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Taking the Profit Out of Crime: Forfeiture

Part I: The Basics

The concept of forfeiture — the loss of property or money because of a breach of a legal obligation¹ — is ancient. The modern principles of real property ownership stretch back to the Norman Conquest. Even the terms used, like “fee simple absolute” and “indentured servant,” sound impressively old. And, of course, if one wants to go back even further, the Bible (Exodus, ch. 21, v. 28) authorized the forfeiture of a person’s ox if the ox gored another man or woman.

And yet, in today’s legal profession, forfeiture is the part of a client’s sentencing that turns some of the finest criminal defense attorneys into frightened first-year law students. Many flee the scene or tell the client to “let the property go” so as not to “complicate” the matter or, as a last resort, retain someone later to deal with the issue. But retaining someone later usually is of little benefit to clients. Thus, here are some of the basics every attorney should know about forfeiture.

Part II, discussing recent case law, will appear in an upcoming issue of *The Champion*.

The Basics

The forfeiture statutes that Congress chose to adopt far exceed their historical forebears. Even the most sacrosanct of all forms of real property ownership — the tenancy by the entirety, which embodies two core areas of state power, real property ownership and marriage — is now being challenged by the government.

But the typical scenarios involving federal forfeiture cases remain. The government seeks to take private assets — including cash, personalty (personal property), and real property — that it claims constitute the proceeds of criminal activity or property involved in criminal conduct. The goal, according to the government, is to take the profit out of crime. The irony, of course, is that, while taking assets from a defendant, forfeiture enriches the coffers of government and law enforcement agencies. Forfeiture is a favored fundraising tactic on both the state and federal levels. Each state has at least two forfeiture provisions and there are more than 200 federal forfeiture statutes. A vast array of federal crimes can provide a basis for forfeiture, including mail and wire fraud, money laundering, drugs, securities fraud, health care-related crimes, and human trafficking.² Despite the number of statutes dealing with this, however, all forfeitures fall into three general categories: administrative, civil, and criminal. Before reviewing them, three general observations are warranted.

Forfeiture Is Statutory

First, there is no such thing as common law forfeiture. The government may sometimes claim otherwise, but that is wishful thinking. Unless there is specific language in a specific statute authorizing the forfeiture of property for a

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specific violation, there can be no forfeiture.³ Accordingly, forfeiture statutes must be narrowly construed.⁴

Forfeiture vs. Restitution

Second, understanding the difference between forfeiture and restitution is important. Forfeiture is intended to deprive the defendant of his ill-gotten gains. Restitution, on the other hand, compensates the victims of the defendant's criminal conduct for their losses.⁵ These numbers may or may not be the same. In federal criminal cases, a convicted defendant may be required to pay both a forfeiture judgment and a restitution judgment for the same conduct.

A notable difference between forfeiture and restitution is that the government usually keeps the forfeiture recovery for itself, whereas restitution must be paid to the victims. When both are ordered to be paid, the defendant may request that the government apply the forfeiture payments toward payment of the restitution. Note that the Supreme Court has said that heightened judicial scrutiny is required when the government has "a direct pecuniary interest in the outcome of the proceeding."⁶ This analysis should be applied to every government forfeiture.

Theories of Forfeiture: Proceeds and Instrumentalities

Further, the theories underlying all forfeitures, whether administrative, civil or criminal, fall into two categories. The first category comprises the proceeds of criminal activity or property that is traceable to criminal activity.⁷ For instance, if a bank robber makes off with \$100,000, that cash is subject to forfeiture because it is the direct proceeds of the robbery. If the robber uses the \$100,000 to purchase a boat or a diamond ring, the boat or ring would be subject to forfeiture because they are directly traceable to the criminal activity.

The second category of forfeitable property includes items that were involved in, used in some manner to commit, or facilitated the criminal activity.⁸ Property facilitates criminal activity when it makes that conduct easier or less difficult to commit.⁹ Because property sought to be forfeited on a facilitation or "involved in" theory can be extremely broad, there must be a "substantial connection between the property and the offense."¹⁰ Further, an overbroad forfeiture of facilitating property may violate the Excessive Fines Clause of the Eighth Amendment.¹¹

With this as background, let's discuss the three categories of forfeiture: administrative, civil, and criminal.

Administrative Forfeiture

Like its name suggests, administrative forfeiture involves property seized by an administrative agency such as Drug Enforcement Administration (DEA), the Federal Bureau of Investigation (FBI), or Homeland Security. Administrative forfeiture does not require a conviction. In fact, no judge is involved in administrative forfeiture, and no prosecutor is involved at that point. It is just the property owner and the agency. Administrative forfeitures comprise about three-quarters of all federal forfeitures.¹²

The seizure of property sets in motion a series of deadlines, options, and filing requirements. Within 60 days of seizure, the agency must serve a notice of seizure on the person from whom the property was seized and anyone else the agency has reason to believe may have an interest in the property. The notice provides three options for the property owner: (1) file a claim, (2) serve a petition for remission or mitigation, or (3) do nothing.

Filing a petition for remission or mitigation is only marginally more effective than doing nothing. An agency's decision whether to grant a petition for remission or mitigation is a matter of administrative "grace" and in general is not subject to judicial review.¹³ In this author's experience, this legal form of begging rarely results in substantial success.

The only option with a reasonable chance of success is option 1. If the property owner timely complies with the required procedures set forth in Supplemental Rule G and 18 U.S.C. § 983, a contested administrative forfeiture will be converted to a court proceeding. If counsel and the federal prosecutor are unable to reach a resolution, the government typically will file a civil forfeiture complaint and the ensuing litigation will be akin to a civil forfeiture matter commenced in court in the first instance.

Civil Forfeiture

In civil forfeiture, the government brings a civil action directly against the property as a defendant. It is in these cases in which one finds captions such as "*United States v. 123 Broadway, New York, New York*" or "*United States v. \$293,487.07 in U.S. Currency*." The government files a civil forfeiture complaint based on the legal fiction that the property itself is guilty of a crime.¹⁴ No prior conviction or indictment of a human being is necessary.

Civil forfeiture is based on *in rem* jurisdiction over the property, which requires the property to be actually or constructively seized.¹⁵ If the action has been converted from an administrative forfeiture, the administrative seizure of the property has already created the necessary *in rem* jurisdiction. If the action is commenced in the first instance by the U.S. Attorney's Office, the government must first secure jurisdiction over the property to proceed with the action, usually through the issuance of *ex parte* civil seizure warrants.¹⁶

Civil forfeiture has ancient roots, derived from admiralty law. This is why, in addition to 18 U.S.C. § 983, the rules and procedures for civil forfeiture are actually codified in the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions — primarily Supplemental Rule G.

After the government commences the action, the property owner or another interested party must file a claim to the property and an answer to the government's forfeiture complaint.¹⁷ That person is called the claimant. The property remains the defendant and, of course, the government is the plaintiff.

In civil forfeiture cases brought pursuant to 18 U.S.C. § 983 and Supplemental Rule G, the government must prove by a preponderance of the evidence that the property is subject to forfeiture.¹⁸ The claimant may attempt to contest the government's evidence of forfeitability and may file a motion to dismiss or one for summary judgment on the ground that the government has failed to make the necessary showing. If the government establishes that the property is subject to forfeiture, the claimant can still prevail by establishing innocent ownership of the property.¹⁹

Civil forfeiture cases are litigated largely like other civil matters, and are procedurally governed by the Federal Rules of Civil Procedure. Accordingly, the full range of federal discovery devices are potentially available, including interrogatories, depositions and requests for admissions, as well as procedural devices such as motions to dismiss and motions for summary judgment.²⁰

If the case is not resolved through a motion, it goes to trial like any other civil case. Trial by jury is available, but must be specifically requested or the case will be tried to the court.²¹

Criminal Forfeiture

Criminal forfeiture is a far more recent variant on traditional civil forfei-

ture law.²² Unlike in civil forfeiture, in which the court's jurisdiction over the property is *in rem*, criminal forfeiture jurisdiction is *in personam*, through the court's jurisdiction over the defendant. Thus, if the defendant has no interest in the property, the property cannot be forfeited in the criminal case.

The biggest difference between civil and criminal forfeiture is that criminal forfeiture requires the conviction of the defendant. Once the defendant is convict-

request to have a jury make the nexus determination must be made before the jury begins deliberating on the issue of the defendant's guilt.

Electing to have the jury make the determination provides to the defendant the added benefit of requiring the prosecutor to "submit a proposed Special Verdict Form listing each property subject to forfeiture and asking the jury to determine whether the government has established the requisite nexus between

To address the issue of defendants avoiding forfeiture by dissipating proceeds of or property involved in their criminal activities, Congress enacted the substitute asset provision, set forth in 21 U.S.C. § 853(p). This section provides that if property found to be subject to criminal forfeiture is rendered unavailable as a result of some act or omission of the defendant, "the court shall order the forfeiture of any other property of the defendant, up to the value of" the tainted property.³³

Pretrial Restraint of Assets

An important distinction between tainted property and substitute assets is that the government is not allowed to seize or restrain substitute assets before trial. Until 2016, there was a lopsided split in the circuits on this issue, with the Fourth Circuit being the lone jurisdiction insisting that substitute assets may be subjected to pretrial restraint. After the 2016 Supreme Court decision in *Luis v. United States*,³⁴ the Fourth Circuit acknowledged it had no choice but to join its sister circuits, reverse more than 25 years of case law, and bar pretrial restraint of substitute property.³⁵

Relation Back Doctrine

The distinction between tainted and substitute assets flows from another key difference between the two types of property. Only tainted property "relates back" to the time of the criminal activity.³⁶ This means that the government's interest in tainted property accrues when the defendant obtained the proceeds of a crime or used the property to commit a crime. With substitute assets, the government's interest in the property is insufficiently substantial to permit it to control the use of the asset before trial and is deemed effective as of the date of the court order secured by the government after it fails to locate sufficient tainted assets to satisfy its judgment.³⁷

Other than the issue of the scope of pretrial restraint, the primary impact of the relation back principle is on third parties seeking to enforce interests in property found to be subject to forfeiture.

Specific Property vs. Money Judgments

Establishing a "nexus" between the property alleged to be subject to forfeiture and the criminal activity underlies all criminal forfeiture of proceeds and instrumentalities. And, as the Supreme Court recently reaffirmed in *Honeycutt v. United*

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ed, however, the defendant "shall" forfeit, as part of sentencing, his interest in property involved in the criminal activity.²³

Two primary statutes, 21 U.S.C. § 853 and 18 U.S.C. § 982, deal with criminal forfeiture. These statutes address issues such as the types of property subject to forfeiture, the criminal activity to which forfeiture can apply, available defenses, and when and how property can be restrained, seized, forfeited, and sold.

Criminal forfeiture procedures are set forth in 21 U.S.C. § 853 and in Rule 32.2 of the Federal Rules of Criminal Procedure. When the government seeks criminal forfeiture, it must include notice of intent to do so in the indictment.²⁴ Because criminal forfeiture is part of sentencing, the government's burden of proving that property is subject to forfeiture is the preponderance of the evidence standard, not the reasonable doubt standard required for proving guilt.²⁵

To forfeit tainted property, the government must "establish[] the requisite nexus between the property and the offense."²⁶ This takes place during the forfeiture phase of a criminal case and, if contested, may involve a hearing with witnesses and submission of legal memoranda. The parties may rely on evidence already in the record as well as new evidence and other relevant material.²⁷

The key here for defense counsel is that, when the government seeks to forfeit specific property, the defendant (or the government) is entitled to have the nexus to the property issue decided by a jury.²⁸ The timing here is crucial. The

property and the offense committed by the defendant."²⁹ Defense counsel should take advantage of these important procedural safeguards.

At the conclusion of the forfeiture phase of the proceeding, if any property is found to be subject to forfeiture, the findings are set forth in a preliminary order of forfeiture.³⁰ After objections filed by the defendant are resolved, the order becomes final as to the defendant. However, the order is preliminary as to any third parties who may claim an interest in the property subject to forfeiture.³¹ Once final against the defendant, the preliminary order of forfeiture also permits the government to seize any of the tainted property.³² If some or all of the tainted property is unavailable for forfeiture, the government may be able to forfeit untainted property in the amount of the missing tainted property. This is called "substitute property" or "substitute assets," both of which are addressed below.

Substitute Assets

The fact that criminal forfeiture jurisdiction is *in personam* rather than *in rem* has important ramifications. Chief among them is the statutory creation of substitute asset forfeitures. Because the court has jurisdiction over the criminal defendant, not just the property sought to be forfeited, it also has the power to impose monetary penalties such as fines and restitution judgments that must be satisfied from any assets the defendant may possess. This same jurisdictional authority underlies substitute asset forfeitures.

States, criminal forfeiture “maintains traditional *in rem* forfeiture’s focus on tainted property” and, despite permitting forfeiture of substitute property, “did not ... enact any ‘significant expansion of the scope of property subject to forfeiture.’”³⁸

What this *should* mean is that, unless the government traces the property to criminal activity, that property cannot be forfeited unless the substitute asset requirements of 21 U.S.C. § 853(p) are satisfied. However, a controversial judge-made remedy relieves the government of having to trace the property sought to be forfeited to the criminal activity. Before the enactment of the substitute asset statute, courts had already permitted the government to avoid tracing by entering a judgment for an amount of money shown to be the proceeds and/or value of property involved in the defendant’s crimes of conviction. The resulting “forfeiture money judgment” could then be enforced like an ordinary civil judgment.

In addition to the substitute asset provision, which serves a similar function to money judgment forfeitures, another objection to the continued utilization of this judge-made device is that a provision already exists for the forfeiture of fungible property. The problem for the government is that this provision shortens the statute of limitations to one year instead of using the five year statute of most forfeitures.³⁹ This is the only provision, however, that eliminates the tracing requirement. Further, there is the jurisdictional objection that criminal forfeiture is a creature of statute and is limited to the remedies specifically authorized by Congress.⁴⁰

Despite these issues, money judgment forfeitures are not only popular, but are the preferred route for the government in criminal forfeiture cases. That should come as no surprise since this excuses the government from tracing the proceeds of the crime.

Also, there are procedural disadvantages to the defendant with money judgment forfeitures. Unlike with forfeiture of specific tainted assets, there is no right to a jury determination of the amount of a money judgment. However, the defendant is still entitled to contest the amount and compel a hearing, with witnesses and legal memoranda, and to challenge the government’s calculation of the amount of the proposed money judgment.⁴¹

One saving grace for the defense regarding money judgments is that, in the *Honeycutt* decision, the Supreme Court found that no untainted property may be forfeited unless the requirements of the substitute asset provision are satisfied. The

Court rejected the government’s reliance on Section 853(o), which states that “the provisions of [§ 853] shall be liberally construed to effectuate its remedial purposes.”⁴² The Court’s response to the government’s argument was that “the Court cannot construe a statute in a way that negates its plain text, and here, Congress expressly limited forfeiture to tainted property that the defendant obtained.... [T]hat limitation is incompatible with joint and several liability.”

Section 853(o) is the same provision pointed to by every court that has authorized money judgment forfeitures. As the Supreme Court correctly found, that provision is not a license for applying the criminal forfeiture laws in direct contravention of their plain meaning.

Criminal forfeiture statutes require the government to trace the property sought to be forfeited to a particular defendant. Both money judgments and joint and several liability contravene this requirement. If, after *Honeycutt*, prosecutors are finally required to satisfy the tracing requirement, the abuse of criminal forfeiture should be markedly reduced. If not, perhaps the Supreme Court will take on money judgments directly, leading them to the same demise as joint and several liability.

Third-Party Claims

If forfeitable property has been transferred to a third party “straw owner” to evade forfeiture, the government can follow that property into the hands of a third party as well.⁴³

A complicating factor for the government in criminal forfeiture arises when the property is actually owned in whole or in part by a third party. In criminal cases, third-party claims cannot be asserted or litigated until the forfeiture phase of sentencing has been completed.⁴⁴ At that point, “ancillary proceedings” are then conducted, and all claims to the property are resolved there by the court.

Ancillary proceedings are governed by 21 U.S.C. § 853(n) and Rule 32.2(c) of the Federal Rules of Criminal Procedure. Yet, because ancillary proceedings are essentially civil in nature, they are also governed by the Federal Rules of Civil Procedure.⁴⁵

The relation back doctrine may impact the rights of third parties to criminally forfeited property. As a result of that doctrine, codified at 21 U.S.C. § 853(c), a third party may prevail in an ancillary proceeding in only one of two ways. First, the third party can demonstrate that they have a legal right, title or

interest in the property under applicable state law and that they acquired that interest prior to the defendant’s criminal activity. The third party’s interest in the property must have been superior to that of the defendant or vested in the third party rather than the defendant at the time of the criminal activity.⁴⁶ The reason is that the government “stands in the defendant’s shoes” for all purposes relating to forfeiture.⁴⁷ Therefore, it can only forfeit the right, title or interest of the defendant.

Second, the third party can demonstrate that they were a *bona fide* purchaser for value of the property who, at the time of purchase, was reasonably without cause to believe that the property was subject to forfeiture.⁴⁸

Procedurally, the issuance of the preliminary order of forfeiture triggers the third party’s duty to timely file a sworn petition setting forth “the nature and extent of the petitioner’s right, title, or interest in the property, the time and circumstances of the petitioner’s acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner’s claim, and the relief sought.”⁴⁹ The petition requests “a hearing to adjudicate the validity of [the petitioner’s] alleged interest in the property.”⁵⁰

The third party must have an interest in the specific property. General creditors of the defendant lack standing and their claims will be dismissed.⁵¹ General creditors may, however, file petitions for mitigation or remission with the Attorney General.

After the conclusion of the ancillary proceeding, a final order of forfeiture is entered against the property, accounting for any proven third-party rights.⁵² The government then has “clear title” to sell any forfeited property.

For an in-depth analysis and discussions of topics related to forfeiture, see Mr. Kessler’s treatises, Civil and Criminal Forfeiture: Federal and State Practice (Thomson Reuters 2022) and New York Civil and Criminal Forfeitures (LexisNexis 2022).

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Notes

1. *Forfeiture*, Merriam-Webster’s Dictionary, www.merriam-webster.com.

2. *See, e.g.*, 18 U.S.C. § 1956(c)(7)(A); 18 U.S.C. § 1956(c)(7)(D); 18 U.S.C. § 1961(1). These statutes authorize civil forfeiture of the proceeds of the violation of hundreds of federal statutes, ranging from relatively minor crimes (selling bootleg concert

recordings) to the most heinous acts of man (murder and child trafficking). Further, through 28 U.S.C. § 2461(c), the government can seek criminal forfeiture in prosecutions for these same violations.

3. See, e.g., *S.E.C. v. Contorinis*, 743 F.3d 296, 307 (2d Cir. 2014) (criminal forfeiture is “a creature of statute” and its application is “confined by the precise contours of statutory language”).

4. *United States v. Giovanelli*, 998 F.2d 116, 119 (2d Cir. 1993) (“The forfeiture statutes give the government vast and important powers, but they must be exercised in the precise manner the statutes provide.”) (citing *United States v. One 1936 Model Ford V-8 De Luxe Coach*, 307 U.S. 219, 226 (1939)).

5. *Compare Honeycutt v. United States*, 137 S. Ct. 1626, 1631 (2017) (forfeiture statutes serve important governmental interests such as “separating a criminal from his ill-gotten gains,” and “lessen[ing] the economic power” of criminal enterprises) (quoting *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 629-630 (1989), with *Dolan v. United States*, 560 U.S. 605, 612 (2010) (the Mandatory Victims Restitution Act “seeks primarily to ensure that victims of a crime receive full restitution”) (citing 18 U.S.C. §§ 3663A).

6. *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 56 (1993) (citing *Harmelin v. Michigan*, 501 U.S. 957, 979, n.9 (1991) (opinion of Scalia, J.) (“[I]t makes sense to scrutinize governmental action more closely when the State stands to benefit”).

7. See, e.g., 18 U.S.C. § 981(a)(1)(C) (subjecting to civil forfeiture “[a]ny property, real or personal, which constitutes or is derived from proceeds traceable to” specified violations); 18 U.S.C. § 982(a)(2) (as part of a criminal sentence, the court “shall order that the person forfeit to the United States any property constituting, or derived from, proceeds the person obtained directly or indirectly, as the result of such violation”).

8. E.g., 18 U.S.C. § 981(a)(1)(A) (subjecting to civil forfeiture “[a]ny property, real or personal, involved in a transaction or attempted transaction involving [specified unlawful activities] ... or any property traceable to such property”).

9. E.g., *United States v. Juluke*, 426 F.3d 323, 330 (5th Cir. 2005).

10. 18 U.S.C. § 983(c)(3) (“if the government’s theory of forfeiture is that the property was used to commit or facilitate the commission of a criminal offense, or was involved in the commission of a criminal offense, the government shall establish that there was a substantial connection between the property and the offense”).

11. 18 U.S.C. § 983(g); *United States v.*

Bajakajian, 524 U.S. 321, 330 (1998).

12. <https://www.law.cornell.edu/wex/administrative>.

13. E.g., *Tourus Recs., Inc. v. Drug Enf’t Admin.*, 259 F.3d 731, 735 (D.C. Cir. 2001) (“the courts may not review the merits of an agency’s decision to deny mitigation or remission, but may only determine whether the agency followed the applicable procedural requirements”).

14. *United States v. Bajakajian*, *supra* note 11.

15. *Republic Nat’l Bank v. Miami*, 506 U.S. 80 (1992).

16. Supplemental Rule G(3).

17. Supplemental Rule G(5).

18. 18 U.S.C. § 983(c)(1). In civil forfeiture cases brought pursuant to Titles 19 (Customs) and 26 (IRS), as well as in cases brought prior to the enactment of Section 983, the government need only demonstrate probable cause to believe that the property is subject to forfeiture, after which the burden shifts to the claimant to prove his or her claim by a preponderance of the evidence. See 18 U.S.C. § 983(i).

19. 18 U.S.C. § 983(d)(1) (“An innocent owner’s interest in property shall not be forfeited under any civil forfeiture statute. The claimant shall have the burden of proving that the claimant is an innocent owner by a preponderance of the evidence.”). In addition to the forfeiture-specific statutory defense of innocent ownership, a claimant may assert a range of procedural and constitutional defenses generally available in civil actions brought pursuant to the Federal Rules of Civil Procedure, such as due process, statute of limitations, lack of jurisdiction, and excessive fines. E.g., *United States v. All Funds on Deposit with R.J. O’Brien & Assocs.*, 783 F.3d 607, 619 (7th Cir. 2015) (“Parties to civil forfeiture proceedings are the servants of two procedural masters: the Supplemental Rules devised for ... *in rem* proceedings, and the generally applicable Federal Rules of Civil Procedure”) (citation and internal quotations omitted).

20. E.g., Supplemental Rule G(8) (motions to dismiss).

21. Supplemental Rule G(9).

22. *Honeycutt v. United States*, 137 S. Ct. at 1634-35.

23. 21 U.S.C. § 853(a).

24. Fed. R. Crim. P. 32.2(a) (“A court must not enter a judgment of forfeiture in a criminal proceeding unless the indictment or information contains notice to the defendant that the government will seek the forfeiture of property as part of any sentence in accordance with the applicable statute. The notice should not be designated as a count of the indictment or information.

The indictment or information need not identify the property subject to forfeiture or specify the amount of any forfeiture money judgment that the government seeks.”).

25. E.g., *United States v. Fruchter*, 411 F.3d 377, 381 (2d Cir. 2005) (“[C]riminal forfeiture is part of the process of criminal sentencing. Fact-finding at sentencing is made by a preponderance of the evidence.”) (citing, *inter alia*, *Libretti v. United States*, 516 U.S. 29, 49 (1995)).

26. FED. R. CRIM. P. 32.2(b)(1)(A).

27. FED. R. CRIM. P. 32.2(b)(1)(B).

28. FED. R. CRIM. P. 32.2(b)(5) (“In any case tried before a jury, if the indictment or information states that the government is seeking forfeiture, the court must determine before the jury begins deliberating whether either party requests that the jury be retained to determine the forfeitability of specific property if it returns a guilty verdict”).

29. FED. R. CRIM. P. 32.2(b)(5)(B).

30. FED. R. CRIM. P. 32.2(b)(2).

31. Fed. R. Crim. P. 32.2(b)(4)(A).

32. Fed. R. Crim. P. 32.2(b)(3).

33. 21 U.S.C. § 853(p)(2). Substitute assets may be forfeited if any of the following have caused the tainted property to become unavailable for forfeiture: the property “(A) cannot be located upon the exercise of due diligence; (B) has been transferred or sold to, or deposited with, a third party; (C) has been placed beyond the jurisdiction of the court; (D) has been substantially diminished in value; or (E) has been commingled with other property which cannot be divided without difficulty.” *Id.* § 853(p)(1)(A)-(E).

34. *Luis v. United States*, 578 U.S. ___, 136 S.Ct. 1083 (2016).

35. *United States v. Chamberlain*, 868 F.3d 290 (4th Cir. 2017).

36. 21 U.S.C. § 853(c) (“All right, title, and interest in [tainted] property ... vests in the United States upon the commission of the act giving rise to forfeiture under this section”).

37. *Luis v. United States*, *supra*, 136 S. Ct. at 1092 (“the government seeks to impose restrictions upon Luis’ untainted property without any showing of any equivalent governmental interest in that property. ... At least regarding her untainted assets, Luis can at this point reasonably claim that the property is still ‘mine,’ free and clear”) (emphasis in original).

38. *Honeycutt v. United States*, 137 S. Ct. at 1635 (quoting S. Rep. No. 98-225, p. 192 (1983)).

39. See 18 U.S.C. § 984.

40. See *S.E.C. v. Contorinis*, *supra* note 3.

41. FED. R. CRIM. P. 32.2(b)(1) (“If the government seeks a personal money judgment, the court must determine the amount of money that the defendant will

be ordered to pay.”). The provision in Rule 32.2(b)(2) that “[i]f the forfeiture is contested, on either party’s request the court must conduct a hearing after the verdict or finding of guilty” applies to all of Subsection (b)(1), which encompasses both specific property forfeitures and money judgment forfeitures.

42. *Honeycutt v. United States*, 137 S. Ct at 1635 n.2 (quoting 21 U.S.C. § 853(o)).

43. 21 U.S.C. § 853(c).

44. 21 U.S.C. § 853(k).

45. FED. R. CRIM. P. 32.2(c)(1); *United States v. Mills*, 18 F.4th 573, 576 (2021).

46. 21 U.S.C. § 853(n)(6)(A) (the petition must demonstrate “a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section”).

47. *E.g. United States v. Kogan*, ___ F. Supp. 4th ___, 2022 U.S. Dist. LEXIS 145659 *10-11, 2022 WL 3362452A (S.D.N.Y. Aug. 15, 2022) (Failla, J.) (“A central tenet of forfeiture proceedings is that the

government ‘stands in the defendant’s shoes’ when it acquires a defendant’s interest in a particular property”) (quoting *United States v. Nektalov*, 440 F.Supp.2d 287, 295 (S.D.N.Y. 2006)).

48. 21 U.S.C. § 853(n)(6)(B).

49. While the issuance of the preliminary order of forfeiture triggers the ancillary phase of the proceeding, the actual 30-day deadline for any third party who “reasonably appears to be a potential claimant” to file a petition to forfeited property does not begin to run until the third party is served with direct notice of the preliminary order of forfeiture. The government must also provide general notice to all potential claimants by publication. 21 U.S.C. § 853(n)(2); FED. R. CRIM. P. 32.2(b)(6).

50. 21 U.S.C. § 853(n)(2)-(3).

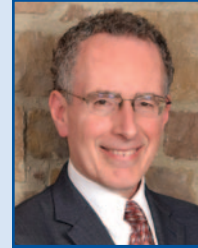
51. *E.g., United States v. Butt*, 930 F.3d 410, 414 (5th Cir. 2019) (“Unsecured creditors generally lack standing to contest forfeiture of their debtor’s property.”).

52. 21 U.S.C. § 853(n)(6) (if the third party is successful, “the court shall amend the order of forfeiture in accordance with its determination”); FED. R. CRIM. P. 32.2(c)(2) (“When the ancillary proceeding ends, the court must enter a final order of forfeiture by amending

the preliminary order as necessary to account for any third-party rights. If no third party files a timely petition, the preliminary order becomes the final order of forfeiture if the court finds that the defendant ... had an interest in the property that is forfeitable under the applicable statute.”). ■

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WEBSITE <https://kessleronforfeiture.com>

2023 NACDL Election Announcement

NACDL’s election will soon be underway. In 2023, NACDL will elect members to the Board of Directors, in addition to the President-Elect, First and Second Vice Presidents, and Secretary.

Members of the Board of Directors help oversee the business of NACDL and determine its policies.

Active members who are interested in seeking elective office should check www.NACDL.org/Elections for submission requirements and take note of the following timeline.

March 6, 2023: Web form for uploading Nominating Committee candidacy materials goes live on NACDL website.

April 6, 2023: Materials (submitted via Web form) due from candidates for Nominating Committee consideration.

April 20, 2023: Candidate materials submitted to Nominating Committee.

April 24, 2023: Nominating Committee meetings with candidates begin.

May 19, 2023: Nominating Committee meetings with candidates end.

May 22, 2023: Nominating Committee slate of candidates announced on NACDL website.

May 23, 2023: Web form for uploading candidacy materials goes live on NACDL website for members who want to seek nomination via petition.

June 8, 2023: Deadline for submitting petitions.

July 10, 2023: Voting begins.

July 21, 2023: Voting ends.

August 5, 2023: Annual meeting in Chicago, Illinois.

