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Introduction

Governments have developed a variety of tools for recovering the proceeds of crime. In the United States, in addition to being able to recover property as part of the sentence in a criminal case if the wrongdoer is convicted, the Government may file a judicial action against the criminally-derived property itself, and recover it in a civil case. Such property, once recovered, may then be distributed to the victims of the crime. This process is called civil forfeiture.\(^3\)

Civil forfeiture is widely used in the United States.\(^4\) In particular, it is the vehicle of choice for recovering criminal proceeds when the wrongdoer is deceased or is a fugitive from justice who cannot be brought to trial in a criminal case. For example, if a fraudster deposits money in a bank account in the United States and then flees to a foreign country, the Government will likely file a civil forfeiture action against the money that the fugitive left behind.\(^5\) This method of

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\(^1\) This article is an edited version of two presentations made by the author at the 22\(^{nd}\) Cambridge International Symposium on Economic Crime on September ___ 2004 and the 23\(^{rd}\) Cambridge International Symposium on Economic Crime on September 7, 2005.

\(^2\) The author is the Deputy Chief of the Asset Forfeiture and 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 of the Department of Justice or any of its agencies.


\(^4\) The Drug Enforcement Administration (DEA) alone initiates over 14,000 forfeitures a year in drug cases. The Federal Bureau of Investigation (FBI) commences several thousand more in cases ranging from fraud, to gambling, to obscenity, to terrorism. Other federal agencies use forfeiture to enforce the currency reporting and alien smuggling laws, the Customs laws, laws relating to the protection of fish and wildlife and many others.

\(^5\) A provision of law called the fugitive disentitlement doctrine precludes a fugitive from contesting the civil forfeiture of his property if he is capable of returning to the United States to stand trial in a related criminal case but is refusing to do so. See 28 U.S.C. § 2466; Collazos v. United States, 368 F.3d 190 (2d Cir. 2004) (explaining the elements of the fugitive disentitlement doctrine and upholding its application).
recovering the proceeds of crime works less well, however, when the fugitive takes his ill-gotten gains with him and deposits them in a foreign bank. The courts in the United States have the authority to enter forfeiture orders against property located in foreign accounts if it was derived from a crime that occurred in the United States, but enforcement of such orders is problematic.

Given the increasing globalization of crime, it has been clear for some time that new tools are needed to recover criminal proceeds in these situations. One such tool was created in 2001 as part of the USA Patriot Act when the United States Congress enacted a new civil forfeiture statute that allows the Government to recover criminal proceeds that have been deposited in a foreign bank account by filing a civil forfeiture action not against the funds in the foreign account itself, but against the funds that the foreign bank has on deposit in the United States at a domestic financial institution. This provision, 18 U.S.C. § 981(k), while controversial, has proven effective in allowing the Government of the United States to recover property from wrongdoers in the types of cases where it was intended to be applied.

This article sets forth the rationale for Section 981(k) and the requirements the Government must satisfy to use it successfully to recover criminal proceeds. It then discusses the facts of a case where the new statute was applied and the legal arguments that were made when a foreign bank challenged the application of the statute in federal court. Finally, it discusses how the court resolved those issues in granting the Government's suit for the recovery of the money.

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6 See 28 U.S.C. § 1355(b)(2); United States v. All Funds in Account Nos. 747.034/278 (Banco Espanol de Credito), 295 F.3d 23 (D.C. Cir. 2002) (section 1355(b)(2) gives the district court in rem jurisdiction over property located abroad; the foreign country's compliance and cooperation "determines only the effectiveness of the forfeiture orders of the district courts, not their jurisdiction to issue those orders"); Contents of Account Number 03001288 Held in the Name of Jalal, 344 F.3d 399 (3d Cir. 2003) (same, following Banco Espanol).

7 The difficulties include the absence of an effective bilateral agreement, such as a Mutual Legal Assistance Treaty or MLAT, relating to the enforcement of civil forfeiture orders, or the foreign country's inability under its domestic laws to enforce such orders. See Stefan D. Cassella, "The Recovery of Criminal Proceeds Generated in One Nation and Found in Another," 9 J. of Financial Crime 268 (2002) (paper presented at the 19th Cambridge International Symposium on Economic Crime, Cambridge University, September 2001).

Why was Section 981(k) enacted?

In the United States, the traditional method for recovering criminal proceeds from a fugitive is to file a civil forfeiture action against the bank account into which the proceeds have been deposited. As mentioned, this works well when the bank account is in the United States, and less well when it is located abroad. The problem is that as long as the property subject to forfeiture is viewed as being located in the United States, the U.S. courts have the power to enforce their forfeiture orders, but when the property is viewed as being located abroad, they do not. But where are the proceeds of crime that have been deposited into a foreign bank located? As various commentators have recognized, money deposited into a dollar-denominated account in a foreign bank may actually be in two places: in the foreign account in the form of the debt that the foreign bank owes to its depositor, and in the United States in the form of the dollar-based correspondent account that most foreign banks maintain in the United States for the purpose of facilitating their customers’ transactions. ⁹

The relationship between the correspondent account and the criminal proceeds is best illustrated by understanding what would happen if the depositor wanted to move his funds from the foreign account to an account in the United States, or to another account in another bank somewhere else in the world. Suppose an American fugitive deposits $100,000 in fraud proceeds into a bank account in London and then, at some later time, wants to move the $100,000 to a bank in New Zealand. The depositor would go to the London bank and provide wire transfer instructions, identifying the New Zealand bank and the account of the intended beneficiary. The London bank would then debit the customer’s account in London and send instructions to its correspondent bank in the United States – usually one of the major banks in New York – to debit its correspondent account by a similar amount. The U.S. bank would do as instructed, debiting the correspondent account of the London bank and making a simultaneous credit to the correspondent account of the New Zealand bank. (For simplicity, I’m assuming both foreign banks have their correspondent accounts at the same U.S. bank.) Finally, the transaction would be completed when the New Zealand bank is notified of the credit to its correspondent account and makes a simultaneous credit to the account of the intended beneficiary of the transaction in New Zealand.

The key point to notice about this extremely ordinary and commonplace transaction is that no money actually crosses an international border. The entire transaction is accomplished through a chain of offsetting debits and credits. What makes it all possible, however, is that the foreign bank had a correspondent account in the United States that it could debit whenever necessary to move its customer’s funds to another location.

In the 1990s, law enforcement agencies in the United States attempted to take advantage of this relationship between the criminal proceeds deposited in a foreign bank and the foreign bank’s funds in the United States by bringing forfeiture actions against the money in the correspondent accounts of foreign banks. The idea was to set in motion the same series of offsetting debits and credits that would occur if the wrongdoer – the foreign depositor – had decided to transfer his funds to the United States of his own accord. In other words, by seizing funds from the correspondent account in the United States and letting the foreign bank make itself whole by debiting the account of the wrongdoer, the law enforcement agency would, in effect, be seizing the funds from the foreign depositor by forcing him to transfer his funds to the United States involuntarily, through the correspondent account.

From the perspective of the U.S. law enforcement agency, this was no different from what happens in a wholly domestic case when the Government seizes a customer’s funds from a domestic bank with a judicial warrant. In such cases, the bank responds to the warrant by giving the law enforcement agent a check drawn on its own funds, and then makes itself whole by debiting the customer’s account without the customer’s consent. In the case of the foreign bank, the law enforcement agency would accomplish the same thing by seizing the foreign bank’s funds from its correspondent account, and letting the bank debit the customer’s account in whatever foreign country that account happens to be maintained.

*Banking law and the innocent owner defense*

As a matter of banking law, however, the situations were not the same. In the wholly domestic case, the law regards the warrant for the contents of the customer’s account not as a warrant for the seizure of the bank’s funds, but as a warrant for the seizure of the debt that the bank owes its depositor. Thus, the depositor, not the bank, is the party whose property is being seized, and is therefore the party entitled to contest the forfeiture of the funds. The bank, as the debtor in this debtor-creditor relationship, has no standing to object to the forfeiture of the money it owed to the depositor, even though, as a mechanical
matter, it converted the intangible debt into tangible funds by turning its own funds over to the law enforcement agent who served the warrant before debiting its customer’s account.\textsuperscript{10}

In the case of the correspondent account, however, the law in the 1990s regarded the warrant for the contents of the account as a warrant permitting a seizure of the debt that the U.S. bank owed to the foreign bank, not the debt that the foreign bank owed its depositor. Thus, the foreign bank, not its foreign depositor, was the party whose property was being seized, and accordingly it was the foreign bank, not the depositor, that had standing to object to the forfeiture of the funds. Moreover, because forfeiture law in the United States protects the rights of “innocent owners,”\textsuperscript{11} the foreign bank generally was able to prevail against the forfeiture action as long as it could prove that it had no reason to believe that the deposited funds represented the proceeds of crime.\textsuperscript{12}

\textsuperscript{10} \textit{See United States v. BCCI Holdings (Luxembourg), S.A.}, 961 F. Supp. 287, 295 (D.D.C. 1997) (holding that the depositor of funds into a bank is regarded, for federal forfeiture purposes, as the funds’ owner because, although title to the deposited funds passes to the bank when the deposit is made, the depositor is the owner of the debt that the bank owes as a consequence of the deposit; it is that debt, not the originally deposited funds, which the United States seeks to forfeit when it brings a forfeiture action against funds in a bank account); \textit{accord United States v. BCCI Holdings (Luxembourg), S.A.}, 956 F. Supp. 5, 11 (D.D.C. 1997).

\textsuperscript{11} \textit{See} 18 U.S.C. § 983(d) (codifying the innocent owner defense in civil forfeiture cases); Stefan D. Cassella, “The Uniform Innocent Owner Defense to Civil Asset Forfeiture,” 89 \textit{Kentucky Law Journal} 653 (2001).


Right now, due to a quirk in the law, U.S. law enforcement faces a significant and unusual legal barrier to seizing funds from a correspondent account. Unlike a regular U.S. bank account, it is not enough for U.S. law enforcement to show that criminal proceeds were deposited into the correspondent account; instead, because funds in a correspondent account are considered to be the funds of the foreign bank itself, the government must also show that the foreign bank was somehow part of the wrongdoing.

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Section 319(a) would eliminate that quirk by placing civil forfeitures of funds in correspondent accounts on the same footing as forfeitures of funds in all other U.S. accounts. There is just no reason foreign banks should be shielded from forfeitures when U.S. banks would not be.

Section 319(a) of the USA Patriot Act was codified at 18 U.S.C. § 981(k).
The legislative history of Section 981(k)

When the role of correspondent bank accounts in international money laundering became the subject of a Senate investigation, the investigators found that this disparity in the application of the civil forfeiture laws meant that foreign depositors — including terrorists, drug dealers, and other fugitives from justice who committed crimes in the United States — could shield their funds from the reach of U.S. law enforcement by placing them in foreign accounts and hiding behind the foreign bank’s innocent owner defense, even if the funds themselves were in the United States in the correspondent account of the foreign bank.

To prevent this abuse of the correspondent banking system by criminals, the investigators concluded, Congress had to change the forfeiture laws to eliminate the foreign bank as a party to the forfeiture action, and to force the foreign depositor to file a claim on his own behalf if he wanted to contest the forfeiture in the federal courts. That is, the law had to treat the correspondent account as if it were the foreign bank itself, and to treat the debt that the foreign bank owed to its customer as if it were located in the United States, so that a judicial warrant served on the correspondent account would be treated as a warrant for the funds the foreign bank owed to its customer, not as a warrant for the funds that the U.S. bank owed to the foreign bank.

The idea was not to target the foreign bank, but rather to foreign banks and their customers on a par with domestic banks and their customers. In both cases, the bank would be merely the debtor in the debtor-creditor relationship

13 See supra note 9.


with no standing to contest the forfeiture, while the depositor would have standing to file a claim in the forfeiture action, contest the forfeitability of the property, and assert any appropriate claims and defenses, including the innocent owner defense. If the Government prevailed, the foreign bank, like its domestic counterpart, would have the right to make itself whole by debiting the customer’s account, while the foreign customer would lose the advantage of using the bank’s innocent owner status to shield his funds from forfeiture.

The Report accompanying the bill that became title III of the USA Patriot Act expressed the congressional intent in the following way.

To prevent drug dealers and other criminals from taking advantage of certain nuances of forfeiture law to insulate their property from forfeiture even though it is deposited in a bank account in the United States, it is necessary to change the law regarding the location of the debt that a bank owes to its depositor, and the identity of the real party in interest with standing to contest the forfeiture. The amendment in this section addresses the location issue by treating a deposit made into an account in a foreign bank that has a correspondent account at a U.S. bank as if the deposit had been made into the U.S. bank directly. Second, the section treats the deposit in the correspondent account as a debt owed directly to the depositor, and not as a debt owed to the respondent bank. In other words, the correspondent account is treated as if it were the foreign bank itself, and the funds in the correspondent account were debts owed to the foreign bank’s customers.

Under this arrangement, if funds traceable to criminal activity are deposited into a foreign bank, the Government may bring a forfeiture action against funds in that bank’s correspondent account, and only the initial depositor, and not the intermediary bank, would have standing to contest it. 16

How does Section 981(k) work?

Congress’s investigation of the role of correspondent banking in money laundering culminated in the introduction of legislation just a month before the

terrorist attacks in the United States on September 11, 2001. So it was not surprising that the legislation would be included in the USA Patriot Act when it was enacted a month later. Section 319(a) of the Patriot Act was codified as Section 981(k).

Under the statute, if the Government can show that forfeitable property was deposited into an account at a foreign bank, it can recover the property by filing a civil forfeiture action against the equivalent amount of money found in any correspondent account of the foreign bank that is located in the United States. It is not necessary to trace the money in the correspondent account to the foreign deposit; nor does the foreign bank have standing to object to the forfeiture action. Only the person who owned the forfeitable funds at the time they were deposited into the foreign bank has standing to contest the forfeiture.

For example, if the United States learns that the assets of an international terrorist are on deposit in an off-shore bank that has a correspondent account at a bank in New York, the Government may effectively seize the terrorist’s assets by bringing a civil forfeiture action under § 981(k) against the funds in the correspondent account. The Government must give notice of the forfeiture action to the foreign customer, who would have the same rights to contest the forfeiture as any other claimant in a civil forfeiture action filed in the United States, including the right to a jury trial, the right to force the Government to establish the forfeitability of the property by a balance of the probabilities, and the right to

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18 See 18 U.S.C. § 981(k)(1)(A) (“if funds are deposited into an account at a foreign bank, and that foreign bank has an interbank account in the United States . . . , the funds shall be deemed to have been deposited into the interbank account in the United States, and any restraining order, seizure warrant, or arrest warrant in rem regarding the funds may be served on the covered financial institution, and funds in the interbank account, up to the value of the funds deposited into the account at the foreign bank, may be restrained, seized or arrested.”).

19 See § 981(k)(2) (“If a forfeiture action is brought against funds that are restrained, seized, or arrested under paragraph (1), it shall not be necessary for the Government to establish that the funds are directly traceable to the fund that were deposited into the foreign bank . . . .”).

20 See § 981(k)(3) (“the owner of the funds deposited into the account at the foreign bank may contest the forfeiture by filing a claim under section 983”); § 981(k)(4)(B) (defining “owner” as discussed infra).
assert an innocent owner defense. But if the Government meets its burden and prevails, the money will be forfeited to the United States notwithstanding the objections of the foreign bank. The theory is that if the forfeiture action results in the forfeiture of a sum of money from the correspondent account, the foreign bank will debit its customer’s account by the same amount, leaving the bank in a wash situation, and depriving the foreign customer of the funds that have been forfeited to the United States.

The key provision in Section 981(k) is paragraph (4)(B), which defines the “owner” of the seized funds — i.e. the person with standing to contest the forfeiture — as the person who owned the funds at the time they were deposited into the foreign bank. Indeed, the statute specifically precludes the foreign bank from asserting an ownership interest in the seized funds unless the basis for the forfeiture action is the bank’s own wrongdoing, or the bank has already closed or emptied all accounts associated with the prior owner of the funds so that it is no longer able to make itself whole if the Government prevails in the forfeiture action. This, of course, is the equivalent of the rule that the Government may not bring a forfeiture action against funds on deposit at a domestic bank if those funds were withdrawn from the bank before the seizure warrant was executed.

So, in the foregoing example, if the United States seizes funds from the

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21 See generally 18 U.S.C. § 983 (codifying the due process protections in the Civil Forfeiture Reform Act of 2000).


23 See § 981(k)(4)(B)(i)(l) (“owner . . . means the person who was the owner, as that term is defined in section 983(d)(6), of the funds that were deposited into the foreign bank at the time such funds were deposited”).

24 See § 981(k)(4)(B)(ii) (“The foreign bank may be considered the “owner” of the funds . . . only if — (I) the basis for the forfeiture action is wrongdoing committed by the foreign bank, or (II) the foreign bank establishes, by a preponderance of the evidence, that prior to the restraint, seizure, or arrest of the funds, the foreign bank had discharged all or part of its obligation to the prior owner of the funds, in which case the foreign bank shall be deemed the owner of the funds to the extent of such discharged obligation.”)
correspondent account of the bank into which the terrorist funds were deposited, only the alleged terrorist could contest the forfeiture action, unless the foreign bank itself were accused of knowingly accepting terrorist funds, or if the bank closed the foreign account or allowed the alleged terrorist to withdraw his funds before the funds in the correspondent account were seized. In short, the correspondent account is treated as if it were the foreign bank, the alleged terrorist funds are treated as if they were deposited into that bank, and the alleged terrorist is given the same right to challenge the forfeiture of the funds as he would have if he had deposited the funds directly into an account in the United States.

**The UBSI case**

The first real test of Section 981(k) came in a civil forfeiture case filed in the District of New Hampshire where the United States was seeking to recover several million dollars in fraud proceeds on behalf of a number of elderly victims. The case was handled by Assistant United States Attorneys Jean Weld and Gretchen Witt.

In this case, the indicted defendants were fraudsters who ran a telemarketing fraud scheme out of Montreal, Canada. They called elderly people in the United States on the telephone and told them they had won a sweepstakes or lottery in Canada, and that they needed only to pre-pay the taxes by cashier's check in order to receive their winnings. The victims sent over $7 million in cashier's checks to the Defendants (generally in amounts of $10,000 or more), and never received anything in return.

The United States traced $4.5 million of these cashier's checks to seven foreign banks where they were deposited. It then filed a civil forfeiture action under Section 981(k) against the correspondent accounts in the United States of all seven banks, hoping to recover as much as possible of the $4.5 million to return it to the victims. One of the foreign banks, Union Bank for Savings and Investments (UBSI), objected to the forfeiture action, while the others either did not object or agreed to a compromise. Thus, the litigation in the case – the challenge to the Government's ability to use Section 981(k) – occurred in the context of UBSI's claim.

Investigation revealed that 124 of the victims' cashier's checks ($2.8 million) were deposited into an account at UBSI in Ramallah in Israeli-occupied territory in the West Bank. To get there, the checks took a somewhat circuitous route. First, the victims sent their cashier's checks to the defendants in Montreal. The
defendants then sold the checks to a restaurant owner, also in Montreal, who in turn sold them to a broker, who sold them to a money exchanger in Jerusalem, who sold them to a second money exchanger who sold them to a third. The third money exchanger (in East Jerusalem) had an account that he used for his money exchange business at UBSI in Ramallah where he deposited the checks. The bank credited the money exchanger’s account and presented the checks for payment through the U.S. banking system, using its correspondent account at the Bank of New York. Thus, at the end of the day the victims’ money was back in the United States in the correspondent account of UBSI.25

According to the claimants in the forfeiture case, none of these transactions appeared to be in the least bit unusual to the people involved. The money exchanger deposited $41 million in dollar-denominated checks drawn on U.S. banks into his account at UBSI in 2001 alone; he often deposited more than 100 checks in a single day. Indeed, in their depositions, the money exchangers acknowledged that there is a robust market in the Middle East for dollar-denominated checks stolen in the United States. It is anyone’s guess what that money is being used to finance in that part of the world.

In any event, when all of this came to light, the United States could have filed a civil forfeiture action against the money exchanger’s account in Ramallah, and attempted to enforce its judgment there. Instead, using § 981(k), it filed its action against $2.8 million in the UBSI correspondent account at the Bank of New York. As we have seen, Section 981(k) expressly bars a foreign bank from contesting the forfeiture of funds from its correspondent account as long as its customer still has sufficient funds in its account to offset the forfeiture. In this case, UBSI’s customer – the individuals operating as the East Jerusalem money exchanger – still had at least $2.8 million on deposit in various accounts at UBSI. In fact, as soon as the Government seized the $2.8 million from the correspondent account at the Bank of New York, UBSI froze $2.4 in the money exchanger’s business account in Ramallah, and transferred it to Amman, Jordan, to ensure that it would be able to recover that amount if the forfeiture action was sustained.

Thus, all of the conditions set forth in Section 981(k) were satisfied, and it should have been the money exchanger that filed a claim in the forfeiture action, asserting either that the cashier’s checks were not traceable to the fraud, or that it

was an innocent owner whose interest was not subject to forfeiture. But that is not what happened. Instead, it was UBSI that filed a claim in the United States, contesting the application of Section 981(k) on constitutional and other grounds.

Arguments in the UBSI case

Tracing the criminal proceeds to the correspondent account

First, the bank asserted that the funds seized from its correspondent account were not traceable to the fraud proceeds allegedly deposited by the money brokers in Ramallah. The correspondent account, the bank asserted, was extremely active with a balance that fluctuated daily. Accordingly, the bank said, even if the Government could show that the proceeds of the fraudulently-obtained cashier checks had ever been deposited into the correspondent account – which the bank denied – the Government certainly could not prove that the tainted funds were still in the account when the seizure occurred.

The court acknowledged that prior to the USA Patriot Act, the Government would have been required to file its civil forfeiture action under another statute that requires the Government to prove that the seized funds are directly traceable to the act giving rise to the forfeiture. But Section 981(k) changes that. Under the new statute, forfeitable funds that are deposited into a foreign bank are “deemed to have been deposited” in the bank’s correspondent account in the United States. This “legislatively mandated fiction,” the court said, eliminates the tracing requirement in situations where the statute applies. “It’s absolutely clear from the plain language of Section 981(k) that Congress intended to allow for the forfeiture of funds in an interbank account without proof that the funds are directly traceable to forfeitable funds that were originally deposited with the

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26 See 18 U.S.C. § 983(d)(3) (exempting from forfeiture the interests of a person who obtains property as a bona fide purchaser for value without reason to believe that it is subject to forfeiture to the United States).

27 The statute routinely used to forfeit property in fraud cases is 18 U.S.C. 981(a)(1)(C), which makes the proceeds of the fraud forfeitable to the United States. That statute requires proof that the seized property is directly traceable to the underlying offense, unless the “fungible property” provision in § 984 applies. Under § 984, money in a bank account is considered fungible for a period of one year. Because the Government filed its action in the UBSI case under § 981(k), neither the tracing requirements in § 981(a)(1)(C) nor the fungible property provision in § 984 applied.

foreign bank,” the court concluded. Therefore, the Government’s inability to trace the funds in the correspondent account to the fraud scheme could not be asserted as a defense to the forfeiture.29

Ownership of the funds

Second, the bank argued that as the owner of the funds in its correspondent account it had standing to contest the forfeiture and assert an innocent owner defense. But the court held that Section 981(k) eliminated this defense as well. According to the legislative history of the Patriot Act, the court said, the ability of a foreign bank to contest the forfeiture of funds in its correspondent account and to assert an innocent owner defense under Section 983(d)(6) gave criminals who deposited their forfeitable property into foreign banks an advantage over those who deposited their money in domestic institutions. In the latter case, the Government could simply forfeit the money, allowing the bank to make itself whole by debiting its customer’s account. But in the former case, the foreign depositor’s funds were shielded from forfeiture by the bank’s standing to contest the forfeiture of what banking law regarded as the bank’s own funds.30

UBSI argued that Congress could not have intended to change this longstanding principle of banking law, but the court held that that is exactly what Congress intended. The court recognized that under Section 981(k), the foreign account holder has standing to contest the forfeiture of the funds seized from the correspondent account but the foreign bank does not. The notion is that if the account holder fails to challenge the forfeiture, or challenges it unsuccesssfully, the foreign bank can make itself whole by debiting its customer’s account – just as a domestic bank must do when its customer’s funds are forfeited. Thus, under Section 981(k), UBSI lacked standing to contest the forfeiture.31

When has a bank “discharged its obligation” to its customer?

UBSI pointed out that the statute contains an exception that prohibits the


30 Id.

31 Id.
Government from invoking § 981(k) in circumstances where the bank is unable to make itself whole by debiting any accounts of its customer at the foreign bank, but the court held that the exception did not apply in this case.

Under Section 981(k)(4)(B)(ii)(II), the bank retains its standing to contest the forfeiture if it has “discharged . . . its obligation” to the foreign customer. In other words, if the bank cannot make itself whole by debiting the customer’s account, the premise underlying the statute does not apply. UBSI argued that, under long-standing principles of banking law codified in the Uniform Commercial Code, it had “discharged its obligation” to the money exchanger when it presented the cashiers checks for payment to the issuing banks and credited the money exchanger’s account. But the court held that this is not what the statute meant by discharging an obligation to a customer.

When the Government seized the $2.8 million from the correspondent account, the bank froze certain funds in the money exchanger’s business account in Ramallah and placed that money in a holding account in Jordan. Thus it was “undisputed,” the court said, that UBSI “remains obligated to the [money exchanger] for any amounts that remain on deposit in the [money exchanger’s] accounts.” “Since these accounts contain substantially more than the amount that the Government is seeking to seize from [the bank’s correspondent account],” the court said, “[the bank] cannot claim that it has standing because it discharged its obligation to [the money exchanger] before the funds in the interbank account were seized.”

But the issue was not yet resolved. In a motion for reconsideration of the court’s ruling, UBSI argued that even if § 981(k) bars a bank from contesting the forfeiture of funds in its correspondent account as long as its customer still has funds on deposit at the bank, that rule should only apply when the customer’s funds are in the account into which the customer deposited the criminal proceeds. In this case, the bank said, the $2.8 million seized from its correspondent account was greater, by a few hundred thousand dollars, than the amount held by its customer in the particular account into which the fraud proceeds had been deposited. In the bank’s view, the fact that its customer had additional funds in

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another account should be irrelevant.\textsuperscript{34}

Noting that Section 981(k) was intended to apply as long as the foreign bank was capable of making itself whole, the Government argued that the bar on standing applies as long as the prior owner of the deposited criminal proceeds has adequate funds anywhere in the foreign bank. But the court held that the Government’s ability to seize funds from a correspondent account is limited by the amount of money still on deposit in either the same foreign account that held the initially deposited forfeitable funds, or an account that was “fungible” with that account. Accordingly, the court held that the bank had standing to contest the forfeiture to the extent that the seizure from its correspondent account exceeded the funds on deposit in the business accounts that the money exchangers had used to hold the fraud proceeds, notwithstanding that one of the money exchangers had additional funds on deposit in his personal account.\textsuperscript{35}

\textit{Constitutional Issues: Was the forfeiture an “excessive fine?”}

UBSI then raised two constitutional challenges to Section 981(k). First, it argued that the forfeiture of funds in its correspondent account constituted excessive punishment in violation of the Eighth Amendment of the United States Constitution. The Eighth Amendment protects persons accused of wrongdoing from being exposed to “cruel and unusual punishment” or to the imposition of an “excessive fine.” The Supreme Court of the United States has interpreted the latter phrase in forfeiture cases to mean that the forfeiture may not be “grossly disproportional to the gravity of the offense.”\textsuperscript{36} In the UBSI case, the Government argued that a party that lacks standing to contest a forfeiture at all surely lacks standing to contest it on Eighth Amendment grounds. In the Government’s view, the bank’s real argument was that the statute’s denial of standing violated its rights under the Due Process Clause, which was the bank’s second constitutional argument. But the court addressed the Eighth Amendment claim on the merits.

\textsuperscript{34} See United States v. Funds on Deposit in Account No. 890-0057173 Maintained at the Bank of New York by the Union Bank for Savings and Investments Jordan, No. 02-472-B, Union Bank for Savings and Investment’s Motion for Reconsideration of the Court’s January 6, 2005 Order, filed February 3, 2005.

\textsuperscript{35} See United States v. Funds on Deposit in Account No. 890-0057173 Maintained at the Bank of New York by the Union Bank for Savings and Investments Jordan, No. 02-472-B (D.N.H. May 13, 2005) (Transcript of oral opinion delivered from the bench).

It was undisputed that the funds being forfeited were the proceeds of fraud. The bank argued that even so, the forfeiture was punitive from its perspective because it was being deprived of property after having done nothing wrong, but the court held that the forfeiture of criminal proceeds is never punitive regardless of whether the property is being recovered from the wrongdoer or a third party into whose hands the property has fallen. The forfeiture merely restores the status quo ante as to all parties.\textsuperscript{37} Recovering the proceeds of a crime that are in the hands of a third party may seem unfair to the third party who believes he has a right to retain the property, but it is not punishment, and so can never be an excessive punishment in the constitutional sense. Accordingly, the court rejected UBSI’s objection to the forfeiture on Eighth Amendment grounds.\textsuperscript{38}

\textit{Does § 981(k) violate due process?}

UBSI’s final argument was one that the bank itself did not raise until prodded by the court. Section 981(k) was unconstitutional, the bank said, because by barring the bank from even filing a claim in the forfeiture case it deprived the bank of its property without due process of law.\textsuperscript{39}

The Government offered several reasons why the statute did not violate the bank’s right to due process. First, the Government argued that the bank was not being deprived of any property at all; it retained the opportunity to seek recourse for the loss of the money in its correspondent account by debiting the account of its customer in Ramallah just as a domestic bank in the United States retains the right to make itself whole by debiting its customer’s account after honoring a

\textsuperscript{37} See, e.g., United States v. Betancourt, 422 F.3d 240 (5th Cir. 2005) (“the Eighth Amendment has no application to the forfeiture of property acquired with proceeds”; the forfeiture of a winning lottery ticket purchased with drug proceeds therefore could not violate the Excessive Fines Clause, regardless of the value of the lottery winnings; that the forfeiture greatly exceeded the maximum statutory fine is irrelevant); United States v. Real Property Located at 22 Santa Barbara Dr., 264 F.3d 860 (9th Cir. 2001) (the Eighth Amendment does not apply to the forfeiture of drug proceeds; all property traceable to such proceeds is forfeitable even though the property doubled in value due to appreciation).

\textsuperscript{38} See United States v. Funds on Deposit in Account No. 890-0057173 Maintained at the Bank of New York by the Union Bank for Savings and Investments Jordan, No. 02-472-B (D.N.H. May 13, 2005) (Transcript of oral opinion delivered from the bench).

\textsuperscript{39} See United States v. James Daniel Good Real Property, 510 U.S. 43 (1993) (applying the Due Process Clause of the Fifth Amendment to a civil forfeiture case, and holding that the Government cannot deprive a person of his property without prior notice and an opportunity to be heard in opposition).
seizure warrant for the customer’s funds. Thus, in the Government’s view, as long as the statute can only be applied when the customer still has sufficient funds in his account to allow the foreign bank to make itself whole, there is no deprivation of property.

UBSI protested that there was no guarantee that it would be able to offset its loss against its customer’s account under Jordanian law, but the Government argued that the right to due process does not require a guarantee that a party will necessarily prevail on the merits of a dispute. The Due Process Clause guarantees a person the right to be heard “at a meaningful time and in a meaningful manner” before he is deprived of his property.\(^{40}\) It does not guarantee that the person’s arguments will carry the day. As long as there is a process by which the bank can seek relief, the Government said, it cannot claim that its due process rights were violated. It is entirely possible that the law in some jurisdictions will not allow a foreign bank to debit its customer’s account as a bank in the United States would be allowed to do, and as Congress contemplated when it enacted Section 981(k), but such uncertainty does not, in and of itself, constitute a due process violation; it is rather one of the consequences that may result when a party does business in different parts of the world.\(^{41}\)

Finally, the Government argued that § 981(k) addresses all of these concerns by providing the foreign bank with the opportunity to request the Attorney General of the United States to suspend the forfeiture action if the result would be unjust.\(^{42}\) The Attorney General may or may not grant the bank’s request, but the right to petition for relief under that provision of the statute undermines any claim that the bank did not have a fair opportunity to be heard. Moreover, the Government advised the court that there is a process by which UBSI could seek remission of the forfeiture by the Attorney General even after forfeiture is granted.

The district court, however, did not find it necessary to address any of

\(\text{Matthews v. Eldridge, 424 U.S. 319, 333 (1976).}\)

\(\text{See United States v. Bank of Nova Scotia, 740 F.2d 817, 828 (11th Cir. 1984) (“In a world where commercial transactions are international in scope, conflicts are inevitable. Courts and legislatures should take every reasonable precaution to avoid placing individuals in the situation [the Bank] finds [it]self. Yet, this court simply cannot acquiesce in the proposition that United States criminal investigations must be thwarted whenever there is conflict with the interest of other states.””).}\)

\(\text{See § 981(k)(1)(B).}\)
these arguments. Instead, it asked the bank to explain exactly what arguments it would have made in opposition to the forfeiture if it had not been barred by the statute from doing so. The bank said that it would have asserted that it was innocent of any wrongdoing, and thus entitled to assert the statutory innocent owner defense under federal forfeiture law. But the court immediately discounted that argument. In Bennis v. Michigan, the U.S. Supreme Court held that the ability to raise an innocent owner defense is not constitutionally required. Accordingly, if UBSI was deprived of nothing more than the right to assert that it was an innocent owner, it was not deprived of due process.

UBSI responded that it would also have put the Government to its proof. That is, its right to due process meant that it had a right to force the Government to prove that the 124 checks deposited into the money broker’s account in Ramallah were actually the proceeds of fraud. But the court pointed out that UBSI had never disputed from the outset of the litigation that the 124 cashiers checks constituted fraud proceeds. If the opportunity to contest the forfeitability of the property was all that the bank was deprived of, the court concluded, then its de facto concession that the property was forfeitable rendered its due process argument moot.

**What happens next?**

The litigation in the UBSI case is not over. The district court — which is the trial court in the federal system in the United States — has entered judgment in favor of the United States as to all but a fraction of the $2.8 million. But it is likely that UBSI will appeal to the Court of Appeals for the First Circuit, and if it does, it is possible that the Government will file a cross-appeal from the court’s adverse ruling on the one issue that was resolved in UBSI’s favor. The appeal and cross-appeal will likely take at least a year to resolve. Accordingly, it will be some time before there is a definitive ruling on the various challenges UBSI raised to Section 981(k).

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44 Bennis v. Michigan, 516 U.S. 442 (1996) (holding that forfeiture of wife’s car because of husband’s wrongdoing of which wife was totally innocent did not violate the Due Process Clause).

45 See United States v. Funds on Deposit in Account No. 890-0057173 Maintained at the Bank of New York by the Union Bank for Savings and Investments Jordan, No. 02-472-B (D.N.H. May 13, 2005) (Transcript of oral opinion delivered from the bench).
The litigation in the UBSI case has not prevented the United States from distributing the funds forfeited pursuant to § 981(k) from the other foreign banks to the victims of the fraud, however. So far, the Government has distributed nearly $1.8 million — over 20 percent of the losses in this case — to 90 victims.

Meanwhile, there are a number of other Section 981(k) cases pending in other courts. Decisions on those cases could come at any time.

Conclusion

Section 981(k) is an innovative and controversial addition to the arsenal of weapons that federal law enforcement authorities in the United States can use to recover the proceeds of crime. Such tools are critically important in an era when the globalization of crime renders the traditional tools of money laundering enforcement and asset recovery obsolete and ineffective. New tools must be found that bridge the political boundaries between states and neutralize the advantages that those boundaries afford international criminals. But the law must still respect the sovereignty of nations and the due process rights of their citizens. Whether Section 981(k) strikes the proper balance is precisely the issue that is being litigated in the United States. Law enforcement authorities, and representatives of the bank industry around the world, await the final outcome with great interest.