

**FORFEITURE OVERVIEW FOR THE NATIONAL SEMINAR FOR FEDERAL
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A. Federal Asset Forfeiture: Introductory Comments for Appointed Counsel

Outside of the admiralty and tax areas, federal asset forfeiture proceedings are a relatively new creature, dating to the Racketeering Influence and Corrupt Organizations Act (RICO), passed in 1970, and, most significantly, to the Comprehensive Crime Control Act of 1984. The pioneering RICO statute permitted the federal government to seize assets which were proceeds of or facilitated violations of the RICO statute, which includes as underlying violations a large number of federal criminal offenses. Most significantly for prosecutors, the RICO asset forfeiture provisions permitted assets to be seized prior to trial.

Under the RICO statute, and the general forfeiture statutes as they have been amended since 1984, there are numerous narcotics and non-narcotics federal criminal violations which permit asset forfeiture. Mail and wire fraud that affects a financial institution, various environment/hazardous waste violations, various motor vehicle violations such as altering or removing a vehicle identification number, motor fuel excise tax violations, and many others are all federal predicates for civil and criminal forfeiture proceedings, in addition to the usual narcotics predicates. Thus, due to the scope of the asset forfeiture statutes, any property that is the proceeds of a variety of illegal conduct or is used to carry out criminal activity may be seized by the federal government.

The federal government may bring two types of asset forfeiture proceedings - civil or criminal. There are also administrative forfeiture actions, a type of civil action, a procedure which federal public defenders may frequently encounter at the early phase of a case.

Federal civil forfeiture proceedings are actions brought directly against particular types of properties, such as parcels of real estate, boats, airplanes, stores, factories, inventory or any type of real or personal property. The actions are entitled "The United States of America v. One Parcel of Real Property Located at..." or some similar name. In general, to prevail in such an action, the government must show probable cause that the property facilitated or was the proceed of certain unlawful activity. To prevail against the government, the owner of the property, or a claimant, must contest the government's showing of probable cause. The Government can forfeit property upon a showing that it is entitled to do so by a preponderance of the evidence.

Administrative forfeiture proceedings are a type of civil forfeiture initiated and conducted by law enforcement agencies. Until an administrative forfeiture is contested, and sent to a U.S. Attorney for prosecution, the law enforcement agencies have great autonomy in handling administrative forfeitures.

Of particular importance to federal public defenders, the U. S. district courts may appoint counsel to represent claimants in federal civil forfeiture actions pursuant to the Criminal Justice Act (CJA) in situations where CJA counsel is appointed in “a related criminal case.” 18 U.S.C. Section 983(b).

In criminal forfeiture proceedings, the other type of federal asset forfeiture procedure, forfeiture is sought as part of a criminal proceeding against a particular person. Thus, unlike a federal civil forfeiture action, the criminal forfeiture proceeding is directly connected to a pending criminal prosecution.

Speaking generally, with an important exception called “substitute assets” discussed further below, under civil or criminal forfeiture procedure, a claimant must either prove that he or she is an “innocent owner” in order to recover its’ interest in the property sought to be seized, or that the property was not involved in criminal activity. Generally, a claimant holding a financial interest in property sought to be seized must show that he or she had no knowledge of any criminal activity relating to the property or, alternatively, that if he or she had such knowledge, that he or she took all reasonable steps to halt such illegal activity.

Ultimately, as part of a forfeiture proceeding, a claimant may seek to preserve its interest in property subject to forfeiture before a fact finder, whether it be a judge or jury. To prevail the government must obtain a judgement from the court to liquidate or obtain undisputed ownership of property subject to forfeiture.

B. Administrative Forfeitures

Federal administrative forfeitures are probably the most common type of asset forfeiture action counsel, whether appointed or retained, will encounter in his or her practice. These are the almost routine grist for the federal forfeiture mill--the car or boat seized after contraband is found by agents, the plane seized on the ground following an interdiction flight, funds seized in a bank account deposited by an alleged narcotics trafficker or a person accused of fraud.

Administrative proceedings are in rem civil actions. They may be brought without any judicial intervention. Although the Department of Justice does not administratively seize real property, currency and conveyances and other instrumentalities of crimes in value up to \$500,000.00 can be seized and forfeited administratively. The statutes governing administrative forfeitures and some but not all related proceedings are found at 18 U.S.C. Sections 981 and 983-985 and at 19 U.S.C. 1602-1621.

The first step in administrative forfeiture proceedings is generally the physical seizure of the property by the Government. In case of vehicles, seizures can occur in the course of routine traffic stops, search warrants, or the like. Currency can also be seized in similar fashion. The government will provide a party from whom such property is taken with some identification of the agency which has physically taken the property

and the identity of an agent who can be contacted about the property. However, this notice does not constitute notice for the purpose of forfeiture; it is essentially a receipt that the property has been taken by the government pending its determination of what it will do with it.

Property can also be taken pursuant to a warrant, as in a seizure of a bank account.

The law requires notice by the seizing agency to potential claimants in administrative forfeiture cases within a particular statutory time period, which is generally 60 days unless the agency takes defined steps to extend that time. 18 U.S.C. Section 983(a).

Upon a determination by the seizing agency that forfeiture is appropriate, the agency must provide notice of the administrative forfeiture. 19 U.S.C. § 1607(a). The agency should provide personal notice to parties known to the Government to have an interest in the property, and in addition public notice should also be provided in *USA Today* or some other general circulation paper. *Id.*

The time to file a claim is no earlier than 35 days after the date of a letter from the seizing agency providing personal notice to a claimant. *Id.* If a claim is not timely filed in accordance with the regulations, a claimant will in all likelihood be barred from disputing the forfeiture on the merits.

Accordingly, counsel should act immediately when a client's property is taken and before the government provides formal notice of the start of the forfeiture process. Counsel should contact the responsible agent, indicate the identity of the client, and request in writing that notice be given immediately to counsel once the forfeiture process is initiated. If these steps are not taken, written notice of the forfeiture may be sent to the wrong address, and public notice may be overlooked.

A federal administrative forfeiture claim may be filed by the owner or someone with an interest in the property. Once a party files a claim they are considered a "claimant." A claim by an attorney on behalf of a claimant is not sufficient. The claim must be sworn under penalty of perjury. There is no fee to file a claim.

Besides stating that the claimant has an ownership interest in the property, typically all that is necessary in the administrative claim is to state that the claimant contests or disputes any allegation that the property is subject to forfeiture.

As an alternative to a direct claim on a property, a claimant may seek remission or mitigation of forfeiture. 19 U.S.C. § 1618; 28 C.F.R. § 9.1 *et seq.* This is essentially a request for mercy from the seizing agency. There is no opportunity for judicial review. Essentially, the claimant waives any claim on the merits to the property, and sets forth facts which merit a return of its interest in the property.

Once a claim is filed, the seizing agency almost always automatically forwards the administrative claim to the United States Attorney's Office for review and possible court action. The Government has 90 days from receipt of a claim to either return administratively seized property or initiate a federal civil or criminal forfeiture action. That decision on filing suit or returning the property is not up to the administrative agency, it is a decision made by the U.S. Attorney.

An opportunity for counsel, whether appointed or retained, arises once a file is received by a U.S. Attorneys' Office following the filing of an administrative claim. Once a file is sent to the U.S. Attorney an Assistant will be assigned to the matter, with whom negotiations can be attempted.

If the U.S. Attorney decides to forfeit the property at issue in the administrative proceeding, either a conventional civil forfeiture suit will be filed or the property will be included within a criminal forfeiture indictment. The civil cases are generally captioned United States of America v. XYZ Property. If a criminal action is brought, the Government will try to forfeit the property in the process of convicting the owner of a particular type of felony violation (a forfeiture predicate) which would allow criminal forfeiture.

C. Civil Asset Forfeiture

Appointed counsel can only be involved in federal civil asset forfeiture where there is a companion criminal case where the appointed attorney is representing the defendant. However, where there is a related criminal case in federal court, not much if anything of importance arises in a federal civil asset forfeiture case. All of the action is in the criminal case. The civil forfeiture case gets stayed (put on hold) until the criminal case is over. If the client is acquitted in the federal criminal case, the forfeiture case may be revived, but at that point appointed counsel would be out of the picture. If the client is convicted after trial or pleads guilty, the plea agreement or the post trial sentencing process will drive the forfeiture of the property subject to the civil asset forfeiture case.

D. Criminal Asset Forfeiture

Criminal asset forfeitures have rapidly become a treasured weapon in the federal prosecutor's arsenal. With sometimes minimal additional effort beyond that required to take a case to trial, prosecutors can bypass the Guidelines provisions for fines and obtain huge money judgments against defendants based on theories of joint and several liability. Restraining orders, obtained ex parte prior to or in connection with an indictment, can have the collateral even if unintended effect of depriving a troublesome defendant of retained counsel. Trial counsel can be so focused on defending the changes on the merits that no time or effort remains to fight the forfeiture battle when the time comes for the jury to address the issue in the criminal trial, or for the court to address it later. The substitute asset provision allows the Government to forfeit assets

which were not proceeds of unlawful activity so long as the Government can show that such assets connected to illegal activity are difficult to obtain.

Criminal forfeitures in recent years have focused on narcotics traffickers. However, every year as part of the war on crime Congress seems to add to the already lengthy list of statutes which permit criminal forfeitures. Mail and wire fraud affecting financial institutions, money laundering, odometer tampering, and health care fraud are only a few of the kinds of charges which can lead to criminal forfeiture judgments.

As appointed counsel, a federal public defender becomes involved in criminal forfeiture as counsel to a defendant charged with a criminal offense and facing related forfeiture charges. Criminal forfeiture actions must be brought against persons or legal entities, not initially against the property to be forfeited itself, and compel forfeiture of assets held or formerly owned by such defendant person or entity. Thus, criminal forfeiture proceedings are in-personam actions and are inescapably connected to federal criminal prosecutions. They are governed by Federal Rule of Criminal Procedure 32.2, 18 U.S.C. Section 982, and 21 U.S.C. Section 853; see also 18 U.S.C. § 1963(h).

Parties with claims to property sought to be forfeited are known as “claimants.” As appointed counsel you will be involved in federal criminal asset forfeiture most often where the client is also the defendant. The general rule is that the burden is on the Government to show by a preponderance of the evidence that it is entitled to forfeit the defendant’s property in a criminal forfeiture action. See United States v. Voigt, 89 F.3d, 1050, 1081-84 (3d Cir. 1996).

Unless a defendant’s assets are restrained prior to indictment, criminal forfeiture actions begin with an allegation in an indictment. See Federal Rule of Criminal Procedure 32.2(a). Thus, the Government must describe, to a level of specificity subject to debate, the defendant’s assets sought to be forfeited in the indictment. Id. Similarly, a criminal forfeiture charge is a count of the indictment subject to a separate verdict by the jury. See Federal Rule of Criminal Procedure 32.2(b)(5).

In connection with the preparation or filing of an indictment, the Government is authorized to restrain or even seize assets pending entry of a judgment of forfeiture, a process which may render the defendant initially eligible for appointed counsel. 21 U.S.C. Sections 853(e) and (f), 18 U.S.C. Section 1963(d). The Government is entitled to freeze assets by protective orders to protect its interest in property. Id. Accordingly, courts can “enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property” either before or after an indictment is filed. Id. If restraint is sought prior to indictment, the Government is required to show the following:

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property

being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered” *Id.*

Defendants are entitled to a hearing on notice if restraint is sought prior to indictment. *Id.* Pre-indictment restraining orders can last no longer than ninety days unless “extended by the court for good cause shown or unless an indictment . . . has been filed.” *Id.*

The Government may restrain property prior to indictment without prior notice to a defendant if it “demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture . . . and that provision of notice will jeopardize the availability of the property for forfeiture.” *Id.* A defendant is entitled to a hearing following entry of an ex parte order. *Id.*

Although not explicitly authorized in the statute, courts generally grant defendants a hearing to contest restraining orders even after the defendant is indicted. The focus of the law on these hearings has been on whether funds can be released so that defendants can hire retained counsel. Accordingly, appointed counsel will probably not be called upon to litigate these issues very often. Courts typically defer to the grand jury’s probable cause finding and will not require the Government to make any additional showing of the merits of its case. *See United States v. Farmer*, 274 F.3d 800 (4th Cir. 2001); *United States v. Jones*, 160 F.3d 641 (10th Cir. 1998). The court is not required to conduct a mini-trial on the merits of the offense to decide a motion to lift or modify a restraining order. *Id.*

The Government is also entitled to seize property subject to forfeiture before obtaining a forfeiture judgment. “The Government may request the issuance of a warrant authorizing the seizure of property subject to forfeiture under this section in the same manner as provided for a search warrant. If the court determines that there is probable cause to believe that the property to be seized would, in the event of conviction, be subject to forfeiture and that an order under subsection (e) of this section may not be sufficient to assure the availability of the property for forfeiture, the court shall issue a warrant authorizing the seizure of such property.” 21 U.S.C. Section 853(f).

Although the statutes generally limit the property or the value of the property which may be forfeited to the property used to commit the offense (facilitating property) and to the gross proceeds directly and indirectly derived from offense (proceeds), the statutes allow the Government on a proper showing to forfeit assets belonging to a defendant which are equal in value to the unlawfully used or obtained assets if the

unlawfully used or obtained assets have been spent or are otherwise too difficult for the Government to readily forfeit. This “substitute asset provision” is found at 21 U.S.C. Section 853(p) and 18 U.S.C. Section 1963(m). Thus, if a defendant used property worth \$1 million to commit a crime and obtained \$2 million through his illegal activity, and if the Government can’t obtain the \$3 million which had already been disposed of or otherwise spent by the defendant, the Government can obtain \$3 million of other assets of the defendant, even if they were totally unrelated to the criminal activity, or could seek to obtain \$3 million in assets held by third party nominees or others received from the defendant.

In the Fourth Circuit, and essentially no where else, the Government can restrain substitute assets prior to trial. Elsewhere, typically the Government must wait for a forfeiture judgment to proceed after substitute assets.

Unless it relies on the substitute asset provision, the Government must show a connection between the property sought to be forfeited and the crime to forfeit the property. The Government must show either that the property facilitated the crime or was a proceed of the crime. See United States v. Voigt, 89 F.3d 1050, 1087 (3d Cir. 1996) (discussing showing required of relationship between crime and proceeds of crime to obtain forfeiture); United States v. Two Tracts of Real Property, 998 F.2d 204, 210-214 (4th Cir. 1993) (civil forfeiture but similar principal: substantial connection between crime and real property not shown). The substitute asset provision does not require the Government to trace the facilitating property or the proceeds of the crime into particular assets, although it is required to show that it cannot readily obtain the original facilitating property or the proceeds of the crime. Id.

E. Parting Words For Appointed Counsel

Traditionally, forfeiture was not an important issue for appointed counsel. Clients were indigent or destitute, and had no assets worthy of forfeiture. However, now clients once worth tens of millions of dollars have their assets seized and cannot afford retained counsel, leaving appointed counsel to try to reclaim their assets, most commonly in a federal criminal forfeiture proceeding. An understanding of the basics of how to defend those forfeiture actions may come in handy more often than you might think.