Rule 32.2(b) was amended in 1996 to allow the court to enter a preliminary order of forfeiture before sentencing to avoid delays in the forfeiture process including the resolution of third party rights in the ancillary proceeding.¹²⁵ In *United States v. Bennett*,¹²⁶ the Third Circuit described the procedures required by Rule 32.2(b) in detail, and explained that the order of forfeiture remains preliminary as to the defendant until sentencing, and remains preliminary as to third parties until the ancillary proceeding is concluded.¹²⁷

There are a number of consequences that flow from the fact that the order of forfeiture becomes final as to the defendant at sentencing. Because forfeiture is part of sentencing, defendants must appeal from the order of forfeiture at the same time they appeal their conviction; they may not wait until it is final as to third parties.¹²⁸ By the same token, once the forfeiture becomes final as to the defendant at sentencing, it cannot be revised by the district court, except as provided in Rules 35(a) and 36, other than to account for third party rights in the ancillary proceeding.¹²⁹

the money judgment acts as a lien against the defendant personally for the duration of his prison term and beyond). *Accord United States v. Delco Wire and Cable Co., Inc.*, 772 F. Supp. 1511, 1517 (E.D. Pa. 1991) (criminal forfeiture is “like a money judgment that runs against the defendant until satisfied in full”).

¹²³ F.R.Crim.P. 32.2(b)(2).

¹²⁴ *United States v. Yeje-Cabrera*, 430 F.3d 1 (1st Cir. 2005)

¹²⁵ *Id.* at 15.

¹²⁶ *United States v. Bennett*, 423 F.3d 271 (3d Cir. 2005).

¹²⁷ *Id.* at 275 n.1.

¹²⁸ *See United States v. Elliott*, 149 Fed. Appx. 489, 492 (7th Cir. 2005) (defendant had to appeal from the preliminary order forfeiting his house as a substitute asset, not from the final order denying third party claims to the property).

¹²⁹ *See United States v. Hicks*, 2005 WL 2656594, at *2 (W.D. Wash. Oct. 14, 2005) (because forfeiture is part of sentencing, it may only be challenged on direct appeal; once the

IX. Order of Forfeiture / Sentencing

Forfeiture is mandatory

In *Monsanto*, the Supreme Court made it clear that criminal forfeiture is mandatory.¹³⁰ In 2005, the Ninth and Fifth Circuits reiterated that point in two drug cases, pointing out that at sentencing, the district court must order the forfeiture in addition to imposing any other sentence.¹³¹ The district court in *United States v. Ivanchukov* held that the point applied equally to forfeitures for alien smuggling and visa fraud under § 982(a)(6).¹³²

Forfeiture must be included in the oral announcement of the sentence

Rule 32.2(b)(3) provides that the forfeiture must be made part of the sentence and included in the judgment.¹³³ In *Bennett*, the Third Circuit held that this means that the forfeiture must be part of the oral announcement of the sentence.¹³⁴ In the circumstances of that case, however, the panel held that the district court's failure to make reference to the forfeiture at sentencing was not fatal.

time for appeal has expired, the forfeiture is final and cannot be revised by the district court). *But see United States v. Croce*, 355 F. Supp. 2d 774, 778 n.6 (E.D. Pa. 2005) (*Croce III*) (preliminary order does not become final as to the defendant until after the ancillary proceeding; therefore, the district court retains inherent authority to make a substantive change to an order of forfeiture after the 7-day period set forth in Rule 35 has expired).

¹³⁰ *United States v. Monsanto*, 491 U.S. 600, 607 (1989) (“Congress could not have chosen stronger words to express its intent that forfeiture be mandatory in cases where the statute applied...”).

¹³¹ *See United States v. Nava*, 404 F.3d 1119, 1124 (9th Cir. 2005) (“At sentencing, the district court must order forfeiture of the property in addition to imposing any other sentence.”); *United States v. Betancourt*, 422 F.3d 240, 250 (5th Cir. 2005) (forfeiture is mandatory and not limited by the maximum statutory fine; forfeiture is to be imposed in addition to, not in lieu of, a fine).

¹³² *United States v. Ivanchukov*, 405 F. Supp.2d 708, 711 n.6 (E.D. Va. Dec. 22, 2005).

¹³³ F.R.Crim.P. 32.2(b)(3).

¹³⁴ *United States v. Bennett*, 423 F.3d 271, 281 (3rd Cir. 2005) (district court erred in not making forfeiture part of the oral announcement of sentence; Rule 32.2(b)(3) requires it).

In *Bennett*, a defendant who was convicted by a jury of a methamphetamine offense, stipulated to the forfeiture of certain property. Relying on the stipulation, the court entered a preliminary order of forfeiture, but forgot to refer to the forfeiture at sentencing. When the defendant challenged the forfeiture on appeal, the panel concluded that because the defendant was clearly aware of the forfeiture, the district court's failure to include the forfeiture in the oral announcement of the sentence did not deprive the defendant of his rights under the Rule.¹³⁵

The order of forfeiture must be entered prior to or at the time of sentencing

The requirement in Rule 32.2(b)(3) that the forfeiture be made part of the sentence also means that if the district court has not already entered a preliminary order of forfeiture as provided in Rule 32.2(b)(2), it must enter an order of forfeiture at the time sentencing itself. As a general rule, if the district court fails to enter an order of forfeiture by the time the defendant is sentenced, the forfeiture is void.

The seminal case on this issue was the Eleventh Circuit's decision in 2002 in *United States v. Petrie*,¹³⁶ which held that a district court had no jurisdiction to enter an order of forfeiture for the first time 6 months after the defendant was sentenced.¹³⁷ A district court in South Carolina reached the same result in 2005 in *United States v. King*.¹³⁸ Following *Petrie*, the court held that it was powerless to correct the sentence to include an order of forfeiture 16 days after sentencing, even though the defendant had agreed to the forfeiture in his guilty plea.¹³⁹

¹³⁵ *Id.* at 282.

¹³⁶ *United States v. Petrie*, 302 F.3d 1280 (11th Cir. 2002).

¹³⁷ *Id.* at 1284 (district court lacked jurisdiction to enter a preliminary order of forfeiture 6 months after defendant was sentenced even though the judgment and commitment order said defendant "was subject to forfeiture as cited in count two"; the scheme set forth in Rule 32.2 is "detailed and comprehensive").

¹³⁸ *United States v. King*, 368 F. Supp. 2d 509 (D.S.C. 2005).

¹³⁹ *Id.* at 512 (following *Petrie*; where there was no mention of forfeiture either at sentencing or in the judgment, there is a clear violation of Rule 32.2(b) that cannot be corrected 16 days after sentencing as a clerical error; distinguishing cases where court issued the order before sentencing but simply forgot to make it part of the judgment).

As the First Circuit explained in *Yeje-Cabrera*, the purpose of the Rule is to ensure that all aspects of the defendant's sentence are part of a single package that is imposed at one time.¹⁴⁰ If the district court fails to enter any order of forfeiture before or at the time of sentencing, and makes no statement regarding the forfeiture in the oral announcement of the sentence, the sentence becomes final without the forfeiture, except to the extent that it may be corrected within 7 days pursuant to Rule 35(a).¹⁴¹ As the Third Circuit said in *Bennett*, a final order of forfeiture that is not entered until after sentencing is a "nullity."¹⁴²

Accordingly, if the court completely omits to enter an order of forfeiture before sentencing, there can be no criminal forfeiture in the case, unless the Government files a timely appeal.¹⁴³

The forfeiture order must be made part of the judgment

Rule 32.2(b)(3) also provides that the order of forfeiture must be included in the judgment.¹⁴⁴ This raises a separate issue that several courts have had to address: What happens if the court enters a preliminary order of forfeiture, but forgets to append it to the judgment and commitment order (the "J&C")? The courts are split on this question.

¹⁴⁰ *United States v. Yeje-Cabrera*, 430 F.3d 1, 15 (1st Cir. 2005) (Rule 32.2(b)(3)'s requirement that the forfeiture be part of the sentence ensures that all aspects of the defendant's sentence are part of a single package that is imposed at one time).

¹⁴¹ *But see United States v. King*, 368 F. Supp. 2d 509, 511-12 (D.S.C. 2005) (even if timely filed, a Rule 35(a) motion cannot be used to obtain an order of forfeiture that should have been entered at or prior to sentencing in accordance with Rule 32.2(b)(2) and (3) because such omission is not an "arithmetical, technical, or other clear error").

¹⁴² *United States v. Bennett*, 423 F.3d 271, 275 (3d Cir. 2005) (the order of forfeiture does not become final as to the defendant and become part of the judgment automatically; the court must comply with Rule 32.2(b)(3); a "final order of forfeiture" that is not entered until after sentencing is a nullity).

¹⁴³ Because the entry of an order of forfeiture is mandatory, the Government may appeal any sentence that omits an order of forfeiture as "illegal" under 18 U.S.C. § 3742. *See United States v. Corrado*, 227 F.3d 543, 548 (6th Cir. 2000) (*Corrado I*) (the Government may appeal from district court's refusal to enter forfeiture judgment; because forfeiture is mandatory, such refusal constitutes a sentence imposed in violation of law for which appeal is authorized under section 3742(b)).

¹⁴⁴ F.R.Crim.P. 32.2(b)(3).

Between 2001 and 2004, the Fourth, Fifth and Eighth Circuits held that the failure to append the order of forfeiture to the J&C was a clerical error that could be corrected at any time pursuant to Rule 36.¹⁴⁵ The Eleventh Circuit, on the other hand, held that the omission could be considered a clerical error only if the forfeiture was made part of the oral announcement of the sentence; otherwise, the court said, it must be regarded as a fatal error that could only be corrected if the Government filed a timely appeal.¹⁴⁶

This division continued in 2005. In *Bennett*, the Third Circuit held that the failure to append the order of forfeiture to the J&C was a clerical error subject to correction under Rule 36 even though the district court did not mention the forfeiture in the oral announcement of the sentence.¹⁴⁷ On the other hand, in *Yeje-Cabrera* the First Circuit held that the error was clerical only because the forfeiture order was issued in writing and made part of the oral announcement at sentencing.¹⁴⁸ Moreover, in *United States v. Robinson*,¹⁴⁹ the Eleventh Circuit

¹⁴⁵ See *United States v. Loe*, 248 F.3d 449, 464 (5th Cir. 2001) (if district court forgets to include forfeiture in the judgment, it may, pursuant to Rule 36 amend the judgment *nunc pro tunc*; even if the judgment is not so amended, oral pronouncement of the forfeiture at the sentencing hearing is sufficient to comply with former Rule 32(d)(2)); *United States v. Hatcher*, 323 F.3d 666, 673 (8th Cir. 2003) (if there was a preliminary order of forfeiture, the failure to include the forfeiture in the judgment or in the oral pronouncement at sentencing is a clerical error that may be corrected at any time pursuant to Rule 36); *United States v. Thomas*, 67 Fed. Appx. 819, 820 (4th Cir. 2003) (amendment of the judgment pursuant to Rule 36 to include the forfeiture judgment 4 years after sentencing was appropriate as it accurately reflected the district court's intention at sentencing).

¹⁴⁶ See *United States v. Pease*, 331 F.3d 809, 816-17 (11th Cir. 2003) (the omission of the order of forfeiture from the judgment in a criminal case is not a clerical error that can be corrected pursuant to Rule 36; if the district court does not make the order of forfeiture part of the judgment at sentencing, and the Government does not appeal, the forfeiture is void); *United States v. Arevalo*, 67 Fed. Appx. 589 (Table) (11th Cir. 2003) (preliminary order of forfeiture becomes final at sentence automatically; the failure to memorialize that in writing by making the forfeiture part of the judgment is a clerical error that may be corrected pursuant to Rule 36); *United States v. Arevalo*, 2004 WL 1253057, at *1 (11th Cir. May 13, 2004) (reaffirming original holding and distinguishing *Pease* on the ground that the court in *Arevalo* apprized the defendant of the forfeiture orally at sentencing).

¹⁴⁷ *United States v. Bennett*, 423 F.3d 271, 279-81 (3d Cir. 2005) (if there was a preliminary order of forfeiture to which defendant did not object, the failure to include the forfeiture in both the oral pronouncement and the judgment and commitment order is a clerical error that may be corrected pursuant to Rule 36) (collecting cases).

¹⁴⁸ See *United States v. Yeje-Cabrera*, 430 F.3d 1, 15 (1st Cir. 2005) (the portion of Rule 32.2(b)(3) requiring the court to make the forfeiture part of the judgment is "largely a

held once again that the error was not clerical and could not be corrected under Rule 36 if the forfeiture was not mentioned in the oral announcement. In that case, the panel reaffirmed the holding in *United States v. Pease*¹⁵⁰ that the Government's only remedy was to appeal, but the court then granted the appeal and remanded the case to the district court with instructions to include the forfeiture in the judgment.¹⁵¹

X. Joint and Several Liability

Liability for the amount subject to forfeiture

Defendants who are convicted of a criminal offense are jointly and severally liable for the forfeiture of the total amount of money derived from that offense. For example, in *United States v. Fruchter*, the Second Circuit held that a RICO defendant was liable for the forfeiture of all proceeds of the offense foreseeable to him, including proceeds traceable to conduct committed by others on which the defendant was personally acquitted.¹⁵²

Generally, as *Fruchter* illustrates, the only limitation on a given defendant's liability is the amount of forfeiture that was foreseeable to that defendant; the defendant's liability is not limited to the amount of benefit that he or she may have received personally. But in *United States v. Spano*,¹⁵³ the court suggested that

housekeeping rule and does not itself go to any fundamental rights of defendants"; the error may be corrected pursuant to Rule 36, but only if there was a preliminary order of forfeiture and the forfeiture was included in the oral announcement).

¹⁴⁹ *United States v. Robinson*, 137 Fed. Appx. 273, 276-77 (11th Cir. 2005).

¹⁵⁰ *United States v. Pease*, 331 F.3d 809, 816-17 (11th Cir. 2003).

¹⁵¹ *United States v. Robinson*, 2005 WL 1509120, at *3 (11th Cir. Jun. 27, 2005) (refusing to reconsider *Pease* and refusing to consider a preliminary order of forfeiture self-executing when it states that it will be made part of the judgment, but granting the Government's appeal and remanding with instructions to include the forfeiture in the judgment). *See also United States v. Davis*, 151 Fed. Appx. 880, 881 (11th Cir. 2005) (denying Rule 60(b) motion for return of criminally forfeited property on the ground that the order of forfeiture was not included in the J&C; Rule 60(b) is a civil rule that does not apply in criminal cases and therefore cannot be used to challenge a criminal forfeiture order).

¹⁵² *United States v. Fruchter*, 411 F.3d 377, 384 (2d Cir. 2005).

¹⁵³ *United States v. Spano*, 421 F.3d 599 (7th Cir. 2005).

even the foreseeability requirement may not exist in the Seventh Circuit. In that case, the panel suggested that the joint and several liability of co-conspirators in a forfeiture case might be analogous to partnership liability for debts in the business context which does not depend on the foreseeability of the debt to a given partner.¹⁵⁴

In *United States v. Reiner*,¹⁵⁵ a district court in Maine held that joint and several liability applies to a defendant who was convicted as an aider and abettor. In that case, the defendant aided the commission of a sex trafficking offense by managing a health club that served as the cover for a prostitution business, but did not personally participate in any of the illegal acts and did not receive any of the prostitution proceeds. Nevertheless, the defendant was liable to forfeit the amounts received by third parties.¹⁵⁶

While joint and several forfeiture liability is extensive, it is not unlimited. In *United States v. Wingerter*, the district court cautioned that the joint and several liability theory cannot be used to make a defendant liable for amounts involved in offenses for which he was not convicted.¹⁵⁷

Credit for amounts forfeited by others

Each defendant is entitled to credit for the amount forfeited by his or her co-defendants if they have been found jointly and severally liable for the forfeiture of the same property.¹⁵⁸ But as the Seventh Circuit noted in *Tedder*, a defendant

¹⁵⁴ *Id.* at 603 (all coconspirators are jointly and severally liable for the amount of the forfeiture regardless of how much or how little they benefitted from the conspiracy; suggesting, but not deciding, that a defendant's liability may not be limited to the amount foreseeable to that defendant).

¹⁵⁵ *United States v. Reiner*, 397 F. Supp. 2d 101 (D. Me. 2005).

¹⁵⁶ *Id.* at 108, 110 ("principles of vicarious liability for forfeiture by coconspirators extend equally to an aider and abettor"; person who did not receive prostitution proceeds is liable for forfeiture under section 2253 for the amount received by a third party).

¹⁵⁷ *United States v. Wingerter*, 369 F. Supp. 2d 799, 809 n.19 (E.D. Va. 2005) (because defendant, unlike his codefendants, is charged only with fraud and not with money laundering, his joint and several liability is limited to the amounts involved in the fraud and cannot include amounts involved only in the money laundering).

¹⁵⁸ *See United States v. Hurley*, 63 F.3d 1, 23 (1st Cir. 1995) (the Government can collect the total amount subject to forfeiture only once, but subject to that cap, it can collect from any defendant so much of that amount as was foreseeable to that defendant).

is not entitled to credit for amounts forfeited by his co-defendants where they were liable to forfeit different property.¹⁵⁹

XI. Substitute Assets

Procedure for obtaining substitute assets

The procedure for amending the order of forfeiture to include substitute assets is set forth in Rule 32.2(e).¹⁶⁰ In *Hall*, the First Circuit noted that the Government may move for forfeiture of the substitute asset under the Rule, but it is up to the court to grant the motion and amend the order.¹⁶¹

On the other hand, it is well-established that the jury has no role in forfeiting substitute assets.¹⁶²

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

The statute authorizing the forfeiture of substitute property is 21 U.S.C. § 853(p). Generally, under that statute, the Government must show that the directly forfeitable property is unavailable due to some act or omission of the defendant.¹⁶³ In *Borich*, however, the district court held that the defendant's stipulation to the forfeiture of substitute assets makes that showing unnecessary.¹⁶⁴

¹⁵⁹ *United States v. Tedder*, 403 F.3d 836, 841 (7th Cir. 2005).

¹⁶⁰ F.R.Crim.P. 32.2(e).

¹⁶¹ *United States v. Hall*, 434 F.3d 42, 60 (1st Cir. 2006) (Rule 32.2(e) allows the Government to move to forfeit substitute assets, but the court still must order the property forfeited).

¹⁶² See *United States v. Candelaria-Silva*, 166 F.3d 19, 43 (1st Cir. 1999) (forfeiture of substitute assets is solely a matter for the court; the defendant's only right is to have the jury determine the amount of the money judgment, which puts an upper limit on the amount that may be forfeited as a substitute asset); *United States v. Weiss*, 2005 WL 1126663, at *12 (M.D. Fla. May 6, 2005) (same; following *Candelaria-Silva*).

¹⁶³ See 21 U.S.C. § 853(p).

¹⁶⁴ *Borich v. United States*, 2005 WL 1668411, at *3 (D. Minn. Jul. 18, 2005) (defendant's agreement to forfeit money as a substitute asset made it unnecessary for the Government to show that it satisfied the "due diligence" requirement in section 853(p)).

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

The general rule is that any asset of the defendant is fair game to be forfeited as a substitute asset.¹⁶⁵ In *Ivanchukov*, the defendant asked a co-defendant for money to help him pay his attorneys fees. Instead of paying the attorney directly, the co-defendant gave the defendant a check for \$100,000 with the payee's name left blank. The defendant then filled in the name of his attorney's law firm and gave the check to the attorney. When the Government later moved to forfeit the \$100,000, the court held that while the check was in the defendant's possession in bearer form it was his money, and thus could be forfeited as a substitute asset.¹⁶⁶

Substitute assets may be forfeited to satisfy money judgment

Courts continue to hold that forfeiting substitute assets is one way of satisfying a forfeiture order that is in the form of a money judgment. For example, in *United States v. Bermudez*,¹⁶⁷ the Second Circuit upheld the forfeiture of substitute assets in partial satisfaction of a \$14.2 million money judgment in a money laundering case, even though the defendant asserted that he had laundered the money for a third party and kept none of it for himself.¹⁶⁸

The prosecutor can switch theories of forfeiture

¹⁶⁵ See *United States v. Weiss*, 2005 WL 1126663, at *6-8 (M.D. Fla. May 6, 2005) (any asset of the defendant may be forfeited as a substitute asset to satisfy a money judgment).

¹⁶⁶ *United States v. Ivanchukov*, 405 F. Supp.2d 708, 713 (E.D. Va. 2005) (money that third party gave defendant in form of bearer check became defendant's property and thus was immediately available for forfeiture as substitute asset; that third party intended money to be used for attorneys fee made no difference).

¹⁶⁷ *United States v. Bermudez*, 413 F.3d 304 (2d Cir. 2005).

¹⁶⁸ *United States v. Bermudez*, 413 F.3d at 306-07. See also *United States v. Hall*, 134 F.3d 42, 58 n.7 (1st Cir. 2006) (following *Candalaria-Silva*; substitute assets may be forfeited to satisfy a forfeiture order for a sum of money that the defendant, by his act or omission, has prevented the Government from tracing).

If the jury fails to include an asset in the list of things directly traceable to the offense, the Government may seek forfeiture of the same asset as a substitute asset.¹⁶⁹

An attorney cannot object that the substitute assets are needed to pay his fee

The fact that the defendant intended to use the substitute asset to pay his attorney's fee does not confer any special status on the property. As the district court held in *Wingter*, the Supreme Court's decision in *Caplin & Drysdale*¹⁷⁰ applies equally to any forfeitable property, whether it is a substitute asset or directly forfeitable property.¹⁷¹ In applying the Supreme Court's decision, the court said, the issue is not whether the property is tainted or untainted, but whether it is forfeitable or unforfeitable.¹⁷²

XII. Property Transferred to Third Parties

The relation back doctrine

Under 21 U.S.C. § 853(c), the Government's interest in forfeitable property vests at the time of the offense giving rise to the forfeiture. In *United States v. Nava*, the Ninth Circuit held that in the case of a drug conspiracy, the Government's interest vests at the onset of the conspiracy that the property

¹⁶⁹ See *United States v. Weiss*, 2005 WL 1126663, at *6-7 (M.D. Fla. May 6, 2005) (while the court of appeals' holding barred the government from pursuing the mortgage as directly forfeitable racketeering proceeds under 1963(a)(3), the mortgage was properly forfeitable as a substitute asset under 1963(m)).

¹⁷⁰ *Caplin & Drysdale v. United States*, 491 U.S. 617 (1989).

¹⁷¹ *United States v. Wingter*, 369 F. Supp. 2d 799, 807 (E.D. Va. 2005) (the issue as far as *Monsanto* and *Caplin & Drysdale* is concerned is not whether the property is tainted or untainted, but whether it is forfeitable or unforfeitable). See also *In re Restraint of Bowman Gaskins Financial Group Accounts*, 345 F. Supp. 2d 613, 627-28 (E.D. Va. 2004) (*Monsanto* applies to the pretrial restraint of substitute assets in jurisdictions that permit such restraint; the defendant has no Sixth Amendment right to object to the pretrial restraint of any property subject to forfeiture, regardless of the Government's forfeiture theory, as long as there is probable cause to support the forfeiture).

¹⁷² *Wingter*, 369 F. Supp.2d at 807.

facilitated.¹⁷³ To contest the forfeiture, any third party who acquires an interest in the forfeited property after that date must be bona fide purchaser.¹⁷⁴

Application of relation back doctrine to substitute assets

Third parties have the right to contest the forfeiture of substitute assets in the ancillary proceeding, but it is unclear when the Government's interest in substitute assets vests for purposes of determining whether the third party challenge must be under section 853(n)(6)(A) or (B). In 2003, the Fourth Circuit held that the Government's interest in substitute assets vests at the time of the offense, and that a spouse who acquired her interest in the property thereafter had to establish that she was a bona fide purchaser for value.¹⁷⁵ In 2005, the same court reaffirmed that ruling in *In re Bryson*.¹⁷⁶ Because the Government's interest in substitute assets vests at the time of the offense giving rise to the forfeiture, the court said, a third party must show that he was the real owner of the property and not a mere nominee at that time, or else show that he acquired the property thereafter as a bona fide purchaser for value.¹⁷⁷

Suing a third party for converting the forfeitable property to his own use

Property transferred to a third party remains subject to forfeiture under the relation back doctrine as long as the third party retains it, but if the third party has dissipated the property, the Government's only remedy is to file a conversion action against the third party to recover its value.¹⁷⁸

¹⁷³ *United States v. Nava*, 404 F.3d 1119, 1124 (9th Cir. 2005).

¹⁷⁴ See 21 U.S.C. § § 853(c) and (n)(6)(B).

¹⁷⁵ See *United States v. McHan*, 345 F.3d 262, 271 (4th Cir. 2003) (relation back doctrine applies to substitute assets and vests title in the Government as of the date of the offense).

¹⁷⁶ *In re Bryson*, 406 F.3d 284 (4th Cir. 2005).

¹⁷⁷ *In re Bryson*, 406 F.3d 284, 291 (4th Cir. 2005). Accord *United States v. Ivanchukov*, 405 F. Supp.2d 708, 712 (E.D. Va. 2005) ("the Government's interest in substitute assets, like its interest in tainted assets, vests at the time the act giving rise to forfeiture is committed").

¹⁷⁸ See *United States v. Moffitt, Zwerling & Kemler*, 83 F.3d 660, 666-67 (4th Cir. 1996) (Government may file a conversion action in federal court based on Virginia tort law to recover drug proceeds that defense attorney converted to his own use), *rev'd* 875 F. Supp. 1190 (E.D.

In *United States v. McCorkle*,¹⁷⁹ the Eleventh Circuit held that the Government had the right to file such an action against defense attorney F. Lee Bailey for converting \$2 million in forfeitable fraud proceeds to his own use.¹⁸⁰ Following the court's suggestion, the Government filed such an action but failed in the district court on the ground that the Government did not satisfy all of the elements of the Florida tort of conversion. On appeal, the Eleventh Circuit agreed with the district court; to prevail in a conversion action, the panel said, the Government must satisfy the requirements of the applicable state tort law, including the requirement (in Florida) that the Government had a right of immediate possession of the converted property. In the panel's view, the relation back doctrine did not give the Government that right to immediate possession.¹⁸¹

In other states that have more modern tort laws, the panel said, it is likely that the Government would have prevailed.¹⁸² It will be up to Congress to create a federal cause of action in such instances so that the Government's ability to recover forfeitable property from third parties does not depend on the vagaries of state law.

XIII. Right of a Third Party To Object to the Forfeiture

21 U.S.C. § 853(k) provides that a third party has no right to intervene in a criminal case to object to the forfeiture until after conviction. The only avenue for challenging the forfeiture is the ancillary proceeding.¹⁸³ For example, as the

Va. 1995).

¹⁷⁹ *United States v. McCorkle*, 321 F.3d 1292 (11th Cir. 2003).

¹⁸⁰ *United States v. McCorkle*, 321 F.3d at 1298.

¹⁸¹ *United States v. Bailey*, 419 F.3d 1208, 1214 (11th Cir. 2005) (Government's conversion action against defense attorney who converted \$2 million in fraud proceeds to his own use failed because Florida law requires plaintiff to show that it had possession or an immediate right of possession of the converted property at the time the conversion took place; the relation back doctrine does not, by itself, satisfy this requirement; the Government has no right of possession until a court enters an order of forfeiture).

¹⁸² 419 F.3d at 1216.

¹⁸³ See *United States v. Nava*, 404 F.3d 1119, 1125 (9th Cir. 2005) ("section 853(n) is the exclusive proceeding in which third parties may claim interests in property subject to criminal forfeiture"; section 853(k) "specifically bars third parties from intervening in the trial or the appeal of a criminal case to assert their interests, or from bringing independent suits

district court held in *Gatex Corp. v. United States*,¹⁸⁴ a third party cannot seek return of property seized for criminal forfeiture under Rule 41(g) if the remedy of filing a claim in the ancillary proceeding is available.¹⁸⁵

For the same reason, a third party may not object to the Government's motion to forfeit substitute assets. In *Ivanchukov*, the defense attorney who received the \$100,000 check in bearer form from the defendant tried to object to the forfeiture of the check as a substitute asset. But the court held that only the defendant could object to the forfeiture when the Government moved for the preliminary order; the attorney, like any other third party, had to wait to make his objections in the ancillary proceeding.¹⁸⁶

XIV. Ancillary Hearing—Procedural Issues

Purpose of the ancillary proceeding

The purpose of the ancillary proceeding is to adjudicate a third party's interest in the property being forfeited, not to adjudicate personal claims against the defendant. Accordingly, the courts have consistently turned a deaf ear to attempts by third parties to use the ancillary proceeding to assert claims for compensatory damages against the defendant, or to recover debts like child support payments.¹⁸⁷

against the United States once an indictment alleging that the property is subject to forfeiture has been filed"); *United States v. Puig*, 419 F.3d 700, 703 (8th Cir. 2005) (the ancillary proceeding is the "only avenue by which a third party claimant may seek to assert an interest in property that has been included in an indictment alleging that the property is subject to forfeiture").

¹⁸⁴ *Gatex Corp. v. United States*, 2005 WL 821516 (S.D.N.Y. Apr. 7, 2005).

¹⁸⁵ *Id.*, at * 2 (denying Rule 41(g) motion for the return of seized property on the ground that movant had the adequate remedy of filing a claim in the ancillary proceeding in the criminal case).

¹⁸⁶ *United States v. Ivanchukov*, 405 F. Supp.2d 708, 713 n.12, (E.D. Va. 2005) (pursuant to Rule 32.2(b)(2), defense attorney cannot contest forfeiture of attorneys fee in the forfeiture phase of the case, but may do so in the ancillary proceeding).

¹⁸⁷ See *Baranski v. Fifteen Unknown Agents*, 401 F.3d 419, 436-37 (6th Cir. 2005) (purpose of the ancillary proceeding is solely to determine who has legal right to the forfeited property; it is not the place for third parties to seek compensation for damages allegedly resulting from the Government's seizure of the property); *United States v. Perkins*, 382 F. Supp. 2d 146, 150 (D. Me. 2005) (claimant to whom defendant owed child support cannot use

Notice requirement under section 853(n)(1)

The procedures that govern the ancillary proceeding are set forth in 21 U.S.C. § 853(n) and Rule 32.2(c). One currently unresolved issue concerning those procedures is whether the Government is required to send direct written notice of the forfeiture order to interested third parties, advising them of their right to contest the forfeiture. Under Section 853(n)(1), the Government has the option of sending direct written notice but it is not required to do so. The issue is whether, notwithstanding the statute, the Due Process Clause makes the sending of such direct notice mandatory.

In *United States v. Puig*,¹⁸⁸ the Eighth Circuit flagged the issue but did not decide it.¹⁸⁹ It held only that a person with *actual* notice cannot complain that the Government failed to send him notice.¹⁹⁰

Subject matter jurisdiction

The claim in the ancillary proceeding must relate to the property that is forfeited. As we will discuss momentarily, an unsecured creditor lacks standing to contest the a forfeiture in the ancillary proceeding. It doesn't do the claimant any good to say, however, "I'm not just an unsecured creditor; I have an actual lien on the defendant's property" if that property is not the property that has been forfeited. In *United States v. Perkins*,¹⁹¹ a third party asserted that she had converted her right to child support payments into a legal interest in the defendant's property, but the court held that because that property was not the

ancillary proceeding to adjudicate the validity of her debt or her lienholder's interest in property *not* subject to forfeiture).

¹⁸⁸ *United States v. Puig*, 419 F.3d 700 (8th Cir. 2005).

¹⁸⁹ *See United States v. Puig*, 419 F.3d 700, 703-04 (8th Cir. 2005) (finding it unnecessary to decide if either the statute or the Due Process Clause requires direct written notice because claimant had actual notice, but questioning cases holding such notice is required).

¹⁹⁰ 419 F.3d at 704 (claimant whose counsel had actual notice of the order of forfeiture cannot complain that the Government should have sent him direct notice).

¹⁹¹ *United States v. Perkins*, 382 F. Supp. 2d 146 (D. Me. 2005).

asset subject to forfeiture, the court had no subject matter jurisdiction over the claim.¹⁹²

Pleading requirements under section 853(n)(3)

Section 853(n)(3) provides that the third party's petition must be filed under penalty of perjury and must describe the Claimant's interest in the forfeited property.¹⁹³ In *Perkins*, the court gave the *pro se* claimant two weeks to conform her petition to the requirements of the statute.¹⁹⁴

When no hearing is necessary

Under Rule 32.2(c)(1)(A), no hearing is necessary if the court can dismiss the claim on the pleadings for lack of standing or for failure to state a claim.¹⁹⁵ In *Perkins*, the court dismissed part of the claim because it lacked subject matter jurisdiction, and part of it because even assuming the facts to be true, the claimant did not have a claim cognizable under § 853(n)(6)(A) because what she alleged was an interest that arose after the crime giving rise to the forfeiture.¹⁹⁶

¹⁹² *United States v. Perkins*, 382 F. Supp. 2d 146, 148-49 (D. Me. 2005) (third party must assert an interest in the forfeited property; court has no jurisdiction to litigate claimant's lien against other property of defendant not being forfeited).

¹⁹³ 21 U.S.C. § 853(n)(3).

¹⁹⁴ *United States v. Perkins*, 382 F. Supp. 2d 146, 147 (D. Me. 2005) (court gives *pro se* claimant 2 weeks to conform her petition to section 853(n)(3), making the claim under oath and stating how defendant's obligation to pay child support gives her a legal interest in the forfeited property). *See also United States v. Speed Joyeros, S.A.*, ___ F. Supp.2d ___, 2006 WL 211946, at *3 (E.D.N.Y. Jan. 27, 2006) (petition filed by counsel and verified by a CPA but not by the petitioners themselves does not comply with § 853(n)(3); the "substantial danger of false claims in forfeiture proceedings" requires strict compliance with the requirement that the claimant sign the petition personally under penalty of perjury).

¹⁹⁵ *See United States v. Jones*, 2005 WL 1806406, at *1 (W.D.N.C. Jul. 27, 2005) (under Rule 32.2(c)(1)(A), court may dismiss third party claim without a hearing for lack of standing or failure to state a claim, but all facts alleged in the petition must be assumed to be true); *United States v. Wheaton*, 2005 WL 2429792, at *5 (D. Me. Sept. 25, 2005) (granting motion to dismiss because petition fails to state a claim sufficient to recover under section 853(n)(6)(A) or (B) even if all facts are assumed to be true).

¹⁹⁶ *United States v. Perkins*, 382 F. Supp. 2d 146, 148-49 (D. Me. 2005) (claim dismissed without a hearing where petition asserted an interest in property not being forfeited and asserted an interest that arose after the Government's interest vested under the relation

Motion for summary judgment

If the claim cannot be dismissed on the pleadings, the Government can move for summary judgment.¹⁹⁷ In *United States v. Harewood*,¹⁹⁸ the court granted the motion for summary judgment because the undisputed facts showed that the defendant's sister, who had obtained title to the property by virtue of a quitclaim deed, could not maintain a claim under either § 853(n)(6)(A) or (n)(6)(B).¹⁹⁹

Burden of proof in the ancillary proceeding

In *United States v. Nava*, the Ninth Circuit reaffirmed that the claimant has the burden of proof in the ancillary proceeding.²⁰⁰

XV. Choice of Law

The role of state law

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 to determine nature of the

back doctrine).

¹⁹⁷ See *United States v. Martinez*, 228 F.3d 587, 589 (5th Cir. 2000) (ancillary hearing is necessary only where there are facts in dispute that must be resolved; if petitioner's claim lacks merit as a matter of law, it can be disposed of on a motion for summary judgment); *Pacheco v. Serendensky*, 393 F.3d 348, 356 (2d Cir. 2004) (only after some discovery has taken place may a party move for summary judgment in the ancillary proceeding).

¹⁹⁸ *United States v. Harewood*, 2005 WL 2076543 (W.D.N.Y. Aug. 25, 2005).

¹⁹⁹ *Id.*, at *2 (granting Government's motion for summary judgment where undisputed facts showed claimant had no interest in forfeited property at the time of the offense and gave nothing of value in exchange for it).

²⁰⁰ *United States v. Nava*, 404 F.3d 1119, 1125 (9th Cir. 2005) ("the petitioner bears the burden of proving his right, title, or interest under section 853(n)(6)").

claimant's interest in the property.²⁰¹ Generally, that means the court looks first to State law,²⁰² but that is not always the case.

If the property right was created by State law, the federal court will look first to State law to see what interest the claimant has in the property. For example, in *United States v. Wendling*,²⁰³ the court looked to state law to see if the defendant's mother owned the property or had gifted it to her son, and concluded that the mother had only a 50 percent interest in the property.²⁰⁴ If the claimant has no interest under state law, the inquiry ends and the claim fails. In *United States v. Holden*,²⁰⁵ the Government sought to forfeit a residence used to commit a drug offense. The defendant's family members contended that the defendant had transferred the property to them, but the court held that the family members had no legal interest in the property by virtue of a provision of state law that requires all transfers of an interest in land be in writing.²⁰⁶

If the property interest was created by foreign law, the court must look to foreign law to see what interest the claimant has in the property. In *United States v. Speed Joyeros, S.A.*,²⁰⁷ the court looked to Panamanian law to see what interest the claimants had in back wages allegedly owed to them by the defendant in that country.

²⁰¹ See *United States v. Speed Joyeros, S.A.*, ___ F. Supp.2d ___, 2006 WL 211946, at *4 (E.D.N.Y. Jan. 27, 2006) (the court properly looks to "the law of the jurisdiction that created the property right" to determine what interest the claimant has in the property; court looks to Panamanian law to see what interest claimants have to back wages).

²⁰² See *United States v. Nava*, 404 F.3d 1119, 1129 (9th Cir. 2005) (court must look to state law to see if claimant was the true owner of the property or only a nominee or straw; there is no federal common law of property in forfeiture cases).

²⁰³ *United States v. Wendling*, 359 F. Supp. 2d 850 (D.N.D. 2005).

²⁰⁴ *United States v. Wendling*, 359 F. Supp. 2d at 853-54 (following *Totaro*; court looks to state law to determine whether defendant's mother had 50 percent interest in forfeited property as joint tenant or had made a gift of her interest to her son).

²⁰⁵ *United States v. Holden*, 2005 WL 1593911 (N.D. Ohio Jul. 7, 2005).

²⁰⁶ *Id.*, at *2-3 (family members did not have a legal interest in defendant's real property based on oral agreement and alleged contributions because state law requires transfers of interest in land be in writing).

²⁰⁷ ___ F. Supp.2d ___, 2006 WL 211946, at *4 (E.D.N.Y. Jan. 27, 2006).

It follows that if the interest was created by federal law, the court should look to federal law to determine the nature of the claimant's interest. This issue arises when the federal court is asked to create a legal interest on behalf of the claimant by imposing a constructive trust. A constructive trust is a creation of equity that does not exist until it is imposed by the court.²⁰⁸ Therefore, when the federal court is asked to designate the forfeited property as the *res* of the trust, and to recognize the claimants as the beneficiaries, it must employ principles of equity generally recognized by the federal courts and not the law of any particular state.²⁰⁹

The role of federal law

Once the court determines what interest the claimant has in the property under the law of the jurisdiction that created the property right, it must look to federal law – i.e., to the provisions in 21 U.S.C. § 853(n)(6) – to determine if the claimant will prevail in the ancillary proceeding.²¹⁰ Thus, a person who has an interest in the property under state or foreign law may nevertheless fail to satisfy

²⁰⁸ 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 section 1963(l)(6)(A)); *United States v. Strube*, 58 F. Supp. 2d 576, 585 (M.D. Pa. 1999) (same) (following *BCCI*).

²⁰⁹ *But see United States v. Wheaton*, 2005 WL 2429792, at *4 (D. Me. Sept. 28, 2005) (court looks to state law to see if claimant is the beneficiary of a constructive trust; claims fails to satisfy the state law requirement that she lack an adequate remedy at law).

²¹⁰ See *United States v. Speed Joyeros, S.A.*, ___ F. Supp.2d ___, 2006 WL 211946, *4 (E.D.N.Y. Jan. 27, 2006) (state law determines what interest the claimant has; “the effect of that interest – i.e. whether it satisfies the requirements of the federal forfeiture statute – is necessarily a matter of federal law”).

the requirements of the federal statute.²¹¹ For example, as discussed below, a person can have a valid interest under state law and not satisfy the “purchaser” requirement in § 853(n)(6)(B).²¹²

XVI. Standing Under Sections 853(n)(2) and 1963(I)(2)

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 file a claim in the ancillary proceeding. If the claimant has no legal interest in the forfeited property, his claim should be dismissed for lack of standing.

For example, in *United States v. Weiss*, the district court held that a corporation that had no ownership interest in a forfeited mortgage lacked standing to contest its forfeiture.²¹³

The defendant may not file a claim

Section 853(n)(2) expressly provides that the defendant cannot file a claim in the ancillary proceeding.²¹⁴ So, as the Ninth Circuit held in *United States v.*

²¹¹ See *United States v. Hooper*, 229 F.3d 818, 820 (9th Cir. 2000) (even if claimant had an interest in the defendant’s drug proceeds as a matter of state law she cannot prevail unless she qualifies for relief under one of the two prongs of section 853(n)(6)).

²¹² See *United States v. Pierce*, 2005 WL 2135142, at *2 (W.D. Va. Sept. 1, 2005) (wife who had 100 percent interest in jointly held bank account under state law, nevertheless could not challenge forfeiture of husband’s one-half interest under section 853(n)(6)(A) because, as a matter of federal law, her interest was not superior to husband’s interest); *United States v. Soreide*, No. 03-60235-CR-COHN/SNOW, slip op. at 17-18 (S.D. Fla. Mar. 22, 2005) (same as to fraud proceeds; claimant may have a valid legal interest in the property under state law but not be able to satisfy the “purchaser for value” element in the federal statute).

²¹³ 2005 WL 1126663, at *10-11 (M.D. Fla. May 6, 2005) (standing in the ancillary proceeding is limited to persons with a “legal interest” in the property; the defendant, not his corporation, was the owner of the mortgage on a shopping mall that was subject to forfeiture).

²¹⁴ See *United States v. Pelullo*, 178 F.3d 196, 202 (3d Cir. 1999) (defendant lacks standing to file a claim in the ancillary proceeding because by that time he no longer has any interest in the property).

Houghton,²¹⁵ the defendant has no right to complain that he did not get notice of the ancillary proceeding.²¹⁶

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

Unsecured creditors lack standing because they have no legal interest in the particular asset that has been forfeited.²¹⁷ In *Perkins*, the case involving the woman claiming that the defendant owed her child support, the court held that unless the claimant had a recorded lien on the specific assets subject to forfeiture, she was only an unsecured creditor without standing to contest the forfeiture of the defendant's property.²¹⁸

In *United States v. Eldick*,²¹⁹ a defendant was convicted of operating a medical practice without a license to do so, and was ordered to forfeit the proceeds of the crime. In the ancillary proceeding, the defendant's brother filed a claim asserting that he and the defendant had entered into an oral contract that entitled the brother to the proceeds of the medical practice in the event the defendant operated the practice illegally. In denying the claim, the district court held that even if there was such a contract, the claimant was nothing more than an unsecured creditor with a cause of action against the defendant to enforce its terms. He did not have a legal interest in the forfeited property.²²⁰

²¹⁵ *United States v. Houghton*, 132 Fed. Appx. 130 (9th Cir. 2005).

²¹⁶ *United States v. Houghton*, 132 Fed. Appx. 130, 131-32 (9th Cir. 2005) (defendant cannot complain that he did not get notice of the ancillary proceeding; he had no right to participate in it).

²¹⁷ See *United States v. Watkins*, 320 F.3d 1279, 1283-84 (11th Cir. 2003) (unsecured creditors lack standing to contest the forfeiture in the ancillary proceeding because they have no interest in the particular assets subject to forfeiture); *United States v. Ribadeneira*, 105 F.3d 833, 836 (2d Cir. 1997) (person holding check drawn on defendant's forfeited bank account is a general unsecured creditor with no interest in specific funds); *United States v. Gordon*, 2005 WL 2759845, at *2 (S.D.N.Y. Oct. 19, 2005) (following *Ribadeneira* and explaining why unsecured creditors lack standing under section 853(n)(2)).

²¹⁸ *United States v. Perkins*, 382 F. Supp. 2d 146, 149 (D. Me. 2005) (following *Ribadeneira*; woman to whom defendant owed child support is likely an unsecured creditor without standing).

²¹⁹ *United States v. Eldick*, 2005 WL 2861130 (N.D. Fla. Nov. 1, 2005).

²²⁰ *Id.*, at *1 (following *Watkins*; even if claimant did have an oral contract with the defendant, he was only an unsecured creditor without standing to contest the forfeiture of

Two other cases involved claimants who had loaned money or materials to the defendant to make improvements on a residence but had not obtained a lien on the property. In both *United States v. Nnaji*²²¹ and *United States v. Wheaton*,²²² the district court held that the claimants were unsecured creditors without standing to contest the forfeiture of the property.

The ability to trace assets to the forfeited property is irrelevant

Third parties often assert that their ability to trace their assets to the property subject to forfeiture from the defendant somehow gives them a legal interest in the property sufficient to establish standing to contest the forfeiture; but one's ability to prove that he or she was the former owner of property is irrelevant. The question isn't whether the claimant was once the owner of the property but whether he or she retained any interest in it once it was transferred to the defendant.²²³

For example, in *United States v. Gordon*,²²⁴ the claimant sold shares of stock to the defendant in exchange for cash and a promissory note, but did not retain a lien or other security interest in the property. When the Government obtained an order forfeiting the stock in a criminal case, the court held that the claimant was merely an unsecured creditor without any legal interest in the property. That the claimant was the former owner of the stock was irrelevant.²²⁵

defendant's assets).

²²¹ *United States v. Nnaji*, 2005 WL 1049905, at *1 (E.D. Mich. Apr. 22, 2005).

²²² *United States v. Wheaton*, 2005 WL 2429792, at *7 (D. Me. Sept. 28, 2005).

²²³ See *United States v. BCCI Holdings (Luxembourg) S.A. (Final Order of Forfeiture and Disbursement)*, 69 F. Supp. 2d 36, 59 (D.D.C. 1999) (a person who voluntarily transfers his property to the defendant is no longer the owner of that property; his ability to trace his property to the defendant's assets is irrelevant; therefore, victims who transferred their property to the defendant have no greater standing to contest the forfeiture order than other unsecured creditors); *United States v. BCCI Holdings (Luxembourg) S.A. (Petitions of Bank Austria)*, 1997 WL 695668, at *6-7 (D.D.C. Aug. 26, 1997) (ability of claimant to trace funds into defendant's account is *necessary* to contest forfeiture but not *sufficient* if title to funds passed to defendant and claimant became a general creditor).

²²⁴ *United States v. Gordon*, 2005 WL 2759845 (S.D.N.Y. Sept. 28, 2005).

²²⁵ *Id.*, at *2 (seller who did not retain a security interest in the property sold to the defendant to secure the unpaid balance was an unsecured creditor with no legal interest in the property under section 853(n)(2)).

Person in possession of the property

Nor does it make any difference that the claimant is in physical possession of the property at the time of the forfeiture. In *Wheaton*, the claimant who had contributed to the cost of the improvements on the defendant's residence was also living on the premises, but the district court held that possession of the property is not the same as a legal interest, and is not sufficient to establish standing.²²⁶

Judgment creditors

A judgment creditor is nothing more than another unsecured creditor, unless he obtains a judgment lien on a specific asset. In a case involving highly sympathetic claimants, a district court in Texas held that the parents of a person who had died from a drug overdose caused by the defendant had no standing to contest the forfeiture of the defendant's assets, even though they had obtained a \$2 million judgment against the defendant in state court.²²⁷

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

There are two grounds for recovery in the ancillary proceeding; the claimant must either demonstrate priority-of-ownership at the time of the offense under § 853(n)(6)(A), or that he subsequently acquired the property as a bona fide purchaser for value under § 853(n)(6)(B).²²⁸

²²⁶ *United States v. Wheaton*, 2005 WL 2429792, at *7 (D. Me. Sept. 28, 2005) (claimant could not base standing to contest forfeiture of real property on the fact that it was her residence).

²²⁷ See *United States v. Speed Joyeros, S.A.*, ___ F. Supp.2d ___, 2006 WL 211946, *5 (E.D.N.Y. Jan. 27, 2006) (creditor who obtained a judicial decree affirming his debt and attached defendant's property may have acquired an interest in the specific asset, but "it comes too late in the day" to recover under § 853(n)(6)(A) which protects interests in effect when the property became subject to forfeiture); *United States v. Fuchs*, 2005 WL 440429, at *2 (N.D. Tex. Feb. 23, 2005) (person who has obtained a civil judgment against the defendant, but who has not perfected a judgment lien against any specific asset, is an unsecured creditor without standing to contest the forfeiture of the defendant's property in the ancillary proceeding).

²²⁸ See *Pacheco v. Serendensky*, 393 F.3d 348, 353 (2d Cir. 2004) (the petitioner must meet the conditions of either section 853(n)(6)(A) or (n)(6)(B)); *United States v. Watkins*, 320 F.3d 1279, 1282 (11th Cir. 2003) (section 853(n)(6) protects only two classes of petitioners); *United States v. Kennedy*, 201 F.3d 1324, 1334 (11th Cir. 2000) (the alternative grounds set forth in sections 853(n)(6)(A) and (B) are the only grounds for recovery in the ancillary

Paragraph (6)(A) embodies the relation back doctrine; it provides that a third party who had a legal interest in the forfeited property before the underlying crime was committed can prevail in the ancillary proceeding on the ground that he had an interest in the property before the Government's interest vested, but one who acquired his interest at a later date cannot.²²⁹ Several years ago, the Ninth Circuit held that a third party can *never* have a successful claim under Section 853(n)(6)(A) if the property was the proceeds of the offense. As the panel explained, the proceeds of an offense do not exist before the offense is committed, and when they come into existence, the Government's interest under the relation back doctrine immediately vests. Thus, a third party contesting the forfeiture of proceeds could possibly prevail under the bona fide purchaser provision in § 853(n)(6)(B), but never under the priority-of-ownership provision in § 853(n)(6)(A).²³⁰

In *United States v. Soreide*,²³¹ a district court in Florida extended this rule, holding that if a third party could not make a successful claim under § 853(n)(6)(A) to the proceeds of the offense, neither could she make a claim to real property that the defendant purchased with the proceeds of the offense.²³²

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

The defense under section 853(n)(6)(B) has three elements

proceeding).

²²⁹ See *United States v. Nava*, 404 F.3d 1119, 1129 (9th Cir. 2005) (because the Government's interest in the property vested at the time of the offense giving rise to the forfeiture under the relation back doctrine, claimant can recover under section 853(n)(6)(A) only if her interest vested before that time); *United States v. Perkins*, 382 F. Supp. 2d 146, 148-49 (D. Me. 2005) (lienholder interest that claimant did not acquire until after real property was used to commit drug offense cannot support claim under section 853(n)(6)(A)).

²³⁰ See *United States v. Hooper*, 229 F.3d 818, 821-22 (9th Cir. 2000) (to prevail under section 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, section 853(n)(6)(A) can never be used to challenge the forfeiture of proceeds),

²³¹ *United States v. Soreide*, No. 03-60235-CR-COHN/SNOW (S.D. Fla. Mar. 22, 2005).

²³² *United States v. Soreide*, No. 03-60235-CR-COHN/SNOW, slip op. at 11-12 (S.D. Fla. Mar. 22, 2005) (following *Hooper* and applying it not only to claimant's attempt to assert an interest in the proceeds themselves, but also to her attempt to assert an interest in property traceable to the proceeds).

Section 853(n)(6)(B) is an exception to the relation back doctrine; it provides that a person who acquired an interest in the forfeited property after the Government's interest vested may nevertheless prevail in the ancillary proceeding if he was a bona fide purchaser for value. This defense has three elements: the claimant must show (1) that he has a legal interest in the forfeited property; (2) that the interest was acquired as a bona fide purchaser for value; and (3) that the interest was acquired at a time when the claimant was reasonably without cause to believe that the property was subject to forfeiture.

In *Soreide*, the court pointed out that these are separate and conjunctive requirements.²³³ Thus, the court does not reach the "cause to believe" element if the claimant does not establish that he or she was a purchaser for value.²³⁴

Donees and family members are not bona fide purchasers

A person who receives the property as a gift, by inheritance, or by virtue of marital property law, is not a "purchaser." Thus, in *Soreide*, the court held that the defendant's wife could not prevail as a bona fide purchaser for value under § 853(n)(6)(B) unless she acquired the property from her husband in an arms-length transaction.²³⁵

Similarly, in *Bryson* the Fourth Circuit held that a claimant who received the forfeited property as a gift from his father was not a bona fide purchaser for value even though he invested money, time and effort in improving the property and perfecting his title to it. In short, property originally conveyed as a gift remains a gift regardless of what happens later.²³⁶

²³³ *United States v. Soreide*, No. 03-60235-CR-COHN/SNOW, slip op. at 13 (S.D. Fla. Mar. 22, 2005) (the three elements of the defense are separate and conjunctive).

²³⁴ *Id.*, slip op. at 16-17 (wife gave no value for the property; therefore, it was unnecessary to decide if she had reason to know it was forfeitable).

²³⁵ *Id.*, slip op. at 14 (notwithstanding all of the interests she might have acquired in marital property under state law, a wife cannot successfully contest the forfeiture of the property as a bona fide purchaser unless she acquired her interest for value in an arms-length transaction), following *United States v. McHan*, 345 F.3d 262, 279 (4th Cir. 2003) (wife who acquired property from husband-defendant in less than arm's-length transaction was not a bona fide purchaser).

²³⁶ *In re Bryson*, 406 F.3d 284, 291 (4th Cir. 2005) (family member who received promissory note as a gift was not a bona fide purchaser for value of the land that he acquired

Finally, the district court in *Harewood* held that a person who did not pay fair market value for the property cannot be considered a “purchaser” within the meaning of the forfeiture statute. Accordingly, the court rejected the claim of the defendant’s sister who had acquired the property by quitclaim deed for zero consideration.²³⁷

Claimant must be reasonably without cause to believe the property was subject to forfeiture

Even if the claimant shows that he gave something of value for the property, he will not prevail unless he satisfies the “reasonably without cause to believe” element of the statute. This is a problem for defense attorneys who give services in return for criminal proceeds. As the Supreme Court said in *Caplin & Drysdale*, “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.”²³⁸

The Fifth Circuit discussed this point at length in a non-forfeiture case in which the panel drew parallels to forfeiture law. In *FTC v. Assail*,²³⁹ the court said that under forfeiture law, an attorney who is “objectively on notice” that his fees may derive from a tainted source has an affirmative duty to conduct an inquiry into the source of the fee and may not rely on his client’s representations that the fee was derived from a legitimate source. An attorney who fails to take these steps would not, in the panel’s view, satisfy the requirements of § 853(n)(6)(B).²⁴⁰

by enforcing the note even though he invested time and effort in doing so).

²³⁷ *United States v. Harewood*, 2005 WL 2076543, at *2 (W.D.N.Y. Aug. 26, 2005) (defendant’s sister, to whom he quitclaimed his real property for \$0, was not a bona fide purchaser for value).

²³⁸ *Caplin & Drysdale v. United States*, 491 U.S. 617, 633 n.10 (1989).

²³⁹ *Federal Trade Comm’n v. Assail, Inc.*, 410 F.3d 256 (5th Cir. 2005).

²⁴⁰ *Federal Trade Comm’n v. Assail, Inc.*, 410 F.3d at 265-66 (under section 853(n)(6)(B) an attorney who is “objectively on notice” that his fees may derive from a tainted source has an affirmative duty to conduct an inquiry into the source of the fee and may not rely on his client’s representations that the fee was derived from a legitimate source; “The 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

XIX. Clear Title to Forfeited Property

The ancillary proceeding gives the Government clear title to the forfeited property.²⁴¹ In *Puig*, the Eighth Circuit held that if no one files a claim in the ancillary proceeding, the Government gets clear title to the property automatically.²⁴² And in *Baranski*, the Sixth Circuit said that a third party whose claim was rejected in the ancillary proceeding cannot make a collateral attack on the judgment in another forum, such as by filing a *Bivens* action.²⁴³

XX. Appeals

The time to appeal from an order of forfeiture is governed by Appellate Rule 4(b)(1)(B). In *Elliott*, the Seventh Circuit held that the defendant can appeal the amendment to the order of forfeiture to include substitute assets, but must do so within 10 days of the order.²⁴⁴

Under Rule 32.2(d), the court may not transfer any portion of the forfeited property to a third party while the defendant's appeal is pending, unless the defendant consents. In *United States v. Betancourt*, the district court noted that the parties followed this procedure when the defendant agreed to a division of the property and distribution of 50 percent of it to an innocent third party while his appeal was pending.²⁴⁵ But things did not work out exactly as planned for the defendant in that case. His understanding was that the third party would immediately kick back a portion of her share to the defendant so that he could

for value.”).

²⁴¹ See 21 U.S.C. § 853(n)(7).

²⁴² *United States v. Puig*, 419 F.3d 700, 703-04 (8th Cir. 2005) (if no third party files a timely claim, the United States has clear title to the property pursuant to section 853(n)(7)).

²⁴³ *Baranski v. Fifteen Unknown Agents*, 401 F.3d 419, 436-37 (6th Cir. 2005) (third party who lost in the ancillary proceeding cannot make a collateral attack on the forfeiture, such as by filing a *Bivens* action).

²⁴⁴ *United States v. Elliott*, 149 Fed. Appx. 489, 492-93 (7th Cir. 2005) (defendant has a right to appeal amendment to order of forfeiture to include substitute asset, but appeal is governed by Rule 4(b) and thus must be filed within 10 days unless the time is extended by the court).

²⁴⁵ *United States v. Betancourt*, 2005 WL 3348908, *1 (S.D. Tex. Dec. 8, 2005).

pay his attorney's fee, but the tax collector was standing by to seize the money to satisfy a tax deficiency instead.

Appeal by the third party from the ancillary proceeding

A third party claimant can appeal an adverse decision in the ancillary proceeding; as the Sixth Circuit held in *Baranski*, the third party's right to file such an appeal is independent of the defendant's appeal from his conviction.²⁴⁶ If there are multiple claims, however, one third party cannot appeal until all of the other third party claims are resolved, unless the court determines pursuant to Rule 32.2(c)(3) that there is no reason to delay the appeal.²⁴⁷

In *Bryson*, the Fourth Circuit noted that the district court had not made the necessary finding under the Rule; thus, the court was inclined to hold that the appeal before it was premature. But the panel held that because all of the competing claims were in fact resolved before the appeal was heard on the merits, there was no violation of the Rule after all.²⁴⁸

Jurisdiction Pending Appeal

The defendant's appeal does not affect the district court's jurisdiction to conduct the ancillary proceeding.²⁴⁹

XXI. Forfeiture and Restitution

²⁴⁶ *Baranski v. Fifteen Unknown Agents*, 401 F.3d 419, 436 (6th Cir. 2005) (third party's right to appeal adverse decision in the ancillary proceeding is independent of defendant's appeal from his conviction).

²⁴⁷ See *United States v. Hodges*, 404 F.3d 354, 354 (5th Cir. 2005) (if there are multiple claims in the ancillary proceeding, one third party cannot appeal until all claims are resolved, unless the court determines per Rule 32.2(c)(3) that "there is no just reason for delay").

²⁴⁸ *In re Bryson*, 406 F.3d 284, 289 (4th Cir. 2005) (under Rule 32.2(c)(3), a third party cannot appeal from the dismissal of his claim until all other claims are resolved by the district court; however, the court of appeals will have jurisdiction to consider the premature claim if the remaining claims are resolved before the appeal is heard on the merits).

²⁴⁹ See *United States v. Houghton*, 132 Fed. Appx. 130, 132 (9th Cir. 2005) (notice of appeal does not stop the ancillary proceeding).

In *In re W.R. Huff Asset Management Co., LLC*,²⁵⁰ the Second Circuit held that crime victims have no right to object to the forfeiture of the defendant's property on the ground that it impairs their ability to get restitution.²⁵¹

In *United States v. Bisig*,²⁵² however, a district court held that the Government cannot use forfeiture as a way around the Government's obligation to the relator in a *qui tam* action.²⁵³

XXII. Award to Informants

In *United States v. Dawson*,²⁵⁴ the Seventh Circuit rejected the argument that paying a percentage of the amount forfeited to an informant automatically disqualified the informant as a witness. The proper safeguard against unreliable testimony, the court said, is requiring that the promise of payment be disclosed to the jury.²⁵⁵

XXIII. The Application of Section 2461(c) to Fraud Cases

Finally, 28 U.S.C. § 2461(c) provides that the Government may bring a criminal forfeiture action whenever a defendant is convicted of an offense for

²⁵⁰ *In re W.R. Huff Asset Management Co., LLC*, 409 F.3d 555 (2d Cir. 2005).

²⁵¹ *Id.* at 564 (section 853(i)(2) gives the Government the authority to compromise a criminal forfeiture with the defendant and third parties; victims have no right under the Crime Victims Rights Act to object to the forfeiture agreement on the ground that it leaves the defendant with no funds to pay as restitution).

²⁵² *United States v. Bisig*, 2005 WL 3532554 (S.D. Ind. Dec. 21, 2005).

²⁵³ *Id.*, at *4, *6 (S.D. Ind. 2005) ("the United States cannot sidestep the requirement to share recovery with the relator . . . by merely electing to recover through criminal forfeiture proceedings;" thus, the relator must receive his share before the Attorney General can use the forfeited funds for victim restitution under § 853(i)).

²⁵⁴ *United States v. Dawson*, 425 F.3d 389 (7th Cir. 2005).

²⁵⁵ *United States v. Dawson*, 425 F.3d 389, 394 (7th Cir. 2005) (rejecting argument that a witness who would be paid a percentage of the amount forfeited if the defendant is convicted should not be permitted to testify against the defendant).

which any form of forfeiture — civil or criminal — is authorized.²⁵⁶ As originally enacted, however, the statute provided that it would apply only where “no specific statutory provision is made for criminal forfeiture upon conviction.” In cases involving mail and wire fraud, the Government typically relies on § 2461(c) and the civil forfeiture statute, 18 U.S.C. § 981(a)(1)(C), to forfeit the proceeds of the crime. A number of defendants argued, however, that because there were specific provisions for criminal forfeiture for mail and wire fraud in 18 U.S.C. § 982(a)(2) and (8), the Government could not rely on § 2461(c) to seek criminal forfeiture in such cases.

In 2004 and 2005, two district courts rejected this argument and one accepted it.²⁵⁷ Then in early 2006 the Ninth Circuit held in *United States v. Rutledge*²⁵⁸ that the defendants’ limited view of § 2461(c) had no merit.

Sections 982(a)(2) and (8), the panel observed, authorize criminal forfeiture of fraud proceeds only in cases involving fraud affecting a financial institution and telemarketing. If, as the defendants contended, the existence of those provisions meant that § 2461(c) could never apply in a mail or wire fraud case, there would be no criminal forfeiture authority in a case where the defendant was charged

²⁵⁶ See *United States v. Razmilovic*, 419 F.3d 134, 136 (2d Cir. 2005) (section 2461(c) “authorizes criminal forfeiture as a punishment for any act for which civil forfeiture is authorized, and allows the Government to combine criminal conviction and criminal forfeiture in a consolidated proceeding”); *United States v. Wittig*, 2004 WL 1490046, at *2 (D. Kan. Jun 30, 2004) (section 2461(c) “allows criminal forfeiture to be sought anytime there is a civil forfeiture provision but no corresponding criminal forfeiture statute”); *Baranski v. Fifteen Unknown Agents*, 401 F.3d 419, 434 (6th Cir. 2005) (section 2461(c) authorizes criminal forfeiture for violation of 26 U.S.C. § 5861(1) because civil forfeiture is authorized by 26 U.S.C. § 5872); *United States v. Baranski*, 75 Fed. Appx. 566, 568-69 (8th Cir. 2003) (same); *United States v. Reiner*, 397 F. Supp. 2d 101, 104 (D. Me. 2005) (“If [property] is subject to civil forfeiture, it is also subject to criminal forfeiture, 28 U.S.C. § 2461(c)”).

²⁵⁷ See *United States v. Schlesinger*, 396 F. Supp. 2d 267, 275-76 (E.D.N.Y. 2005) (rejecting *Croce* and *Thompson* and holding that criminal forfeiture of mail and wire fraud proceeds under sections 2461(c) and 981(a)(1)(C) is coextensive with civil forfeiture; citing legislative history); *United States v. Lebed*, 2005 WL 2495843, at *7-8 (E.D. Pa. Oct. 7, 2005) (disagreeing with *Croce II*; plain language of section 2461(c) and legislative history of CAFRA indicate that Congress meant to authorize criminal forfeiture for all mail and wire fraud offenses). But see *United States v. Croce*, 345 F. Supp. 2d 492, 496 n.9 (E.D. Pa. 2004) (*Croce II*) (the Government may not forfeit mail fraud proceeds under sections 981(a)(1)(C) and 2461(c) because the more specific provision in section 982(a)(2) limiting such forfeitures to cases affecting a financial institution preempts the field).

²⁵⁸ *United States v. Rutledge*, ___ F.3d ___, 2006 WL 328271 (9th Cir. Feb. 14, 2006).

with a species of fraud other than those set forth in those statutes. In the court's view, that could not be what Congress intended.

"The most natural meaning of this language," the court said, "is that criminal forfeiture is authorized under section 2461(c) when no criminal forfeiture provision applies to the charges made against the particular charged individual. There is no reason why Congress would choose to make criminal forfeiture almost universally available for property subject to civil forfeiture but would exempt proceeds from particular kinds of mail and wire fraud." Accordingly, the court held that Defendant's case represented exactly the situation in which § 2461(c) was meant to apply.²⁵⁹

In the Act reauthorizing the USA Patriot Act, Congress resolved this issue once and for all by redrafting § 2461(c) to eliminate the limitation to cases where there was no other criminal forfeiture authority. Thus, under the new version of the statute, it is clear that criminal forfeiture is authorized in *all* cases where there is civil forfeiture authority, and that the procedures in § 853 apply to all stages of such cases.

Conclusion

The case law on criminal forfeiture procedure is extremely volatile. Tens of cases are decided every month, reflecting the increasing use of this important law enforcement tool by federal prosecutors. Indeed, it is clear that criminal forfeiture has become a standard part of the criminal process. Thus, the deluge of new case law is certain to continue for the foreseeable future.

²⁵⁹ *Id.*, at *2.