Third Party Rights in Criminal Forfeiture Cases

Stefan D Cassella
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I. INTRODUCTION

There are two ways to file a federal forfeiture action: as a civil action against the property, or as part of a criminal prosecution against a particular individual. Each procedure has its advantages, but civil forfeiture provides the better mechanism for addressing the rights of third parties with an interest in the property.

Because criminal forfeitures are in personam, the government can only forfeit interests in the property held by the defendant. If the government tried to forfeit someone else's property in a criminal case, a court would be required to find the forfeiture "invalid." Therefore, in criminal forfeiture cases, a great

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1 The author is the Deputy Chief of the Asset Forfeiture & Money Laundering Section of the United States Department of Justice. The views expressed in this article are solely those of the author and do not necessarily reflect the views or policies of the Department of Justice.

2 The most commonly used forfeiture statutes have both civil and criminal components. See e.g. 21 U.S.C. §§ 881 and 853 (civil and criminal forfeiture, respectively, for drug violations); 18 U.S.C. §§ 981 and 982 (same for money laundering, bank fraud and other offenses). Many forfeiture statutes, however, provide for civil forfeiture only. See e.g. 18 U.S.C. § 545 (smuggling); 18 U.S.C. § 1955 (gambling); 18 U.S.C. § 924 (firearms); 49 U.S.C. § 80302 (aircraft, vehicles, and vessels used to transport contraband); 7 U.S.C. § 1324 (alien smuggling). Only three statutes provide only for criminal forfeiture. See 18 U.S.C. § 1963 (RICO); 18 U.S.C. § 1960 (illegal money transmitting business); 7 U.S.C. § 2024(h) (food stamp fraud).

3 See United States v. Lester, ___ F.3d ___, 1996 WL 297070 (9th Cir. Jun. 6, 1996) (noting, in dicta, that defendant could have challenged the forfeiture on the ground that the property was held by a corporation, not by the defendant, and that unless the corporate form could be ignored, defendant's only forfeitable interest was his stock in the corporation); United States v. Riley, 78 F.3d 367 (8th Cir. 1996) (if corporation used by defendant to commit offense is not a defendant, only defendant's interest in the corporation may be forfeited, not the corporation itself or its assets); United States v. Jimerson, 5 F.3d 1453 (11th Cir. 1993) (the government may not use the ancillary proceeding to forfeit the interests of third parties); S. Rep.
deal of attention must be paid to determining the extent of the defendant's interest in the forfeited property vis a vis third parties.

Moreover, the focus of a criminal case is on the guilt or innocence of the defendant. Forfeiture issues are not addressed until after the criminal trial is concluded. Therefore, third parties wishing to contest the forfeiture of a given asset must take a back seat until the end of the criminal case.

Civil forfeiture cases are very different. Because the proceeding is in rem, which means that the property itself is the defendant, it does not matter who the property belongs to. Anyone with an interest in the property can file a claim in a civil forfeiture proceeding, and everyone's interests are adjudicated at the same time. No one has to wait until the guilt or innocence of a defendant is determined. And at the end of the day, the government can obtain an interest in the entirety of an asset, not just the portion that was held by the defendant, subject, of course, to the statutory innocent owner defense that is available to third parties.

For example, suppose a drug dealer hires a pilot to fly cocaine from Colombia to California, but the pilot is caught and the airplane is seized. In a civil forfeiture case against the airplane, it would matter not at all whether the plane belonged to the drug dealer, the pilot, a South American corporation, or anyone else. Nor would it matter if the drug dealer himself has been apprehended and prosecuted for the criminal offense. If the government wants to forfeit the plane, it simply files a complaint against it, and anyone claiming an interest and wishing to contest the forfeiture files a claim. Innocent owners are protected, but otherwise the government obtains title to the plane if it establishes the requisite connection between the plane and the criminal offense.

In contrast, criminal forfeiture focuses on the acts and interests of the criminal defendant. Only after the defendant has been apprehended and convicted can his interests in the property be forfeited, and only then can third parties attempt to recover their interests in the property. And at the end of the process, the government obtains only the defendant's interest in the property. If the defendant did not own the property, there may be no forfeiture at all.

No. 255, 98th Congress, 1st Sess. 208 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3191 ("Criminal forfeiture is an in personam proceeding. Thus, an order of forfeiture may reach only property of the defendant, save in those instances where a transfer to a third party is voidable.").
For these reasons, civil forfeiture is generally regarded as the preferred method of forfeiting property in which more than one person asserts an interest or where the ownership of the property is otherwise uncertain; and historically, that is how most forfeitures were done.

The shift to criminal forfeiture

Recently, however, the government has begun to do more forfeitures as part of the criminal case. This has advantages; the government accomplishes its goal in a single proceeding instead of in two separate ones. But the shift to criminal forfeiture has forced the government and the courts to confront a great many problems in cases where the ownership of the forfeited property is unclear or is shared among a number of parties. Take the case of the airplane used by the drug dealer, for example. If the government prosecutes the drug dealer and he is convicted, his interest in the airplane is forfeited. If his ownership of the plane is clear and there are no other owners, there is no problem. In that case, a criminal forfeiture is as effective as a civil forfeiture if not more so.

But what if the defendant used someone else's plane to commit the offense? What if he owned the plane jointly with his wife? What if there is a lien on the plane? What if the plane is held by a nominee, or the defendant holds the plane as a nominee for someone else? Suppose the defendant used to own the plane but in an attempt to avoid criminal forfeiture he has given it to someone else? Suppose only the pilot is prosecuted while the drug dealer who owned the plane remains a fugitive?

In all of these instances, and others, third party rights come into play. But how? When does a third party get to adjudicate his or her interest in the forfeited property? Before trial, during trial, after trial, after appeal? Can the government restrain property in a third party's name pre-trial to make sure it doesn't disappear? What burden does the government have to demonstrate that it is forfeiting only the defendant's interest? Is this a question for the court or the jury? What is the procedural mechanism for resolving third party interests? What kinds of legal defenses are third parties entitled to raise? Can the victims of the crime the defendant committed challenge the forfeiture of his property and get it for themselves? Suppose the defendant has already disbursed the property to someone else, can the government get it back? How?

There are no clear answers to most of these questions. Even though criminal forfeiture has been available for drug and money laundering crimes since the mid-1980's, it has been little used in cases involving third parties. But the government's switch to criminal forfeiture means that all of these questions are now being litigated in hundreds of cases in the federal courts. The
purpose of this article is to discuss the developing case law in this area and to suggest how some of the unanswered questions might be resolved.

II. WHAT IS FORFEITABLE IN A CRIMINAL CASE

In a criminal case, the government can only forfeit property that belongs to the defendant. It cannot forfeit property the defendant used to commit the crime if that property actually belonged to someone else; nor can it include property in the indictment without regard to ownership and expect to sort out the ownership issues when the trial is over. When forfeiture of property is sought in a criminal indictment, the government must have reason to believe that it will be able to prove that the defendant was the owner of the property. There is an ancillary proceeding that takes place after the criminal trial, but that is a procedure in which third parties make claims against property the government has already established belongs to the defendant. It is not an in rem proceeding in which the government can seek to forfeit the interests of third parties.

This does not mean that the indictment must be limited to property held exclusively by the defendant, or even to property held in the defendant's name. As long as the defendant has an interest in the property, it may be included in the indictment and the interests of third parties can be resolved in the ancillary proceeding. For example, if the defendant holds real property jointly with his wife, it may be included in the indictment and the extent of the wife's interest can be worked out later. The same is true if the defendant holds property subject to a lien. The property can be included in the

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4 Id.

5 See Rule 7(c)(2), Fed. R. Crim. Pro. ("No judgement of forfeiture may be entered in a criminal proceeding unless the indictment or the information shall allege the extent of the interest or property subject to forfeiture."); In Re: Moffitt, Zwerling & Kemler, P.C., 846 F. Supp. 463 (E.D. Va. 1994) (Moffitt I) (indictment need not list each asset subject to forfeiture; under Rule 7(c), this can be done with bill of particulars).


7 See United States v. Lester, ___ F.3d ___, 1996 WL 297070 (9th Cir. Jun. 6, 1996) (wife may recover community property interest in ancillary proceeding); United States v. Hilliard, 818 F. Supp. 309 (D. Col. 1993) (forfeiture count not subject to dismissal on ground that subject property is jointly owned by innocent spouse).
indictment and the lienholder's rights can be addressed once the order of forfeiture has been entered.

The government can also forfeit property held in the name of a third party if the government can prove the defendant is the true owner. For example, the court may order the forfeiture of real property held in the defendant's father's name, real property held in his girlfriend's name, and vehicles held in his son's name, all based upon a finding that the defendant was the true owner of the property and the family members were nominees.

Finally, the government can forfeit property that belonged to the defendant at the time he committed the offense but was later conveyed to someone else. Under the "relation back doctrine," which is codified at 18 U.S.C. § 1963(c) and 21 U.S.C. § 853(c), the government's interest in the defendant's property vests at the time of the criminal offense. Subsequent transactions between the defendant and third parties can be voided and the property forfeited to the government, unless the transferee is a bona fide purchaser for value without reason to know that the property is subject to forfeiture.

So, if the defendant owns a car subject to financing lien, the government can forfeit the car and the lienholder can file a claim in the ancillary proceeding. If the defendant owns a house in his own name or as tenant by the entirety, the government can forfeit the house and allow the wife to litigate her community property or entireties interest in the ancillary proceeding. If defendant uses a car held in his elderly aunt's name, and the government can prove the defendant is the true owner, the government can forfeit the car and let the aunt file a claim in

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8 United States v. Ben-Hur, 20 F.3d 313 (7th Cir. 1994) (the government must establish, by a preponderance of the evidence, that the defendant, as a matter of state law, held an ownership interest in the property at the time the offense was committed).


10 See Caplin & Drysdale v. United States, 491 U.S. 617 (1989) (government can forfeit criminal proceeds that have been paid to defendant's attorney as attorney's fees).

the ancillary proceeding. If defendant used his own car but transferred it to his aunt who is not a bona fide purchaser, the government can void the transfer and forfeit the car under the relation back doctrine.

What the government cannot do is attempt to use the criminal forfeiture process to forfeit interests that are clearly held by third parties. If defendant owns 50 per cent of the shares in a corporation, and his spouse owns other 50 per cent, the government can only forfeit the defendant's shares in the criminal case; it cannot forfeit the corporation or the corporation's assets, unless the corporate form can be ignored. To forfeit the wife's 50 per cent, the government would have to file a civil case. And if the defendant committed the crime using his sister's car, the government could forfeit nothing in the criminal case at all.

Special Verdicts

The procedure for ensuring that the court limits the forfeiture to property held by the defendant is far from clear. Rule 31(e), Fed. R. Crim. Pro., requires that a special verdict be returned when the indictment contains a forfeiture allegation. The Rule states that the verdict "shall be returned as to the extent of the interest or property subject to forfeiture," but there is little agreement as to what this means.

At a minimum, the Rule requires the jury to find that the government has established the requisite nexus between the property subject to forfeiture and the criminal offense. For example, the jury might be asked to find whether the property was the proceeds of a drug offense for which the defendant has been found guilty, or property used to facilitate the commission of such offense. That question can be answered "yes" or "no." But what about the defendant's ownership of the property? Does Rule 31(e) require a special verdict on that issue as well?

12 See United States v. Lester, ___ F.3d ___, 1996 WL 297070 (9th Cir. Jun. 6, 1996); United States v. Riley, 78 F.3d 367 (8th Cir. 1996).

13 United States v. Sokolow, ___ F.3d ___, 1996 WL 417637 (3rd Cir. 1996) (approving special verdict form that required jury to answer "yes" or "no" whether amount was "involved in" a money laundering offense).
Most courts ask the jury to determine whether the defendant has some interest in the property -- a question that also can be answered "yes" or "no" -- but they do not ask the court to determine the extent of the defendant's interest vis a vis third parties. In other words, if the property subject to forfeiture is real property, the court would ask the jury, "Does the defendant have an interest in this property?" But it would not ask the jury to determine whether the property was subject to a lien, marital interest or other third party claim. Those issues are reserved for the ancillary hearing. The Fourth Circuit, however, holds that unless a jury enters a special verdict regarding the extent of the defendant's interest in the property, the district court cannot enter order of forfeiture.\(^\text{15}\)

There is no good reason to involve the jury in determining the extent of the defendant's interest in the property. Indeed, there may be no good reason to involve the jury in ownership issues at all. The jury is well-equipped, based on the evidence it heard during the trial, to determine if the property in question is subject to forfeiture. But questions relating to the ownership of the property are generally not germane to the defendant's guilt or innocence. If the defendant is prosecuted for drug smuggling, for example, there may be no reason to be concerned during the criminal trial with who owned the airplane in which the drugs were smuggled. Therefore, if the defendant denies ownership of the property, the jury may not be able to render a verdict regarding his ownership interest without hearing additional evidence -- a process that will often cause a substantial delay in the conclusion of the trial.\(^\text{16}\) And if resolution of the ownership issue requires application of principles of property law, the jury will need to receive instructions on matters of state property law as well.\(^\text{17}\) In such cases, it would be better to leave the determination of whether the defendant has an interest in the property to the court at sentencing.\(^\text{18}\)

\(^{15}\) United States v. Ham, 58 F.3d 78 (4th Cir. 1995).

\(^{16}\) See United States v. Messino, 917 F. Supp. 1303 (N.D. Ill. 1996) (defendant denied ownership; called witnesses in forfeiture phase of trial who claimed they were the true owners).

\(^{17}\) See United States v. Alcaraz-Garcia, 79 F.3d 769 (9th Cir. 1996) (whether defendant was owner of currency turned on whether, under California law, defendant was merely a gratuitous bailee).

\(^{18}\) See Libretti v. United States, 116 S. Ct. 356 (1995) (criminal forfeiture is part of the sentence imposed in a criminal case; defendant has no constitutional right to a jury trial on forfeiture issues).
Asking the jury to determine the extent of the defendant's interest in the property is even more problematic. The extent of the defendant's interest depends, of course, on the extent of the third parties' interests. The extent of the defendant's interest in a residence, for example, may turn on a third party's ability to establish the existence of a valid lien, or a former spouse's ability to establish interests retained in a divorce settlement. But the third parties are not parties to the criminal case; they cannot present evidence during the criminal trial. Instead, third parties are required to file claims to the forfeited property in the ancillary proceeding and present evidence regarding the extent of their interests at that time. Thus, having the jury, or the court for that matter, determine the extent of the defendant's interest in the criminal trial is a waste of time because the same issue has to be addressed by the court all over again in the ancillary proceeding. Rather than have either the court or the jury determine the extent of the defendant's interest in the property in the criminal case when third parties are barred from submitting evidence, it would make much more sense to have the court resolve the issue only once, in the ancillary proceeding, when third parties are parties to the litigation.

Resolution of these issues may ultimately require a clarification of Rule 31(e). In the meantime, the government should urge the court to interpret the Rule in a manner that protects the interests of third parties without unduly prolonging the criminal trial or wasting judicial resources.

Guilty Pleas

No special verdict is required when the defendant pleads guilty; nor is one required when the defendant is convicted by a jury on the substantive charges but waives his jury right on the forfeiture issues. In such cases, it is up to the court to satisfy itself that the defendant is agreeing to the forfeiture of his property and not property that belongs to someone else.

The Supreme Court's decision in Libretti v. United States raised some question about whether such a finding is required in cases resolved by guilty pleas. In Libretti, the Court ruled that Rule 11(f), Fed. R. Crim. Pro., does not apply to the forfeiture aspects of a guilty plea. Thus, the district court is not required by the Rule to find that there is a factual basis

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20 United States v. Saccoccia, 58 F.3d 754 (1st Cir. 1995) (Rule 31(e) only applies to jury trials).

for the forfeiture; but the court strongly suggested that a trial court should nevertheless make some inquiry to ascertain that a factual basis exists. Presumably, that means that the court should find not only that the requisite nexus between the property and the criminal offense to which the defendant has pled guilty can be established, but also that the facts support the defendant's implicit admission that the property he is agreeing to forfeit belongs to him. Such a finding by the court will reduce the possibility that a defendant, uninterested with the forfeiture of property that doesn't belong to him, will agree to the forfeiture of such property, thus forcing third parties to incur the expense of litigating claims in the ancillary proceeding.22

III. PRE-TRIAL CHALLENGES TO THE FORFEITURE

Suppose that property in which a third party claims to have an interest has been included in a criminal forfeiture count. When and how may the third party assert his claim? Pre-trial when the government obtains a restraining order? At trial when the jury is asked to complete the special verdict form and find that the property belongs to the defendant? Post-trial after the court enters an order of forfeiture? After the defendant's appeals are complete?

And what issues is the third party entitled to raise? Is he limited to asserting a superior legal interest in the property, or may he contest the underlying basis for the forfeiture by arguing that the crime giving rise to the forfeiture did not occur or that the property was not involved in the commission of that crime?

Challenging the forfeitability of the property

The criminal forfeiture statutes state explicitly that a third party has no right to intervene in a criminal case until after the defendant is convicted.23 This "wait and see" provision makes sense as a matter of judicial economy: there is no point in litigating third party interests in property that may never be forfeited. More important, the issues at trial -- did the defendant commit a crime and was the property involved in the

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22 See United States v. Douglas, 55 F.3d 584 (11th Cir. 1995) (if government forfeits third party's property in criminal case without conducting factual inquiry into ownership of the property, and court orders forfeiture of property without ascertaining factual basis for defendant's guilty plea, government may be liable to third party for attorneys fees under the Equal Access to Justice Act in the ancillary proceeding).

crime he committed -- are matters that concern only the government and the defendant. Questions involving third party rights in property should not be allowed to interfere with the fundamental purpose of a criminal trial: to determine the guilt or innocence of the defendant and the appropriate punishment to be imposed.

Suppose, for example, the court is trying a money laundering case in which the government is hoping to forfeit the business the launderer used to hide the dirty money. Should potential third parties who claim to have an interest in the business be offered a seat at counsel table during the trial so they can rise periodically to protest that the elements of money laundering have not been established, or that the business was not used to commit the crime? Of course not. Whatever may be the merits of a third party's interest in property subject to forfeiture, that interest must take a back seat until the criminal trial is concluded.

The situation in civil forfeiture cases, of course, is very different. As mentioned, in civil cases claimants have every right to participate in the forfeiture proceeding from the beginning and are permitted not only to raise ownership issues, but also to contest the forfeitability of the property. So, in the money laundering example, if the government were seeking to forfeit the business in a civil case, any party claiming an interest in the business could file a claim, establish an ownership interest, and have the right to assert, as an affirmative defense to the forfeiture, that the money laundering offense did not occur or that the property was not involved in it.

The reason for this difference is that in the criminal forfeiture case, the government is not seeking to forfeit any property belonging to any third party; criminal forfeiture can only affect the interests of the defendant. As long as a third party is able to establish the priority of his ownership interests in the property he is fully protected. If he really is the owner, he is going to get his property back at the end of the day whether the government was correct in establishing that the property was used to commit an offense or not. And if he is not really the owner of the property, then it is no concern of his whether the defendant was properly convicted of the crime and the property was actually involved in the offense.

24 See 18 U.S.C. § 982 (property involved in a money laundering offense is subject to criminal forfeiture).

25 See 18 U.S.C. § 981(a)(1)(A) (property involved in a money laundering offense is subject to civil forfeiture).
For these reasons, forfeitability issues are of no concern to a third party in a criminal case and he has no right to raise them either during the trial or at any other time. In the money laundering case involving the business, for example, suppose the jury convicts the defendant of money laundering, and finds the business is forfeitable, but they're dead wrong. Does this matter to the third parties who claim a share of the business? Not at all. The government can only forfeit the defendant's interest in the business. If a third party has an interest in the business he's going to get it back in the ancillary proceeding whether the jury's verdict on the forfeitability issues was correct or not.

When can the third party object to the forfeiture?

As mentioned, the statutes make clear that a third party may not intervene in the criminal trial. This means that a third party cannot object to entry of order of forfeiture before it is entered; he may not move to quash a preliminary order of

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26 See United States v. Sokolow, 1996 WL 32113 (E.D. Pa. Jan. 26, 1996) (unpub.) (third party may not relitigate propriety of the special verdict form, legality of a forfeiture count, or whether court properly ordered forfeiture of substitute assets); United States v. Duboc, No. GCR 94-01009-MMP (N.D. Fla. May 9, 1996) (defendant's counsel, F. Lee Bailey, cannot dispute defendant's admission that property was purchased with drug proceeds). The only exception to this rule applies to situations where the third party's standing to file a claim in the ancillary proceeding turns on the government's theory of forfeiture. See United States v. Farley, 919 F. Supp. 276 (S.D. Ohio 1996) (where government moves to dismiss claim for lack of standing on ground that no one has standing to object to the forfeiture of proceeds, claimant has right to contest finding that the property constituted proceeds).

27 As discussed infra, this means that the third party will recover his interest even if he was complicit in the offense. In contrast to the civil forfeiture statutes, which require the claimant to establish an innocent owner defense once forfeitability is established, the criminal statutes contain only a superior owner requirement.

forfeiture;\textsuperscript{29} nor may he file any action in another court to circumvent the forfeiture procedure.\textsuperscript{30} Moreover, a third party may not move to dismiss the forfeiture count in an indictment pre-trial,\textsuperscript{31} nor may he put on evidence for the consideration of the jury when they are considering the special verdict form.

**Restraining Orders**

The one situation in which courts have recognized the right of a third party to participate in a criminal forfeiture action outside of the post-trial ancillary proceeding involves pre-trial restraining orders. The forfeiture statutes authorize the court to issue pre-trial restraining orders to preserve the availability of property for forfeiture.\textsuperscript{32} Such orders will sometimes apply to property in which a third party has a partial interest or to property actually held by a third party but subject to forfeiture if the third party is really a nominee or is a transferee and the relation back doctrine applies.\textsuperscript{33}

A restraining order constitutes a temporary but nevertheless legally significant deprivation of a person's ability to use and

\textsuperscript{29} United States v. Duboc, No. GCR 94-01009-MMP (N.D. Fla. May 9, 1996) (denying motion to quash or reconsider for lack of standing).


\textsuperscript{31} See United States v. Real Property in Waterboro, 64 F.3d 752 (1st Cir. 1995) (third party cannot make a \textit{res judicata} argument to assert that his superior ownership of the property has already been established until the ancillary proceeding).


\textsuperscript{33} See United States v. Jenkins, 974 F.2d 32 (5th Cir. 1992) (pre-trial restraint of third party interests is permitted); In re Assets of Tom J. Billman, 915 F.2d 916 (4th Cir. 1990); United States v. Regan, 858 F.2d 115 (2d Cir. 1988); but see United States v. Riley, 78 F.3d 367 (8th Cir. 1996) (court may not appoint receiver to operate corporation where only the defendant's interest in the corporation, not corporation itself, is subject to forfeiture).
enjoy his property. It is no answer to say to a third party whose property has been restrained pre-trial that he will be fully protected from the forfeiture of his interests because only the defendant's interest is subject to forfeiture, if he has to wait until the end of the trial to assert his interest and have the restraining order vacated. By that time, his enjoyment of the property may have been restrained for months or years.

For these reasons, some courts have held that notwithstanding the "wait and see" provisions of the criminal forfeiture statutes, when a third party's property is restrained pre-trial, due process requires that the third party be allowed to contest the restraining order. But exactly what issues can the third party raise?

As mentioned, a third party should not be able to challenge the forfeitability of property, because the forfeitability of the property is of no concern to him. Moreover, it is easy to imagine a situation where a third party who is really a confederate of the criminal defendant, would challenge a pre-trial restraining order on forfeitability grounds as a means of discovering the basis for the government's criminal case. Accordingly, third parties should not be permitted to look behind the grand jury's indictment to challenge the criminal case on the

34 See United States v. Riley, 78 F.3d 367 (8th Cir. 1996) (non-defendant corporation can object to appointment of a receiver); United States v. Real Property in Waterboro, 64 F.3d 752 (1st Cir. 1995) (third party denies he is a nominee, claims he is the true owner of the property); United States v. Wu, 814 F. Supp. 491, 495 (E.D. Va. 1993) (discussing legislative history and fairness of allowing third party to contest restraining order); but see United States v. O'Brien, 836 F. Supp. 438 (S.D. Ohio 1993) (third parties barred from opposing pre-trial restraint by 21 U.S.C. § 853(k)).

35 The American Bar Association recognizes the government's interest in discouraging the use of challenges to pre-trial restraining orders to circumvent the criminal discovery rules and to obtain a preview of the government's case. In its recommendations to Congress on the reform of the forfeiture laws, the ABA says the following: "Congress should amend the provisions of the criminal forfeiture statutes regarding pre-trial restraining orders to provide a mechanism for addressing the interests of third parties in a manner that does not unduly interfere with the criminal trial." Statement of Principles Regarding Asset Forfeiture, Feb. 5, 1996.
merits or otherwise to object that the property would not be subject to forfeiture even if the defendant were convicted.\textsuperscript{36} In the money laundering case, for example, a third party who cannot object to forfeitability issues at trial should not be able to say, in opposition to a restraining order, "the grand jury had no probable cause to believe a money laundering offense was committed or that this business was involved."

Assuming the third party cannot challenge forfeitability pre-trial, can he challenge ownership? This is a difficult issue and there are no decided cases on point. On the one hand, since his right to assert a superior ownership interest in the property is the third party's ultimate protection against forfeiture in a criminal case, it might make sense to allow a third party to object to a pre-trial restraining order on the ground that the property belongs to him, not to the defendant. On the other hand, if a third party could adjudicate his ownership interest pre-trial, the hearing on the restraining order could once again be used to preview the government's case, because in many cases, the government's proof of ownership is interwoven with it's proof of guilt or innocence. For example, in many money laundering cases the issue at trial is whether the defendant attempted to conceal or disguise criminal proceeds by placing them in a third party's name. In such a case, who is really the owner of the assets or the entity that controlled them may be the central issue at trial. Litigating those issues pre-trial in connection with a restraining order would inevitably turn the pre-trial hearing into a mini-trial on the government's case-in-chief.

For these reasons, as long as the forfeiture count in a criminal indictment has been presented to a grand jury, and the grand jury has determined that the property is subject to forfeiture and that it belongs to the defendant, the grand jury's finding should not be subject to challenge by a third party. In other words, the grand jury's finding operates as a protection against the arbitrary indictment and restraint of property that belongs to persons other than the defendant, and it should not be subject to challenge until the ancillary proceeding as the forfeiture statutes provide.

\textsuperscript{36} See United States v. Real Property in Waterboro, 64 F.3d 752 (1st Cir. 1995) (neither third party nor defendant has statutory right to use restraining order hearing to look behind grand jury indictment to challenge criminal case on the merits); but see United States v. Riley, 78 F.3d 367 (8th Cir. 1996) (restraining order may only be issued if the government demonstrates that defendant is likely guilty and that property will be subject to forfeiture; restraining order vacated where forfeitability of property not demonstrated).
There are, however, grounds on which it is appropriate for a third party to challenge a pre-trial restraining order. In particular, a third party should be able to assert that the government simply restrained the wrong property, or that less intrusive means exist to preserve the property for forfeiture.

IV. THE ANCILLARY PROCEEDING

Once the jury returns its forfeiture verdict, the court may enter a preliminary order of forfeiture authorizing the Attorney General to seize the property subject to forfeiture, and "to begin proceedings consistent with any statutory requirements for ancillary hearings and the rights of third parties." In essence, the "ancillary proceedings" give third parties the opportunity to establish that even though the property belongs to the defendant, they have an interest in it that must be recognized; that the court has erred in forfeiting the property because it actually belongs to the third party, not the defendant; or that the property used to belong to the defendant but has been lawfully transferred to the third party who should be allowed to keep it.

The mechanics of the ancillary proceeding are governed by two statutes: 18 U.S.C. § 1963(l) and 21 U.S.C. § 853(n). The former applies to RICO cases and the latter to virtually all other criminal forfeitures. Because the language of the two statutes is identical, case law interpreting either one of them is applied to both.

First, the government is required to publish notice of the order of forfeiture and of its intent to dispose of the forfeited property. The notice may be published at any time after entry


38 18 U.S.C. § 1963(l)(1); 21 U.S.C. § 853(n)(1). The statutes also provide that the government "may" provide "direct written notice to any person known to have an interest in the property." While the statute makes the sending of "direct written notice" discretionary, failure to provide such notice to a person known to the government to have asserted an interest in the forfeited property might be considered a violation of due process. Cf. Barrera-Montenegro v. United States, 74 F.3d 657 (5th Cir. 1996) (when government has in its possession information that would enable it to effect actual notice of civil forfeiture on an interested party, the government cannot ignore
of the order of forfeiture, but generally the government initiates the ancillary proceeding promptly because it does not have clear title to the property until the ancillary proceeding is concluded.

Unlike its civil counterpart, the criminal forfeiture statute does not require the government to send direct notice of the forfeiture to third parties. Nevertheless, the government generally sends direct notice when it is practical to do so. Sending direct notice to a third party does not estop the government from later opposing the third party's claim for lack of standing or for failure to assert the requisite legal interest. This often confuses third parties who argue that "if the government didn't think I had a legal interest in the property, it wouldn't have sent me notice." But the government nevertheless follows the rule that it is better to risk such confusion than to be accused of violating the due process rights of someone who should have received notice of the forfeiture. Thus, it is not uncommon for the government to send notices to anyone with a conceivable interest in the forfeited property, and then move to dismiss any resulting claims.

39 In contrast to the civil forfeiture statutes, the criminal statutes contain no cross reference to the customs laws requiring publication three times; nor is there a cross-reference to the Admiralty Rules regarding place of publication. The statute says only that the publication may take place "in such manner as the Attorney General may direct." Id. Nevertheless, the government generally follows the civil rule and publishes "three times in newspaper of general circulation."


41 United States v. Bouler, ___ F. Supp. ___, 1996 WL 277387 (W.D.N.C. May 9, 1996) (even though § 853(n)(1) says gov't "may" send direct notice to third parties, such notice is mandatory under 19 U.S.C. § 1607 which applies to criminal forfeitures).

42 See e.g. United States v. BCCI Holdings (Luxembourg) S.A. (In re Petitions of General Creditors), 919 F. Supp. 31 (D.D.C. 1996) (government publishes notice of forfeiture in 11 newspapers and mails direct notice to 523 persons and entities, then moves to dismiss all claims filed by general, unsecured creditors for lack of standing).
Timing and form of claims

Third parties have 30 days from receipt of notice, or date of last publication, whichever is earlier, to file a claim. But the court may "equitably toll" the 30 day period to allow a late claim in the interest of justice.

There is no particular form for the third-party petition; the statute says only that it must be signed by the petitioner (not counsel) under penalty of perjury, and must set forth the nature and extent of petitioner's right title and interest. There is little case law interpreting what the latter requirement means, but it is clear that a claimant who merely scrawls random legal phrases and makes a blanket statement that the forfeited property belongs to him has not stated a proper claim.

Seizure and interlocutory sale

While all of this is happening, the U.S. Marshals will be authorized to seize the forfeited property pursuant to the preliminary order of forfeiture. One issue that has arisen since the Supreme Court's decision in United States v. James Daniel Good Real Property is whether the government can seize property that is subject to a third party's claim before the ancillary

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44 See United States v. BCCI Holdings (Luxembourg) S.A. (In re Petition of Indosuez Bank), 916 F. Supp. 1276 (D.D.C. 1996) (claimant that diligently pursued its interest in the forfeited property allowed to file out of time because notice took over 2 months to reach it in Switzerland); United States v. BCCI Holdings (Luxembourg) S.A. (In re Petition of Delphis Bank), 1992 WL 753228 (D.D.C. 1992) (where gov't sends two notices to claimant at different addresses, and claimant reasonably believed it had 30 days from second notice to file claim, court may waive statutory requirement); but see United States v. BCCI Holdings (Luxembourg) S.A. (In re Petition of B. Gray Gibbs), 916 F. Supp. 1270 (D.D.C. 1996) (court declines to equitably toll 30-day period for the benefit of claimant who failed to provide the government with a forwarding address and who should have been aware of notice by publication in local newspaper).


hearing takes place. James Daniel Good was a civil forfeiture case that held that seizure of real property without prior notice and an opportunity to be heard violates the due process rights of the property owner. In a criminal case, of course, the government is seizing property that the court has already determined to be the property of the defendant who was afforded ample due process during the criminal trial. Third parties have a right to contest that determination in the ancillary proceeding, but until and unless that challenge succeeds, the government has a right to assume that the trial court's finding was correct. Therefore, as long as the court in the criminal case found that the property belonged to the defendant, there should be no due process bar to the government's seizing the forfeited property before the ancillary hearing.48

A related question is whether the Marshals may conduct an interlocutory sale to liquidate the forfeited property before the ancillary proceeding is concluded. Although the preliminary order of forfeiture gives the government authority to exercise total control over the forfeited property, its title to the property is not settled until the ancillary proceeding is complete.49 Therefore, if a third party is claiming that he or she is rightful owner of property, the government will generally not attempt to sell it without the consent of the third party or a court order explicitly authorizing the sale. The government may obtain such a court order by filing a motion to show cause why the property should not be sold pending resolution of a third party claim. If the third parties asserting an interest in the property cannot proffer a reason why their interests would not be adequately protected if the property were reduced to cash and held by the Marshals pending the conclusion of the ancillary proceeding, the court will authorize the sale, thus saving the Marshals the costs of maintaining the property and risking liability in connection with it.

Hearing within 30 days

The forfeiture statutes provide that a hearing on the merits of the claim should be held within 30 days, if practicable.50 A

48 Cf. United States v. Farley, 919 F. Supp. 276 (S.D. Ohio 1996) (third party, who claims in the ancillary proceeding, that government did not comply with the procedural requirements of §§ 853(e) and (f) pre-trial, is not entitled to any relief; those statutes do not create substantive rights in favor of third parties such that government's omission requires it to give property to third parties).

49 See footnote 40, supra.

hearing within that time frame is rarely practicable, except in cases involving a single claim and a single asset. In some celebrated cases involving large numbers of victims and millions of dollars in assets, the ancillary proceeding has lasted far longer than the original criminal trial.\(^{51}\) Failure of the trial court to hold a hearing within 30 days confers no substantive rights on the claimant and cannot be asserted as a reason why the third party's claim should be granted.\(^{52}\)

No hearing on the merits is necessary at all if the court can dispose of the claim on the pleadings.\(^{53}\) For example, the court may dismiss the claim for lack of jurisdiction if the property claimed by the third party is not among the assets ordered forfeited from the defendant.\(^{54}\) Most commonly, however, this will occur in response to a motion filed by the government to dismiss a third party claim for lack of standing or for failure to state a claim upon which relief can be granted.

**Standing**

Third parties must show that they have standing to contest the order of forfeiture. If a party lacks standing, the court can dismiss the claim without conducting a hearing.\(^{55}\) So in many cases, the government will want to file a motion to dismiss for lack of standing before the court even addresses the merits of the claim.

\(^{51}\) See United States v. BCCI Holdings (Luxembourg) S.A. (In re Petitions of General Creditors), 919 F. Supp. 31 (D.D.C. 1996) (petitions dismissed more than four years after entry of preliminary order of forfeiture).


\(^{53}\) United States v. BCCI Holdings (Luxembourg) S.A. (In re Petitions of General Creditors), 919 F. Supp. 31 (D.D.C. 1996) ("If a third party fails to allege in its petition all elements necessary for recovery, including those relating to standing, the court may dismiss the petition without providing a hearing"); United States v. Campos, 859 F.2d 1233, 1240 (6th Cir. 1988); United States v. Rutgard, Cr. No. 94-0408GT (S.D. Cal. Mar. 7, 1996) (where there was no factual dispute, court could determine whether claimant had a legal interest as a matter of law); United States v. Wolf, 1994 WL 411372 (N.D. Ill. Aug. 3, 1994).


\(^{55}\) See BCCI Holdings, supra note 54 (citing cases).
The standing provisions, as set forth in 18 U.S.C. § 1963(l)(2) and 21 U.S.C. 853(n)(2), provide that anyone, other than the defendant, who has a legal interest in the property to be forfeited, can file a claim. The provision barring the defendant from filing a claim applies to the defendant's nominees and alter egos, liquidators standing in the defendant's shoes, and branches of a defendant corporation.

The courts have only recently begun to wrestle with notion of what constitutes a "legal interest" in forfeited property. An allegation of ownership of the property may be sufficient to satisfy the standing requirement, but the claimant must do more than assert bare legal title. A third party who holds legal title to the forfeited property, but who exercised no dominion or control over it may be found to lack standing. So, if the government thinks the property really belongs to the defendant and that the claimant is a strawman or nominee, it may move to dismiss the claim for lack of standing.

**Standing to contest the forfeiture of proceeds**

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56 See United States v. Brunson, 1996 WL 306438 (10th Cir. 1996) (Table Case) (defendant who disclaims ownership of the forfeited property must appeal order of forfeiture; he lacks standing to appeal from denial of wife's claim in the ancillary proceeding).

57 See United States v. BCCI Holdings (Luxembourg) S.A. (In re Petitions of Foreign Branches), 48 F.3d 551 (D.C. Cir. 1995) (branches of defendant bank are the "defendant").

58 See United States v. Alcaraz-Garcia, 79 F.3d 769 (9th Cir. 1996) (allegation of ownership is sufficient to establish standing under (n)(2), but may not satisfy "superior interest" requirements of (n)(6)(A)).

59 See United States v. Sokolow, 1996 WL 32113 (E.D. Pa. Jan. 26, 1996) (unpub.) (bare legal title without exercise of dominion and control is insufficient to establish standing; the defendant cannot protect his property from forfeiture simply by making sure it's titled in his daughter's name before he uses it to commit a crime); United States v. Messino, 917 F. Supp. 1303 (N.D. Ill. 1996) (defendant's father, son and girlfriend held legal title but exercised no dominion or control); cf. United States v. One 1990 Chevrolet Corvette, 37 F.3d 421 (8th Cir. 1994) (in civil forfeiture case, titled owner lacks standing to contest forfeiture of property over which she exercised no dominion or control).
An interesting question is whether a third party may ever have standing to contest the forfeiture of criminal proceeds. The issue most commonly arises when the spouse of the convicted defendant asserts that he or she acquired a legal interest in the defendant's criminal proceeds by virtue of state community property law, or the existence of a tenancy by the entirety if the proceeds constitute or have been converted into real property. It is true that whether a third party has a legal interest in the forfeited property will generally turn on state property law. But relying on state law, federal courts have found that a spouse does not acquire a legal interest in criminal proceeds because property that a spouse unlawfully acquires does not become part of marital estate, or because even if the property does become part of the estate, the forfeiture order operates as a debt that the defendant spouse is obligated to pay.

60 See United States v. Alcaraz-Garcia, 79 F.3d 769 (9th Cir. 1996) (state law determines whether the legal interests covered by the federal statute exist; under state law, third parties were bailors who retained legal interest in forfeited property); United States v. Henry, 850 F. Supp. 681 (M.D. Tenn. 1994) (defendant's spouse had standing to contest forfeiture of marital residence in which she had a legal interest under state law); United States v. Weaver, Cr. No. 94-293-MA (D.Or. Oct. 4, 1995) (because spouse did not have a perfected interest in the forfeited property under state law, her petition was dismissed for failure to state a claim on which relief could be granted), aff'd without op.

Not all standing questions turn on questions of property law, however. State law may be used to determine whether the type of legal interest protected by the federal statute exists; e.g. if the federal statute protects lienholders, state law will be used to determine if the claimant had a valid lien. But the threshold question -- e.g. does the statute protect lienholders? -- is a matter of federal law. See e.g. United States v. BCCI Holdings (Luxembourg) S.A. (In re Petitions of Foreign Branches), 48 F.3d 551 (D.C. Cir. 1995) (using federal law to determine the definition of "defendant" for the purpose of deciding whether branch of defendant corporation had standing to file a claim); United States v. BCCI Holdings (Luxembourg) S.A., 46 F.3d 1185 (D.C. Cir. 1995), cert. denied, 115 S. Ct. 2613 (1995) (using federal law to determine that the criminal forfeiture statutes do not protect beneficiaries of a constructive trust).

out of the estate notwithstanding the interests of the other spouse. 62

All of this applies to property interests in proceeds that are alleged to have come into existence by operation of law at the time the crime giving rise to the forfeiture took place. A different rule should probably apply to cases where the third party allegedly acquired his or her interest as a bona fide purchaser of the property after the crime giving rise to the proceeds occurred. In United States v. 92 Buena Vista Ave., 63 the Supreme Court held that in a civil forfeiture case a woman who received criminal proceeds as a gift from her drug dealer boyfriend had standing to assert an affirmative defense to the forfeiture. The criminal forfeiture statutes do not protect beneficiaries of gifts, but they do protect persons who purchase property without reason to know that the property is subject to forfeiture. 64 Presumably, a person who purchased property from the defendant without reason to know the property constituted criminal proceeds would be protected from criminal forfeiture just as a bona fide purchaser is protected in such circumstances under principles of commercial law. 65

Accordingly, if a person otherwise is able to assert the requisite legal interest in the forfeited property -- e.g. as an owner or lienholder -- and acquired that interest as a bona fide purchaser, he would have standing to contest the forfeiture even though the property in question constituted criminal proceeds.

Standing of unsecured creditors and victims

The key part of the standing provision is that the claimant must be able to assert a legal interest in the property that has been ordered forfeited. Outside of the instances noted above, spouses, lienholders, and people who took title from the defendant or were using the defendant as a nominee will be able

62 See United States v. Ranch Located in Young, Arizona, 50 F.3d 630 (9th Cir. 1995).

63 113 S. Ct. 1126 (1993).


65 United States v. Lavin, 942 F.2d 177, 185 (3rd Cir. 1991) (Congress derived the bona fide purchaser provision in the criminal forfeiture statutes "essentially from hornbook commercial law"); id., at 186 (the bona fide purchaser provision serves the same purpose in the criminal forfeiture statute as it does in commercial law: it protects an innocent purchaser who gives valuable consideration to a seller whose title in the property conveyed is defective).
to meet the standing requirements. The wife, for example, will say she owns half the defendant's house; the financing company will claim to have a lien on the defendant's car; another third party will say he is the true owner of the boat the defendant used to smuggle drugs. All of these parties can point to a specific piece of property in which they have a potential legal interest.

In contrast, a general unsecured creditor may have a legal interest in the defendant's estate, but he has no interest in any specific asset that is included within the estate. For that reason, a general unsecured creditor lacks standing to challenge the forfeiture of any of the defendant's property. For example, because a bank depositor is only a general creditor of the bank, a depositor has no standing to contest the forfeiture of the bank's assets if the bank is convicted of a criminal offense. Similarly, a person holding a check drawn on the defendant's bank account has no legal interest in the funds in the account but only a general interest in the defendant's estate; he therefore lacks standing to challenge the forfeiture of the account. Trade creditors who have breach of contract actions against the defendant, former employees with claims for employee benefits, beneficiaries of letters of credit, all for the same reasons, cannot challenge the criminal forfeiture of the

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67 See United States v. BCCI Holdings (Luxembourg) S.A., 73 F.3d 403 (D.C. Cir. 1996) (In Re Organization of American States) (depositor OAS was entitled to no special status in the ancillary proceeding despite treaty obligations of the United States respecting its property, because it was only a general creditor and therefore it was the defendant's property, not the claimant's, that was forfeited); United States v. BCCI Holdings (Luxembourg) S.A. (In Re Chawla), 46 F.3d 1185 (D.C. Cir. 1995), cert. denied, 115 S. Ct. 2613 (1995) (bank depositors as a class lack standing in criminal forfeiture proceeding); id. 814 F. Supp. 106 (D.D.C. 1993) (bank depositors); 833 F. Supp. 17 (D.D.C. 1993) (same).

defendant's assets. Of course, the situation is different if the creditor has reduced his claim to a judgment and obtained a judgment lien against specific assets.

The same rule applies to tort victims. A person who claims "the defendant defrauded me" or "the defendant ran over my foot with his car" cannot use the ancillary proceeding as a forum for litigating his tort claim and collecting a judgment. Tort victims, like general unsecured creditors, have a general interest in the defendant's estate but they have no legal interest in the property that has been ordered forfeited.

Again, the situation is different if the victim has reduced his claim to a judgment and levied against specific property. It is also different for a tort like theft or embezzlement where the defendant takes the victim's property without the victim's consent. In that case, title to the property never changes hands; the property still belongs to the original owner, so the owner has standing to oppose the forfeiture. For example, if

69 United States v. BCCI Holdings (Luxembourg) S.A. (In re Petitions of General Creditors), 919 F. Supp. 31 (D.D.C. 1996) (rejecting for lack of standing claims based on breach of contract, letter of credit, bank deposit, and employer/employee relationship); id. 833 F. Supp. 22 (D.D.C. 1993) (trade creditors); id. 841 F. Supp. 1 (D.D.C. 1993) (breach of fiduciary duty). The rule is the same in civil forfeiture cases, see United States v. $20,193.39 U.S. Currency, 16 F.3d 344 (9th Cir. 1994); but see United States v. Reckmeyer, 836 F.2d 200 (4th Cir. 1987) (general creditors have a legal interest in forfeited property if defendant's entire estate is forfeited).

70 See United States v. Douglas, 55 F.3d 584 (11th Cir. 1995) (third party who has reduced his claim to a judgment lien on the forfeited property may file a claim); United States v. BCCI Holdings (Luxembourg) S.A., 46 F.3d 1185, 1191 (D.C. Cir. 1995) (general creditors have no standing to contest criminal forfeiture "unless they have already secured a judgment against the debtor and perfected a lien against a particular item").

71 See United States v. Lavin, 942 F.2d 177 (3rd Cir. 1991) (victim of embezzlement may not recover in ancillary proceeding unless it can trace its property to forfeited funds); BCCI Holdings (In re Petition of Republic of Panama), 833 F. Supp. 29 (D.D.C. 1993) (same); BCCI Holdings (In re Petition of Central Bank of Peru), 814 F. Supp. 111 (D.D.C. 1993) (victim of tortious interference with honest services of employees bribed by the defendant may not recover damages).

72 See Lavin, supra (if victim of embezzlement had been able to establish that the forfeited property was the property
defendant steals the victim's car, the victim has standing to contest forfeiture of the car, because he never transferred ownership of the car and his alleged ownership interest therefore lies in the particular car being forfeited. But if the defendant no longer has the car, and the government is forfeiting other property of the defendant, the victim has no legal interest in any particular asset being forfeited and therefore has no standing.

**Claims filed by victims in the ancillary proceeding**

In any criminal forfeiture case involving the forfeiture of the proceeds of a white collar crime, it is likely that the victims of the offense, seeking to take advantage of the forfeiture proceeding to try to get their money back, will file claims in the ancillary proceeding. But for all of the reasons just mentioned, victims generally lack standing to challenge an order of forfeiture: they are creditors or tort victims with causes of action against the defendant but with no legal interest in the forfeited property.

Claims filed by such innocent victims pose a dilemma for the government. Does the government acquiesce in the claims, thus converting the ancillary proceeding into a liquidation proceeding for the benefit of the victims? Or does it move to dismiss the victims' claims, insisting on rigorous application of the standing rules and forcing the victims to seek relief in other ways?

In a case involving victims, the goal of forfeiture is not only to get the money out of the hands of the defendant, but also to get it back to the victims. The question is the best way to do that. Where there are few victims and there is plenty of forfeited property to satisfy all claims, it may be appropriate to allow the victims to file claims in the ancillary proceeding and acquiesce in an amendment to the order of forfeiture acknowledging their superior interest in the property -- provided, of course, that the costs of the government's forfeiture action have been reimbursed and the defendant's interests have been extinguished so that the property is the government's to distribute.\(^73\) In the appropriate case, this

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\(^73\) See footnote 120 and accompanying text regarding settlements of third party claims and granting remission.
device may be more expedient than the alternatives which include requiring the victims to file petitions for remission or mitigation of forfeiture pursuant to 28 C.F.R. § 9.8 after the order of forfeiture is final, or having the court enter a restitution order under the Victim and Witness Protection Act, 74 and allowing the defendant to use all or part of the forfeited funds to satisfy the order if he has no other source of funds to do so.

Often, however, criminal forfeiture will be ordered in a case involving a great many victims and only enough property to restore to each victim a fraction of his losses. In a telemarketing case, for example, 75 there may be over a thousand victims and only enough money for everyone to get 30 cents on the dollar. The ancillary proceeding is not the way to restore property to victims in that kind of case. Some victims will be savvy enough to file claims for the full amount of their loss in the ancillary proceeding and others will not. It would be unfair to let some victims take more than their fair share of the defendant's estate simply because they had the wherewithal and foresight to file claims in a proceeding that was never designed to accommodate the interests of victims.

Also, the government does not want to turn the criminal case into a liquidation proceeding. There is no mechanism under the criminal forfeiture statutes for granting part of a third party's claim on the ground that there isn't enough money for all claims to be granted in full. Either a given claimant is the owner of the forfeited property or not: if he is, he should recover all of the property, and if he is not, he should recover none of it. Thus, dividing up the forfeited property to give each victim a pro rata share is not something the criminal forfeiture statutes contemplate.

petitions while the defendant's conviction is still pending appeal.


75 There is no forfeiture for telemarketing fraud or any other variety of consumer fraud, but if the defendant is convicted of laundering the proceeds of a fraud scheme under 18 U.S.C. § 1956 or 1957, the laundered proceeds are subject to criminal forfeiture under 18 U.S.C. § 982(a)(1)(A). The government frequently charges money laundering in fraud cases specifically to be able to use the forfeiture statutes to recover property for the benefit of the victims.
Arguably, the court, in the exercise of its jurisdiction over the criminal case and with the consent of the government, could appoint a special master to entertain claims from victims and parcel out the forfeited property to them, but that option would be available only after all bona fide third party claims asserting superior ownership are disposed of. At that point, of course, the property belongs to the government and may be distributed under the remission regulations which contain provisions for the appointment of a special master. Thus, in all but the most unusual case it would seem better to leave the process of restoring property to victims to the Attorney General as the forfeiture statutes intended, and not to involve the criminal court in that function.\footnote{See \textit{Schwimmer}, 968 F.2d at 1584 (the forfeiture statute states explicitly "that the Attorney General, and not the judiciary, shall make decisions about how to divide up funds in order to compensate victims. The only role of the District court is to amend the order of forfeiture where a genuine property interest of the sort specified in § 1963(1)(6) is demonstrated"); \textit{Lavin}, 942 F.2d at 187 (the forfeiture statutes afford judicial protection to only two narrow classes of claimants; "third parties who fall outside of both exceptions, regardless of how sympathetic they are, must petition the Attorney General for relief"); 18 U.S.C. § 1963(g)(1) (authorizing the Attorney General "to grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims . . ., or take any other action to protect the rights of innocent persons which is in the interest of justice").}

Accordingly, in fairness to all victims and to ensure that forfeited property is distributed equitably, the government will generally be obligated to oppose the claims of victims who lack standing but who insist on filing third party claims anyway. In cases where it was apparent that this was the government's motive in opposing the victims' claims, the courts have strictly enforced the standing requirements.\footnote{In \textit{BCCI Holdings}, where 156 victims filed petitions in the ancillary proceeding, the court denied virtually all of them on standing grounds. See \textit{e.g.}, 833 F. Supp. at 14 (granting claims of some victims "would significantly harm the abilities of other BCCI creditors to recover fair portions of lost funds");}
Victims who can trace their property

Some victims will choose to file a claim in the ancillary proceeding notwithstanding the government's representation that it will use the forfeited funds to restore property to victims on an equitable basis. The reason is obvious: a victim who agrees to accept a pro rata share of the forfeited property will recover only a fraction of his losses, while a victim who files a meritorious claim in the ancillary proceeding will recover 100 percent of his losses -- at the expense, of course, of the other victims.

Victims who choose this course are generally those who were the last to be victimized by the defendant and who therefore can trace their money to specific assets that are subject to forfeiture. For example, suppose the defendant defrauds 10 people of $50,000 each, but when the government seizes the defendant's bank account it contains only $50,000. If no one files a claim in the ancillary proceeding, the Attorney General will be free to distribute the $50,000 to all victims equally, or $5,000 per victim. Suppose, however, the last person to be defrauded by the defendant can trace the $50,000 found in the defendant's account to a check he gave to the defendant the day before he was arrested. That person may point to the account and say "there's my money." Of course, if that victim files a claim in the ancillary proceeding and the court grants it, none of the other victims will receive anything.

This situation has caused no small amount of confusion. It is true, as mentioned before, that the victim of a theft or embezzlement can recover his property in a criminal forfeiture proceeding as long as he can trace his property to the asset subject to forfeiture. That is because title to property that is taken from the victim without his consent never passes to the defendant; it remains at all times the victim's property. The situation is quite different, however, in cases where the victim voluntarily transfers his property to the defendant. In such cases, even if the transfer is induced by fraud, title to the property passes to the defendant and the victim becomes a general, unsecured creditor like all other victims. The fact

see also United States v. Sokolow, 1996 WL 32113 (E.D. Pa. Jan. 26, 1996) (constructive trust should not be imposed if result would be to deprive victims of funds government plans to distribute equitably once forfeiture is final).

79 See footnote 72 and accompanying text.
that he can point to the forfeited asset and say "there is property that used to be mine" is irrelevant. 80

The ability to trace one's property to the forfeited asset is a condition necessary to the recovery of property in the ancillary proceeding, but it is not sufficient. The "last victim" -- even if he can trace his property to the forfeited asset -- is on the same footing as every other victim; all are unsecured creditors with no legal interest in the specific assets forfeited from the defendant.

If the court were to grant the third party petition of the last victim just because he was able to trace his property to the forfeited asset, the other victims, equally situated, would suffer a great unfairness. The rule, therefore, is that if a victim is a general, unsecured creditor of the defendant, he has no greater standing to contest the forfeiture of the defendant's property than any other creditor whether he can trace his property to the defendant's estate or not. And to enforce this rule and ensure that all victims are treated equally, the government should move to dismiss the claims of all victims who voluntarily transferred their property to the defendant and leave the equitable distribution of the forfeited funds to the remission process.

V. FAILURE TO STATE A CLAIM

The ancillary proceeding statutes set forth two grounds for relief. A third party either can establish that at the time of the offense giving rise to the forfeiture, the property in question belonged to him or that his interest in the property was superior to that of the defendant, or he can establish that after the offense was committed, he obtained the property from the defendant as a bona fide purchaser for value who was without reason to know that the property was subject to forfeiture. 81 If a third party fails to allege facts sufficient to support a claim under either of these theories, his claim may be dismissed without a hearing for failure to state a claim upon which relief can be granted. 82

80 See United States v. $3,000 in Cash, 906 F. Supp. 1061 (E.D. Va. 1995) (even though claimant/victim could trace his money to seized bank account, title passed to perpetrator making claimant an unsecured creditor without standing).

81 18 U.S.C. § 1963(1)(6)(A) and (B); 21 U.S.C. § 853(n)(6)(A) and (B).

Interest in existence when the crime occurred

To succeed under the first prong of the third party defense, the claimant must establish that he had a "legal right, title or interest" in the forfeited property that existed at the time of the offense giving rise to the forfeiture. A third party who acquired the property after the commission of the offense, i.e. after it became subject to forfeiture, must make his claim under the second, or bona fide purchaser prong, of the statute.\(^{83}\)

For example, in \textit{United States v. Sokolow},\(^{84}\) the defendant's wife and daughter claimed that the property the government wanted to forfeit as the proceeds of a fraud offense actually belonged to them. The court held that to the extent the property in question had been transferred by the defendant to the claimants after the crime occurred, the claim had to be made under the bona fide purchaser prong of the statute. To the extent that the property was traceable to the investment of legitimate funds held by family members at the time the crime occurred, the wife and daughter could assert a claim under the "superior interest" prong, but in that instance, the government would be able to use accounting techniques such as first-in, first-out to rebut any claim that the property was traceable to such legitimate funds.\(^{85}\)

The showing the claimant has to make to establish that he had a legal interest in the property is similar if not identical to the showing he must make to establish standing.\(^{86}\) He must


\(^{84}\) \textit{Id.}

\(^{85}\) \textit{Id.}

\(^{86}\) Courts generally treat the standing requirement in § 1963(1)(2) (claimant must have a "legal interest in the property") and the substantive requirement in § 1963(1)(6)(A) (claimant must have a "legal right, title or interest in the property") as equivalent such that one who fails to satisfy the standing requirement fails to establish the substantive requirement, and vice versa. See \textit{United States v. BCCI Holdings (Luxembourg) S.A. (In Re Petition of Chawla)}, 833 F. Supp. 9, 15 (D.D.C. 1993) aff'd 46 F.3d 1185 (D.C. Cir. 1995) (even if he had standing under § 1963(1)(2), general creditor would fail to meet
have a real interest in the property; nominal ownership is not sufficient. So if the defendant placed the forfeited property in the names of family members to avoid forfeiture but continued to exercise full dominion and control over the property, the family members could not satisfy the superior interest requirement. But if the defendant was merely a bailee, and the property was truly owned by a bailor who gave the defendant the property to carry, the bailor would have a valid third-party claim under the superior ownership prong of the statute.

**Constructive trusts**

Crime victims -- who otherwise would be considered general unsecured creditors or tort victims -- may attempt to satisfy the "legal right, title or interest" requirement, as well as the standing requirement, by asserting that the property subject to forfeiture was property that the defendant was holding for them in constructive trust. In other words, a crime victim might say, "The defendant induced me to transfer my property to him by fraud. Therefore, I am not just a creditor of the defendant with no interest in the assets that make up his estate. Those assets were held in constructive trust by the defendant, and I am the beneficiary of that trust."

There are several ways in which the government may respond to the constructive trust argument. First, a constructive trust is an equitable remedy; it is not a "legal interest." Therefore, Congress could not have intended to include beneficiaries of a constructive trust within the scope of a requirement in (1)(6)(A) that he have some legal right, title or interest in the forfeited property; but see United States v. Alcaraz-Garcia, 79 F.3d 769 (9th Cir. 1996) (allegation of ownership is sufficient to establish standing under § 853(n)(2), but may not satisfy "superior interest" requirements of (n)(6)(A)).

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87 See United States v. Messino, 917 F. Supp. 1312 (N.D. Ill. 1996) (defendant's father fails to establish that he was true owner of property purchased in his name but over which he exercised no control).

88 Alcaraz-Garcia, supra (property given to defendant as bailee -- to carry to claimants' relatives in Mexico -- could not be forfeited where bailors retained the right to terminate the bailment at any time).

89 See Matter of Kennedy and Cohen, Inc., 612 F.2d 963, 965 (5th Cir.), cert. denied, 449 U.S. 833 (1980) (a constructive trust is traditionally and correctly viewed as a "tool of equity").
statute that protects persons with a "legal right, title or interest" in forfeited property. All courts that have considered this argument, however, have rejected it, holding that Congress meant to protect anyone with an interest cognizable "under the law."\(^{90}\)

The District of Columbia Circuit rejected a constructive trust claim by focusing on the second part of the statutory requirement. It holds that while a constructive trust may be a "legal interest," it is not an interest that existed at the time of the act giving rise to the forfeiture.\(^{91}\) A constructive trust is a remedy imposed by the court after the fact. Therefore, the beneficiary of a constructive trust cannot satisfy the pleading requirements of the "superior interest" prong of the forfeiture statute.

The Second Circuit takes a slightly different approach. It holds that a constructive trust is a cognizable legal interest that existed at the time of the criminal act, but only if the defendant can trace his property directly to the property allegedly held in trust.\(^{92}\) In other words, a constructive trust will not assist every person who was victimized by the defendant. Most victims are general creditors or tort victims with not interest in any particular asset held by the defendant. But courts may impose a constructive trust for the benefit of those victims who voluntarily transferred their property to the defendant but who nevertheless can trace their property to a specific asset.\(^{93}\)

As mentioned, acceptance of this argument can result in great unfairness to similarly situated victims who are unable to

\(^{90}\) See United States v. Schwimmer, 968 F.2d 1570, 1583-84 (2d Cir. 1992); United States v. Lavin, 942 F.2d at 185 n.10 ("legal interest" includes rights protected in equity); United States v. Campos, 859 F.2d at 1238-39 (suggesting, in dicta, that a constructive trust is a "legal interest" for the purposes of the ancillary forfeiture proceeding); County of Oakland v. Vista Disposal, 826 F. Supp. 218 (E.D. Mich. 1993).

\(^{91}\) United States v. BCCI Holdings (Luxembourg) S.A. (In re Petition of Chawla), 46 F.3d 1185 (D.C. Cir. 1995) (because constructive trust, as an equitable remedy, doesn't come into existence until imposed by a court, it cannot be asserted as an interest in existence at the time of the act giving rise to the forfeiture).


\(^{93}\) Id.
trace their assets to the forfeited property. A constructive trust, of course, is a creature of equity, and the essence of equity is fundamental fairness. Accordingly, in cases where the imposition of a constructive trust would benefit one victim at the expense of other equally innocent victims, courts have exercised their discretion and declined to impose a trust for the benefit of anyone.\footnote{See United States v. BCCI Holdings (Luxembourg) S.A. (In re Petition of Chawla), 833 F. Supp. 9, 14 (D.D.C. 1993), aff'd 46 F.3d 1185 (D.C. Cir. 1995) (court should not impose a constructive trust, even if all elements are otherwise satisfied, if to do so would disrupt liquidation proceedings designed to distribute forfeited property equitably, and provide an advantage to some victims and the expense of others); United States v. Sokolow, 1996 WL 32113 (E.D. Pa. Jan. 26, 1996) (unpub.) (constructive trust not imposed because the opportunity to file a remission petition with the Attorney General gives claimant adequate remedy at law).} In such cases, court have deferred to the government's authority to distribute the forfeited funds equitably to all victims once the order of forfeiture is final.\footnote{Id.; see also United States v. Ribadeneira, 1996 WL 148355 (S.D.N.Y. Apr. 2, 1996) (unpub.) (constructive trust not imposed because the opportunity to file a remission petition with the Attorney General gives claimant adequate remedy at law).}

Finally, to receive the benefits of a constructive trust, the claimant/beneficiary must establish that he has "clean hands." If the claimant was himself a collaborator in the defendant's scheme but learned too late that the defendant was defrauding him as well as other victims, the claimant is not entitled to the imposition of a constructive trust and is treated like all other unsecured creditors for the purposes of contesting the forfeiture of the defendant's property.\footnote{See United States v. $3,000 in Cash, 906 F. Supp. 1061 (E.D. Va. 1995) (constructive trust not imposed, even though claimant could trace assets, because claimant was a participant in defendant's scheme to defraud the Nigerian government).}

\textbf{Bona fide purchasers}

The second prong of the ancillary proceeding statute pertains to persons who acquired their interest in the forfeited property after the commission of the crime giving rise to the forfeiture. Under the relation back doctrine, any property derived from a criminal offense or used to commit the offense remains subject to forfeiture notwithstanding the defendant's
attempt to transfer the property to a third party. The purpose of the provision, of course, is to prevent defendants from shielding their property from forfeiture by transferring it to someone else.

In enacting the relation back provision, however, Congress recognized that the doctrine should not apply to deprive a person of property that he acquired as a bona fide purchaser for value without reason to believe that the property was subject to forfeiture. Just as the bona fide purchaser provision in commercial law protects a person who acquires property from someone who had defective title, the second prong of the ancillary proceeding statute protects a person who acquired property from a criminal defendant whose title was forfeitable to the government under the relation back doctrine.

So, if someone gives value to the defendant for a car that was purchased with drug proceeds, or a car that was used to smuggle drugs, and does so without having any reason to know that the car was involved in or is traceable to an illegal act, he could file a claim in the ancillary proceeding and recover his interest in the car. In particular, this provision protects attorneys who provide legal services in exchange for payment that the attorney has no reason to believe is traceable to illegal activity. If the attorney is aware that he is being paid with criminal proceeds, however, he is not a bona fide purchaser and his legal fee may be forfeited.

Courts have been fairly strict in limiting the bona fide purchaser provision to the meaning it has in the commercial law context. In particular, courts decline to consider creditors, persons who received gifts, or persons with causes of action against the defendant to be bona fide purchasers. Thus, a woman who receives property from her defendant husband in a divorce settlement is not a bona fide purchaser because she gave

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98 See In Re: Moffitt, Zwerling & Kemler, P.C., 846 F. Supp. 463 (E.D. Va. 1994) (Moffitt I) (criminal defense attorney who was paid in cash by his client was not a bona fide purchaser under § 853(n)(6)(B); claim that third party was without cause to believe property was subject to forfeiture must be "objectively reasonable"); id. at 475 (attorney cannot claim he was without reason to believe property was "subject to forfeiture" because he thought government would refrain from forfeiture; question is whether attorney knew property was derived from drug trafficking).
no value for the property.\textsuperscript{99} The defendant's daughter is not a BFP if she received the property from her father as a gift knowing he had been indicted.\textsuperscript{100} A trade creditor to whom the defendant owes a debt is not the bona fide purchaser of any asset subject to forfeiture,\textsuperscript{101} nor is a person holding a check drawn on the defendant's bank account the BFP of the funds in the account.\textsuperscript{102}

"Donee" vs. "bona fide purchaser"

The third party defenses to criminal forfeiture are most easily understood when contrasted with the statutory "innocent owner" defenses applicable to most civil forfeitures.\textsuperscript{103} In one sense, the criminal forfeiture provision is more favorable to the government than the civil provision. In civil cases, anyone with an ownership interest can assert a claim, including a donee who acquires his interest in the property as a gift after the commission of the crime giving rise to the forfeiture.\textsuperscript{104} In contrast, the second prong of the criminal forfeiture provision contains a BFP requirement for those who acquire the property after the offense.


\textsuperscript{100} Id.

\textsuperscript{101} United States v. Campos, 859 F.2d at 1238; see also, United States v. BCCI Holdings (Luxembourg) S.A., 46 F.3d 1185 (D.C. Cir. 1995) (general creditors are not bona fide purchasers); United States v. Lavin, 942 F.2d at 185-87 (refusing to recognize tort victims as bona fide purchasers); BCCI Holdings (Class Petitions), 833 F. Supp. at 16; BCCI Holdings (Depositors II), 833 F. Supp. at 21; BCCI Holdings (Trade Creditors), 833 F. Supp. at 28; BCCI Holdings (Branch Petitions), 833 F. Supp. at 39; but see United States v. Reckmeyer, 836 F.2d 200 (4th Cir. 1987).


\textsuperscript{103} See e.g. 21 U.S.C. § 881(a)(6) and (7) ("no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner").

\textsuperscript{104} United States v. 92 Buena Vista Ave., 113 S. Ct. 1126 (1993).
So, in a civil case, the defendant can insulate his property from forfeiture by conveying it to a minor child. In the Third Circuit, the defendant can protect his property from civil forfeiture by conveying it to virtually anyone because the court of appeals has ruled that the owner's innocence must be evaluated as of the time the crime occurred. Because a donee could not have consented to the use of the property in the commission of the offense before he owned the property, the court held, a person who receives the property from the defendant as a gift after the crime has been committed is automatically an innocent owner.  

In a criminal forfeiture case, of course, a person who acquired the property after the offense giving rise to the forfeiture must show that he was a bona fide purchaser without reason to know that the property was subject to forfeiture. Thus, in cases where property has been transferred to a donee, the government will make every effort to forfeit the property as part of the criminal case.

"Superior owner" vs. "innocent owner"

On the other hand, with respect to property held at the time of the offense, the civil rule is better for the government. In civil cases, the claimant must establish his "innocence," that is why the statute is called an "innocent owner" defense. In criminal forfeiture, however, "superior interest" will suffice; because only the defendant's property can be forfeited, the third-party claimant need only show that his interest in the property is superior to the defendant's interest; his innocence is irrelevant. Thus the criminal forfeiture provision is a "superior ownership" defense, not an "innocent ownership" defense.

\[\text{105 United States v. One 1973 Rolls Royce, 43 F.3d 794 (3d Cir. 1994).}\]

\[\text{106 See United States v. Lester, ___ F.3d ___, 1996 WL 297070 (9th Cir. Jun. 6, 1996) (§ 853(n)(6) is not an innocent owner statute; it requires only a showing of superior ownership; because only the defendant's interest is fft'ble in a criminal case, an innocent owner defense is unnecessary). Unfortunately, many courts have misunderstood this distinction. See e.g. United States v. Alcaraz-Garcia, 79 F.3d 769 (9th Cir. 1996) (holding that claimants would not be permitted to establish an innocent owner defense in a criminal case but repeatedly referring to § 853(n) as an "innocent owner" statute).}\]
This means that a person who was complicit in the commission of the criminal offense but who is not prosecuted may recover his ownership interest in a criminal case, but not a civil one. For example, assume a defendant with the full knowledge and even the assistance of his wife, uses marital property to distribute drugs, but only the defendant is prosecuted. In a criminal forfeiture case, the wife, notwithstanding her complicity in the offense, could file a claim and recover her interest in the property. In contrast, in a civil case, because the wife could not satisfy the innocent owner defense her interest would be subject to forfeiture. For this reason, the government prefers to forfeit jointly held property in civil forfeiture cases.

Examples

Some simple examples illustrate the differences between the criminal third party defenses and the civil innocent owner defense.

1. Suppose the defendant uses his truck to distribute drugs and then conveys the truck as a gift to his sister who knows nothing about the illegal use. In a civil forfeiture case, the sister would get the keep the truck because she is an innocent owner; but in a criminal case the sister would lose because she is not a bona fide purchaser.

2. Now suppose the defendant uses his truck to deliver drugs and conveys the truck as a gift to his sister saying, "here is the truck I used in my drug business." The sister still loses in the criminal case because she is not a BFP. In the civil case, the sister would lose in most courts because she was had knowledge of the illegal use of the truck at the time she acquired it, but she would win in the Third Circuit because she did not have the guilty knowledge at the time the crime occurred.

3. Suppose the defendant uses his sister's truck to deliver drugs and the sister knows all about it but is not prosecuted. If the government knows at the outset that the truck belonged to the sister, it cannot even attempt to forfeit the truck in the criminal case because it wasn't the defendant's property. If the truck is forfeited but the sister then files a third party claim that establishes that she had superior title, she will recover the truck despite her role in the offense because innocence is not a factor. But the sister would lose in a civil case because she is not an innocent owner.

Substitute assets

The criminal forfeiture statutes provide that when the property subject to forfeiture from the defendant cannot be located, the court may order the defendant to forfeit substitute
assets. Substitute property, of course, like any other property held by the defendant, may be subject to claims of superior or competing ownership from third parties. So the question arises, do all of the rules governing third party claims apply when the government is attempting to forfeit substitute assets?

What little case law there is suggests that substitute assets are treated like any other property for purposes of the ancillary proceeding. There are some aspects of the third-party provisions of the forfeiture statutes, however, that do not make sense in the context of substitute assets.

For example, the relation-back provisions of the forfeiture statutes say that the government's interest vests in the property at the time of the offense giving rise to forfeiture. The "superior owner" provisions say that the third party must show that his interest existed at that time. But property forfeited as a substitute asset may not have even existed at the time the crime giving rise to the forfeiture was committed. Suppose a defendant who committed a fraud offense in 1992 is prosecuted in 1995 and ordered to forfeit the proceeds of the fraud. If the proceeds cannot be located, the court can order the forfeiture of the defendant's 1995 Mercedes Benz as a substitute asset. If there is a third party claim to the automobile, how would a third party show he had an interest in the property "at the time of the offense" if the asset did not exist at that time or the defendant did not acquire it until afterwards?

So when does the government's interest in substitute assets vest? At the latest, a third party whose interest did not vest until after substitute assets were included in an order of forfeiture should not be able to claim superior title. Beyond


108 See United States v. Lester, ___ F.3d ___, 1996 WL 297070 (9th Cir. Jun. 6, 1996) (ancillary proceeding applies equally to property forfeited as substitute assets); United States v. Henry, 850 F. Supp. 681 (M.D. Tenn. 1994) (defendant's spouse had standing to contest forfeiture of marital residence that was forfeited as substitute property).


110 Sections 1963(l)(6)(A) and 853(n)(6)(A).

111 See United States v. Ripinsky, No. CR 93-409(A) WJR (C.D. Cal. Mar. 24, 1995) (creditor who obtains judgment lien against property after it is forfeited as substitute asset does not have a valid claim).
that, the government may argue that no one should be able to acquire an interest in property once it has been named in an indictment as property subject to forfeiture as a substitute asset, because at that point the third party is on notice of the government's intent to forfeit the property. But it is likely that Congress will have to resolve this matter in subsequent legislation.

VI. ANSWER AND DISCOVERY

If a motion to dismiss a third-party claim is granted, the claimant may appeal. If the motion to dismiss is denied, or if none is file, the next step in the process is for the government to file an Answer and request discovery of evidence supporting the third party's claim.

The criminal forfeiture statutes, unfortunately, do not say anything about discovery in the ancillary proceeding. They provide only for discovery by the government for the purpose of locating the defendant's assets. For example, the government can ask the court at any time to order a bank to turn over bank records that might reveal the location of the defendant's forfeitable property. The sensible view, however, is to regard the ancillary proceeding essentially as a civil matter in which the court has the inherent power to order traditional two-way civil discovery. Courts that have addressed this question have followed this rule.


113 See United States v. Saccoccia, 898 F. Supp. 53 (D.R.I. 1995) (government can take depositions of defense counsel to determine source of their fees for the purpose of locating a pool of assets controlled by the defendant that is subject to forfeiture); United States v. Saccoccia, 913 F. Supp. 129 (D.R.I. 1996) (defendant has a right to be present at any deposition conducted for the purpose of locating his forfeitable assets).

114 See United States v. Alcaraz-Garcia, 79 F.3d 769 (9th Cir. 1996) (ancillary proceeding is essentially a civil matter such that the civil appellate rules apply to appeals from the denial of third-party claims); United States v. Lavin, 942 F.2d 177 (3rd Cir. 1991) (same).

115 See United States v. BCCI Holdings (Luxembourg) S.A. (In re Petition of Department of Private Affairs), 1993 WL 760232 (D.D.C. 1993) (government may take discovery from claimant); United States v. Porcelli, CR-85-00756 (CPS), 1992 U.S. Dist. LEXIS 17928 (E.D.N.Y Nov. 5, 1992) (court may use inherent powers to permit third party to obtain discovery from defendant in accordance with civil rules); United States v. Duboc, No. GCR 94-
VII. TRIAL

Few third party petitions have actually gone to trial. Generally, the cases are resolved through settlements or disposed of on motions to dismiss before that happens. So the case law provides little guidance on how a trial in an ancillary proceeding should be conducted.

The statutes themselves provide that the hearing shall be to the court alone without a jury. While the constitutionality of this provision has been challenged, it has been upheld on the ground that the ancillary proceeding is akin to a quiet title action. The government is not seeking to forfeit the property of any third party in the ancillary proceeding; the forfeiture occurred as part of the criminal trial. The ancillary hearing exists only for the purpose of giving a third party the opportunity to establish that title to the forfeited property does not lie with the defendant as the court originally determined.

For the same reasons, the statutes provide that the court, in the ancillary proceeding, may take into account evidence presented during the criminal trial. This, too, has been subject to constitutional challenge on the ground that the third party's rights in the property should not be determined on the basis of evidence admitted in a proceeding from which the third party was explicitly excluded. As mentioned earlier, however, the issues litigated at trial mainly involve the forfeitability of the property. Because the only the defendant's interest in the property is subject to forfeiture, the third party has no reason to contest the forfeitability of the property. Therefore, the third party has no reason to object to the court's

01009-MMP (N.D. Fla. May 9, 1996) (third party may obtain discovery from the government, but discovery is limited to the narrow issues of ownership to be adjudicated in the ancillary proceeding).


118 See United States v. Farley, 919 F. Supp. 276 (S.D. Ohio 1996) (court is not bound, in the ancillary proceeding, to the factual basis for the forfeiture that was asserted in the criminal case; § 853(n)(5) requires only that the court "consider" the record).
consideration of evidence relating to forfeitability in the course of the ancillary proceeding.

What the third party has the right to litigate in the ancillary proceeding is his ownership of the property. If evidence relating to ownership was admitted in the criminal trial, it might be unfair for the court to draw any inference from that evidence without giving the third party claimant an opportunity to rebut it. One court has held, however, that if the defendant puts on evidence in the criminal case tending to show that he was not the owner, and the jury rejects it, the court can take that finding into account in the ancillary proceeding, as long as the third parties themselves were among the witnesses whose trial testimony the jury rejected.\footnote{119 United States v. Messino, 917 F. Supp. 1303 (N.D. Ill. 1996) (court in ancillary proceeding could consider that third parties testified at trial that they were owners, not nominees, and jury returned special verdict anyway).}

\section*{VIII. SETTLEMENTS}

At any point during the ancillary proceeding, the government can settle a third party claim. There is some question as to whether the court has to approve the settlement, but generally it does. In most cases, the preliminary order of forfeiture says that the Marshal is to hold forfeited property pending further order of the court, so approval of a settlement is part of the court's modification of the preliminary order of forfeiture to deduct the amount owed to the claimant before the order becomes final. For example, in a simple case, the court could issue a final order of forfeiture and order Marshal to pay the unforfeited amount to the claimant.

Alternatively, a settlement agreement could provide that the claimant withdraw his claim, allow the order of forfeiture to become final, and then submit a remission petition to the Attorney General. A settlement of that nature would not involve the court or require its approval. It is important to remember, however, that the government cannot agree to accept any remission petition until the order of forfeiture is final. As long as there are other third party claims pending, the forfeited property does not belong to the government and the government therefore does not have anything to remit.\footnote{120 See United States v. Schwimmer, 968 F.2d 1570 (2d Cir. 1992) (government could not agree to remit portion of forfeited property to an attorney as long as the competing claim of another third party was pending in the ancillary proceeding).}
In multi-claim cases, the best course is to have the court approve the settlement and order the Marshal to disburse a portion of seized the funds to the claimant in accordance with the settlement agreement while holding the balance of the funds in reserve until all third-party claims are resolved and the order of forfeiture is final. This, of course, will only work if the property that is the subject of the settlement is not also the subject of a competing third party claim. In that case, the government cannot agree to let one claimant take what another claim contends actually belongs to him.

What courts have approved in that situation is a "contingent settlement" which provides that in the event all other claims are resolved in favor of the government, the government agrees to ask the court to disburse a portion of the forfeited property to the party with whom it is settling. In that instance, the property remains in the custody of the Marshals until the competing claims are resolved, at which point the government asks the court to disburse the property pursuant to the previously-approved settlement agreement.121

IX. JURISDICTION IF DEFENDANT APPEALS

What happens to the ancillary proceeding if the defendant appeals his conviction? Does the court have to suspend its consideration of all third party claims to be sure that the conviction and forfeiture order will be affirmed, or can it proceed with the ancillary proceeding? The forfeiture statutes provide no good answer to this question, and there is virtually no case law on this point.

First, the Federal Rules of Criminal Procedure and the forfeiture statutes conflict on stays pending appeal. Rule 38 says the court can stay a criminal forfeiture pending appeal, but §§ 1963(f) and 853(h) say that only third parties, and not the defendant, may request a stay of the forfeiture order. This is odd, because generally it would be the defendant who wants the stay to preserve his interest in the property while his appeal is pending. Third parties usually want to go ahead with the ancillary proceeding without delay, particularly if the property is depreciating.

In any event, the provision allowing third parties to request a stay pending appeal implies that without a stay, the

121 See United States v. BCCI Holdings (Luxembourg) S.A., Cr. No. 91-0655 (JHG) (D.D.C. July 29, 1992) (order approving contingent settlement with State of Florida whereby portion of forfeited funds would be disbursed to Florida in accordance with settlement agreement once competing claims to the same property were resolved).
ancillary proceeding would go forward despite the appeal. Moreover, the district court retains jurisdiction over the order of forfeiture for other purposes even if an appeal is pending, so there does not appear to be any jurisdictional reason why the court cannot go forward with the ancillary proceeding even if the defendant appeals his conviction.

The problem, of course, is that the defendant is excluded from the ancillary proceeding. Any judgment in favor of a third party on the ground that the third party has a superior interest in the property is made at the expense not only of the government, but at the expense of the defendant as well. One might say that the United States stands in the shoes of the defendant in the ancillary proceeding, because the government has the same interest in defending the defendant's interest in the property as the defendant himself would have; but suppose the defendant wins his appeal. If in the meantime the court has found in favor of a third party, the defendant's interests in the property will have been adjudicated in a proceeding that he was barred from entering as a party.

Most likely, Congress will have to amend the forfeiture statute to give a defendant who is appealing his sentence the right to intervene in an ancillary proceeding to protect his property rights. In the mean time, the government may attempt to get the defendant to waive in writing any objection to the third party's claim, or it can litigate the third party's interest (or settle the claim) but not actually transfer the property to the successful claimant until the appeal is resolved.

Parallel civil and criminal cases

The obvious solution to the problem of competing interests in forfeitable property is to do the forfeiture civilly so that the defendant and all third parties can file their claims at the same time. If, for whatever reason, the forfeiture proceeds criminally, however, the government may file a parallel civil forfeiture action while the criminal case is pending.

Suppose, for example, in a criminal forfeiture case the government realizes that a third party -- who was complicit in

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122 See United States v. Hurley, 63 F.3d 1 (1st Cir. 1995) (court retains authority to order forfeiture of substitute assets after appeal is filed); United States v. Messino, 907 F. Supp. 1231 (N.D. Ill. 1995) (the district court retains jurisdiction over forfeiture matters while an appeal is pending; court may order forfeiture of substitute assets and enter final order of forfeiture if no third party files a claim).

the scheme but is not charged as a defendant -- may be able to establish a superior interest in the property that the government wants to forfeit from the defendant in the criminal case. For the reasons mentioned above, if such a person can establish his superior interest he will win in the ancillary proceeding, but he could not win a civil case because he could not establish an innocent owner defense. Thus, the government needs to bring a civil forfeiture case to dispose of the third party's interest.

In this instance, the government should file a civil forfeiture action against the property and ask the court to stay it pending the resolution of the criminal case. The government should then include a criminal forfeiture count in the indictment and proceed to trial against the defendant. Once the defendant is convicted and an order of forfeiture is entered, and affirmed on appeal, the defendant will no longer have an interest in the property. At that point, the government can resurrect the civil case and proceed to litigate with the third party without fear that the defendant will have any standing to intervene in the civil case.

Of course, this means holding the ancillary proceeding in abeyance until the defendant's conviction is affirmed on appeal, and then dismissing the ancillary proceeding in favor of the civil forfeiture. The third parties may complain that they would prefer to go forward with the criminal forfeiture proceeding, for obvious reasons: the absence of any innocence requirement. They may argue that as long as they have a claim pending in the ancillary proceeding, that proceeding cannot be dismissed. But the court is not obligated to keep a forfeiture proceeding alive just because it confers a tactical advantage on a claimant when the issues is that proceeding have been rendered moot by, or can be resolved in, another case.124

Third parties may also argue that once the government has chosen its method of forfeiture it has no choice but to stick to it. But that is not correct either. In bringing a criminal forfeiture action, the government acknowledges that it seeking to forfeit only the defendant's interest in the property. The jury verdict and the order of forfeiture extinguish the defendant's interest, but up to that point, the government has taken no action whatsoever against any third party's interest, and it remains free to do so for the first time in a civil case. There is no reason why the government's original choice of criminal

124 Cf. United States v. One 1990 Arctic Cat EXT Snowmobile, 1996 WL 132107 (S.D.N.Y. Mar. 22, 1996) (claimant in civil forfeiture case could not object to government's motion to dismiss the forfeiture action once the property was forfeited in a criminal case, even though the claimant saw some strategic advantage in proceeding with his civil claim).
forfeiture to divest the defendant of his interest should preclude it from filing an entirely separate action against the interests of other parties. And if the government is going to proceed with a civil action in that case, it would be a waste of everyone's time to go forward with the ancillary proceeding in the criminal case.

X. PROPERTY TRANSFERRED TO THIRD PARTIES

The final topic concerns the mechanism for forfeiting property that the defendant has transferred to a third party. Recall the example of the truck transferred to the defendant's sister. According to the forfeiture statutes, the government can void the transaction and get the truck back from the sister. But suppose the sister has already sold the truck? Can the government recover substitute assets from the sister? Can it forfeit the money the sister received in return for the truck?

These issues were litigated in the Eastern District of Virginia in a series of cases involving the forfeiture of drug proceeds that had been transferred to a criminal defense attorney as an attorneys fee. In the criminal case, the government obtained an order of forfeiture for the money, but the defense attorney filed a third party claim in the ancillary proceeding asserting that he was a bona fide purchaser. The court rejected the claim, holding that the attorney was not a person "reasonably without cause to believe that the property was subject to forfeiture." When the government attempted to collect the forfeited property from the defense attorney, however, he objected that he had already spent it. When the government sought to recover substitute assets from the defense attorney, the court said no. The substitute assets provision applies only to the defendant; it cannot be invoked to recover any property from a third party. That was not the end of the case, however. The government argued that if the defense attorney had in fact spent the money, he should be required to forfeit whatever property he had received in return. The court agreed. In a criminal case, the government may recover property traceable to forfeitable property transferred to third party, and may conduct discovery to locate

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125 18 U.S.C. § 1963(c) (property transferred to third party shall be included in the special verdict and forfeited); 21 U.S.C. § 853(c) (same).


Thus, the attorney and members of his law firm were required to submit to discovery so that the government could determine if other assets at the law firm constituted property traceable to the forfeited attorneys fee.

Alternatively, the court held that the government may institute a civil action in federal court against the third party based on the state law of conversion. That is, because the subject property belonged to the government under the relation back doctrine, the third party's dissipation of that property constitutes a cause of action in tort which the federal court will adjudicate.

CONCLUSION

Practitioners are likely to see an explosion of litigation over criminal forfeiture issues as the government begins to file more of its forfeiture actions in criminal cases and the courts are forced to fill in the void left by the many ambiguities in the present law. In the end, it is likely that Congress will have to resolve many of these issues that were unforeseen when the criminal forfeiture statutes were enacted.

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