Introduction to Defending Civil Forfeiture Cases Under Chapter 59

Charles B Frye
INTRODUCTION TO
DEFENDING CIVIL FORFEITURE
CASES UNDER CHAPTER 59
OF THE TEXAS CODE OF CRIMINAL PROCEDURE

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Presented by:

CHARLES B. “BRAD” FRYE
Attorney and Counselor at Law
The Niels Esperson Building
808 Travis, Suite 808
Houston, Texas    77002
    (713) 236-8700
(713) 229-8031 Telecopier
Frye@Charlesbfrye.com
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Introduction

The State of Texas, every year, seeks to forfeit millions of dollars in currency and property seized by law enforcement agencies. Asset forfeiture is “big business” for the State and for many local law enforcement agencies. The statute authorizing this process is very broad and not very protective of your client’s rights.

Harris County seized $12.5 million in private property in 2009 by using the civil forfeiture law. And, consider this quote from the publication The Prosecutor, July-August 2008, Volume 38, No. 4, "There’s something about The Texas Prosecutor …", by Rob Kepple, the Texas District and County Attorneys’ Association (“TDCAA”) Executive Director:

In a recent hearing before the Senate Criminal Justice Committee, the Attorney General, who is charged with keeping your audits concerning asset forfeiture funds, reported that in 2007 y’all collected about $9.84 million in asset forfeiture funds and spent about $13.3 million. (That is just for DA offices and excludes law enforcement’s share of the proceeds. And for a little perspective, keep in mind that the county budget for the Harris County DA’s Office alone is around $45 million.)

As discussed in this article, the State has a lower burden of proof in forfeiture cases than in criminal cases. In a forfeiture case, the State need only show “by a preponderance of the evidence” that your client’s property is “contraband” and should be forfeited to the State.

There is little hope in the case law (or in the current make up of our state Supreme Court and the U.S. Supreme Court) that we can change the law to require a higher burden of proof than preponderance of the evidence when the State seeks to forfeit property. The forfeiture "industry" in law enforcement is too well-rooted to hope for widespread systemic change. But, we can continue to craft arguments within the framework that will require the State to actually justify, under the law, forfeitures that do not easily fall into the traditional mold of "instrumentalities" or "fruits" of crimes. If we don’t, the definition of "instrumentalities" of crimes will continue to grow and soon encompass all forms of property which should not legitimately be the target of law enforcement seizure.

As discussed below, forfeiture cases are civil cases in Texas. While there is a mix of criminal and civil issues involved, a forfeiture case proceeds as a civil case, with all of the attendant civil rules on pleadings, discovery, summary judgment, pre-trial issues, and trial. At the outset, one of the most important aspects of the civil case for lawyers who somewhat exclusively practice criminal law is that the rules as they pertain to discovery, responding to discovery, and, in general, deadlines for responding or filing pleadings, are much more inflexible in civil court than in criminal court. In civil court, most judges are not concerned with whether a defendant has received the “effective assistance of counsel.” While many criminal court judges will allow late filings and tolerate other oversights by defense counsel prior to trial to be rectified, the same is not often true in civil cases. So, a familiarity with the Rules of Civil Procedure is a basic prerequisite to handling a civil forfeiture case.
This article presents “the basics” of defending a civil forfeiture case and discusses some of the salient and recurring issues which lawyers face when attempting to recover a client’s property from the clutches of the State.

Statutory Basis for Forfeiture

Asset forfeiture in Texas is generally covered by the provisions of the Code of Criminal Procedure in Chapter 59, titled “Forfeiture of Contraband.” The law provides for the definition of property subject to forfeiture (called “contraband” in the statute), who may claim the property, and the procedure for the state to seize the property and forfeit it.

Article 59.01 of the Code of Criminal Procedure defines “Contraband” as “property of any nature, including real, personal, tangible, or intangible, that is: (A) used in the commission of: (i) any first or second degree felony under the Penal Code; (ii) any felony under Section 38.04 or Chapters 29, 30, 32, 33, 33A, or 35, Penal Code.” “Contraband” also includes the proceeds gained from the commission of a felony listed in Paragraph (A) or (B) of this subdivision or a crime of violence; or acquired with proceeds gained from the commission of a felony listed in Paragraph (A) or (B) of this subdivision or a crime of violence.

Article 59.01 defines an “owner” of “contraband” as “a person who claims an equitable or legal ownership interest in property.” Contraband property is “seized” when a law enforcement officer takes custody of it. The law defines “seizure” as “the restraint of property by a peace officer” under Article 59.03(a) or (b) of the Code, whether the officer restrains the property by physical force or by a display of the officer’s authority.

Article 59.03 of the Code provides for the rules relating to “Seizure of Contraband.” Property subject to forfeiture under this chapter of the Code may be seized by any peace officer under authority of a search warrant. Seizure of property subject to forfeiture may be made without warrant if: (1) the owner, operator, or agent in charge of the property knowingly consents; (2) the seizure is incident to a search to which the owner, operator, or agent in charge of the property knowingly consents; (3) the property subject to seizure has been the subject of a prior judgment in favor of the state in a forfeiture proceeding under this chapter; or (4) the seizure was incident to a lawful arrest, lawful search, or lawful search incident to arrest.

A peace officer who seizes property under this chapter has custody of the property, subject only to replevy under Article 59.02 or an order of a court. A peace officer who has custody of property shall provide the attorney representing the state with a sworn statement that contains a schedule of the property seized, an acknowledgment that the officer has seized the property, and a list of the officer’s reasons for the seizure. Not later than 72 hours after the seizure, the peace officer shall: (1) place the property under seal; (2) remove the property to a place ordered by the court; or (3) require a law enforcement agency of the state or a political subdivision to take custody of the property and move it to a proper location.

Once property has been seized by a law enforcement officer, the law provides for specific procedures to be observed before the property may be forfeited.

Sometimes, before proceeding to a forfeiture action, the state will inquire of the owner of the property (if that person is different from the person arrested with the property, if there was an
arrest) to determine if there are grounds to stop forfeiture proceedings. Sometimes, the state will ask the owner of the property to make an affidavit outlining one or more of the defenses to forfeiture. If the state accepts the owner’s affidavit regarding the defenses, (that is, that the owner did not know and could not reasonably have known that the property was going to be used in the commission of a crime, for example), then the state will not institute a forfeiture proceeding but will release the property to the owner. However, the state is not required to take this step.

Article 59.02 provides for “Forfeiture of Contraband.” Property that is contraband is subject to seizure and forfeiture under this provision of the Code. Any property that is contraband other than property held as evidence in a criminal investigation or a pending criminal case, money, a negotiable instrument, or a security that is seized under this chapter may be replevied by the owner or interest holder of the property, on execution of a good and valid bond with sufficient surety in a sum equal to the appraised value of the property replevied. The bond may be approved as to form and substance by the court after the court gives notice of the bond to the authority holding the seized property. “Replevied” means that the owner may take possession of the property after posting bond, subject to the property being disposed of by court order. So, it is important to remember that property that is “replevied” may still be retaken by the court after the proceeding is completed, if the owner does not prevail in the forfeiture proceeding.

The Code also has some protections for property owners of seized property. Article 59.02 provides that an owner or interest holder’s interest in property may not be forfeited under this chapter if the owner or interest holder: (1) acquired and perfected the interest before or during the act or omission giving rise to forfeiture or, if the property is real property, he acquired an ownership interest, security interest, or lien interest before a lis pendens notice was filed under Article 59.04(g) of this code; and (2) did not know or should not reasonably have known of the act or omission giving rise to the forfeiture or that it was likely to occur at or before the time of acquiring and perfecting the interest or, if the property is real property, at or before the time of acquiring the ownership interest, security interest, or lien interest. That means that, if the owner of the property did not know of its use in the commission of a crime, or could not have reasonably known of the property’s use in a crime or its intended use in a crime, then the owner may win the property back after seizure.

Article 59.04 of the Code provides for the “Notification of Forfeiture Proceeding.” If a peace officer seizes property under this chapter, the attorney representing the state shall commence proceedings under this section not later than the 30th day after the date of the seizure. A forfeiture proceeding commences under this chapter when the attorney representing the state files a notice of the seizure and intended forfeiture in the name of the state with the clerk of the district court in the county in which the seizure is made. The attorney representing the state must attach to the notice the peace officer’s sworn statement under Article 59.03 of this code. Except as provided by Subsection (c) of this article, the attorney representing the state shall cause certified copies of the notice to be served on the following persons in the same manner as provided for the service of process by citation in civil cases: (1) the owner of the property; and (2) any interest holder in the property.
If the property is a motor vehicle, and if there is reasonable cause to believe that the vehicle has been registered under the laws of this state, the attorney representing the state shall ask the Texas Department of Transportation to identify from its records the record owner of the vehicle and any interest holder. If the addresses of the owner and interest holder are not otherwise known, the attorney representing the state shall request citation be served on such persons at the address listed with the Texas Department of Transportation. If the citation issued to such address is returned unserved, the attorney representing the state shall cause a copy of the notice of the seizure and intended forfeiture to be posted at the courthouse door, to remain there for a period of not less than 30 days. If the owner or interest holder does not answer or appear after the notice has been so posted, the court shall enter a judgment by default as to the owner or interest holder, provided that the attorney representing the state files a written motion supported by affidavit setting forth the attempted service. An owner or interest holder whose interest is forfeited in this manner shall not be liable for court costs. If the person in possession of the vehicle at the time of the seizure is not the owner or the interest holder of the vehicle, notification shall be provided to the possessor in the same manner specified for notification to an owner or interest holder.

If the property is a motor vehicle and is not registered in this state, the attorney representing the state shall attempt to ascertain the name and address of the person in whose name the vehicle is licensed in another state. If the vehicle is licensed in a state that has a certificate of title law, the attorney representing the state shall request the appropriate agency of that state to identify the record owner of the vehicle and any interest holder.

A person who was in possession of the property at the time it was seized shall be made a party to the proceeding. If no person was in possession of the property at the time it was seized, and if the owner of the property is unknown, the attorney representing the state shall file with the clerk of the court in which the proceedings are pending an affidavit stating that no person was in possession of the property at the time it was seized and that the owner of the property is unknown. The clerk of the court shall issue a citation for service by publication addressed to “The Unknown Owner of _______________,” filling in the blank space with a reasonably detailed description of the property subject to forfeiture. The citation must contain the other requisites prescribed by and be served as provided by Rules 114, 115, and 116, Texas Rules of Civil Procedure.

Proceedings commenced under this chapter may not proceed to hearing unless the judge who is to conduct the hearing is satisfied that this article has been complied with and that the attorney representing the state will introduce into evidence at the hearing any answer received from an inquiry required by the law concerning evidence of ownership of the alleged contraband. So, theoretically at least, the owner of property which the state seeks to forfeit should get notice of the forfeiture case and should have an opportunity to argue why the property should not be forfeited.

Asset forfeiture is only finalized after a court hearing in an “asset forfeiture case.” The state must initiate an asset forfeiture case before the property may be forfeited to the state and, while that suit is pending, must make provision for the safe-keeping of the property or the temporary return to the person claiming ownership. Only after this proceeding is the owner’s
interest in the property, if appropriate, dissolved. On motion by any party or on the motion of the
court, after notice in the manner provided by Article 59.04 of the Penal Code (discussed briefly
below) to all known owners and interest holders of property subject to forfeiture under this
chapter, and after a hearing on the matter, the court may make appropriate orders to preserve and
maintain the value of the property until a final disposition of the property is made under this
chapter, including the sale of the property if that is the only method by which the value of the
property may be preserved until final disposition.

The defendant’s acquittal or the dismissal of related criminal charges do not constitute
defenses to the forfeiture action. The defendant/respondent in the forfeiture action may introduce
evidence of the dismiss or acquittal of the related criminal charges in the forfeiture case and
Article 59.05(d) provides that the evidence of dismissal or acquittal raises a presumption that the
property in the forfeiture case is not subject to forfeiture. However, this presumption may be
rebutted by the State by its presentation of evidence that the owner of the property (the defendant /
respondent in the forfeiture proceeding) knew or should have known that the property was
contraband.

Article 59.05 of the Code of Criminal Procedure provides for a “Forfeiture Hearing.” In
the forfeiture case and proceeding, all parties must comply with the rules of pleading as required
in civil suits. All cases under this chapter shall proceed to trial in the same manner as in other
civil cases.

As a general rule, the State litigates as any other party in Texas courts. "When the state
becomes a litigant in the courts it must observe and is bound by the same rules of procedure that
bind all other litigants, except where special provision is made to the contrary." Texas Company
v. State, 154 Tex. 494, 281 S.W.2d 83, 90 (1955). See also State v. Jasco Aluminum Products
evidence, burden of proof, cross complaints, pleadings, instructed verdicts and summary
judgments bind the State and other litigants uniformly. See State v. Humble Oil & Refining Co.,
141 Tex. 40, 169 S.W.2d 707 (1943); Bednarz v. State, 142 Tex. 138, 176 S.W.2d 562 (1943).

The state has the burden of proving by a preponderance of the evidence that property is
subject to forfeiture. It is an affirmative defense to forfeiture under this chapter of property
belonging to the spouse of a person whose acts gave rise to the seizure of community property
that, because of an act of family violence, as defined by Section 71.01, Family Code, the spouse
was unable to prevent the act giving rise to the seizure. A final conviction for an underlying
offense is not a requirement for forfeiture under this chapter. An owner or interest holder may
present evidence of a dismissal or acquittal of an underlying offense in a forfeiture proceeding,
and evidence of an acquittal raises a presumption that the property or interest that is the subject
of the hearing is nonforfeitable. This presumption can be rebutted by evidence that the owner or
interest holder knew or should have known that the property was contraband.

It is the intention of the legislature that asset forfeiture is remedial in nature and not a
form of punishment. If the court finds that all or any part of the property is subject to forfeiture,
the judge shall forfeit the property to the state, with the attorney representing the state as the
agent for the state, except that if the court finds that the nonforfeitable interest of an interest
holder in the property is valued in an amount greater than or substantially equal to the present
value of the property, the court shall order the property released to the interest holder. If the court finds that the nonforfeitable interest of an interest holder is valued in an amount substantially less than the present value of the property and that the property is subject to forfeiture, the court shall order the property forfeited to the state with the attorney representing the state acting as the agent of the state, and making necessary orders to protect the nonforfeitable interest of the interest holder.

A peace officer who takes any action with respect to the property that is not authorized by the statute has violated the statute and has converted the property. *See Johnson v. Johnson*, 849 P.2d 1361, 1366 (Alaska 1993); *Scarabin v. Drug Enforcement Admin.*, 966 F.2d 989 (5th Cir. 1992). The officer, depending on the facts, may have personal liability for the seizure where the procedures for forfeiture and notice of forfeiture are not observed. Generally, however, law enforcement officers turn over the seized property to the local district attorney for a determination of the filing of a forfeiture notice and petition.

If the State declines or fails to initiate a forfeiture action, the owner or possessor is entitled to return of the property. *See State v. Park*, 820 S.W.2d 948, 950 (Tex. App.--Texarkana 1991, no writ).

In summary, there are distinct categories of property subject to forfeiture: “Actual Contraband” which is property for which ownership by itself constitutes a crime, including property improperly imported into the country, drug paraphernalia, narcotics, and unlawful weapons; “proceeds from unlawful activity,” which is property directly resulting from, or that can be traced to, an unlawful activity; “tools or instrumentalities used in to commit or in the commission of a crime, which may include everything from burglary tools to vehicles and real estate.

*Defenses and Preparing the Original Answer*

A forfeiture proceeding is a civil case that "shall proceed to trial in the same manner as in other civil cases." Tex. Code Crim. Proc. Ann. art. 59.05(b) (Vernon 2006).

Accordingly, absent authority to the contrary, a real party in interest in a forfeiture proceeding has the same right as any other civil litigant to obtain full discovery within a reasonable time, develop his defenses, and proceed to trial.

The State has the burden of proof on the overall issue of whether property is subject to forfeiture – i.e., that it is “contraband.” Art. 59.05(b) The State has the burden of proving by a preponderance of the evidence that property is subject to forfeiture.

*The “Parts” of an Original Answer*

The Original Answer consists of a declaration of a denial of a plaintiff’s right to recovery along with a listing of those defenses which the Rules of Civil Procedure require to be

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1Citations to “Article” and “art.” are to Article 59.01, et seq., Tex. C. Crim. Proc., unless otherwise specified.

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affirmatively plead. Often, the Answer will also contain “special exceptions,” where the defendant points out where the Petition does not adequately state a cause of action or fails to present sufficient factual assertions to support a cause of action.

Special exceptions are governed primarily by Tex. R. Civ. P. 91, with reference to Rule 90 as well. Special exceptions may challenge the claim or cause of action itself, or may go to the form of the pleading.

A special exception challenging a claim will be granted upon one or more of three propositions, the applicable one being set out explicitly: (1) that no legal rule justifies a recovery on a claim in the type alleged; (2) that, though there is a legal rule which might be applicable, the petition omits one or more allegations essential to bring plaintiff’s claim within its scope; or (3) that, though there is a legal rule which might be applicable, the petition shows on its face facts which negative its application. 2 McDonald Texas Civil Practice, § 9:25[a] (1992)(footnotes omitted).

So, for most purposes, the Answer will consist of:

- Special Exceptions (listed first)
- General Denial
- Affirmative Defenses

The general rules of pleading and of the parts of an Answer are in Rules 78 through 85 and 90 through 98 of the Texas Rules of Civil Procedure.

A sample Answer in a forfeiture case is attached at the end of this paper.

**Pleading the Defenses and Defensive Matters**

**“Statute of Limitations”**

As noted in the statute, the State must file its Notice of Seizure and petition seeking forfeiture within thirty (30) days of the seizure of the property. See Tex. Code Crim Proc. art. 59.04(a). A civil action commences with the filing of a petition, but such petition must also be filed within the applicable statute of limitations. Tex. R. Civ. Proc. 22.

A fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under the circumstances, to apprise interested parties of the pendency of the action and afford them the opportunity to present their objections. Ortiz v. State, 24 S.W.3d 603, 605 (Tex.App.-Corpus Christi 2000, no pet.). So, even when the petition is filed timely, the suit will be nonetheless barred by limitations unless the plaintiff also exercises due diligence in serving the defendant with process within the statute of limitations period. See

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2 The author assumes the reader has a basic knowledge of the rules of pleading under the Texas Rules of Civil Procedure.
Gant v. DeLeon, 786 S.W.2d 259, 260 (Tex.1990) (holding that, though not expressed in TEX.R. CIV. P. 22, service of process is required to "commence" suit).

The State's right to bring a forfeiture cause exists by statute, and not by virtue of the constitution or common law. 1976 Harley Davidson Motorcycle v. State, 106 S.W.3d 398, 401 (Tex.App.-Corpus Christi 2003, no pet.); State v. Benavides, 772 S.W.2d 271, 273 (Tex.App.-Corpus Christi 1989, writ denied). So, the statute must be construed as its plain meaning may be determined. The time period within which the State must file its Notice and petition is plainly stated in the statute.

Courts employ rules of strict construction against forfeiture when the forfeiture is to the sovereign and is created by statute. 1976 Harley Davidson Motorcycle, 106 S.W.3d at 402; State v. Lot 10, Pine Haven Estates, 900 S.W.2d 400, 402 (Tex.App.-Texarkana 1995, no writ). So, the statute must and should be strictly construed against the State.

Therefore, the State must not only file the Notice (normally attached to the petition) and the petition within thirty days of the date of seizure, but must also diligently pursue service of citation. See $24,156.00 In U.S. Currency v. State, 247 S.W.3d 739, 743 (Tex. App.-Texarkana 2008, no pet.).

If the State fails to file the Notice and petition within the statute of limitations period, its’ claim is subject to being barred. This issue must be plead in the Original Answer. A determination of this issue may either be a fact issue, (i.e., “diligence” in pursuing service of Citation), which will be decided at trial by submission of an issue to the fact-finder, or, if there are no genuine issues of material fact as to the date of filing and dates of service or attempted service, it may be resolved by summary judgment.

The Property Is Not Contraband

The most basic defensive theory is that the property the State seeks is not “contraband” as defined in the statute.

The State must develop proof beyond mere surmise or conjecture that the property is contraband. The “best defense,” therefore, is to show that the property was not the fruit or instrumentality of a crime, but that it was legitimately acquired and used.

The focus of much of the case, and especially in cases involving currency, will be on the legitimate source of the property. The State will attempt to show by evidence either circumstantial or direct that the property was used in a crime, purchased or acquired as the result of a crime, or otherwise fits into the definition of “contraband.”

The State is required in a forfeiture proceeding to show probable cause for seizing the property. $56,700 in U.S. Currency v. State, 730 S.W.2d 659, 661 (Tex.1987); $9,050.00 in U.S. Currency v. State, 874 S.W.2d 158, 161 (Tex.App.-Houston [14th Dist.] 1994, writ denied). This means that the State must establish a substantial connection or nexus between the seized currency and the defined criminal activity. 1.70 Acres v. State, 935 S.W.2d 480, 486 (Tex.App.-Beaumont 1996, no pet.). Therefore, in proving its case by a preponderance of the evidence, the State must prove that it was more reasonably probable than not that the seized currency was either intended for use in, or derived from, a violation of the offenses enumerated in the forfeiture statute. When
relying on circumstantial evidence in forfeiture cases, the State is required to offer proof which does more than raise a mere surmise or suspicion regarding the source of the currency. 

$11,014.00 v. State, 828 S.W.2d 814, 816 (Tex.App.-Houston [1st Dist.] 1992, no writ) (op. on remand) (noting, "[m]oney is subject to forfeiture if it is derived from or intended for use in manufacturing, delivering, selling, or possessing a controlled substance."); Antrim v. State, 868 S.W.2d 809, 812 (Tex.App.-Austin 1993, no writ). In other words, the State must present sufficient circumstantial evidence to meet its burden by a preponderance of the evidence. Spurs v. State, 850 S.W.2d 611, 614 (Tex.App.-Tyler 1993, writ denied).

In $281,420.00 in U.S. Currency v. State, 312 S.W.3d 586 (Tex. App. - [13th Dist. - Corpus Christi] 2008), the court wrote:

In fact, the State has failed to establish (1) that a crime involving a controlled substance occurred or was intended, and (2) a nexus between such a crime and the currency seized. See 1.70 Acres, 935 S.W.2d at 486. In viewing the evidence in a light favorable to the verdict, we find that the currency seized was not contraband within the ambit of the forfeiture statute. See TEX.CODE CRIM. PROC. ANN. art. 59.01(2)(B)(i), art. 59.02(a); see also Williams v. Briscoe, 137 S.W.3d 120, 124 (Tex.App.-Houston [1st Dist.] 2004, no pet.).

Therefore, when arguing that the property is not “contraband,” it is important to concentrate, so far as possible, on the basic premise that the property cannot be “contraband” unless there was an underlying crime and that there is no nexus between the crime and the property.

In the Answer, the defendant would do well to specifically deny that the property is “contraband” under the statutory definition.

The “Innocent Owner” Defense

For a defendant in a forfeiture case who is not a defendant in an underlying criminal case, the “innocent owner” defense may be invoked. However, to prove this defense, the defendant has the burden of proof. Art. 59.02 (c)

In Texas, the forfeiture statute allows a person to prove that they are an “innocent owner” of property that is otherwise contraband under the law. However, this was not always the case in the United States. The U.S. Supreme Court wrote in its’ opinion in Bennis v. Michigan that even “innocent” property owners do not have a constitutional right to an “innocent owner” defense in civil forfeiture lawsuits. Bennis v Michigan, 516 U.S. 442 (1996). In Bennis, the wife’s automobile was used -- without her knowledge -- by her husband to secure the services of a prostitute. When the husband was arrested, law enforcement seized the automobile. Under the law in Michigan, vehicles used for such purposes were subject to seizure and forfeiture, regardless of the ownership. At the time, Michigan law did not provide for a defense to the forfeiture action based on an owner’s lack of knowledge about the use of the vehicle for illegal purposes. So, under the law, the wife, who was innocent of any criminal conduct, did not have a
defense to the forfeiture of the automobile, even though her interest would be forfeited as well. The wife appealed the forfeiture judgment of the vehicle, and the U.S. Supreme Court ruled against her. In Texas, the “innocent owner” defense is in the forfeiture statute.

Still, even with the “innocent owner” defense, that innocent owner is still required to prove their innocence of the criminal conduct or knowledge of the criminal conduct that prompted the seizure, and the burden is on that owner to establish innocence of the criminal conduct or knowledge of the conduct which would then exempt the property -- or at least their interest in the property -- from forfeiture. The concept of “innocent until proven guilty” does not apply in civil forfeiture actions.

The “safe harbor” for “innocent owners” is in article 59.02(c): "[a]n owner or interest holder's interest in property may not be forfeited . . . if the owner or interest holder: (1) acquired and perfected the interest before or during the act or omission giving rise to forfeiture or, if the property is real property, he acquired an ownership interest, security interest, or lien interest before a lis pendens notice was filed . . .; and (2) did not know or should not reasonably have known of the act or omission giving rise to the forfeiture or that it was likely to occur at or before the time of acquiring and perfecting the interest or, if the property is real property, at or before the time of acquiring the ownership interest, security interest, or lien interest." The statutory safe harbor is an affirmative defense.

The key to the “innocent owner” defense is not whether the property is contraband – one may concede that it is – but that it is excepted from the statute because of the standing of another person besides the criminal actor as an owner of the property.

Consider this case in which the “innocent owner” defense was applied. From State v. Southwind Auto Sales, 951 S.W.2d 849 (Tex.App.-San Antonio 1997):

In this case, Southwind moved for summary judgment on its "innocent owner" defense. To prevail on this affirmative defense, Southwind needed to show: (1) that it acquired and perfected the interest before or during the act or omission giving rise to the forfeiture; and (2) that it did not know or should not reasonably have known of the act or omission giving rise to the forfeiture or that it was likely to occur at or before the time of acquiring and perfecting the interest. TEX. CODE CRIM. PROC. ANN. art. 59.02 (c) (Vernon Supp. 1997).

The Texas Code of Criminal Procedure provides that if an owner or interest holder establishes these facts, its interest in property may not be forfeited. Id. An "Owner" is defined as "a person who claims an equitable or legal ownership interest in the property." Id. art. 59.01(6). The code defines an "Interest holder" as "the bona fide holder of a perfected lien or a perfected security interest in property." Id. art. 59.01(4). Southwind claims that it established the first prong of the statutory test by demonstrating that the interest it acquired and perfected was that of an "owner" having legal title to the 1985 Cadillac.
Southwind contends that, as such an owner, it was not required to establish that it had a perfected security interest in the property. We agree. Southwind's summary judgment evidence established that title was last assigned to Southwind, and that Southwind entered into an agreement with Regina McGowan for sale of the vehicle to her, but title to the Cadillac was never transferred to McGowan because she failed to comply with the terms of the contract.

The summary judgment evidence included the following: (1) a copy of a title certificate to the vehicle that was issued to Homer Crawford initially, but that was then assigned by Crawford to Gunn Olds, and by Gunn Olds to Southwind, with the assignments noted on the certificate of title; (2) a copy of the retail installment contract between Southwind and Regina McGowan, which required proof of liability insurance and physical damage coverage with specified deductibles; (3) a copy of the reassignment of title to McGowan and Application for Texas Certificate of Title for McGowan, which were never delivered or submitted; and (4) the affidavit of Felix Pasedez, proprietor of Southwind, stating that McGowan never provided proof of the required liability and physical-damage coverage.

The affidavit of Pasedez also established that a licensed dealer may establish complete legal ownership of a vehicle held for resale by showing that title was assigned to it, even though a new title has not been issued registered in the dealer's name. Southwind argued that this evidence conclusively proved that it acquired title from Gunn by assignment and that neither legal nor equitable title was conveyed to McGowan thereafter because the sale to her was invalid due to her failure to establish proof of financial responsibility. It is true that a dealer perfects legal title to a vehicle if he holds an executed assignment of title, even though the dealer is not shown as the “registered” owner on a certificate of title. See First State Bank of Corpus Christi v. Austin, 315 S.W.2d 390, 392 (Tex.Civ.App. — San Antonio 1958, writ ref'd) (noting that transfer of title upon prescribed form by dealer holding assignment of title would convey legal title to vehicle).

The Texas Certificate of Title Act, as it existed at the time relevant to this forfeiture action, specifically exempted dealers from the requirement that a certificate of title be issued in the name of the owner prior to a sale. TEX. REV. CIV. STAT. ANN. art. 6687-1 §27 (Vernon 1977) (amended 1995) (current version at TEX. TRANSP. CODE ANN. §501.022 (Vernon Pamphlet 1997)). Accordingly, Southwind, by proving that it received an assignment of title to the vehicle from Gunn and that the subsequent sale to McGowan was never finalized, established conclusively that it was the legal owner of the vehicle at the time of the forfeiture.

In summary, the requirements of the “Innocent Owner” defense are set out in Mitchell v. State, 819 S.W.2d 659 (Tex.App.-El Paso 1991):
In response to the State's forfeiture suit, Appellant Carrol Mitchell filed a verified answer asserting that he was the owner of the Cadillac, the Rolex watch and the $1,683.00 in currency. Appellant also pled that he acquired his interest in the property prior to the commission of the offense; and that he did not know, nor consent to the use of the property in the commission of a felony. By pleading such facts, Appellant raised a defense known as the innocent owner defense allowed by Tex. Code Crim.Pro.Ann. art. 59.02(c)(2). The burden of proof for this defense is placed on the owner of the property. If the owner sustains this burden, the property is not forfeitable. *McDorman v. State*, 757 S.W.2d 905 (Tex.App. — Eastland 1988, writ denied); *Gaston v. State*, 641 S.W.2d 261 (Tex.App. — Houston [14th Dist] 1982, no writ).

Therefore, in your Answer you must plead “innocent owner” as an affirmative defense.

*The Proportionality and “Excessive Fines” Defense*

“Proportionality” and the related “Excessive Fines” defenses are defenses which are also best set out in your Answer.

These defenses are related, and there is controversy whether Texas courts should apply the same rationale that has been adopted in the federal system. The statute attempts to foreclose the application of these defenses, as it explicitly states that it is the intention of the legislature that asset forfeiture is remedial in nature and not a form of punishment and that if the court finds that all or any part of the property is subject to forfeiture, the judge shall forfeit the property to the State. So, defending the forfeiture action with these defenses would be something of a “last resort,” as the issue of whether the property is “contraband” is beside the point (and often against your client’s interest). In practice, these defenses work best, if at all, when applied to currency where the currency is not a direct product of an illegal act.

Even if it is established that the property in question is contraband, in some instances, depending on the character of the property, you should argue that the court must apply a "proportionality" test as set forth in *United States v. Bajakajian*, 524 U.S. 321, 118 S.Ct. 2028, 141 L.Ed.2d 314 (1998). *Bajakajian* pertained to a forfeiture of currency under a Federal Statute making it a crime to carry more than $10,000 in currency out of the country without reporting it. Respondent pled guilty to the criminal violation of failure to report. The government also sought forfeiture of the entire amount of cash carried by Respondent, $357,144. The district court ruled that under the statute the entire sum was subject to forfeiture, but declined to enter such a judgment, holding that such a result would violate the Excessive Fines Clause. The Ninth Circuit affirmed. *Id.* at 326-27.

The Supreme Court held: (1) forfeitures, i.e., payments in kind, are "fines" subject to the limitations of the Eighth Amendment if they constitute punishment for an offense, *Id.* at 328; (2) the forfeiture of currency under the subject statute is a form of punishment; it is an additional sanction available when imposing a sentence for violation of the criminal statute, imposed at the culmination of criminal proceedings and cannot be imposed on an "innocent owner," *Id.*; and (3) modern statutory forfeiture provisions are "fines" for Eighth Amendment purposes, if they
constitute, even in part, punishment, *Id.* at 332-34. Therefore, the forfeiture of currency was subject to the Excessive Fines Clause. *Id.* at 334.

The basic defensive argument is that in determining whether what you argue is or is equivalent to “the fine” is excessive, the court should consider proportionality, i.e., the amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish. *Id.* at 334, 335-36. In determining whether the forfeiture of the entire sum was "excessive" or "grossly disproportional," the court should examine the nature of the offense, the relationship of the offense to other illegal activities, the class of offenders addressed by the forfeiture, and the harm caused.

In Texas, the Fort Worth Court of Appeals wrote an opinion in December of last year that seems to fix something of a mathematical formula in considering whether a forfeiture is "excessive" under the Constitution. As you know, the Constitution prohibits the imposition of "excessive fines" in the Eighth Amendment, and that prohibition extends to asset forfeiture cases. Or, at least that’s what we argue. Even that basic proposition is under attack and not yet well-settled, according to the prosecutors and some courts.

Basically, the theory of this defensive argument in asset seizure and forfeiture cases is that even if the property is otherwise subject to forfeiture under the law and the facts, the court should restrict the forfeiture because it is "excessive." However, the law is somewhat unsettled, as is mentioned in the case discussed below, and, as I mentioned above, there is the threshold argument as to whether the Eighth Amendment argument applies to asset forfeiture cases at all.

Justice Lee Gabriel of the Fort Worth Court of Appeals wrote the opinion of the court released two days before Christmas, 2010, in a case styled "$27,877.00 Current Money of the United States vs. The State of Texas." Here are the facts from Justice Gabriel’s opinion:

“In March 2007, Carrollton Police Department Narcotics Officer Mai Tran received information from a confidential informant that Roberts was trafficking marihuana and alprazolam (also known as Xanax) from a house in The Colony, Texas, where Roberts lived with his girlfriend and some friends. Officer Tran obtained a search warrant from a City of Carrollton magistrate (with jurisdiction in Dallas and Denton Counties) and executed the warrant at 4249 Malone Avenue, The Colony, Texas (the Malone address), in Denton County.

At the Malone address, Carrollton police officers found 8.5 tablets of alprazolam, 2 tablets of hydrocodone, 4.48 grams of marihuana, and $4,857 in cash. Roberts was arrested.

After the arrest, Officer Tran received additional information that Roberts, fearing that the police would raid his home, had moved drugs and money to two separate places. Specifically, the information was that Roberts had moved drugs to the house of James Savoldi, a friend and alleged "runner" for Roberts, and had moved money to Roberts's parents' house. Carrollton Police Officer Jeremy Sanchez, a canine handler, and his dog, Bosko, performed a "sniff search" on Savoldi's home at 4601 Freeman Drive, The...
Colony, Texas (the Freeman address), in Denton County. Bosko "alerted" to an odor at the front door of the house. Based on the information from the informant and the sniff search, Officer Tran obtained a search warrant for the Freeman address.

During the execution of the warrant, Savoldi admitted to the police that he was holding the drugs for Roberts. Savoldi had hidden a black gym bag with approximately two pounds of marihuana at the Freeman address. When he heard from Roberts's girlfriend that the police had searched the Malone address, Savoldi took the bag of marihuana from his house to a hotel in Addison, Texas, where it was later confiscated by Carrollton police officers. Roberts pleaded guilty to the felony offense of possession of more than four ounces but less than five pounds of marihuana for the marihuana that the officers found in the Addison hotel room.

While in jail, Roberts made a phone call and advised an unknown person that "the money" was in a bag under his brother's bed at Roberts's parents' house, 4628 Archer Drive, The Colony, Texas (the Archer address), in Denton County. Officer Sanchez and Bosko conducted a sniff search around the exterior of the Archer address, and Bosko alerted at the bottom of the garage door. Officer Tran obtained a search warrant for the Archer address from the same magistrate in Carrollton as the previous two warrants and executed that warrant. There, the police found $23,020 under the brother's bed, in bills of various denominations, tied with hair bands. In a written statement to the police, Roberts's brother denied any knowledge or ownership of the money.

The money recovered from the Archer address was taken to the Carrollton Police Station, where Officer Sanchez conducted another sniff search. This time, he took three new paper bags and put the money in one of them. Each bag was closed by folding over the top and all three bags were placed in a hallway about six feet apart. Bosko sniffed all three bags and alerted on the sack containing the money.

In April 2007, the State filed its notice of seizure and intended forfeiture, alleging, among other things, that Roberts owned the money and that it was contraband as proceeds from the sale of narcotics. Roberts denied the allegations and asserted affirmative defenses, including illegal search and seizure.

After the asset forfeiture hearing, the trial court issued forty findings of fact and four conclusions of law in which it concluded that the $23,020 seized from the Archer address "is the proceeds of Brendan Roberts's illegal drug trafficking activities," and is therefore contraband. The trial court ordered the money to be forfeited to the State under article 59.02 of the code of criminal procedure. This appeal followed.”
After losing in the trial court, Mr. Roberts appealed and, on appeal, argued, among other things, that the forfeiture of the $23,020 was an unconstitutionally excessive fine under the Eighth Amendment. The Fort Worth Court of Appeals disagreed.

Justice Gabriel acknowledged the basic constitutional tenet that the Eighth Amendment prohibits the imposition of excessive fines. U.S. Const. amend. VIII.

But, Justice Gabriel continued, expressing some doubt about whether the Eighth Amendment prohibit actually applied to forfeiture cases:

“The United States Supreme Court has determined that the Eighth Amendment applies to forfeitures "if they constitute punishment for an offense." United States v. Bajakajian, 524 U.S. 321, 328, 118 S. Ct. 2028, 2033 (1998). Whether the forfeiture of drug proceeds is subject to the Eighth Amendment is unsettled in Texas. Compare U.S. v. Betancourt, 422 F.3d 240, 250 (5th Cir. 2005) (stating that after Bajakajian the Eighth Amendment still does not apply to the forfeiture of drug proceeds) with One Car, 1996 Dodge X-Cab Truck v. State, 122 S.W.3d 422, 427 (Tex. App.-Beaumont 2003, no pet.) (applying the Eighth Amendment to article 59.02 forfeitures); see also Tex. Code Crim. Proc. Ann. art. 59.05(e) (Vernon 2006) ("It is the intention of the legislature that asset forfeiture is remedial in nature and not a form of punishment.").

“Assuming without deciding that forfeiture of the $23,020 is subject to the Eighth Amendment's excessive fines clause, and under the analysis set forth in Bajakajian, we do not believe the forfeiture in this case to be unconstitutionally excessive. Roberts's offense is a serious one involving illegal drugs. The offense occurred in the context of other alleged illegal activities, including possession of other illegal substances. The information provided by the informant was that Roberts was trafficking drugs and the evidence in this case showed that Roberts was knowledgeable enough of police investigations of drug dealers to move his drugs and money to separate locations for hiding. The civil forfeiture statute unquestionably targets drug traffickers. See Tex. Health & Safety Code Ann. § 481.112(b) (Vernon 2010); Tex. Code Crim. Proc. Ann. arts. 59.01(2)(B)(i), 59.02(a) (Vernon Supp. 2010). The evidence in this case demonstrated that Roberts had no other source of income and that the extent of his criminal activity went beyond mere possession of marihuana. The marihuana had a street value of $7,000, drug trafficking is known to correlate with violence, see 1992 BMW v. State, No. 04-07-00116-CV, 2007 WL 2608364, at *2 (Tex. App.-San Antonio Sept. 12, 2007, no pet.) (mem. op.) (quoting Thomas v. State, 916 S.W.2d 578, 583 (Tex. App.-San Antonio 1996, no writ)) ("Studies clearly demonstrate the direct nexus between illegal drugs and crimes of violence."), and the trial court expressed concern that there was "$27,877.00 worth of harm" to the State. So the seriousness of Roberts's criminal activity and the destructive effects of drugs on today's society weigh heavily in analyzing proportionality.

Justice Gabriel then concluded that Roberts’ offense was serious, and justified the forfeiture of the currency:
“Roberts's offense was a state jail felony with a maximum of two years' imprisonment and a fine not to exceed $10,000. Tex. Penal Code Ann. § 12.35(a), (b) (Vernon 2003). Thus, the proceeds to be forfeited are roughly 2.3 times the maximum statutory fine. Courts have held that a forfeiture of twice the maximum fine is not grossly disproportional. See, e.g., U.S. v. Wallace, 389 F.3d 483, 486 (5th Cir. 2004) (upholding forfeiture of $30,000 airplane when the statutory maximum fine for failure to register the airplane was $15,000). In light of the gravity of Roberts's offense, we do not find the forfeiture of $23,020 grossly disproportionate.”  (Emphasis added.)

So, Justice Gabriel seems to argue that, first, Roberts’ crime was serious enough to justify this forfeiture and then, apparently not willing to rely only on the (for want of a better phrase) “public policy” argument, sets out what appears to be a mathematical formula justification. Readers who follow conservative jurists attacks on exemplary or “punitive” damages will recognize the “formula” argument, and the fact that the “two to three times” the amount of actual or economic damages is the same argument used in those arguments.

So, is the Eighth Amendment’s prohibition against “excessive fines” (if it applies to forfeiture cases) subject to a mathematical formula? Apparently so, but, it is not settled what that formula might be. If the crime was more serious, would larger forfeitures be allowed? If the crime less serious, would smaller forfeitures be required? And, how do you calculate the “harm” to society of a crime, especially one with no apparent single victim? All of these are good, and so far unanswered, questions.

Here is a sample paragraph for introducing the “excessive fines” defense in an Answer:


Discovery

“Discovery is ... the linchpin of the search for truth, as it makes "a trial less a game of blind man's bluff and more a fair contest with the issues and facts disclosed to the fullest practicable extent."
As noted, *supra*, the forfeiture case is subject to the Rules of Civil Procedure and all of the discovery methods listed in the Rules are available.

In forfeiture cases, discovery is often a hotly contested battleground. The State, especially in road-side currency seizure cases, rarely has any legitimate, fact-based reason to seek forfeiture of the client’s currency at the time the Notice of Seizure and the Petition are prepared and filed. Often, the State has to come up with a factual basis beyond the seizing officer’s opinion that the currency was used in or was the proceeds of a drug transaction. The State attempts to do this by sending your client extensive and intrusive discovery.

Our rules of civil procedure mandate a flexible approach to discovery. A party may seek any information which "appears reasonably calculated to lead to the discovery of admissible evidence." Tex. R.Civ.P. 166b(2)(a).

Discovery is a process by which the parties to lawsuits explore the facts, circumstances, evidence, and arguments of each other’s case. The purpose of discovery is to provide each side with full knowledge of the facts and documents prior to trial. Contrary to popular belief, the courts frown on “trial by surprise.” Rather, the courts expect each side to come into court knowing as much as possible about the opposing side’s evidence and arguments. As the Texas Supreme Court has stated, cases should be decided on the basis of what the facts reveal, not on the basis of what is concealed.

Also, during discovery you should evaluate the effectiveness of opposing witnesses and counsel. Information received during discovery can also help you determine whether settlement is a viable option and it can help us determine what type of settlement is satisfactory if it proves to be the best option.

Your client should be prepared early on in the forfeiture case to expect extensive discovery requests. And, as noted elsewhere in this article, if your client is also the defendant in the underlying criminal case, a careful evaluation of that case must be undertaken before the forfeiture case strategy is finalized.

The rules that govern lawsuits provide a number of different discovery techniques. For instance, there are requests for disclosure, oral depositions, written interrogatories, requests for production, and requests for admission. Some of these devices will require written answers from the client, some will require that you provide the other side with documents or other tangible things, and some require that you and other witnesses give sworn testimony before a court reporter. All of these discovery devices require that the answers be truthful and complete, and the client will be required to swear to or verify all of the answers. Discovery must be answered unless it is not within the proper scope of discovery or involves a matter that is privileged from discovery, such as communications protected by the attorney-client privilege or trade secret information.

Parties routinely send “requests for disclosure.” Requests for disclosure require the receiving party to provide certain information without objection. These items include: the correct names of the parties to the lawsuit; the name, address, and telephone number of any
potential parties to the suit; the legal theories and general factual bases of the responding party’s claims or defenses; the amount and method of calculating damages; the name, address, and telephone number of persons with knowledge of relevant facts and a brief statement of the person’s connection with the case; information on experts expected to testify at trial; all discoverable indemnity, insurance, or settlement agreements; statements of witnesses; and medical information.

A “deposition on oral examination” is similar to giving testimony at a trial, although a deposition does not occur in a courtroom. The person whose deposition is taken, called the deponent, is placed under oath and questioned by the attorney for the party who scheduled the deposition. Any attorneys representing other parties to the case are also entitled to be present and ask questions. Of course, the attorney representing the deponent is also there to protect that person’s interests and to object to any improper questions or tactics. There is no judge, but a court reporter will be present to record the testimony. The deposition may also be videotaped, as well as being recorded stenographically, if the party scheduling the deposition requests.

“Interrogatories” are written questions sent by one party to another. Requests for Admissions ask the receiving party to admit certain facts, and take them out of controversy.

“Requests for production” ask that a party produce certain documents or other tangible items relevant to the lawsuit so that the other side can inspect or copy them. Sometimes, document production and review can be a time-consuming process. So, it is important that you get as much of the requested material as possible from the client as soon as possible, preferably even before it is requested. For a headstart, consult the “typical” discovery requests from the State starting on page 24.

Lawyers have a duty to cooperate in the discovery process; you can be severely penalized by the court if you do not respond honestly and promptly to reasonable discovery requests or if you abuse the discovery process. In recent years, many judges have lost patience with uncooperative lawyers and clients, and have taken an active approach towards imposing sanctions. Sanctions for discovery abuse can be imposed on both the lawyer and the client, and possible sanctions include monetary fines and, for extremely abusive behavior, pleadings can be stricken from the case and claims can be dismissed or a default judgment can be rendered. Your client can actually lose her case, regardless of the merits, if the judge determines that they are not conducting or participating in discovery in good faith. You must ensure that you cooperate during discovery, and provide full and complete responses to any discovery you receive.

However, let me make clear that this duty to cooperate is not a duty to volunteer. While you and your client will certainly give honest answers to reasonable discovery requests, you should not provide any information that is not clearly requested.³ And, of course, you should take care to protect privileged information.

³The exception here is that if you intend to use documents or witnesses at trial the better practice is to disclose them if ANY discovery request might reasonably be said to address them. And, often civil courts will require pre-trial exchange of exhibits, exhibit lists, and witness lists. Most trial court judges in civil cases are quick to exclude evidence which was not disclosed pre-trial, where there is any basis to believe that it should have been.
You should ensure your client understands that the answers and documents she provides you are not necessarily what the other side will receive. You should advise your client that you will review their answers and documents and then you will put them in appropriate form for response to the discovery request. In that way, your client should be more willing to give you all of the requested information and documents and not “self-censor” the responses. Often, “self-censoring” by the client backfires and leads to unwelcome outcomes at trial, just as it does in a criminal case.

The limitations on discovery are set out in Tex. R. Civ. Proc. 190. A thorough reading of Rules 190 through 193 is absolutely required before conducting discovery in a civil case.

Generally, these are the most widely used methods to obtain discovery:

- Request for Disclosure Rule 194
- Interrogatories Rule 197
- Requests for Production Rule 196
- Requests for Admissions Rule 198
- Oral Depositions Rule 199
- Depositions on Written Questions Rule 200

A Note on the Use of the Fifth Amendment

Invoking the right against self-incrimination is not a defense to a forfeiture action nor will it necessarily interfere with the process of discovery. A consideration of when and whether to invoke the right must be analyzed along with the benefits and costs of attempting to abate the case while the companion criminal case is proceeding. Additionally, there may be situations where there is more to the defendant’s exposure to prosecution than just the pending or underlying criminal case.

The important consideration here is to know that in a civil case, a person may selectively invoke her rights to remain silent, but the other side may comment on the defendant’s silence and ask the fact-finder to make an inference based on that silence. Tex. R. Evid. 513 (c)

In the context of discovery proceedings, the defendant may actually prefer to abate the case until the underlying criminal case is completed. Or, and especially if the defendant in the forfeiture case is not the defendant in the underlying criminal case, she may choose to proceed or try to proceed with the forfeiture case while the criminal case is ongoing. That choice is discussed, infra, in the section on abatement.

In discovery, the State is going to ask a wide range of questions and request a wide range of documents and each of the discovery requests must be reviewed, carefully, so as to protect the defendant against exposure to an adverse result in the criminal case or the filing of additional charges.
The Scheduling Order and Discovery Techniques

Scheduling Order

Most civil courts enter scheduling orders. Scheduling orders typically set deadlines for mileposts in pre-trial preparation and set, at least, a docket call. Many courts assign cases to a trial docket in the scheduling order.

Scheduling orders normally have the following deadlines:

- Joinder of Parties
- Amending Pleadings
- Disclosure of Experts
- Dispositive Motions
- Discovery Period
- Agreement or Appointment of Mediator and Mediation Completion
- Pre-Trial Conference
- Docket Call
- Trial Docket (Two Week Period)

Discovery Control Plan

Rule 190 of the Rules of Civil Procedure provides that every case is to be governed by a discovery control plan. There are three “levels” of discovery provided under the rules.

Rule 190.2 defines “Level 1” cases as those cases in which all plaintiffs affirmatively plead that they seek only monetary relief aggregating $50,000 or less, excluding costs, pre-judgment interest and attorney’s fees, or divorce cases involving no children and a marital estate worth no more than $50,000. In a Level 1 case, each party is allotted a total of six hours to take all witnesses’ testimony by oral deposition. The parties can agree to expand this limit up to ten hours. Regarding interrogatories to a party, each party may serve on any other party no more than twenty five interrogatories, not including interrogatories which only ask a party to identify or authenticate specific documents or records. In a Level 1 case, discovery must be completed during the discovery period which is defined as beginning when the suit is filed and continuing until thirty days before the date set for trial. However, you should be aware that the court’s “discovery control plan” may shorten the time for discovery to a date earlier than thirty days before trial.

Level 2 cases are those cases which are not Level 1 and which also do not have a discovery control plan. When a specific discovery control plan is entered by the court, the case becomes a Level 3 case. In Level 2 cases, discovery must be completed during the discovery period, which begins when suit is filed and continues until: (a) thirty days before the date set for trial, in cases under the Family Code; or (b) in other Level 2 cases, the earlier of (i) thirty days before trial, or (ii) nine months after the earlier of two dates, one being the first oral deposition or the other being the due date of the first response to written discovery. Note that these deadlines
may not be tied to the trial date, so it is important to calendar these deadlines at the outset of the case.

In a Level 2 case, each “side,” as opposed to “each party,” has a maximum of fifty hours for oral depositions to examine and cross-examine parties on the opposing side and experts designated by those parties and persons who are subject to those parties’ control. Rule 190.3(2) defines a “side” as being all of the litigants with generally common interests in the litigation. Additionally, if one side designates more than two experts, the opposing side gets an additional six hours of total deposition time for each additional expert designated. In forfeiture cases, where there are often multiple respondents, you should carefully consider who is on “your side” and, if you object to being included on that “side,” you should move the court to rule on who is and who is not on “your side,” especially if you contemplate needing extensive discovery.

Level 3 cases are those governed by a “discovery control plan” under Rule 190.4. Under Rule 190.4, “the court must, on a party’s motion, and may, on its own initiative, order that discovery be conducted in accordance with a discovery control plan tailored to the circumstances of the specific suit.” Level 3 cases will likely be rare in civil forfeiture cases but the entry of a scheduling order setting deadlines for discovery is not.

The discovery control plan may address any issue concerning discovery and may change any limitations on the time for, or amount of, discovery. A Level 3 discovery control plan must include the following: (1) a trial date or trial scheduling conference date; (2) a discovery period during which all discovery either must be conducted or all requests sent for the case or phase of a case; (3) appropriate limits on the amount of discovery; and (4) deadlines for joining additional parties, amending or supplementing pleadings, and designating expert witnesses. This “discovery control plan” is not the same as a “scheduling order,” but many civil courts routinely enter a “scheduling order” that sets deadlines on the completion of discovery.

When confronted with new issues prior to trial and facing a discovery cut-off date, be aware that Rule 190.5 allows you to ask the court to extend the time for discovery “regarding matters that have changed materially after the discovery cutoff if trial is set or postponed so that the trial date is more than three months after the discovery period ends.”

**Discovery Techniques**

As noted above, under the Rules of Civil Procedure, discovery may be initiated by a party requesting “initial disclosures.” The Rules of Civil Procedure provide that, upon request, certain elementary information be provided by the parties. When defending a forfeiture case, it is good practice to introduce the client to these disclosure requests early on in the representation so as to obtain a more complete understanding of his or her defenses.

**Requests for Disclosure**

These are the basic requests for disclosure required by Tex. R. Civ. Proc. 194:

(A) The correct names of the parties to the lawsuit;

(B) The name, address, and telephone number of any potential parties;
(C) The legal theories and, in general, the factual bases of the responding party’s claims or defenses (the responding party need not marshal all evidence that may be offered at trial);
(D) The amount and any method of calculating economic damages (the damages you’re claiming in the lawsuit -- how much and how do you calculate it?);
(E) The name, address, and telephone number of persons having knowledge of relevant facts, and a brief statement of each identified person’s connection with the case;
(f) For any testifying expert:

(1) The expert’s name, address, and telephone number.
(2) The subject matter on which the expert will testify.
(3) The general substance of the expert’s mental impressions and opinions and a brief summary of the basis for them, or if the expert is not retained by, employed by, or otherwise subject to the control of the responding party, documents reflecting such information.
(4) If the expert is retained by, employed by, or otherwise in the control of the responding party:
   (a) All documents, tangible things, reports, models, or data compilations that have been provided to, reviewed by, or prepared by or for the expert in anticipation of the expert's testimony.
   (b) The expert’s current resume and bibliography.

(G) Any discoverable indemnity and insuring agreements;
(H) Any discoverable settlement agreements;
(I) Any discoverable witness statements. (Has anyone made a statement about the facts of this case?)

After the request for initial disclosures, or, often, contemporaneously with them, the State will start with the written discovery in the form of interrogatories and requests for production. Because of budgetary constraints, most district attorneys’ offices make little use of oral depositions in the majority of cases.

**Interrogatories**

Here are some examples of the State’s discovery requests:

Typical Interrogatories from the State:

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Produce a copy of your federal income tax returns and all schedules attached thereto including preliminary quarterly returns, along with W-2 statements filed with the Internal Revenue Service for the tax years of __________________. If you have not prepared your return for any of the requested years, produce a copy of all W-2 statements you and your spouse have received for each and every such year.

With respect to any income received by you or your spouse from any business of which you or your spouse is a proprietor, partner, or in which you or your spouse otherwise claim any interest, identify the name and address of the business, and the amount of income or other benefit you have received from such business for each of the following years: ____________________.

State the name and address of each person or entity to whom you have given a financial statement in the last five years including any application for credit.

Describe each motorized vehicle, including the vehicle identification number and license plates, in which you or your spouse, if any, or either or both of you claim an interest and indicate if they are used in connection with your trade of business or for personal use.

Identify all accounts, business or personal, in which you currently hold any interest or in which you held any interest in the three-year period prior to the seizure of the money at any financial institutions or non-bank institutions, including banks, savings and loans associations, investment companies, mutual funds, insurance companies, stock brokerage firms, retirement plans, annuities and credit unions.

State the full name and complete address of each person or business entity by whom you were employed, the nature of your occupation, and the dates and duration of each period of employment you have had during the three (3) years prior to the filing of this cause of action.

Did you, your spouse, or any members of your household receive any type of government assistance; including, but not limited to: food stamps, welfare or aid to families with dependent children, for the years ____________________.

State each trade name or assumed name under which you did any business or conducted any commercial or remunerative activity during the three (3) years prior to the filing of this cause of action and the complete address of each place where you conducted such business or commercial or remunerative activity.

Identify each person, group, association, or corporation with whom you engaged in any partnership or business enterprise or venture in the three (3) years prior to the filing of this cause of action.
Identify any and all individuals claiming any interest in the money seized herein, including the extent of their interest, and the date and manner in which their interest was acquired.

Identify the source(s) of the money seized herein including the person(s) from whom it was obtained and the date it was obtained.

Identify all persons who will testify as witnesses in your behalf at the trial of this case.

Typical Requests for Production from the State:

Please furnish a copy of all documents, materials or tangible things which you assert constitute evidence of a defense to forfeiture or support the allegations and assertions which you have raised or will raise.

Please furnish a copy of all documents to which you referred in answering any of the Interrogatories.

Typical Requests for Admissions from the State:

That the money made the subject of this forfeiture action was used or intended to be used in the commission of a felony offense under Chapter 481 of the Health & Safety Code or was derived from or constitutes the proceeds of the commission of a felony offense under Chapter 481 of the Health & Safety Code.

That the money made the subject of this forfeiture action was lawfully seized.

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As you can see, the discovery requests, especially the interrogatories, will require your client to gather dozens, if not hundreds of pages of documents as well as disclose almost every significant financial transaction for the past few years. The State often also requests extensive cell phone and email records – all in an attempt to build a case that your client has unexplained, and therefore unlawful, income.

The author practices under the theory that “what is good for the goose, is good for the gander,” and so tries to give the State the same type of discovery requests it would foist on our clients. The following are examples of some of those discovery requests.

Sample Respondent’s Interrogatories to the State

State all facts which support your contention that the currency seized from Respondent on or about **DATE***, was “contraband” as asserted by you in your “Notice of Seizure.”
If you contend that the full amount of the money made the subject of this suit (the approximately $***,***.**) is subject to forfeiture, then state each and every fact that supports your contention.

State, in detail, the officer’s purpose for detaining Respondent on or about **DATE**, and the reasons for the subsequent search of her person and/or possessions during which the alleged “contraband” currency was discovered. (For the purpose of this Interrogatory, the “officer” referred to herein is that officer or officers of the City of ***** Police Department who detained as set out in the Notice of Seizure dated **DATE**.

As to each person you expect to call to testify at trial, other than a testifying expert, with regard to the facts of this case, please:

a. Identify each person.
b. State the matter on which the person is expected to testify.
c. State the substance of the anticipated testimony.
d. Identify each and every document, including without limitation any statement of any person with knowledge of relevant facts, that has been prepared by or reviewed by the person who is expected to testify, with regard to the subject matter of this litigation.

Did you or any other persons or entities make an investigation of the transactions and occurrences that are the basis of this lawsuit? If so, with regard to each investigation:

a. Identify the person who initially requested that the investigation be undertaken.
b. Give the dates on which the investigation was initiated and completed.
c. Identify all persons who were responsible for conducting the investigation.
d. Identify all persons who did any work whatsoever in connection with the investigation.
e. Identify every person interviewed or contacted in any manner with regard to the investigation. If these persons gave a written or recorded statement, identify the current custodian(s) of the statement or recording. If the communication inquired about was oral, please state the date and substance of the communication fully and in detail.

Do you have knowledge of any photographs or videotapes being taken of the Respondent on, before, or during the seizure of the alleged contraband on **DATE**? If so:

a. Give a brief description of what each photograph or videotape depicts.
b. State the date each photograph or videotape was taken.
c. Identify each person currently having custody of a copy, print or negative of each photograph or videotape.
Please identify the “narcotics detector dog” and his/her handler or K-9 Officer, said dog which, on **DATE**, “gave a positive alert on the currency” as set out in the Notice of Seizure dated **DATE**. With respect to this Interrogatory, the term “identify” should be interpreted and defined as requiring the following: with respect to the dog, its’ name and location; with respect to the Officer (K-9/Handler), his or her name, agency employing, badge number, and current duty assignment.

*Sample Respondent’s Request for Production to the State*

All documents pertaining to the training, testing, health, and certification of the animal identified in response to Respondent’s Interrogatory Number **.

All documents which were consulted to answer any of Respondent’s Interrogatories.

The “incident or offense report” and all supplements and addenda referenced by the affiant in the Notice of Seizure, Incident Number *****, dated *****.

Photographs or videotapes taken of the Respondent on, before, or during the seizure of the alleged contraband on *****.

Documents showing or demonstrating the criminal history of the Respondent in this action, for the ten year period prior to the service of these Requests, including all misdemeanor convictions, misdemeanor probations, and misdemeanor deferred adjudications involving crimes of moral turpitude (e.g., theft, embezzlement, fraud, perjury, and other forms of criminal dishonesty); or which identify all felony convictions, felony probations, and felony deferred adjudications Respondent has received.

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*Objections to Discovery*

Perhaps the most basic objection to interrogatories is to the number of them propounded. In modern practice, with the use of “sub-parts,” many parties submit far more than the allowed number of interrogatories. Here is an example of an objection to more than twenty-five interrogatories:

The total number of interrogatories, including subparts, served by Plaintiff on Respondent exceeds twenty-five (25). Respondent will answer the first twenty-five (25) interrogatories, but is not required to answer more than twenty-five (25) interrogatories, including discrete subparts. Therefore, Respondent specifically objects to Interrogatories **, **, ** and **, as they require answers beyond the scope of permissible discovery.
requiring as they do that Respondent answer more than twenty-five (25) interrogatories. Tex. R. Civ. Proc. 190.

When the State propounds the types of interrogatories that seem to ask for your client’s entire financial history, it is best to try to limit that intrusion. Here is an example to use against interrogatories that are “overbroad and unduly burdensome”:


Occasionally the State will inquire into matters that invade a recognized privilege, especially the attorney-client privilege. When one is attempting to protect privileged information, the first step is to draft the objection and the “privilege log,” listing the protected and withheld documents. Here is an example:

Pursuant to Tex. R. Civ. Proc. 193.3(a) , Respondent hereby informs Plaintiff that:

10. Information or material responsive to the request has been withheld; and

11. The work product and attorney-client \{or other\} privileges are asserted.

Further, to the extent that the Interrogatory \(or request for production\) calls for the production of documents or information which fall within the work product or attorney-client privilege, Respondent hereby notifies Plaintiff that certain communications or documents protected by attorney-client or work product \{or other\} privileges have been withheld. Respondent would show that the documents withheld are exempt from discovery in that they are privileged communications to or from her lawyer, or his representative, or a privileged document of a that lawyer or lawyer’s representative \(1\) created or made from the point at which a party consults a lawyer with a view to obtaining professional legal services from the lawyer in the prosecution or defense of a specific claim in the litigation in which discovery is requested, and \(2\) concerning the litigation in which the discovery is requested. Tex. R. Civ. Proc. 193.3(c)

As you can see, discovery can be both contentious and time-consuming in a forfeiture case. A little planning and foresight, along with a clear settlement strategy to short-circuit the case if possible, will go a long way in making it economical for your client to challenge the State.
Replevy

Your client asks: “Can I get my property back while the forfeiture case is going on?”

You may answer “yes,” although you must carefully consider the costs and benefits that your client will incur if she makes that decision.

Civil cases often take months, if not longer than a year, to be resolved. For most people and families, that is a long time to go without a vehicle.

Replevy of property is allowed under Chapter 59. Article 59.02 of the Code of Criminal Procedure provides that “any property that is contraband other than property held as evidence in a criminal investigation or a pending criminal case, money, a negotiable instrument, or a security that is seized under this chapter may be replevied by the owner or interest holder of the property, on execution of a good and valid bond with sufficient surety in a sum equal to the appraised value of the property replevied.” The bond may be approved as to form and substance by the court after the court gives notice of the bond to the authority holding the seized property. The bond must be conditioned (1) on return of the property to the custody of the state on the day of hearing of the forfeiture proceedings; and (2) that the interest holder or owner of the property will abide by the decision that may be made in the cause.

Most of the time, the only property you will want to consider filing a bond for return during the case will be a vehicle. You can’t post a bond to get your money returned before the end of the case, and if the State claims that the property is being held as evidence, you don’t have a right to post a bond for the return of that property, either. And, keep in mind, if you lose the case, but don’t return the property, the Court will order the bond you posted forfeited in its place.

If you want to get the Court to set a bond, then in the case of a vehicle, you will need the following information and documents to consider and prepare the motion for approval of the bond and to make an argument for the return of the property while the case is pending:

A. Copy of the title and most recent registration;
B. Copy of any loan documents where the vehicle is the collateral;
C. The “blue book” (NADA) value of the vehicle and the source of the valuation;
D. The amount of any balance owed (total) on the vehicle financing.

Once that information is gathered and evaluated, you and your client can decide whether she wants to bear the expense of a commercial bond to secure the return of the vehicle pending the resolution of the case. Commercial bond fees vary widely, so, you should probably contact a bonding company to determine what it may charge for issuing this bond.

If you are able to obtain approval for the filing of a bond, and then if the Court rules against your client in the forfeiture case on final judgment, then the client must either return the property (the vehicle) to the State or forfeit the bond. Forfeiting the bond could be quite expensive, depending on the terms with the commercial bonding company and surety, so, you will want to ensure that your client understands those terms in the beginning before she makes that decision.

DEFENDING CIVIL FORFEITURE CASES
UNDER CHAPTER 59 OF THE TEXAS CODE OF CRIMINAL PROCEDURE
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Abatement

The reasons for the State and the Respondent to seek an abatement of a forfeiture action vary widely. Often, the State will not want the Respondent to conduct discovery during the pendency of the underlying criminal case. Sometimes the Respondent does not want to submit herself to discovery during the pendency of the underlying criminal case. Whatever the reason, either party may seek to abate a pending suit for a variety of reasons. As in other civil cases, a lack of all required parties, another pending proceeding which should take precedence over the current proceeding, or some other reason for suspending the current proceeding may all be grounds for abatement. The trial court has broad discretion on abating a suit, but that discretion is not unlimited.


The leading case which sets out the parameters of an abatement in a forfeiture proceeding is *In re Gore*, 251 SW3d 696 (Tex. App.-San Antonio 2007, no writ). (Also, see *In re R.R.*, 26 SW3d 569 (Tex. App.-Dallas 2000, no writ), which is cited in Gore.) These cases stand for the proposition that a trial judge cannot just enter a “blanket order” prohibiting all discovery or abating the entire case in a forfeiture proceeding without some finding of necessity to protect the State’s legitimate “law enforcement privilege” interest.

As noted, and bears repeating, a forfeiture proceeding is a civil case that “shall proceed to trial in the same manner as in other civil cases.” Tex. Code Crim. Proc. Ann. art. 59.05(b) (Vernon 2006). Accordingly, absent authority to the contrary, a defendant real party in interest in a forfeiture proceeding has the same right as any other civil litigant to obtain full discovery within a reasonable time, develop his defenses, and proceed to trial. See *Underwood v. Bridewell*, 931 S.W.2d 645, 647-48 (Tex. App.-Waco 1996, orig. proceeding) (abuse of discretion to abate civil forfeiture action until criminal prosecution completed); see also *McInnis v. State*, 618 S.W.2d 389, 392-93 (Tex. App.-Beaumont 1981, writ ref’d n.r.e.) (“We find no constitutional or statutory provisions granting this appellant the right to choose the case, either criminal or civil, which he desires to first proceed to trial.”).

Courts of Appeals have repeatedly held that a trial court abuses its discretion when it arbitrarily abates a civil case for an indefinite period of time. See *In re Sims*, 88 S.W.3d 297, 306 (Tex. App.-San Antonio 2002, orig. proceeding); *Gebhardt v. Gallardo*, 891 S.W.2d 327, 330-32 (Tex. App.-San Antonio 1995, orig. proceeding); *In re Messervey Trust*, No. 04-00-00700-CV, 2001 WL 55642, at *4 (Tex. App.-San Antonio, Jan. 24, 2001, orig. proceeding) (not designated for publication). Nevertheless, the State argued in the trial court that because there were pending criminal proceedings, it was "absolutely” entitled to a full abatement on everything.

The State normally argues that it is entitled to abatement of the civil case "as a matter of statute." However, the only citation to which the State may cite for such a broad argument is §552.108 of the Government Code, which on its face only creates an exemption from disclosure
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for certain law enforcement and prosecutorial records under the Public Information Act. See Tex. Gov't Code Ann. §552.108 (Vernon Supp. 2007). While courts have concluded this section creates a "law enforcement investigation" privilege, there is no case or authority for treating such language as mandating a blanket and open-ended abatement upon request of the State in a forfeiture case.

Likewise, §30.006 of the Texas Civil Practice and Remedies Code provides for an exemption from discovery for “law enforcement agency records.” However, that section does not apply where the “law enforcement agency is a party.” §30.006(b), Tex. Civ. Prac. Rem. Code. The District Attorney’s Office represents “the State of Texas,” which is a party in a forfeiture case, and arguably cannot claim the exemption from discovery provided by that section of the Civil Practice and Remedies Code.

The State may argue that the trial court acts within its discretion and will not run afoul of the holdings in Gore and Gebhardt because the abatement it requests will end when the criminal case is resolved and therefore is not "indefinite." The order at issue in Gebhardt abated the case until the latter of the running of the statute of limitations for any crime relevant to the civil pleadings or the final disposition of any criminal charges that might be brought. 891 S.W.2d at 329. The Court of Appeals held that given the information before the court, it was impossible to determine when the abatement would end and thus “indefinitely” denied the real party in interest the ability to develop her case and a forum to try her case. Id. at 331-33. Likewise, there is ordinarily nothing in the forfeiture case record that enables the trial court to determine when the abatement will end if it is premised on the “conclusion” of the underlying criminal case.

Moreover, whether the trial court's order exceeded its discretion does not turn solely on whether the abatement is "indefinite." In Messervey, the Court of Appeals considered an order that abated a civil case for a period of six months or until the criminal case was concluded, whichever occurred earlier. 2001 WL 55642, at *2. Recognizing that the abatement was not indefinite, the Court of Appeals nevertheless conditionally granted a writ of mandamus to vacate the abatement order because by completely curtailing prosecution of the entire case, it was impermissibly overbroad. Id. at *4.

One can recognize that the State may have a legitimate interest in seeking some protection from civil discovery because disclosure could interfere with a criminal prosecution based on the same facts. See Texas Attorney General's Office v. Adams, 793 S.W.2d 771, 776 (Tex. App.-Fort Worth, 1990, no pet.). But it is "not good public policy to deny civil litigants their entitlement to a fully authorized discovery to assist in preparation of the civil lawsuit merely because criminal matters may be pending." Id. at 777. Rather, the proper remedy is an individually tailored protective order. See Underwood, 931 S.W.2d at 647; Messervey 2001 WL 55642, at *4. The State, just as other civil litigants, must timely plead and prove its entitlement to protection from discovery. See Tex. R. Civ. P. 192.6, 193.2, 193.3, 193.4. Failure to do so can result in waiver of any objection or claimed privilege. See Hobson v. Moore, 734 S.W.2d 340, 340-41 (Tex. 1987); Scrivner v. Casseb, 754 S.W.2d 354, 358 (Tex. App-San Antonio 1988, no pet.). When properly raised, "the trial court has an obligation to weigh each discovery request and apply the law for discovery or protection to each request by determining the least restrictive way
to protect both cases and the defendant's right to defend himself in this suit.” In re R.R., 26 S.W.3d at 574.

Normally, the State cannot demonstrate a need to abate all of the discovery. While some information may be subject to a legitimate claim of the law enforcement privilege, other information may not. For example, the defendant may send requests for disclosure to the State, asking for the “legal theories” upon which the State wishes to proceed. A response to that request would not be subject to the law enforcement privilege, nor would the names of witnesses to support the State’s case. Likewise, the proper names of the parties to the instant lawsuit, and the suggestion of any other appropriate parties, would not be the kind of information for which the assertion of the law enforcement privilege would be proper.

Rather than relying on a “blanket abatement,” the State should have to show, in an individualized manner relating to specific discovery requests, that the discovery requested by the defendant fits into the framework of §552.108 of the Government Code.

Spoliation

Spoliation (noun) 1. spoliation -- (law) the intentional destruction of a document or an alteration of it that destroys its value as evidence).

When evidence becomes unavailable because of the misconduct of a party, the district court has discretion to fashion an appropriate remedy to restore the parties to a rough approximation of their positions as if all evidence had been available. These remedies must generally be fashioned on a case-by-case basis. A common remedy for spoliation of evidence is an instruction informing the jury that it must presume that the missing evidence would have been unfavorable to the party that was at fault. Wal-Mart Stores, Inc. v. Johnson, 106 S.W.3d 718, 721 (Tex. 2003).

In most currency forfeiture cases, the State does not preserve the actual currency seized, instead depositing the currency into a county bank account. If the currency was seized based on a dog “sniff search” then any chance of testing the currency is lost when the State deposits it in a bank. In this section on spoliation, we will discuss whether the State should have to preserve the currency or face an instruction to the jury injurious to its case on forfeiture.

Generally, the use of a spoliation instruction is limited to two circumstances [see Wal-Mart Stores, Inc. v. Johnson, 106 S.W.3d 718, 721 (Tex. 2003); Anderson v. Taylor Publ'g Co., 13 S.W.3d 56, 61 (Tex. App.--Dallas 2000, pet. denied) ]:

The deliberate destruction of relevant evidence.
The failure of a party to produce relevant evidence or to explain its non-production.

The Texas Supreme Court discussed the use of a spoliation instruction in a personal injury case in which the plaintiff was injured by a falling decorative reindeer that could not later be produced in response to discovery. The parties disputed the composition and weight of the reindeer. The Court decided the case on the issue of duty, “the initial inquiry for any complaint of
discovery abuse.” A duty to preserve evidence arises, the Court said, only when a party knows or reasonably should know that there is a substantial chance that a claim will be filed and that evidence in its possession or control will be material and relevant to that claim.

In the Tyler Court of Appeals opinion in *Tex. Elec. Coop. v. Dillard*, 171 S.W.3d 201, 208-209 (Tex. App.--Tyler 2005, no pet.), the Appeals Court found that the trial court did not abuse its discretion in ordering a spoliation instruction when defendant had knowledge of a claim and understood its severity before it destroyed documents, even though destruction was in course of normal operating procedure.

The *Dillard* case rationale is on point in currency seizure cases where “drug residue” is at issue or is part of the State’s proof. The State, at the time it disposed of the currency by depositing it in a bank, knew that it was seizing it and intending to file a forfeiture action. The State had knowledge that the “claim” to the currency was going to be litigated and “destroyed” the currency’s evidentiary value by depositing it in a bank.

In exceptional cases it may be appropriate for the court to order even more severe sanctions based on the spoliation of evidence. In a case in which a plaintiff destroyed audiotapes that were the only available dispositive evidence, the Texas Supreme Court upheld the trial court's decision to strike her pleadings and dismiss the case. The trial court had carefully considered the possibility of less stringent sanctions, including a spoliation instruction, and determined that they would not be sufficient to promote compliance with the discovery rules. Given the extent and severity of the abuses committed by the plaintiff, this was an "exceptional" case in which "death penalty" sanctions were justified. *Cire v. Cummings*, 134 S.W.3d 835, 843 (Tex. 2004).

As noted in the *Wal-Mart Stores, Inc. v. Johnson* opinion, the Texas Courts of Appeals have generally limited the use of the spoliation instruction to two circumstances: (1) the deliberate destruction of relevant evidence and (2) the failure of a party to produce relevant evidence or to explain its non-production. Under the first circumstance, a party who has deliberately destroyed evidence is presumed to have done so because the evidence was unfavorable to its case. Under the second, the presumption arises because the party controlling the missing evidence cannot explain its failure to produce it. *See Wal-Mart Stores, Inc. v. Johnson*, 106 S.W.3d 718 (Tex. 2003).

Before any failure to produce material evidence may be viewed as discovery abuse, the opposing party must establish that the non-producing party had a duty to preserve the evidence in question. Such a duty arises only when a party knows or reasonably should know that there is a substantial chance that a claim will be filed and that evidence in its possession or control will be material and relevant to that claim. *See Wal-Mart Stores, Inc. v. Johnson*, 106 S.W.3d 718 (Tex. 2003).


Such an instruction is a common remedy for spoliation, with roots going back to the English common law. *See Armory v. Delamirie*, 93 Eng. Rep. 664 (K.B. 1722). Its purpose is captured in the Latin maxim *omnia presumuntur contra spoliatorem*, "all things presumed against the a despoiler or wrongdoer." **BLACK'S LAW DICTIONARY**
The presumption has been a part of Texas jurisprudence for over a century, and we have characterized it as an inference to be drawn by the jury. *Curtis & Co. Mfg. Co. v. Douglas*, 79 Tex. 167, 15 S.W. 154, 155 (Tex. 1890). We have never had occasion, however, to define its use. See *State ex rel. State Dep’t of Highways & Pub. Transp. v. Gonzalez*, 82 S.W.3d 322, 330, 45 Tex. Sup. Ct. J. 925 (Tex. 2002) (unnecessary to decide whether spoliation instruction was erroneous); *Trevino*, 969 S.W.2d at 952 (mentioning but not applying this remedy); *Malone v. Foster*, 977 S.W.2d 562, 563, 41 Tex. Sup. Ct. J. 923 (Tex. 1998) (mentioning adverse inference associated with spoliation); *Curtis*, 15 S.W. at 155 (same).

A court need not decide whether a spoliation instruction is justified when evidence is unintentionally lost or destroyed, or if it is, what standard is proper. Rather we begin and end our analysis here with the issue of duty, the initial inquiry for any complaint of discovery abuse.

Before any failure to produce material evidence may be viewed as discovery abuse, the opposing party must establish that the non-producing party had a duty to preserve the evidence in question. See Wendorf et al., *TEXAS RULES OF EVIDENCE MANUAL III-12* (6th ed. 2002); Kindel & Kai Richter, *Spoliation of Evidence: Will the New Millennium See a Further Expansion of Sanctions for the Improper Destruction of Evidence?*, 27 WM. MITCHELL L. REV. 687, 689 (2000). Such a duty arises only when a party knows or reasonably should know that there is a substantial chance that a claim will be filed and that evidence in its possession or control will be material and relevant to that claim. See 1 *WEINSTEIN & BERGER, WEINSTEIN'S FEDERAL EVIDENCE §301.06[4] at 301-28.3* (2d ed. 2003) (“There must be a sufficient foundational showing that the party who destroyed the evidence had notice both of the potential claim and of the evidence’s potential relevance.”); cf. *Nat'l Tank Co. v. Brotherton*, 851 S.W.2d 193, 204, 36 Tex. Sup. Ct. J. 715 (Tex. 1993) (stating objective test for when litigation may reasonably be anticipated).

In currency seizure cases, there is almost always an argument for the spoliation instruction where the currency was seized because of a “dog sniff search” when the State does not maintain the currency for testing. Here is a sample spoliation instruction for those situations:

You are instructed that, when a party has possession of a piece of evidence at a time he knows or should have known it will be evidence in a controversy, and thereafter he

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5See discussion, *infra*, on how “drug dog sniff searches” are attacked on other grounds to challenge their validity as evidence of “drug contamination” to justify forfeiture.
disposes of it, makes it unavailable, or fails to produce it, there is a presumption in law
that the piece of evidence, had it been produced, would have been unfavorable to the
party who did not produce it. If you find by a preponderance of the evidence that
[PARTY DISPOSING OF EVIDENCE] had possession of the [EVIDENCE] at a time it
knew or should have known they would be evidence in this controversy, then there is a
presumption that the [EVIDENCE], if produced, would be unfavorable to [PARTY
DISPOSING OF EVIDENCE]..


As you can see, in the appropriate case, especially dog “sniff search” currency cases, a
spoliation instruction can be very helpful at trial.

Search and Seizure Issues in Forfeiture Cases

What are the risks of transporting large sums of cash when you’re traveling? Obviously,
you could get robbed or get involved in an accident and lose the money. Your car could catch on
fire while you’re buying gas and your currency could go up in smoke. A number of bad things
could happen if you carry a large amount of cash on you when you travel. But, one risk that
many folks never consider is that a law enforcement officer could decide to seize your cash, even
if you are not committing a crime and the officer cannot show any reason to believe that you
have committed a crime.

If you’ve never had a law enforcement officer stop you for a traffic violation and then ask
for your “consent” to search your vehicle, or you’re not a criminal defense attorney, you probably
find it difficult to believe that you or any other “law abiding citizen” could become embroiled in
a criminal case or a forfeiture lawsuit just because you happen to be carrying a large amount of
currency. But, it can, and does, happen.

Many times, when the State files the Notice of Intended Forfeiture and the Petition, it has
no evidence other than what the arresting officer observed at the time of the seizure. It is not at
all uncommon for law enforcement to seize property, especially currency, without making an
arrest for a related offense. As noted before, the State is looking to actually make its case during
discovery, since all it has at the time of filing is opinion, supposition, and suspicion.

One Texas Court of Appeals case, Deschenes v. State, 253 S.W.3d 374
(Tex.App.-Amarillo 2008, pet. ref.), catalogued the various ways that the State tries to justify a
seizure and later forfeiture of a large amount of currency discovered after a traffic stop. Justice
Pirtle wrote in the majority opinion in Deschenes listing twenty two arguments the State
advanced to justify the seizure:

“Here, the evidence tending to establish a connection between the money and some
unnamed criminal activity amounts to mere conjecture. In support of a nexus between
Appellant’s $17,620 and some unidentified “criminal activity,” the State points to
profiling characteristics and a positive alert by a narcotics dog: (1) Appellant opened the
passenger door to speak to the officer, handed him his wallet when asked for his license, and exited on the passenger side at the officer's request; (2) car had energy drinks and fast food wrappers on the floorboard giving it a "lived-in" look; (3) he could not give his uncle's exact address in San Diego; (4) he was traveling east to west on Interstate 40; (5) he was nervous throughout the encounter; (6) he stared at his vehicle rather than maintaining eye contact when answering one of Esqueda's questions; (7) he denied carrying a large sum of cash; (8) he was in possession of scales; (9) he avoided showing Esqueda [the investigating officer] the money; (10) the money was in a plastic bag; (11) it was a large amount of money; (12) the money was divided into bundles and wrapped with rubber bands; (13) he had an empty suitcase; (14) he denied having any drugs in his vehicle; (15) he stated he was going to Las Vegas; (16) he failed to produce "documentation" for the money; (17) a narcotics dog alerted to the money and the large empty suitcase; (18) an odor of narcotics on the empty suitcase; (19) the close proximity of the cash to the empty suitcase that presumably contained narcotics at one time; (20) an odor of narcotics on the cash; (21) the money was enough to purchase a felony amount of narcotics; (22) money from drug trafficking travels east to west.”

What could have lead to the State’s advancing twenty two arguments to try to justify the search of Mr. Deschenes’ vehicle and the seizure of Mr. Deschenes’ $17,500.00 in currency – and his later indictment for “money laundering”? Was Deschenes in the process of robbing a bank or making a drug deal? Hardly. He was getting a traffic ticket. Here are the facts of the case from the Court of Appeals opinion:

On January 22, 2002, DPS [Texas Department of Public Safety] Trooper Oscar Esqueda stopped [Mr. Deschenes] for speeding on Interstate 40 in Gray County. Esqueda approached [Mr. Deschenes’] car on the passenger side to avoid passing traffic, and [Mr. Deschenes] opened the passenger car door to speak with him. Esqueda observed empty beverage containers and fast food wrappers strewn on the car's floorboard. After [Mr. Deschenes] produced his driver's license, Esqueda informed him that he was speeding, asked him to get out of the vehicle, and sit in his patrol car.

In the patrol car, Esqueda continued to ask [Mr. Deschenes] questions. [Mr. Deschenes] told him that his car had been rented by his father and that he was traveling from Connecticut to San Diego to visit an uncle living on a naval base. Esqueda named several naval bases in the San Diego area and [Mr. Deschenes] was unsure of the specific base where his uncle lived. Esqueda became suspicious because [Mr. Deschenes] appeared defensive, nervous, and unsure of the exact location of his ultimate destination. He was also suspicious because [Mr. Deschenes] was traveling east on I-40, a route used by drug smugglers to move drugs from the west coast to the east coast and cash from the east coast to the west coast. In his experience, smugglers typically did not know exactly where they were going and it appeared [Mr. Deschenes] was driving straight through because the car's interior had a "lived-in" look.
Esqueda then asked [Mr. Deschenes] whether he had any weapons in his car, grenades, or narcotics such as marihuana or cocaine. [Mr. Deschenes] looked at his car and answered in the negative. Esqueda's suspicions were further heightened when [Mr. Deschenes] looked at his car when he answered rather than maintaining eye contact. Esqueda also asked whether [Mr. Deschenes] was carrying any large sums of money. [Mr. Deschenes] indicated he was not and responded he had eighty dollars and several credit cards on his person and intended to fund his trip using a debit card. Esqueda observed [Mr. Deschenes]'s nervous behavior appeared to increase as the traffic stop progressed. He further testified that the typical motoring public became less nervous as a stop progressed and things were explained to them. In his opinion, a person involved in some type of criminal activity remains nervous, or becomes more so, the longer there is contact.

Esqueda issued a warning to [Mr. Deschenes]. While [Mr. Deschenes] was signing the warning, Esqueda asked [Mr. Deschenes] if he could search his car and [Mr. Deschenes] consented. During the search, Esqueda again observed that [Mr. Deschenes]'s nervousness escalated. Esqueda found nothing in the passenger side of the vehicle or passenger compartment and found no evidence of drugs or contraband in the car. Esqueda then took the keys from the ignition and went back to search the trunk.

[Author’s Note: Please take special note that AFTER the officer had written the traffic citation, for the ONLY offense of which the officer was aware, THEN he asked for “consent” to search Mr. Deschenes’ vehicle. Obviously, Mr. Deschenes could have, and should have, politely said “no thank you, officer.”]

In the trunk, Esqueda observed three pieces of luggage — a large, tan suitcase, a medium, black suitcase, and a small carry bag. Esqueda asked [Mr. Deschenes] to show him the bags' contents. [Mr. Deschenes] showed Esqueda some clothing in the medium bag. Esqueda then asked [Mr. Deschenes] to show him what was in the small carry bag. He believed [Mr. Deschenes] was apprehensive about opening the remaining bags. [Mr. Deschenes] opened the carry bag and showed Esqueda some hygiene articles and underwear; however, from Esqueda's perspective, he believed [Mr. Deschenes] appeared to be ignoring a blue plastic sack inside the bag.

Esqueda pressed down on the carry bag and felt something hard inside. [Mr. Deschenes] then looked up at Esqueda and said, "Okay, I lied." Esqueda looked in the sack and found five bundles of cash held together by rubber bands. When he inquired how much money was in the bag, [Mr. Deschenes] responded $17,500. Esqueda testified that, in his experience, people smuggling or transporting illegal proceeds often bundled the money with rubber bands and placed it in plastic bags.

Esqueda then searched the medium bag and found a set of scales. [Mr. Deschenes] indicated he used the scales to "weigh stuff." The large, tan bag was empty. [Mr.
Deschenes] stated he owned the money and had brought it with him because he was thinking of going to Las Vegas. He told Esqueda that he had worked for the money.

Esqueda suspected [Mr. Deschenes] was transporting scales to measure drugs and intended to use the empty suitcase to store drugs. Based upon his observations, Esqueda believed the cash represented proceeds from illegal transactions. He accompanied [Mr. Deschenes] to his patrol car and called for a canine officer. When Esqueda asked [Mr. Deschenes] why he lied about the money being in his vehicle, [Mr. Deschenes] responded he was nervous telling anyone he had a large amount of cash in his car because, when he was young, he had problems with the police taking his money.

[Author’s Note: Again, please take special notice that the law enforcement officer could not identify any specific criminal offense that may be tied to the currency – only that the “believed the cash represented proceeds from illegal transactions.”]

When DPS Trooper Tony Rocha arrived with DPS Canine Storm, Esqueda asked him to run [Mr. Deschenes]'s car. Storm was trained to detect an odor of marihuana, methamphetamine, cocaine, and heroin. Storm did not alert to the interior or exterior of [Mr. Deschenes]'s car. Rocha put Storm in the trunk and he alerted to the small carry bag containing the currency and the large empty suitcase. Esqueda then arrested [Mr. Deschenes] for money laundering, seized the $17,620, and deposited the money in a bank.

Justice Pirtle correctly points out that the State’s rationale for the seizure of the currency – the twenty two arguments – amounts to nothing more than “mere conjecture.” Helpfully, Justice Pirtle then lists the cases and the rationale which have previously held that the State’s arguments are not based on facts, not based on science, and are, in fact, just wishful law enforcement thinking.

Sometimes, instead of a non-consensual search, law enforcement is able to obtain consent to search a vehicle or container.

“Is there anything in your vehicle I should know about?” Clients hear this question from law enforcement officers all the time, often followed by “so, you wouldn’t mind if I searched your vehicle?” Many forfeiture cases begin with property – usually currency – found during a “consensual” search after a traffic stop. Challenging the search and asking the civil court to apply the exclusionary rule is often required in defending a forfeiture case.

Once the purpose of a valid stop has been completed and an officer’s initial suspicion has been verified or dispelled, detention must end unless there is an additional reasonable suspicion supported by articulable facts. United States v. Machuca-Barrera, 261 F.3d 425, 434 (5th Cir. 2001); St. George v. State, 237 S.W.3d 720 (Tex.Crim.App. 2007) (Suppression upheld) (Nervousness alone is not enough to amount to reasonable suspicion.) See Woods v. State, 956 S.W.3d 33, 35,38 (Tex.Crim.App. 1997) holding that once the investigation of the conduct was
concluded, continued detention of the driver was permitted only if there was reasonable suspicion to do so. 6

In Ohio v. Robinette, 519 U.S. 33 (1996) the Supreme Court held that a continued detention and request to search a detainee's car following a traffic stop was reasonable, where consent was given, even though no circumstances were noted that would have constituted reasonable suspicion of any criminal activity. See Robinette, 117 S.Ct. at 420-21. Most courts interpret Robinette to mean that an officer may request consent to search a vehicle after a traffic stop but may not detain the occupants or vehicle further if such consent is refused unless reasonable suspicion of some criminal activity exists. See Simpson v. State, 29 S.W.3d 324 (Tex.App.-Houston [14 Dist.], 2000).

Because a trained narcotics-detection dog alerts police only to the presence of contraband, and there is no Fourth Amendment right to possess contraband, the United States Supreme Court has held that a dog sniff is not a search under the Fourth Amendment. United States v. Place, 462 U.S. 696, 707, 103 S. Ct. 2637, 77 L. Ed. 2d 110 (1983). Based on the premise that a dog sniff is not a search, the Supreme Court has also found that a drug-trained dog may walk the perimeter of a lawfully detained vehicle even if police have no reasonable suspicion that the vehicle occupants are engaged in drug-related activity so long as the dog sniff search does not extend the duration of the stop. Illinois v. Caballes, 543 U.S. 405, 408, 125 S. Ct. 834, 160 L. Ed. 2d 842 (2005). However, "[a] seizure ... can become unlawful if it is prolonged beyond the time reasonably required to complete that mission." Id. at 407.

Officers often try to justify a search by using the detainee’s behavior and answers to their "consensual" questioning.

These are some cases which found that the justification for a continued detention and a subsequent search were insufficient to justify the search and subsequent seizure of property:

In United States v. $5,000 in U.S. Currency, 40 F.3d 846, 850 (6th Cir.1994), the Circuit Court of Appeals held that the claimant's evasive explanation of trip's purpose provided, at best, "inchoate and unparticularized suspicion."

Traveling a particular route does not establish probable cause for forfeiture. See United States v. $252,300.00 in U.S. Currency, 484 F.3d at 1274 ("Generalized allegations about . . . 'known drug destinations' and 'known drug routes' do not provide a nexus to drugs on these facts."); United States v. $10,700, 258 F.3d 215, 228 (3d Cir.2001)("[W]e cannot credit the fact that the claimant was using a major interstate to be probative of drug trafficking.").

A number of courts have observed that nervousness is of minimal probative value, given that many, if not most, individuals can become nervous or agitated when detained by

Police seize money from thousands of people each year because a dog “alerts,” at least according to his handler, to show that bills are tainted with drugs. But some scientists say the test the police rely on is no test at all because drugs contaminate virtually all the currency in America.

Over a seven-year period, Dr. Jay Poupko and his colleagues at Toxicology Consultants Inc. in Miami have repeatedly tested currency in Austin, Dallas, Los Angeles, Memphis, Miami, Milwaukee, New York City, Pittsburgh, Seattle and Syracuse. He also tested American bills in London.

"An average of 96 percent of all the bills we analyzed from the 11 cities tested positive for cocaine. I don't think any rational thinking person can dispute that almost all the currency in this country is tainted with drugs," Poupko says.

Scientists at National Medical Services, in Willow Grove, Pa., who tested money from banks and other legal sources more than a dozen times, consistently found cocaine on more than 80 percent of the bills.

"Cocaine is very adhesive and easily transferable," says Vincent Cordova, director of criminalistics for the private lab. "A police officer, pharmacist, toxicologist or anyone else who handles cocaine, including drug traffickers, can shake hands with someone, who eventually touches money, and the contamination process begins."

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7This general section was compiled from Internet news stories and sources. YOU SHOULD UPDATE AND CONFIRM THESE SOURCES BEFORE CITING ANY OF THIS CONTENT IN ANY BRIEF OR FILING.
Cordova and other scientists use gas chromatography and mass spectroscopy, precise alcohol washes and a dozen other sophisticated techniques to identify the presence of narcotics down to the nanogram level one billionth of a gram. That measure, which is far less than a pin point, is the same level a dog can detect with a sniff.

What a drug dog cannot do, which the scientists can, is quantify the amount of drugs on the bills.

Half of the money Cordova examined had levels of cocaine at or above 9 nanograms. This level means the bills were either near a source of cocaine or were handled by someone who touched the drug, he says.

Another thirty percent of the bills he examined show levels below 9 nanograms, which indicates "the bills were probably in a cash drawer, wallet or some place where they came in contact with money previously contaminated."

The lab's research found $20 bills are most highly contaminated, with $10 and $5 bills next. The $1, $50 and $100 bill usually have the lowest cocaine levels.

Cordova urges restraint in linking possession of contaminated money to a criminal act. "Police aid prosecutors have got to use caution in how far they go. The presence of cocaine on bills cannot be used as valid proof that the holder of the money, or the bills themselves, have ever been in direct contact with drugs," says Cordova, who spent 11 years directing the Philadelphia Police crime laboratory.

Nevertheless, more and more drug dogs are being put to work.

Some agencies, like the U.S. Customs Service, are using passive dogs that don't rip into an item or person when the dogs find something during a search. These dogs just sit and wag their tails. German shepherds with names like Killer and Rambo are being replaced by Labradors named Bruce or Memphis' "Chocolate Mousse."

Marijuana presents its own problems for dogs since its very pungent smell is long-lasting. Trainers have testified that drug dogs can react to clothing, containers or cars months after marijuana has been removed.

One of the reasons for the proliferation of “drug dogs” is the Supreme Court’s answer to the questions at to whether a “search” is really a “search” under the Constitution. In United States v. Place, 462 U.S. 696 (1983), the Court ruled that exposure of luggage located in a public place "did not constitute a search within the meaning of the Fourth Amendment."

In Place, the defendant aroused the suspicions of DEA agents in the Miami International Airport. They conducted a brief investigation and examined Place's airline ticket and driver's license. Although Place consented to a search of his luggage, the agents declined to search because they feared that he would miss his plane and the DEA would be liable for the cost of the ticket. The agents telephoned other DEA agents at New York's LaGuardia Airport to pass on their suspicions about Place. Once Place arrived in New York, he was met by DEA agents who again asked consent to search his luggage. This time, however, Place refused to consent. The agents then detained Place's luggage and took the luggage to the Kennedy Airport where a trained drug detection dog sniffed the luggage and gave an alert.
"Alert" is the term which describes the dog's behavior when the dog detects the odor of drugs which it is trained to identify. Based on the dog's alert, the agents continued to detain the luggage. Place had not been detained.

A federal judge issued a search warrant for Place's luggage. A large quantity of drugs was found, and Place was later arrested.

Ultimately, the Supreme court reversed Place's conviction, but not on the basis of the search. The Court ruled that the pre-sniff seizure of the luggage was too long (ninety minutes) to be reasonable. The Court was also troubled by the fact that the agents had not told Place where his luggage was being taken, how long it would be detained, and how he would be able to retrieve it. Nonetheless, the Court took great pains to clarify that the dog's alert created sufficient reason for further detention of the luggage.

Once the dog alerted on the luggage, there was probable cause to search the luggage. The Fourth Amendment requires both probable cause and a search warrant -- or an exception to the warrant clause -- to search. None of the traditional warrant requirement exceptions, such as search incident to arrest, plain view, automobile, exigency, or stop and frisk, applied in the Place circumstances. Therefore, the agents had to obtain the search warrant.

The Court also ruled that the dog's sniff of the luggage did not amount to a search. Canine sniffs are not intrusive. Place was not required to open his luggage and expose his personal items to public view. The dog's sniff would only reveal the presence of contraband.

In the Court’s view, a canine sniff by a well-trained narcotics detection dog does not require opening the luggage. It does not expose noncontraband items that otherwise would remain hidden from public view, as does, for example, an officer's rummaging through the contents of the luggage. Thus, the manner in which information is obtained through this investigative technique is much less intrusive than a typical search. Moreover, the sniff discloses only the presence or absence of narcotics, a contraband item. Thus, despite the fact that the sniff tells the authorities something about the contents of the luggage, the information is limited.

Many courts have relied on United States v. Place to establish a firm rule that a positive alert by a trained drug detection dog creates probable cause to search and probable cause to arrest.

Still, a positive alert by a drug detection dog, standing alone, does not constitute evidence that money was used in connection with a drug deal. $7,058.84 in U.S. Currency v. State, 30 S.W.3d 580, 588 (Tex.App.-Texarkana 2000, no pet.); $80,631.00 v. State, 861 S.W.2d 10, 12 (Tex.App.-Houston [14th Dist.] 1993, writ denied).

Although federal circuit courts recognize "that a positive alert by a drug detection dog is, in the very least, strong proof of probable cause," United States v. Outlaw, 134 F.Supp.2d 807, 812 (W.D.Tex. 2001), aff'd, 319 F.3d 701 (5th Cir.2003), the evidentiary value of such an alert is being questioned because the spread of trace amounts of drugs in the nation's currency supply increases the likelihood of false alerts. Id. at 813. See United States v. $506,231 in U.S. Currency, 125 F.3d 442, 453 (7th Cir.1997) (refusing "to take seriously the evidence of post-seizure dog sniff"); United States v. $49,576.00 in U.S. Currency, 116 F.3d 425, 427 (9th Cir. 1997) (positive alert entitled to little weight); Muhammed v. DEA, 92 F.3d 648, 653 (8th Cir. 1996) (discounting government's argument that dog alert constituted probable cause supporting
administrative forfeiture due to high percentage of currency contaminated with drug residue); United States v. $5,000 in U.S. Currency, 40 F.3d 846, 849 (6th Cir.1994)(evidentiary value of the narcotic dog’s alert is minimal because it is well established that an extremely high percentage of all cash in circulation is contaminated with drug-residue sufficient to alert a trained dog); $80,760.00, 781 F.Supp. at 472 ("[R]ecitation of the profile elements and the alert of a narcotics detection dog, without more, does not establish probable cause to forfeit").

In addition to searches prompted by probable cause and consent, there is the situation where the person is arrested and then law enforcement conducts a search incident to that arrest.

The United States Supreme Court held in Arizona v. Gant, that “police may search the passenger compartment of a vehicle incident to a recent occupant’s arrest only if it is reasonable to believe that the arrestee might access the vehicle at the time of the search or that the vehicle contains evidence of the offense of arrest.” Id. In reaching this decision, the Court limited the scope of New York v. Belton, in which the Court previously held that “police may search the passenger compartment of a vehicle and the containers within it when the search is contemporaneous incident to a lawful arrest.” New York v. Belton, 453 U.S. 454, 460 (1981). The Court reiterated that there are two situations in which a vehicle search incident to arrest is justified. First, the search is justified when police are searching an area within the arrestee’s immediate control, meaning “the area from within which he might gain possession of a weapon or destructible evidence.” Gant, (citing Chimel v. California, 395 U.S. 752, 763 (1969), and noting that this rule determines the scope of Belton). Second, the search is justified when “it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle.” Id.

The premise of the inquiry concerning a search is well-stated in the U.S. Supreme Court’s decision in Arizona v. Gant, 129 S. Ct. 1710 (2009):

Consistent with our precedent, our analysis begins, as it should in every case addressing the reasonableness of a warrantless search, with the basic rule that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." Katz v. United States, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (footnote omitted). Among the exceptions to the warrant requirement is a search incident to a lawful arrest. See Weeks v. United States, 232 U.S. 383, 392, 34 S.Ct. 341, 58 L.Ed. 652 (1914). The exception derives from interests in officer safety and evidence preservation that are typically implicated in arrest situations. See United States v. Robinson, 414 U.S. 218, 230-234, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973); Chimel, 395 U.S., at 763, 89 S.Ct. 2034.

Finally, there is the old stand-by: the inventory search.

The “inventory doctrine” permits police to search impounded vehicles to make an inventory of items in the vehicle in order to: (1) protect the owner’s property; (2) protect the police from lost property claims; and (3) protect the police from dangerous contents. Gamboa v. State, No. 13-08-623-CR, at 4 (Tex.App.—Corpus Christi 2009) (citing State v. Stauder, 264

Furthermore, in Benavides v. State, the court of criminal appeals also held that “before an inventory search can be upheld as lawful there must be an inquiry into the lawfulness of the impoundment.” Benavides v. State, 600 S.W.2d 809, 810 (Tex.Crim.App. 1980). The Court listed various scenarios under which impoundment would be lawful: (1) the remove a vehicle from an accident scene; (2) the remove a vehicle parked in violation of regulations; (3) the owner or driver requests or consents; (4) officers reasonably believe the vehicle is stolen; (5) the vehicle is abandoned; (6) the vehicle is a “hazard”; (7) the vehicle is so mechanically defective that it creates a danger to others using the highways; (8) a statute authorizes impoundment; (9) the driver is arrested from being intoxicated while in the vehicle and no other person is available to drive the vehicle or otherwise safeguard it; and (10) “if the driver is removed from his automobile and placed under custodial arrest, and no other alternatives are available other than impoundment to insure the protection of the vehicle.” Id. at 811. Impoundment is often unlawful when there is no showing that the vehicle was stolen or involved in a crime, that the vehicle is illegally parked, or when the vehicle is legally parked in a public place, especially if the defendant is likely to be promptly released. See Rodriguez v. State, 641 S.W.2d 955 (Tex.Crim.App. 1982) (Impoundment was held to be improper when the defendant was arrested at his sister’s house, and there was no showing that the vehicle was illegally parked). Smith v. State, 759 S.W.2d 163 (Tex.App.– Houston [14th Dist.] 1988) (Impoundment improper because the decision whether to leave the vehicle parked in a private parking lot should have been made by the defendant.). Fenton v. State, 785 S.W.2d 443 (Tex.App.–Austin 1990) (Inventory search was unlawful when the vehicle was lawfully parked in a public parking lot, there was no evidence that the vehicle was stolen or used in the crime, and there was no necessity for safekeeping property because the defendant made bond in a short amount of time). Gords v. State, 824 S.W.2d 785 (Tex.App.–Dallas 1992) (Inventory search was unlawful, even though the defendant was trying to enter the vehicle at the time of arrest, because the car was legally parked in a private lot and was locked, there were other people present who could have safeguarded the car, and there was no evidence the car was instrument of the crime or contained contraband).

All in all, there are a variety of ways that law enforcement may come into possession of your client’s property. In each situation, evaluating the propriety of the search and the subsequent seizure is one of the first steps taken in undertaking the defense of a forfeiture action.

Conclusion

Once the salient issues are understood, evaluating a forfeiture defense becomes a matter of knowing the State’s “policies” in these cases and developing a discovery plan. Because of space limitations, this article does not discuss a variety of important subjects such as summary judgments, jury instructions, trial strategy and appeal. However, this short introduction should give you some tools to understand how these cases are supposed to work and what your initial concerns should be when formulating your defense.
SAMPLE ANSWER IN FORFEITURE CASE

CAUSE NUMBER 2011- 1234567

THE STATE OF TEXAS § IN THE DISTRICT COURT

VS. § 000 JUDICIAL DISTRICT

RESPONDENT’S PROPERTY § HARRIS COUNTY, TEXAS

RESPONDENT’s and REAL PARTIES IN INTEREST’s ORIGINAL ANSWER

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW, PERSON CHARGED WITH A CRIMINAL OFFENSE and ANOTHER
PERSON WHO IS NOT CHARGED WITH A CRIMINAL OFFENSE, Respondents and Real
Parties in Interest, and in answer to Plaintiff’s Petition would respectfully show as follows:

Special Exceptions

1. The Real Parties in Interest specially except to Plaintiff’s Petition for the reason that it
does not specify how the seized property is “contraband” as defined in Chapter 59, Texas Code
of Criminal Procedure.

[**EDIT and NUMBER PARAGRAPHS**]

2. Pursuant to TEX. R. CIV. P. 91, Real Party in Interest specially excepts to the portion of
Paragraph ***of Plaintiff’s Original Notice of Seizure and Intended Forfeiture that alleges that
"items are contraband” on the basis that the pleading fails to allege with particularity and

_____________________________________

\*The labels “Respondent” and “Real Party in Interest” are used interchangeably. There is no “defendant” in
a forfeiture case, since the proceeding is in rem.

DEFENDING CIVIL FORFEITURE CASES
UNDER CHAPTER 59 OF THE TEXAS CODE OF CRIMINAL PROCEDURE
31st Annual Prairie Dog Lawyers Advanced Criminal law Course
specificity why the “items” are contraband.

3. Pursuant to TEX. R. CIV. P. 91, Real Party in Interest specially excepts to the portion of Paragraph *** of Plaintiff’s Original Notice of Seizure and Intended Forfeiture that alleges the seized items were “the proceeds gained from the commission of a felony, or property acquired with the proceeds of a felony” on the basis that the pleading fails to allege with particularity and specificity how the seized items are proceeds from a felony or property acquired with proceeds of a felony.

4. Pursuant to TEX. R. CIV. P. 91, Real Party in Interest specially excepts to the portion of Paragraph *** of Plaintiff’s Original Notice of Seizure and Intended Forfeiture that alleges the seized items were “used or intended for use in the commission of a felony” on the basis that the pleading fails to allege with particularity and specificity how the seized items were used or intended to be used in the commission of a felony.

5. For these reasons, after notice and a hearing, the Real Party in Interest requests the Court to sustain these special exceptions and order Plaintiff to replead and cure the pleading defects and, if Plaintiff does not cure those defects, strike the Plaintiff’s Petition and enter judgment in favor of the Real Party in Interest.

Affirmative Defense

Innocent Owner – PERSON NOT CHARGED

6. Real Party in Interest PERSON NOT CHARGED, would show that he is an “innocent owner” of the seized property and entitled to the safe harbor provisions of art. 59.02, Texas Code of Criminal Procedure.
7. Chapter 59 of the Texas Code of Criminal Procedure provides a safe harbor for "innocent owners" of alleged contraband. Pursuant to article 59.02(c), "[a]n owner or interest holder's interest in property may not be forfeited . . . if the owner or interest holder: (1) acquired and perfected the interest before or during the act or omission giving rise to forfeiture or, if the property is real property, he acquired an ownership interest, security interest, or lien interest before a lis pendens notice was filed . . . ; and (2) did not know or should not reasonably have known of the act or omission giving rise to the forfeiture or that it was likely to occur at or before the time of acquiring and perfecting the interest or, if the property is real property, at or before the time of acquiring the ownership interest, security interest, or lien interest."

8. PERSON NOT CHARGED would show that he is a co-owner of the seized property and is entitled to the protections of art. 59.02, Texas Code of Criminal Procedure.

   Excessive Fines Clause – Eighth Amendment

9. Additionally, BOTH PARTIES would show that forfeiting his interest in the seized property would be disproportional to the underlying offense charged by the State against the co-Respondent, and, as applied to them, individually, would be an “excessive fine” which violates the Eighth Amendment to the United States Constitution.

10. By way of further answer, should such be necessary, and without waiving the foregoing, Real Party in Interest pleads the search that resulted in the seizure of the property that forms the basis of this lawsuit was illegal under the Texas and United States Constitutions.

11. By way of further answer, should such be necessary, and without waiving the foregoing,
Real Party in Interest pleads the warrantless seizure of the property pursuant to and authorized by TEX. CODE CRIM. PROC. ANN. art. 59.03(b) was illegal and unconstitutional under the Texas and United States Constitutions.

**Motion for Return of Property**

12. Respondents and Real Parties in Interest move the Court to return the property to them, free of any encumbrance resulting from this proceeding, upon a finding that the property is not “contraband” or otherwise not subject to forfeiture under the law.

**General Denial**

13. Respondents deny, all and singular, the allegations of Plaintiff as set out in the Original Petition and demands strict proof thereof. Respondents enter a general denial as provided by the Texas Rules of Civil Procedure.

**Notice Pursuant to Rule 193.7, Texas Rules of Civil Procedure**

14. Respondents hereby give notice that they will use any and all documents produced by Plaintiff in discovery at the trial of this cause or at any pre-trial proceeding herein.

**Reservation of Objections, Rule 193.7, Texas Rules of Civil Procedure**

15. Respondents reserve their right to object to the authenticity of any document produced by them in discovery within ten (10) days of receiving actual notice from Plaintiff that the document(s) will be used in a pre-trial proceeding or at trial.

**WHEREFORE, PREMISES CONSIDERED,** Respondents pray that Plaintiff recover nothing by its Petition, that Respondents be awarded their costs in this behalf expended, and that they recover such other and further relief, at law or in equity, to which they may show themselves
to be justly entitled.

Respectfully submitted,

CHARLES B. “BRAD” FRYE
Attorney and Counselor at Law
The Niels Esperson Building
808 Travis, Suite 808
Houston, Texas  77002
(713) 236-8700
(713) 229-8031 Telecopier

By:____________________________
   Charles B. “Brad” Frye
   SBN: 07496250
   Frye@Charlesbfrye.com

Certificate of Service

This is to certify that on this the _______ day of December, 2011, a true and correct copy of the foregoing was mailed, via the United States Postal Service, certified mail, return receipt requested, postage prepaid, and/or telecopied, and/or hand-delivered to the following attorney(s) of record, and/or pro se parties, in accordance with Rule 21a, T.R.C.P.

Karen L. Morris
Harris County District Attorney’s Office
1201 Franklin, Suite 600
Houston, Texas 77002
713-755-5461
713-755-6863 (facsimile)

________________________________________
Charles B. “Brad” Frye