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Stefan D Cassella



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The Case for Civil Forfeiture: Why *In Rem* Proceedings are an Essential Tool for Recovering the Proceeds of Crime

Stefan D. Cassella
Deputy Chief for Legal Policy
Asset Forfeiture and Money Laundering Section
U.S. Department of Justice¹

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I. Introduction

Law enforcement professionals throughout the world are devoting increasing amounts of their time and energy to the pursuit and interdiction of the proceeds of serious crime as those proceeds are moved rapidly across political boundaries. Our common goal is to find the tools that might be employed most effectively to recover criminal proceeds so that they do not remain in the hands of the wrongdoers.

The work I have done over many years in this regard focuses on the use of the asset forfeiture laws. In most countries, this refers to laws that allow governments to confiscate criminal proceeds as part of the sentence imposed in a criminal case. That is indeed an important law enforcement tool; my thesis, however, is that having the option of recovering criminal proceeds through criminal forfeiture, *i.e.* as part of the sentence in a criminal case – what is often called a confiscation order – is not enough. There are many situations where it is not possible to obtain a confiscation order as part of a criminal case. In those cases, it is essential that the forfeiture laws have a civil component that allows the State to recover the proceeds of crime whether there is a criminal prosecution of the wrongdoer or not.

In this paper I will give a number of examples of situations where criminal forfeiture will not work, and where civil forfeiture is essential to the recovery of criminal proceeds. I will end by urging all States to do as many

¹ The views expressed in this paper are solely those of the author and do not necessarily reflect the views or policies of the Department of Justice or any of its agencies.

States have already done: enact a comprehensive civil forfeiture scheme as part of any proceeds of crime legislation.

II. Defining Terms

I have to begin by defining some terms. As I mentioned, a criminal forfeiture order is imposed as part of the sentence in a criminal case; in many countries, it is called a confiscation order. It is an *in personam* order (an order imposed against the person). The accused, or defendant, is convicted, sentenced to prison or to pay a fine, ordered to pay restitution to his victims, and ordered to disgorge the proceeds of his crime, or property he used to commit the offense.

For example, if the defendant was a public official who stole \$10 million, he may be ordered to forfeit that \$10 million if he is convicted of the offense in a criminal case. If he used the \$10 million to purchase a private jet or a yacht, he may be ordered to forfeit the jet or yacht as property traceable to the crime. And if he laundered the \$10 million through a business that he controlled, he may be ordered to forfeit the business as property used to commit or to facilitate the commission of the offense.

All of that would be part of the sentence in the criminal case, and is what I am calling “criminal forfeiture.”

Civil forfeiture works differently

In a civil forfeiture case, the objectives are the same: to recover the proceeds of the crime and the property used to facilitate it; but the procedure is different. Instead of bringing an action against a person (*in personam*) as part of a criminal case, the action is brought against the property (*in rem*). In other words, it is a civil case in which the Government is the plaintiff, the property is the defendant, and the persons objecting to the forfeiture are intervenors called “claimants.” This is why civil forfeiture cases – in the United States at least – have such unusual names, such as *United States v. \$160,000 in U.S. Currency*, or *United States v. Contents of Account Number 12345 at XYZ Bank Held in the Name of Jones*.

The old cases – and this procedure has been around for a very long time in the United States – said that there was a legal fiction that the

property had done something wrong.² That is no longer the theory underlying civil forfeiture; rather, it is viewed simply as a procedural device for resolving all objections to the forfeiture of the property at one time in a single proceeding, after giving everyone with an interest in the property notice and a full opportunity to be heard.

For example, if a drug dealer uses an airplane to smuggle drugs, we want to take title to the plane for all of the usual reasons: punishment, deterrence, keeping the plane from being used again, disrupting the operation of a criminal investigation, etc. We could just convict the drug dealer and forfeit his airplane as part of his sentence; that is, we could do the forfeiture criminally. But there may be third parties who may have an interest in the plane: his wife may be a co-owner; a lender may hold a lien; the plane may be titled in the name of a third party who may or may not be a nominee.

How do we deal with these people? If we limit ourselves to *in personam* actions against the drug dealer – *i.e.*, if the only forfeiture procedure available to us is forfeiture as part of a criminal prosecution – we can only forfeit the defendant's interest; we cannot forfeit the interests of the wife, the lienholder, or the person whose name is on the title (if he is the true owner and not just a nominee) in a criminal case to which the third party has not been a party. It would be a violation of due process to confiscate the interests of persons who were not permitted to participate in the proceeding that resulted in the confiscation order. So what do we do?

We could bring a separate *in personam* civil action against each party with an interest in the property, but that would be cumbersome. We would have to locate and serve all of them and conduct separate trials as to each person's interest.

Civil forfeiture is the better approach: we bring an action against the property – in this example against the drug dealer's airplane, give everyone notice and an opportunity to litigate a claim, provide a defense for innocent

² For an overview of asset forfeiture law in the United States, and an historical perspective on how that law developed, see S. Cassella, *Asset Forfeiture Law in the United States*, Juris Publishing (New York, 2007), Chapters 1 and 2.

owners, and resolve all third party issues at one time so that at the end of the day, the Government, if it prevails, has clear title to the property.

Other countries have adopted this approach

In the past decade, many countries have adopted some form of civil forfeiture. In addition to the United States, there are now effective civil forfeiture programs in the UK, South Africa, the Republic of Ireland, Australia, the Philippines, and several provinces in Canada. My friend and colleague Jeff Simser from Toronto has published a series of articles on the adoption of civil forfeiture laws in countries outside of the United States and tracking the development of the case law upholding those statutes³

III. Examples of When Civil Forfeiture is Necessary

I will now give some examples of when it is necessary to do a forfeiture civilly, or where civil forfeiture is at least the better option.

1) Where the forfeiture is uncontested

If you file a forfeiture action directly against the property, and no one files a claim, the property may be forfeited to the State directly without any judicial forfeiture proceeding. In effect, the property is forfeited by default.

In the United States, 80 percent of our seizures for forfeiture are uncontested. In many of those cases there is a criminal prosecution, but if the forfeiture is going to be uncontested, a lot of time and effort is saved by handling the forfeiture as an uncontested civil matter against the property.

It is interesting to see what this has meant in terms of the actual dollars forfeited. In 2006, the United States Department of Justice

³ Simser, J., Civil Asset Forfeiture in Common Law Jurisdictions (Osgoode Hall Law School: Proceeds of Crime and Money Laundering Symposium, January 29, 2005)

Simser, J., Anti-Money Laundering Techniques: Civil Asset Forfeiture (Osgoode Hall Law School: Money Laundering Symposium, February 11, 2006)

Simser, J., Civil Asset Forfeiture in Common Law Jurisdictions: Developments in 2006-07 (Osgoode Hall Law School: Money Laundering Symposium, February 11, 2006)

Simser, J., The Significance of Money Laundering: the Example of the Philippines (2006), 9 J Money Laundering Control 293

recovered \$1.2 billion through asset forfeiture; the estimate for 2007 is that we will recover \$1.6 billion. Of that, the breakdown between criminal cases and contested and uncontested civil cases (in terms of dollars recovered, not cases filed) is as follows:

38 percent uncontested civil cases (\$456 million)

29 percent
contested
civil cases
(\$348
million)

33 percent criminal cases (\$400 million)

So as you can see, having the civil forfeiture option, which allows for the efficient processing of uncontested matters, yields significant results at little cost – *i.e.*, at the cost of providing proper notice of the forfeiture to interested parties who 80 percent of the time choose not to file a claim.

2) Where the defendant has died

You can only get a criminal confiscation order as part of the sentence in a criminal case if the defendant lives long enough to be tried and convicted. In the prosecution connected to the Enron case, the Government obtained a criminal conviction against Mr. Kenneth Lay, but he died before a criminal forfeiture order could be imposed. His death meant that the conviction abated; hence there was no longer any way of recovering the proceeds of his crime in the criminal case.⁴

In such a case, civil forfeiture often becomes the principal way of recovering the property that can be traced to the criminal offense.

3) Where the wrongdoer is unknown

In the United States, we commonly find criminal proceeds in the hands of a courier – a person who was not himself involved in the commission of the crime. We know from the circumstances that the money

⁴ See *United States v. Lay*, 456 F. Supp. 2d 869 (S.D. Tex. 2006).

is criminal proceeds, but neither we nor (in most cases) the courier, know who the money belongs to, or who committed the criminal offense. In such cases, the chances of bringing a criminal prosecution are nil, yet we want to be able to recover the money.

The following are some recent cases where we seized money from a courier and then forfeited it civilly when no one was able to file a valid claim:

- I. *United States v. \$252,300.00 in U.S. Currency*, 484 F.3d 1271, 1274-75 (10th Cir. 2007)
- II. *United States v. \$124,700 in U.S. Currency*, 458 F.3d 822, 826 (8th Cir. 2006)
- III. *United States v. \$30,670 in U.S. Funds*, 403 F.3d 448, 467-68 (7th Cir. 2005)
- IV. *United States v. \$84,615 in U.S. Currency*, 379 F.3d 496, 501-02 (8th Cir. 2004)
- V. *United States v. \$17,920.00 in U.S. Currency*, 413 F.3d 826, 829 (8th Cir. 2005)
- VI. *United States v. \$110,873.00 in U.S. Currency*, 159 Fed. Appx. 649, 652 (6th Cir. 2005)
- VII. *United States v. \$159,880.00 in U.S. Currency*, 387 F. Supp. 2d 1000, 1017 (S.D. Iowa 2005)

As one can see from the case captions and dates alone, these cases occur with great frequency, and involve substantial sums.

4) Where the property belongs to a third party

It is quite common, of course, for the accused to commit an offense using property that belongs to a third party. As I mentioned, we cannot forfeit the third party's property in a criminal case in which the third party was not charged with a crime. Yet if the third party was aware that his property was being used for a criminal purpose – or was willfully blind to that fact – he should be made to forfeit the property. The procedural device for forfeiting property held by a non-innocent third party is civil forfeiture.

To give just one example, in *United States v. Real Property . . . 464 Myrtle Avenue*, 2003 WL 21056786 (E.D.N.Y. 2003), *aff'd United States v. Collado*, 348 F.3d 323 (2d Cir. 2003), we sought the forfeiture of a grocery store in New York where a drug dealer had conducted \$20 million worth of drug transactions over a one year period. Indeed, law enforcement agents monitored 646 narcotics-related conversations that were held on the property over a three month period.

The problem was that the grocery store belonged not to the drug dealer but to his mother. So we filed a civil forfeiture action and were able to forfeit the grocery store because the mother was not an innocent owner.

She knew of her son's history of narcotics trafficking; admitted she suspected her son was selling drugs again because his associates from jail had been calling and stopping by the property frequently; and warned her son's associates to speak to him in person and not to use the phone on her property to avoid being monitored by the police. In those circumstances, the court ordered the forfeiture of the grocery store based on its use in committing the drug offense in a civil forfeiture action.

5) When the interests of justice do not require a criminal conviction

There are many cases where the interests of justice do not require a criminal conviction on the offense giving rise to the forfeiture. Some of these are relatively minor cases, such as the case of the teenager who uses his home computer to create counterfeit currency. In such cases, forfeiture of the computer, not incarceration of the teenager, is probably the appropriate law enforcement action.

But often there are very serious cases – usually cases involving corporations – where the corporate defendant will not (for political or economic reasons) admit to a criminal offense, or will admit only to a relatively minor offense, but will agree to the forfeiture of a substantial sum of money. Because the accused corporation will not admit to the more serious criminal offense, there can be no criminal forfeiture absent a criminal trial, but because the corporation cannot be incarcerated in any event, it seldom makes no sense to conduct a criminal trial just to get a criminal confiscation order if the corporation is willing to agree to a civil forfeiture order. In such cases, we use civil forfeiture to accomplish our objective without wasting resources on an unnecessary trial.

For example, earlier this year my colleague Sharon Burnham in Roanoke, Virginia handled the forfeiture aspect of a case involving Purdue Frederick, a pharmaceutical company that manufactured the painkiller OxyContin but misrepresented its tendency to cause addiction. The company would not agree to admit to anything more than a minor mislabeling offense in the criminal case against it, and there was nothing to forfeit criminally based only on the mislabeling offense; but the company agreed not to contest the civil forfeiture of \$276.1 million based on a money laundering offense.

The \$276.1 million forfeiture represented approximately 90% of its profits during the specified time frame; thus, the civil forfeiture action served the essential function of facilitating a forfeiture settlement that could not have been achieved through the pleas and convictions.

6) When the wrongdoer is a fugitive

Criminal forfeiture is available only when there is a conviction, but there can be no conviction as long as the accused is a fugitive in a foreign country. The civil forfeiture laws, however, allow us to file an action against the assets that the fugitive left behind. The fugitive retains the right to contest the forfeiture, of course, but only if he is willing to surrender to face the criminal charges. He cannot ignore the process of the court in the criminal case and ask the court to protect his property interests in the civil one.

For example, in *United States v. \$6,976,934.65 Plus Interest*, 478 F. Supp. 2d 30 (D.D.C. 2007), the defendant and a corporation he controlled were indicted on money laundering and other charges stemming from an off-shore internet gambling operation based in Antigua. The defendant, who was living in Antigua when the indictment was returned, renounced his U.S. citizenship and chose not to return to the United States to face the criminal charges; he was a fugitive. But we learned that defendant had deposited nearly \$7 million in proceeds from his offense in a bank in Guernsey.

Using the law that allows the United States to recover criminal proceeds by filing a civil forfeiture action against the correspondent account of a foreign bank (more about that in a moment), we filed a forfeiture action against the \$7 million and succeeded in having the court deny the defendant's attempt to contest the forfeiture until he surrendered to face the criminal charges.

7) When the criminal is prosecuted in another country but the property is in the United States

Finally, we use civil forfeiture when the accused has already been prosecuted in a foreign country (and thus will not be prosecuted in the United States), but there are assets related to the crime in the United

States that we want to forfeit. This last example is one that I have discussed before,⁵ but now the appellate court has ruled and the matter is final.

In *United States v. Union Bank for Savings and Investment (Jordan)*, 487 F.3d 8 (1st Cir. 2007), proceeds of a fraud perpetrated against elderly American citizens found their way into bank accounts controlled by money exchangers in the Middle East. We brought a forfeiture action against a Jordanian bank's correspondent account in New York and recovered the funds, leaving the Jordanian bank to make itself whole by debiting its customer's account in Jordan. The Court of Appeals has now upheld the forfeiture in this case, holding that it was perfectly appropriate for the Government to file a civil forfeiture action against the money in the correspondent account of the foreign bank, and force the wrongdoer to contest the forfeiture by not allowing the foreign bank to do so in his place.

If we did not have civil forfeiture authority, we never could have done this because the original fraudsters were prosecuted in Canada, and the money launderers in the Middle East were outside the jurisdiction of the United States. The civil forfeiture laws, in other words, allowed us to recover property in the United States for the benefit of victims in the United States without having to bring a criminal prosecution against, or obtain jurisdiction over, the wrongdoers who were prosecuted in foreign courts.

IV. Conclusion

The point of all of this is that it is not enough for all of us to agree that the asset forfeiture laws are an important means of recovering the proceeds of crime, if all we mean by that is that we should have the ability to make a confiscation order part of the defendant's sentence in a criminal case. There is a significant and essential role to be played by civil forfeiture actions directed at the property itself. Many countries have enacted such laws, and I would strongly urge others to do so.

⁵ See Cassella, "Recovering the Proceeds of Crime from the Correspondent Account of a Foreign Bank," 9 *J. of Money Laundering Control* 401 (2006) (combining papers presented at the 22nd and the 23rd Cambridge International Symposium on Economic Crime, Cambridge University, September 2004 and September 2005).