Criminal Forfeiture Procedure in 2008: A Survey of Developments in the Case Law

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Criminal Forfeiture Procedure in 2008: An Annual Survey of Developments in the Case Law

Stefan D. Cassella

A survey of the developments in the case law in the past year relating to the procedure for obtaining a forfeiture judgment as part of the sentence in a federal criminal case.

I. Introduction

This is another in a series of articles on developments in the federal case law relating to criminal forfeiture procedure. It covers the cases decided in 2007.

Like the earlier articles in this series, this one does not attempt to discuss every topic related to criminal forfeiture, nor all of the exceptions and nuances that apply to the topics that are discussed; rather, it covers only those matters on which there was a significant development in the case law in the past year. Thus a basic familiarity with federal criminal forfeiture procedure is assumed.

The article begins with the law on the scope of criminal forfeiture and the seizure and restraint of property prior to trial. It then continues more or less chronologically through the trial, sentencing, ancillary proceeding and post-trial phases of a criminal forfeiture case. Except in instances where it is necessary to refer to the leading case in a given area for purposes of comparison or context, the citations are limited to the cases decided in 2007.

1 The author is a Special Assistant U.S. Attorney in the Eastern District of Virginia, on detail from his position as the Deputy Chief for Legal Policy of the Asset Forfeiture and Money Laundering Section of the United States Department of Justice. This article is an edited version of a presentation made by the author at the Asset Forfeiture Chiefs and Experts Conference at the National Advocacy Center, University of South Carolina, on February 26, 2008. 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 or any of its agencies.


3 A complete discussion of each of the issues covered in this article, along with the citations to the relevant cases, may be found in Chapters 15-24 of Stefan D. Cassella, Asset
II. The Scope of Criminal Forfeiture

In 2007, there were a number of cases dealing with the limited scope of criminal forfeiture – *i.e.*, with the requirements that there be a criminal conviction and that the property be connected to the offense of conviction, and with the rule that property belonging to a third party may not be forfeited in a criminal case.

*Forfeiture requires a conviction*

In a criminal case, forfeiture is part of the defendant’s sentence. So, if a conviction is reversed, any forfeiture based on that conviction must be vacated along with the rest of his sentence.⁴

In *United States v. Lake*, the Tenth Circuit reversed the convictions of two defendants in a massive white-collar fraud scheme and accordingly vacated the forfeiture orders that had been issued by the district court.⁵ The panel held, however, that the defendants could be retried on some, but not all, of the original charges. Thus, when the case was remanded, the district court had to determine what should become of the forfeited property pending retrial.

The court held that if the property could be forfeited a second time if the defendants were convicted again on the remaining offenses, the Government could retain possession of the property pursuant to a pre-trial restraining order. But if the property was subject to forfeiture only in connection with the offenses on which the defendants *could not* be retried, the Government had to release the property to the defendants.⁶

*Forfeiture requires a nexus to a specific offense*

The district court’s decision on this point was a straightforward application of the rule that because forfeiture is part of the defendant’s sentence, there must

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⁴ See id. at § 15-3(a).

⁵ *United States v. Lake*, 472 F.3d 1247, 1250-51 (10th Cir. 2007) (because underlying fraud and money laundering convictions were reversed on appeal, forfeiture had to be vacated as well).

be a nexus between the property and the specific offense for which the defendant is convicted.\(^7\) Another case involving the same rule was the Second Circuit’s decision in *United States v. Capoccia*.\(^8\)

In *Capoccia*, the defendant – a lawyer accused of stealing funds from his clients – was charged with several substantive offenses involving the interstate transportation of stolen property (ITSP). See 18 U.S.C. § 2314. The defendant committed these offenses in both Vermont and New York, but for venue reasons, only the Vermont offenses were charged in the indictment. When the defendant was convicted, the Government argued that the forfeiture should include the proceeds of the entire scheme, but the Second Circuit said that it could not. Because the defendant was charged and convicted only of the offenses that occurred in Vermont, the court said, the forfeiture had to be limited to the proceeds of the Vermont offenses; it could not include the proceeds of the New York offenses.\(^9\)

The same rule applies if the Government is seeking a money judgment (or substitute assets) in an amount equal to the proceeds of an offense: the amount that can be forfeited is determined by the offense of conviction. Thus, in *United States v. McKay*, when the court calculated the amount of the money judgment to be issued as part of the order of forfeiture in a RICO case, it included only the conduct that occurred within the dates alleged in the indictment, and refused to include conduct that occurred at other times.\(^10\)

*Forfeiture of property derived from a conspiracy*

If the Government wants to forfeit property involved in conduct beyond what is alleged in the specific acts set forth in the indictment, it usually has to

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\(^7\) See AFLUS, note 3, *supra*, at § 15-3(b).

\(^8\) *United States v. Capoccia*, 503 F.3d 103 (2nd Cir. 2007).

\(^9\) *Capoccia*, 503 F.3d at 110, 114 (notwithstanding prefatory language in the indictment stating that the defendant’s acts were part of a larger scheme, defendant who was convicted of an ITSP offense under § 2314 may be made to forfeit only the proceeds of the specific acts alleged in the indictment).

\(^10\) *United States v. McKay*, 506 F. Supp.2d 1206, 1211-12 (S.D. Fla. 2007) (reducing amount of requested money judgment by the amount of proceeds defendant received in the year before the date alleged in the indictment as the beginning of the scheme).
charge a conspiracy.\textsuperscript{11} For example, in \textit{United States v. White}, the defendant was charged with two substantive drug offenses and a drug conspiracy. When he was found guilty on all three counts, the Government moved to forfeit two Cadillacs that the defendant had used to facilitate his drug sales. The court declined to order the forfeiture based solely on the substantive convictions because there was no evidence that the vehicles were used in connection with those specific crimes, but it held that the vehicles could nevertheless be forfeited as property used to facilitate the conspiracy.\textsuperscript{12}

\textit{Forfeiture of property derived from an offense involving a ‘scheme’}

In 2007, several courts extended this principle to cases involving a scheme to defraud, holding that once a defendant is convicted of engaging in a scheme, he must forfeit the proceeds of the entire scheme, not just the proceeds of the particular acts alleged in the indictment. Thus, in \textit{United States v. Boesen}, a defendant convicted of 82 substantive counts of federal health care fraud was required to forfeit the proceeds of his entire scheme – encompassing hundreds of uncharged substantive offenses – and not just the proceeds traceable to the 82 counts alleged in the indictment.\textsuperscript{13} Once the defendant has been convicted of perpetrating a scheme, the court said, it does not matter how many executions of that scheme were alleged in the indictment. The offense of conviction is the scheme; hence the defendant must forfeit the proceeds of the entire scheme.\textsuperscript{14}

\textsuperscript{11} See \textit{United States v. Hasson}, 333 F.3d 1264, 1279 n.19 (11th Cir. 2003) (the court in a money laundering case may not impose a forfeiture order based on a money laundering offense with which defendant was not charged or for which he was acquitted, but if he is convicted of a conspiracy, the forfeiture may be based on amounts defendant conspired to launder, including amounts derived from uncharged substantive conduct, or substantive counts for which he has been acquitted).

\textsuperscript{12} \textit{United States v. White}, 2007 WL 3244054, at *4 (W.D. Mich. 2007) (where defendant was convicted of a conspiracy and two substantive counts, vehicles could be forfeited in connection with the conspiracy because they facilitated various offenses encompassed by the conspiracy, but they could not be forfeited in connection with the substantive counts because there was no nexus to those particular offenses). See also \textit{Wittig}, 2007 WL 1875677, at *7 (because defendant, on remand, can only be retried on the conspiracy counts, the only property subject to forfeiture, and hence the only property subject to pretrial restraint, is property derived from the conspiracy; proceeds of the substantive acts committed before there was a conspiracy are no longer subject to forfeiture).


\textsuperscript{14} \textit{Id.}
The Second Circuit said the same thing in Capoccia. In that case, the forfeiture was limited to the property derived from the specific acts alleged in the indictment because the ITSP offense on which the defendant was convicted was based on discrete acts, not a continuing scheme. But if the defendant had been convicted of something else such as mail fraud, the court said, that necessarily involves proof of a continuing scheme, he would have been required to forfeit the proceeds of the entire scheme.¹⁵

The Seventh Circuit’s rule

The Seventh Circuit seems to be setting its own course on this. In 2003, the court held in United States v. Genova that if the defendant is convicted of at least one offense giving rise to forfeiture, property involved in offenses on which a defendant has been acquitted may be forfeited based on a “relevant conduct” analysis similar to the analysis a court would employ in calculating the defendant’s sentence under the Sentencing Guidelines.¹⁶ That decision was controversial at the time it was decided and has not been widely followed. But in United States v. Black, a district court in Illinois followed the Genova approach, holding that the forfeiture could be based on conduct on which the defendant, Conrad Black, was found not guilty, as long as the Government established by a preponderance of the evidence that the property was involved in criminal conduct related to the offenses on which the defendant was being sentenced. In the end, it did not matter, however, as the court found that the Government had not met the preponderance standard with respect to the property it wanted to forfeit.¹⁷

¹⁵ Capoccia, 503 F.3d at 117 (stating in dicta that if a defendant were convicted of mail or wire fraud, or any other offense of which a scheme is an element, he would be liable for the proceeds of the entire scheme, citing Boesen). See also United States v. Jennings, 487 F.3d 564, 584 (8th Cir. 2007) (affirming without discussion of this point the forfeiture of the proceeds of the entire mail fraud scheme based on a conviction on just two substantive counts). Cf. United States v. Phillips, 434 F.3d 913, 915 (7th Cir. 2005) (pretrial restraint of defendant’s assets is not limited by the amount involved in the specific substantive health care fraud counts alleged in the indictment as long as the amount of proceeds derived from the entire scheme is alleged as well).

¹⁶ United States v. Genova, 333 F.3d 750, 762-63 (7th Cir. 2003) (because criminal forfeiture is part of sentencing, the forfeiture is not limited to the property involved in the offenses for which the defendant was convicted; to the contrary, property involved in conduct for which the defendant has been acquitted may be forfeited if the judge finds that it is forfeitable by a preponderance of the evidence).

¹⁷ United States v. Black, 526 F. Supp.2d 870, 882-83 (N.D. Ill. 2007) (following Genova; proceeds of mail fraud counts on which defendant has been acquitted may be
Property held by third parties

The limited scope of criminal forfeiture is also reflected in the rule that property belonging to a third party cannot be forfeited in a criminal case, even if it was used to commit the crime for which the defendant has been convicted. To forfeit property that genuinely belongs to a third party, the Government generally has to commence a civil forfeiture proceeding.

The ownership issue is not litigated during the criminal trial, however. As Rule 32.2(b) provides, all questions regarding the ownership of the property are deferred to the post-trial ancillary proceeding where third parties are given the opportunity to contest the forfeiture on the ground that the property really belonged to them. Thus, if property was used to commit a criminal offense, and notwithstanding the way the property is titled, the defendant appears to be the true owner, or the ownership is unclear, the Government may include the property in the indictment, obtain an order of forfeiture against it, and sort out the ownership of the property in the ancillary proceeding.

This is precisely what happened in United States v. White. The two Cadillacs that the Government wanted to forfeit in that case were held in the names of third parties, but the court held that the vehicles could be included in the indictment and forfeited in the criminal case. Whether the persons whose names were on the titles to the vehicles were the true owners, the court said, would be sorted out in the ancillary proceeding.

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18 See AFLUS, note 3, supra, at § 15-3(f).

19 See Rule 32.2(b)(2), F.R.Crim.P.

20 United States v. White, 2007 WL 3244054, at *5 (W.D. Mich. 2007) (court orders forfeiture of vehicles held in third party names; third parties will be able to contest the forfeiture in the ancillary proceeding).
Proceeds of a criminal offense titled in a third party’s name

The proceeds of the defendant’s criminal offense can always be forfeited in a criminal case regardless of whose name the property may be titled, unless the titled owner was a bona fide purchaser for value who acquired the property without having reason to know that it was subject to forfeiture. Thus, the Government may seek the forfeiture of the criminal proceeds and obtain an order of forfeiture in a criminal case even if the defendant caused the proceeds to be titled in the name of his wife or some other third party when he committed the crime.

For example, in United States v. Grossman, the defendant used bank fraud proceeds to purchase a house that he titled in his wife’s name. A third party, who lent money to the wife secured by the house, filed a claim asserting that the preliminary order of forfeiture was defective because criminal forfeiture is limited to the property of the defendant, but the court held that because the proceeds of the crime are always forfeitable regardless of who may have subsequently acquired title, there was nothing wrong with the order of forfeiture.

Property acquired by the defendant after the offense was committed

As these recent cases illustrate, at the time the order of forfeiture is entered, there is no burden on the Government to show that the defendant had any interest in the property. At the conclusion of the criminal trial, the court simply forfeits the property derived from or used to commit the offense, and then affords third parties the right to contest the forfeiture in the ancillary proceeding.

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21 See United States v. Hooper, 229 F.3d 818, 821-22 (9th Cir. 2000) (drug dealer’s wife could not assert community property interest in his drug proceeds because the Government’s interest in the proceeds vested upon the commission of the offense); 21 U.S.C. § 853(n)(6)(B) (creating an exception to the relation back doctrine for bona fide purchasers for value).

22 United States v. Grossman, 501 F.3d 846, 849 (7th Cir. 2007) (the proceeds of the crime, or property traceable thereto, is always subject to forfeiture in a criminal case, even if it is held in the name of a third party; the rule that criminal forfeiture orders cannot reach the property of third parties is not violated because under the relation back doctrine, the transfer of the proceeds to a third party is void).

23 See De Almeida v. United States, 459 F.3d 377, 381 (2d Cir. 2006) (criminal forfeiture is not limited to property owned by the defendant; “it reaches any property that is involved in the offense;” but the ancillary proceeding serves to ensure that property belonging to third parties who have been excluded from the criminal proceeding is not inadvertently
In 2007, however, the Sixth Circuit issued a contrary decision on this point – a decision that appears to be wrongly decided.

In *United States v. Jones*, the defendant used her parents’ property to commit a drug offense and then took title to the property sometime thereafter. The court held that the property could not be forfeited in the criminal case because the defendant did not own it at the time the offense was committed. But the panel was mistaken; there is no requirement that the defendant be the owner of the property when the offense occurs or at any other time. The rule is that property of a third party *may not* be forfeited; not that the property must belong to the defendant. The *Jones* cases illustrates why that distinction is important.

The forfeiture of property used to facilitate a drug offense is mandatory, subject only to a third party’s filing a successful claim in the ancillary proceeding. The issue in *Jones* should have been not whether the defendant owned the property at the time of the offense, but whether, at the time of the ancillary proceeding, her parents had standing to contest the forfeiture. Because the parents had no ownership interest in the property by the time it was forfeited, they had no cause to oppose the forfeiture once the order of forfeiture was entered.

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24 *United States v. Jones*, 502 F.3d 388, 394 (6th Cir. 2007) (real property where defendant conducted drug and money laundering operation should not have been forfeited because defendant did not take title to the property from her parents until after the offense was committed).
III. Preserving the Property for Forfeiture Pending Trial

The next set of cases dealt with the court’s authority to issue orders preserving the property subject to forfeiture while the criminal case is pending. One case involved the pretrial seizure of the property;25 the others involved the issuance of pretrial restraining orders pursuant to 21 U.S.C. § 853(e).26

The effect of an illegal seizure

In United States v. Pierre,27 the defendant argued that the illegal seizure of his property prior to trial meant that the Government could not forfeit the property as a substitute asset once the defendant was convicted. But the First Circuit disagreed. The illegal seizure of a defendant’s property, the panel said, has no effect on the court’s authority to order the forfeiture of that property as a substitute asset if the defendant is later convicted of an offense.27

Procedure and criteria for issuing a post-indictment restraining order

In most criminal forfeiture cases, the property is already in the Government’s custody when the case begins because it was previously seized as evidence or as part of an administrative or civil forfeiture proceeding. If that is not the case, however, the Government may seek to preserve the property with a pre-trial restraining order.28 The procedure and criteria for obtaining such a restraining order have generated some debate.

In 2006, the Fifth Circuit issued a controversial decision in United States v. Holy Land Foundation, holding among other things that no restraining order could be issued in a criminal case without prior notice to the affected parties and the opportunity for a hearing.29 Last year, however, the en banc court reversed that decision.

25 See AFLUS, note 3, supra, at § 17-3.

26 See id. at § 17-4.

27 United States v. Pierre, 484 F.3d 75, 87 (1st Cir. 2007) (the illegal seizure of defendant’s property does not bar its forfeiture as a substitute asset once defendant is convicted).

28 See AFLUS, note 3, supra, at § 17-4.

decision: a pre-trial restraining order, the court said, may be issued *ex parte*, with no right to a pre-restraint hearing.\textsuperscript{30}

Moreover, the court held that the standard for issuing the restraining order is simply probable cause. This has long been the rule in other circuits;\textsuperscript{31} indeed it is the standard endorsed by the Supreme Court almost 20 years ago in *United States v. Monsanto*.\textsuperscript{32} Before the Supreme Court decided *Monsanto*, however, the Fifth Circuit applied the standard in Rule 65 of the Federal Rules of Civil Procedure — substantial likelihood of success on the merits – to restraining orders issued in criminal forfeiture cases.\textsuperscript{33} That decision remained unchallenged until the *en banc* court in *Holy Land Foundation* expressly overruled it, and brought the law in the Fifth Circuit into line with *Monsanto*.\textsuperscript{34}

**Satisfying the probable cause requirement**

To satisfy the probable cause requirement, the Government may rely on the finding of probable cause made by the grand jury at the time it returned the indictment.\textsuperscript{35} But while the grand jury’s finding of probable cause is *sufficient*, it is not *necessary*; in the alternative, the court may base its probable cause finding on an affidavit submitted in support of the application for the order.

That practice is well-established, but the district court in the “D.C. Madam” case saw it differently. In *United States v. Palfrey*, the court held that a

\textsuperscript{30} *United States v. Holy Land Foundation for Relief and Development*, 493 F.3d 469, 475 (5th Cir. 2007) (*en banc*) (“a court may issue a restraining order without prior notice or a hearing”); *see also United States v. Wittig*, 2007 WL 1875677, at * 6 (D. Kan. 2007) (“due process does not require a hearing before restraining assets under § 853(e)”).

\textsuperscript{31} See, *e.g.*, *Wittig*, 2007 WL 1875677, at * 4 (“the standard for entering a pre-trial restraining order is probable cause”).

\textsuperscript{32} *United States v. Monsanto*, 491 U.S. 600, 615-16 (1989) (standard for issuance of restraining order is probable cause).

\textsuperscript{33} *United States v. Thier*, 801 F.2d 1463, 1468 (5th Cir. 1986).

\textsuperscript{34} *Holy Land Foundation for Relief and Development*, 493 F.3d at 471.

\textsuperscript{35} *See United States v. Jamieson*, 427 F.3d 394, 405 (6th Cir. 2005) (initial issuance of restraining order may be based on grand jury’s finding of probable cause; probable cause may be challenged in post-restraint hearing if defendant satisfies the requirements for obtaining such a hearing).
restraining order may be issued only if the property has been named in the indictment and the grand jury has made a probable cause finding as to its forfeitability. That is not correct.

The purpose of the restraining order

Another issue in the Palfrey case presented a closer question. Section 853(e) says that the purpose of the restraining order must be to preserve assets for forfeiture, and indeed most restraining orders are issued for that purpose. In Palfrey, however, the Government’s reason for seeking to restrain the asset – the defendant’s list of the customers of her prostitution business – was to prevent the asset from being used to intimidate the Government’s witnesses. But the court held that this was not a proper purpose under the terms of the statute and refused to issue the order.

Post-restraint hearings: the Jones-Farmer rule

Once the property is restrained, a post-restraint, pretrial hearing is required only if the defendant’s right to use the restrained property to preserve his Sixth Amendment right to counsel is implicated, and only if the defendant makes a prima facie showing that there is no probable cause for the forfeiture of the restrained property. This is known as the Jones-Farmer rule.

The Fifth and Ninth Circuits have not adopted Jones-Farmer expressly, but the Fifth Circuit came close in the Holy Land Foundation case, holding that a


37 See Wittig, 2007 WL 1875677, at * 6 (“the purpose of § 853(e)(1)(A) is to preserve assets and assure the availability of property pending disposition of the criminal case”; restraining order reinstated following remand to preserve the assets for the next trial).

38 Palfrey, 2007 WL 1954181, at * 2 (a restraining order may only be issued to preserve the availability of property).

39 See AFLUS, note 3, supra, at § 17-6.

40 See United States v. Jones, 160 F.3d 641, 647 (10th Cir. 1998) (defendant has initial burden of showing that he has no funds other than the restrained assets to hire private counsel or to pay for living expenses, and that there is bona fide reason to believe the restraining order should not have been entered); United States v. Farmer, 274 F.3d 800, 804-05 (4th Cir. 2001) (defendant entitled to pretrial hearing if property is seized for civil forfeiture if he demonstrates that he has no other assets available; following Jones).
post-restraint hearing is not necessary in every case, but may be required when the defendant “needs the restrained funds to pay for legal defense on associated criminal charges, or to cover ordinary and reasonable living expenses.”

The Ninth Circuit also appears to have adopted Jones-Farmer, but in an unpublished case. In United States v. McCray, the court held that a defendant has no right to a post-restraint, pre-trial hearing under either the Fifth or Sixth Amendments unless he offers evidence of the legitimate source of the restrained property or “his inability to compensate counsel form other funds available to him.”

District courts in other circuits continue to apply the Jones-Farmer rule routinely in civil and criminal forfeiture cases.

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41 Holy Land Foundation for Relief and Development, 493 F.3d at 475 (not expressly adopting Jones-Farmer but citing Jones with approval).

42 United States v. McCray, 113 Fed. Appx. 770, 772 (9th Cir. 2004) (upholding district court’s refusal to grant Monsanto hearing regarding funds held in parallel civil case; under United States v. Unimex, Inc., 991 F.2d 546, 551 (9th Cir. 1993), defendant has no Sixth Amendment right to a hearing unless he offers evidence as to the source of the restrained property, “or his inability to compensate counsel from other funds available to him”); United States v. McCray, ___ Fed. Appx. ___, 2007 WL 4142985 (9th Cir. Nov. 21, 2007) (defendant’s post-conviction challenge to his conviction, alleging Fifth Amendment denial of due process when district court denied hearing on release of assets, rejected for same reasons as Sixth Amendment challenge was rejected in prior appeal).

43 See United States v. All Funds on Deposit . . . in the name of Jaeggi, 2007 WL 3076952, at *7 (E.D.N.Y. 2007) (refusing to allow claimant in civil forfeiture case to challenge the probable cause for the arrest of his property pending trial because he did not satisfy the Jones-Farmer requirements); United States v. E-Gold Ltd., 2007 WL 2103602, at *2 (D.D.C. 2007) (applying Jones-Farmer and denying defendants’ right to a hearing because they could not show there was any reasonable ground to believe the seized property was not involved in the conduct alleged in the indictment); United States v. Contents of Nationwide Life Ins. Annuity Account, 2007 WL 682530, at *2 (S.D. Ohio 2007) (denying request for probable cause hearing in civil forfeiture case where stated reason for needing the money was only to pay back taxes, not to retain counsel in related criminal case); United States v. Wittig, 2007 WL 1875677, at *4 (D. Kan. 2007) (the first Jones showing ensures that defendant will have the right to contest the restraining order if his Sixth Amendment rights are implicated, while the second requirement prevents defendant from using the hearing merely as a way of getting discovery from the Government when he has no real basis for challenging the restraining order).
The Eleventh Circuit remains an exception, however. In that circuit, a defendant has no right to a post-restraint hearing even if he is able to show that he has no other funds with which to retain counsel.\textsuperscript{44}

\textit{Filing a notice of lis pendens}

As an alternative to seizing or restraining property to preserve it for forfeiture pending trial, the Government has the option of simply filing a notice of \textit{lis pendens} against the property in the local land records pursuant to State law.\textsuperscript{45} The notice of \textit{lis pendens} does not prevent the defendant from selling his property, but it does put third parties on notice of the Government’s interest. If the third party decides nevertheless to purchase the property, or to give the defendant a loan secured by the property, the third party may find that he is unable to contest the forfeiture of the property as a bona fide purchaser for value.\textsuperscript{46}

There is no question that the Government can file a notice of \textit{lis pendens} against any property that is directly traceable to the offenses alleged in the indictment. For example, a district court in Ohio held last year that the Government could file a notice of \textit{lis pendens} against a directly forfeitable asset even though a third party – the defendant’s spouse – had a legal interest in the property.\textsuperscript{47}

The courts are split, however, as to whether a \textit{lis pendens} can be filed on property forfeitable only as a substitute asset. The majority of decisions, including two cases decided in the past year, hold that there is nothing wrong with

\textsuperscript{44} See \textit{United States v. Bissell}, 866 F.2d 1343, 1354 (11th Cir. 1989) (no post-restraint hearing required, even if the Sixth Amendment is implicated); \textit{United States v. Kaley}, 2007 WL 1831151, at * 2 (S.D. Fla. 2007) (following \textit{Bissell}; defendant has no right to post-restraint probable cause hearing; district court’s initial, independent finding of probable cause for the restraining order is sufficient to protect defendant’s Sixth Amendment rights; thus, there is no due process violation).

\textsuperscript{45} See AFLUS, note 3, supra, at § 17-8.

\textsuperscript{46} See \textit{Pacheco v. Serendensky}, 393 F.3d 348, 351 (2d Cir. 2004) (person who is aware there is a \textit{lis pendens} on the property cannot be a bona fide purchaser).

\textsuperscript{47} See \textit{United States v. Poulsen}, 2007 WL 1138466, at *6 (S.D. Ohio 2007) (there is no reason why a \textit{lis pendens} cannot be filed on real property that the defendant holds with his wife as tenants by the entireties).
filing a *lis pendens* on any asset subject to forfeiture, regardless of the theory of forfeiture.\(^{48}\) But in *United States v. Jarvis*, the Tenth Circuit – relying on New Mexico law – held that a *lis pendens* may not be filed against property that was not directly implicated in the underlying criminal offense.\(^{49}\) This split in the courts is unlikely to be resolved until Congress gives the Government the right under federal law to file a notice of *lis pendens* against any property named as subject to forfeiture in a civil or criminal forfeiture case.

*Interlocutory appeals from pretrial restraining orders*

The issuance of a restraining order is appealable under 28 U.S.C. § 1292.\(^{50}\) But a defendant is not entitled to a stay of his criminal case pending appeal unless he shows a likelihood of success on the merits and irreparable harm. In the *E-Gold* case, the court acknowledged the defendant’s right to an interlocutory appeal, but held that because the appeal was weak on the merits, it would deny the stay.\(^{51}\)

*Third party’s right to a hearing on the pretrial restraint of property*

\(^{48}\) See *United States v. Jewell*, ___ F. Supp.2d __, 2008 WL 638414 (E.D. Ark. Mar. 6, 2008) (a *lis pendens* is not a restraining order; it does not prevent a property owner from selling his property nor interfere with his use and enjoyment of his property; it is merely a notice to potential buyers of the Government’s interest); *United States v. Makki*, 2007 WL 781821, at *16 (E.D. Mich. 2007) (finding nothing improper in Government’s filing *lis pendens* on property listed in the indictment as substitute assets).

\(^{49}\) *United States v. Jarvis*, 499 F.3d 1196, 1203 (10th Cir. 2007) (under New Mexico law, a *lis pendens* may only be filed on property involved in pending litigation; it may not be used merely to secure a future money judgment; substitute assets are not involved in the pending criminal case except to the extent they may be used to satisfy a money judgment; therefore a *lis pendens* cannot be filed against such property); see also *United States v. Parrett*, 469 F. Supp. 2d 489, 493-94 (S.D. Ohio 2007) (district court assumes without analysis that *lis pendens* is the same as a restraining order, and that cases prohibiting pretrial restraint of substitute assets therefore prohibit filing *lis pendens* on substitute real property); *Poulsen*, 2007 WL 1138466, at *6 (same ruling in related case).

\(^{50}\) See *United States v. Floyd*, 992 F.2d 498, 500 (5th Cir. 1993); *In re Assets of Martin*, 1 F.3d 1351, 1355 (3d Cir. 1993); *United States v. Kirschenbaum*, 156 F.3d 784, 788 (7th Cir. 1998) (collecting cases).

\(^{51}\) *United States v. E-Gold Ltd.*, 2007 WL 2103602, at *3 (D.D.C. 2007) (denying request to stay criminal case while defendants appeal denial of motion to vacate seizure warrant).
For a long time it was unclear whether a third party, who asserted that the restraining order interfered with his property rights, had any right to contest the restraining order in a pre-trial hearing.\textsuperscript{52} The only appellate decision directly on point was the First Circuit’s opinion in \textit{United States v. Real Property in Waterboro}, which created a vague right to raise “prudential arguments regarding the burdens of restraint.”\textsuperscript{53}

In 2007, however, the Fifth and Ninth Circuits held that the third parties have no right to contest a restraining order prior to trial, but must withhold their challenges to the forfeiture until the ancillary proceeding.\textsuperscript{54} “It would be a significant burden on the Government,” the Fifth Circuit said in the \textit{Holy Land} case, “to have to defend the forfeiture order from attack by a third party during the course of an ongoing criminal prosecution.” The third party, the court said, will get his day in court in the ancillary proceeding.\textsuperscript{55}

\textbf{Pretrial restraint of substitute assets}

The Fourth Circuit continues to hold that substitute assets may be restrained pre-trial,\textsuperscript{56} while other courts hold that they may not.\textsuperscript{57}

\textsuperscript{52} See \textit{AFLUS}, note 3, \textit{supra}, at § 17-12.

\textsuperscript{53} \textit{United States v. Real Property in Waterboro}, 64 F.3d 752, 756 (1st Cir. 1995) (third party may not challenge the validity of the indictment or raise ownership issues; superior ownership claims must await the ancillary proceeding, but claimant may raise “prudential arguments concerning the burdens of restraint” pretrial).

\textsuperscript{54} \textit{United States v. Holy Land Foundation for Relief and Development}, 493 F.3d 469, 476 n. 10, 477 (5th Cir. 2007) (\textit{en banc}) (making third party wait until the ancillary proceeding to contest the forfeiture as § 853(k) requires ensures an orderly proceeding and does not violate due process); \textit{United States v. Lazarenko}, 476 F.3d 642, 648 (9th Cir. 2007) (third party has no right to an immediate hearing on validity of seizure pursuant to section 853(f); he must wait until the ancillary proceeding); \textit{see also United States v. Hollis}, 2007 WL 1135515, at *1 (S.D. Ga. 2007) (section 853(k) bars third party from contesting seizure warrants and restraining orders pretrial; he must wait to contest the forfeiture in the ancillary proceeding pursuant to section 853(n) and Rule 32.2(c)).

\textsuperscript{55} \textit{Holy Land Foundation}, 493 F.3d at 476-77.


\textsuperscript{57} See \textit{United States v. Wittig}, 525 F. Supp.2d 1281, 1289 (D. Kan. 2007) (construing \textit{United States v. Jarvis}, 499 F.3d 1196 (10th Cir. 2007), as holding that substitute assets may not be restrained pre-trial in the Tenth Circuit). \textit{See generally \textit{AFLUS}}, note 3, \textit{supra}, at § 17-
Retention of Property Seized With Civil Process

As mentioned earlier, in most cases the Government will already have possession of the forfeitable property when the criminal case begins because it will have seized the property for evidence or in connection with an ongoing administrative or civil forfeiture proceeding. In such cases, the Government need not do anything more to maintain its custody of the property during the criminal case. But if the Government seizes property for civil forfeiture but does not commence a civil forfeiture action, it may maintain custody of the property during a criminal case only if it obtains criminal process authorizing it to do so.58

This does not mean that the Government must obtain a seizure warrant to seize the property from itself, however, or that it must obtain a restraining order restraining it own use of the property. To the contrary, as the district court held in United States v. Scarmazzo, all that is required is an order directing the Government to continue to maintain its custody of the property.59 Courts routinely issue such housekeeping orders without objection.60

IV. Indictment

We turn now to the cases discussing the manner in which the forfeiture allegation must be set forth in the indictment.

Rule 32.2(a)

Rule 32.2(a) of the Federal Rules of Criminal Procedure says that there can be no forfeiture in a criminal case unless the defendant has been given


59 United States v. Scarmazzo, 2007 WL 587183, at *3 (E.D. Cal. 2007) (neither a seizure warrant nor a restraining order is appropriate when the property is already in the Government’s possession; rather, all that is required is an ordered issued pursuant to section 853(e) directing the Government to continue to maintain its custody of the property).

60 See United States v. Standridge, 2007 WL 2572207, at *3 (M.D. Fla. 2007) (court grants Government’s motion seeking permission to maintain custody of property seized with a civil seizure warrant so that it can pursue criminal forfeiture).
notice of the forfeiture in the indictment or information. In *United States v. Silvious*, a case decided in early 2008, the Seventh Circuit had to decide whether the Government failed to comply with the Rule when it included a notice of forfeiture in the indictment but inadvertently cited to the wrong statutory provision. After discussing the purpose of the Rule, the court held that an incorrect statutory citation is harmless if the allegation otherwise adequately informs the defendant that his property will be subject to forfeiture. A district court in Alabama reached the same result in *United States v. Russo*.

*The property subject to forfeiture need not be itemized*

It is well-established that the Government does not have to list the property subject to forfeiture in the indictment if it does not care to do so. Nor does it have to specify the amount of the money judgment that it will be seeking, or even state that it will be seeking a money judgment at all. The reason the Government may prefer to omit any reference to a specific dollar amount in the indictment is avoid being limited to that amount if the evidence available at the

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61 See AFLUS, note 3, supra, at § 16-2.

62 *United States v. Silvious*, 512 F.3d 364, 369-70 (7th Cir. 2008) (Government’s acknowledged error in citing § 982(a)(2) instead of §§ 981(a)(1)(C) and 2461(c) in a mail fraud case did not deprive defendant of his right to notice under Rule 32.2(a)).

63 *United States v. Russo*, 2007 WL 505056, at *3 (S.D. Ala. 2007) (indictment that improperly cited section 982(a)(2) instead of sections 981(a)(1)(C) and 2461(c) was nevertheless sufficient to put defendants on notice that Government was seeking forfeiture of the proceeds of the mail and wire fraud offenses alleged in the indictment).

64 See *United States v. Lazarenko*, 504 F. Supp.2d 791, 796-97 (N.D. Cal. 2007) (Rule 32.2(a) requires only that the indictment give the defendant notice of the forfeiture in generic terms; that the Government did not itemize the property subject to forfeiture until much later was of no moment; older cases like *Gilbert*, holding that property had to be listed in the indictment, are no longer good law); *United States v. Afremov*, 2007 WL 3237630, at *10 (D. Minn. 2007) (the Advisory Committee note to Rule 32.2(a) makes clear that the indictment need not explain how the Government intends to trace the property subject to forfeiture to the offenses alleged in the indictment; it is sufficient if the defendant is given notice that he faces forfeiture of his property in terms of the applicable statute).

65 See *United States v. Odom*, 2007 WL 2433957, at *4 (S.D. Miss. 2007) (“the Government was not required to provide specific notice in the indictment that the defendants could be subjected to a money judgment); *United States v. McKay*, 506 F. Supp.2d 1206, 1211 (S.D. Fla. 2007) (Government is not required to specify the amount of the money judgment it will be seeking in the indictment).
time of trial turns out to support the forfeiture of a greater amount than did the evidence available at the time the case was presented to a grand jury.

In United States v. Segal, the Seventh Circuit held that the Government can include a dollar amount in the indictment without limiting itself to that specific figure by using terms like “at least” and “not limited to.” In that case, the indictment advised the defendant that the Government would be seeking a money judgment of “at least” $20 million. When the jury returned a forfeiture verdict for $30 million, the defendant objected, but the court upheld the forfeiture on appeal because the indictment did not limit the Government to the $20 million figure.

The nexus between the property and the offense need not be alleged

In Palfrey, the “D.C. Madam” case, the defendant argued that the Government was required to spell out the nexus between the property and the offense in the indictment. The court held, however, that if the Government does not even have to identify the property in the indictment, it can hardly be required to spell out the nexus between the property and the offense.

Substitute assets need not be listed in the indictment

In the same vein, the First Circuit has held that the indictment need not contain a list of the substitute assets that the Government will be seeking to forfeit if the directly forfeitable property turns out to be unavailable. In United States v. Misla-Aldorando, the defendant, a public official convicted of extortion and money laundering, argued that the court should not impose a money judgment because the only way to enforce it would be by forfeiting substitute assets. This would be impossible, the defendant argued, because the indictment did not say anything about substitute assets, and because the prosecutor stated at the defendant’s

66 United States v. Segal, 495 F.3d 826, 839-40 (7th Cir. 2007) (because the forfeiture notice used terms like “at least” and “including but not limited to” in describing the proceeds subject to forfeiture, the indictment did not limit the forfeiture to any specific figure or assets).

67 United States v. Palfrey, 499 F. Supp.2d 34, 48-49 (D.D.C. 2007) (if the indictment is not required to list the property subject to forfeiture, it would be “manifestly illogical” to require it to allege the factual nexus between the property and the offense).

68 See generally AFLUS, note 3, supra, at § 16-3.
sentencing that the Government would only be seeking a money judgment and would not be seeking substitute assets.\textsuperscript{69}

But the panel was not persuaded. It reasoned that the Government may not know at the time the indictment is returned that it will need to forfeit substitute assets, because at that point the defendant may not yet have dissipated the assets or transferred them to a third party. Accordingly, the court concluded, to forfeit substitute assets the Government need only show that the requirements of Section 853(p) have been satisfied.\textsuperscript{70}

\textit{Bill of particulars}

If the Government does not specify the property subject to forfeiture in the indictment, it will usually do so in a bill of particulars, if for no other reason than to put third parties on notice that the property is subject to forfeiture.\textsuperscript{71} But a district court in Connecticut held that even this is unnecessary.\textsuperscript{72}

On the other hand, the district court in \textit{Palfrey}, having already held that it is not necessary either to itemize the property or to describe its nexus to the offense in the indictment itself, held that the Government had to specify both in a bill of particulars.\textsuperscript{73} The latter requirement is contrary to the weight of authority on this issue.\textsuperscript{74} Indeed, in 2007, the Advisory Committee on the Federal Rules of

\textsuperscript{69} \textit{United States v. Misla-Aldarondo}, 478 F.3d 52 (1st Cir. 2007).

\textsuperscript{70} 478 F.3d at 75.

\textsuperscript{71} By putting such third parties on notice, the Government hopes to foreclose later challenges to the forfeiture of the property by persons claiming that they acquired it from the defendant without having any reason to know that it was subject to forfeiture. \textit{See} 21 U.S.C. § 853(n)(6)(B).

\textsuperscript{72} \textit{See United States v. Dubogrysov}, 2007 WL 2590465, at *5 (D. Conn. 2007) (denying request for bill of particulars; Government does not have to specifically identify the exact property subject to forfeiture in either the indictment or a bill of particulars; as to the money judgment, it is sufficient that the Government has advised defendant it will seek the amount that he profited from the crime).

\textsuperscript{73} \textit{Palfrey}, 499 F. Supp. 2d at 48-49.

\textsuperscript{74} \textit{United States v. Columbo}, 2006 WL 2012511, at *5 & n.13 (S.D.N.Y. 2006) (denying motion for bill of particulars describing how the Government calculated the amount subject to forfeiture that was alleged in the indictment; such information is not necessary for trial.
Criminal Procedure rejected a proposal that would have inserted such a bill of particulars requirement into Rule 32.2.

Statute of limitations

Forfeiture is part of the defendant’s sentence in a criminal case; it is not a separate substantive charge. Thus, as long as the substantive counts in an indictment are filed within the statute of limitations, the forfeiture allegations will be considered timely as well, no matter when they are added to the indictment.\(^{75}\)

In United States v. Lazarenko, the Government obtained an indictment before the five-year limitations period expired, but the indictment contained only a boilerplate forfeiture allegation that did not list the property subject to forfeiture. By the time the Government listed the property, more than five years had passed from the date of the offense. But the court held that this did not prevent it from making forfeiture part of the defendant’s sentence.\(^{76}\)

In United States v. Jennings, the defendant made the creative argument that the fungible property provision in 18 U.S.C. § 984 creates a one-year statute of limitations for criminal forfeiture when the Government relies on a civil forfeiture statute as the authority for seeking forfeiture in a criminal case,\(^{77}\) but the Eighth Circuit was unimpressed. Section 984, the court said, relaxes the tracing preparation and is relevant only at sentencing; Government’s alternative of sending defendant a letter describing its calculation is reasonable); United States v. Bridges, 2006 WL 3716653, at *5 (E.D. Tenn. 2006) (denying request for bill of particulars stating the exact amount of currency possessed by the defendant as illegal proceeds, and stating the exact time and place where the currency was possessed; a “bill of particulars may not be used by a defendant to obtain detailed disclosure of all evidence held by the Government before trial”); United States v. Varacalli, 2004 WL 992493, at *2 (S.D.N.Y. 2004) (denying request for bill of particulars identifying the legal theories on which the Government intended to rely to support the forfeiture).

\(^{75}\) See United States v. Ayers, 2007 WL 496674, at *2 (S.D. Ohio 2007) (if the substantive counts in an indictment are filed within the statute of limitations, the forfeiture count will be considered timely filed as well); AFLUS, note 3, supra, § 16-5.

\(^{76}\) United States v. Lazarenko, 504 F. Supp.2d 791, 796 (N.D. Cal. 2007) (filing an indictment tolls the statute of limitations; that the Government did not itemize the property subject to forfeiture until after the limitations period expired is of no moment).

\(^{77}\) See 28 U.S.C. § 2461(c) (authorizing criminal forfeiture in any case where a civil forfeiture statute authorizes civil forfeiture for the same offense).
requirement in civil forfeiture cases by treating currency as fungible as long as the Government commences the forfeiture action within one year of the offense giving rise to the forfeiture. But this has no application in criminal forfeiture cases.78

Estoppel

In United States v. Odom, the indictment contained a number of substantive criminal charges as well as a forfeiture notice that was also designated as a “count.” When the defendant agreed to plead guilty to two of the substantive charges, the prosecutor dismissed the remaining “counts,” including, inadvertently, the forfeiture count. But the court held that that did not estop the Government from seeking forfeiture at sentencing because the defendant was plainly aware of the Government’s intent to pursue the forfeiture.79

V. Guilty Pleas

Because forfeiture is part of the defendant’s sentence in a criminal case, it is possible for the defendant to plead guilty to the criminal charges and still oppose the forfeiture. In most cases, however, the prosecutor and the defendant agree to resolve the forfeiture issues as part of a written plea agreement.80

Apprising the defendant of the forfeiture in the change of plea hearing

Rule 11(b)(1)(J) requires the court to warn the defendant during the plea colloquy that his property may be forfeited, but in United States v. Heard, the Seventh Circuit held that the court’s failure to comply with the rule was harmless

78 United States v. Jennings, 487 F.3d 564, 587 (8th Cir. 2007) (the one-year limitations period in 18 U.S.C. § 984(b) applies only to civil forfeiture cases, not to criminal cases even though the forfeiture is based on §§ 981(a)(1)(C) and 2461(c)).

79 United States v. Odom, 2007 WL 2433957, at *5 (S.D. Miss. 2007) (prosecutor’s inadvertent dismissal of the forfeiture counts at the change of plea hearing did not estop the Government from seeking forfeiture at sentencing where defendant was plainly aware of the Government’s intent).

80 See AFLUS, note 3, supra, § 18-3.
error because the defendant had agreed to the forfeiture in his written plea agreement.\textsuperscript{81}

\textit{Agreement to drop charges in return for forfeiture}

When negotiating a plea agreement that resolves the forfeiture issues, the Government must be careful not to appear to be agreeing to a more lenient sentence in return for the defendant's agreement to forfeit his property. Understandably, courts are wary of the possibility that a well-heeled defendant may be able to bargain for a reduced period of incarceration by willingly turning over a substantial sum of money.

In \textit{United States v. Imadu}, a district court rejected a plea agreement on the ground that it failed to reflect the seriousness of the defendant's conduct, and refused to consider the fact the defendant had agreed to forfeit $300,000 as a reason to accept the plea.\textsuperscript{82}

\textit{Breach of the plea agreement}

In \textit{United States v. Collins}, the plea agreement provided that the defendant would assist the Government in recovering the property subject to forfeiture from Liechtenstein, but instead he hired counsel to oppose the recovery efforts in the Liechtenstein courts and won. The Government complained that this constituted a breach of the plea agreement and asked the district court to impose sanctions on the defendant, but the defendant argued that the district court lacked jurisdiction to do so. The Seventh Circuit sided with the Government, holding that the district court retained jurisdiction to sanction the defendant for the breach of the plea agreement no matter how much time had passed since the guilty plea was entered.\textsuperscript{83}

\textsuperscript{81} \textit{United States v. Heard}, 256 Fed. App. 834 (7\textsuperscript{th} Cir. 2007) (rejecting appeal based on inadequacy of plea colloquy; court's failure to warn defendant that his property could be forfeited as required by Rule 11(b)(1)(J) was harmless where defendant agreed to forfeiture in his written plea agreement).

\textsuperscript{82} \textit{United States v. Imadu}, 2007 WL 295515, at *2 (M.D. Fla. 2007) (district court declines to accept plea to charge that does not adequately reflect the actual conduct; that defendant agreed to forfeit $300,000 is not a sufficient reason to accept the plea).

\textsuperscript{83} \textit{United States v. Collins}, 503 F.3d 616, 617 (7\textsuperscript{th} Cir. 2007) (the district court retains jurisdiction to find defendant in breach of his plea agreement to forfeit property no matter how much time has passed since the plea was entered).
VI. The Forfeiture Phase of the Trial

Criminal trials are bifurcated into a guilt phase and a forfeiture phase; thus, there is generally no mention of the forfeiture until the defendant has been found guilty of at least one offense giving rise to the forfeiture of his property. Once the jury returns its guilty verdict, however, the court must conduct a forfeiture hearing pursuant to Rule 32.2(b).\textsuperscript{84}

The right to have the jury determine the forfeiture

Rule 32.2(b)(4) gives either party the right to request that the jury be retained in the forfeiture phase of the trial,\textsuperscript{85} but three courts have held that the Rule does not apply if the Government is only seeking a money judgment.\textsuperscript{86} Until 2007 there was no decision to the contrary, but in United States v. Armstrong, a district court overruled the defendant’s objection to the Government’s request to have the amount of the money judgment determined by the jury.\textsuperscript{87} Moreover, the court held that if the jury is asked to determine the amount of a money judgment, it is not limited to the amount requested by the Government but may return a

\textsuperscript{84} See AFLUS, note 3, supra, § 18-2.

\textsuperscript{85} See id. at § 18-4.

\textsuperscript{86} See United States v. Tedder, 403 F.3d 836, 841 (7th Cir. 2005) (the defendant’s right under Rule 32.2(b)(4) is to have the jury determine if the Government has established the required nexus between the property and his crime; the rule does not give the defendant the right to have the jury determine the amount of a money judgment); United States v. Delgado, 2006 WL 2460656, at *1 (M.D. Fla. 2006) (Rule 32.2(b)(4) gives the defendant the right to have the jury determine if there is a nexus between specific property and the offense; if the Government is seeking on a money judgment, there is no nexus determination to be made; defendant’s request to have the jury determine the amount of the money judgment is denied); United States v. Reiner, 393 F. Supp. 2d 52, 54-57 (D. Me. 2005) (same, following Tedder; Rule 32.2(b)(4) applies only when the Government is required to establish a nexus between the property and the offense; when the Government is seeking only a money judgment, there is no nexus requirement and thus no nexus for the jury to find).

\textsuperscript{87} United States v. Armstrong, 2007 WL 809508, at *4 (E.D. La. 2007).
forfeiture verdict for whatever amount of money it determines to be appropriate.\textsuperscript{88}

When the Government is seeking to forfeit a specific asset, the jury’s role is limited to determining whether the Government has established the requisite connection between the property and the offense. It is not up to the jury to determine whether the property should be forfeited; that is a matter for the court to decide in accordance with the applicable forfeiture statutes.

In \textit{United States v. Segal}, a district court ran afoul of this rule when it asked the jury in a RICO case to determine not only whether the Government had established the required nexus between the property and the RICO offense, but also to determine \textit{what part} of the property had been tainted by the illegal activity. The Seventh Circuit held that the latter question was irrelevant and should not have been asked. In a RICO case, the defendant’s interest in the racketeering enterprise is subject to forfeiture in its entirety whether it was used in connection with the illegal activity or not. Thus, in the panel’s view, asking the jury what part of the enterprise was tainted was tantamount to asking what part should be forfeited, which is not for the jury to decide.\textsuperscript{89}

\textit{Evidence admissible in the forfeiture phase of the trial}

In \textit{United States v. Capoccia}, the Second Circuit held that because forfeiture is part of sentencing in a criminal case, the Government may rely on hearsay in the forfeiture phase of the trial.\textsuperscript{90} In addition, the court held that the

\textsuperscript{88} \textit{Armstrong}, 2007 WL 809508, at *1 (noting that the Government requested a money judgment in the amount of $16.6 million, but that the jury returned a verdict for only $10.6 million).

\textsuperscript{89} \textit{United States v. Segal}, 339 F. Supp. 2d 1039, 1044 (N.D. Ill. 2004) (special verdict form should not ask the jury what part of the defendant’s interest should be forfeited; jury’s only role is to determine if the Government has established the requisite nexus between the property and the offense), aff’d 495 F.3d 826 (7\textsuperscript{th} Cir. 2007).

\textsuperscript{90} \textit{United States v. Capoccia}, 503 F.3d 103, 109 (2\textsuperscript{nd} Cir. 2007) (Rule 32.2(b)(1) allows the court to consider “evidence or information,” making it clear that the court may consider hearsay; this is consistent with forfeiture being part of the sentencing process where hearsay is admissible).
Government can rely on evidence from the guilt phase of the trial without having to reintroduce it in the forfeiture phase.\textsuperscript{91}

\textit{Deferring the ownership issue to the ancillary proceeding}

Rule 32.2(b)(2) says that determining the extent of the defendant’s ownership interest vis à vis third parties is deferred to the ancillary proceeding.\textsuperscript{92} Therefore the defendant cannot object to the forfeiture on the ground that the property belongs to a third party, and the jury may be instructed not to concern itself with ownership.\textsuperscript{93}

\textit{Tracing the property to the offense of conviction}

If the Government seeks to forfeit the property as directly forfeitable property, as opposed to a substitute asset, it must prove by a preponderance of the evidence that the property is traceable to the offense for which the defendant has been convicted. This may not be possible in cases involving commingled funds.

Back in 1996, the Third Circuit held in \textit{United States v. Voigt} that once the defendant commingled his criminal proceeds with funds from an unknown source, the Government could not forfeit anything purchased with the commingled funds as property directly traceable to the offense.\textsuperscript{94} In \textit{United States v. Black}, the court followed \textit{Voigt} and held that the Government failed to prove by preponderance of the evidence that assets purchased with funds from the defendant’s commingled

\textsuperscript{91} \textit{Capoccia}, 503 F.3d at 109 (the court may rely on evidence from the guilt phase of the trial, even if the forfeiture is contested; it is not necessary for the Government to reintroduce that evidence in the forfeiture hearing). \textit{See AFLUS}, note 3, \textit{supra}, § 18-5.

\textsuperscript{92} \textit{See United States v. Lazarenko}, 476 F.3d 642, 648 (9th Cir. 2007) (“Upon a finding that the property involved is subject to forfeiture, a court must promptly enter a preliminary order of forfeiture without regard to a third party’s interests in the property”); \textit{AFLUS}, note 3, \textit{supra}, § 18-6.

\textsuperscript{93} \textit{See Armstrong}, 2007 WL 809508, at *4 (“the extent of the defendant’s ownership interest in the property is examined in the ancillary proceeding;” thus the jury may be instructed “not to concern itself with anyone’s ownership interest in the property” and defendant may not object to the forfeiture on the ground that the property belongs to a third party).

\textsuperscript{94} \textit{United States v. Voigt}, 89 F.3d 1050, 1088 (3d Cir. 1996) (jewelry purchased with commingled funds was not traceable to the underlying offense).
account were traceable to fraud proceeds that had been deposited into that account.⁹⁵

**Burden of Proof**

Because forfeiture is part of sentencing, the Government’s burden is to establish the forfeitability of the property by a preponderance of the evidence.⁹⁶ To date, the appellate courts are unanimous in holding that nothing in the Supreme Court’s *Booker* decision required a change in this rule. There was one new case on this point in 2007.⁹⁷

**Jury instructions**

As mentioned earlier, some courts hold that there is no right to have the jury determine the amount of the money judgment while others will grant the parties the right to have the jury make that determination. If the money judgment issue does go to the jury, the court must instruct the jury as to how calculate the amount of the judgment.

In *United States v. Duncan*, a drug case, the court told the jury that it could calculate the amount of the forfeiture by multiplying the quantity of drugs sold by the street value of those drugs.⁹⁸ Later, in a post-conviction hearing pursuant to Section 2255, the defendant argued that if his counsel “had been coherent” he would have objected to that instruction, but the court held that there was nothing wrong with the instruction it had given the jury.⁹⁹

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⁹⁵ *United States v. Black*, 526 F. Supp.2d 870, 888-90 & n.16 (N.D. Ill. 2007).

⁹⁶ See AFLUS, note 3, supra, § 18-5(d).

⁹⁷ See *United States v. McAuliffe*, 490 F.3d 526, 540 (6th Cir. 2007) (following *United States v. Hall*, 411 F.3d 651, 654-55 (6th Cir. 2005); *Booker* merely extended *Apprendi* to the sentencing guidelines and redefined what constitutes the statutory maximum, but the guidelines do not apply to forfeiture, and the forfeiture statutes contain no statutory maximum; forfeiture is a form of indeterminate sentencing “which has never presented a Sixth Amendment problem”).

⁹⁸ *United States v. Duncan*, 2007 WL 3119999, at *12 (N.D. Fla. 2007) (setting out text of instruction allowing jury to base the calculation of a money judgment on the gross proceeds of a drug offense).

⁹⁹ Id. See also *United States v. Brown*, 2007 WL 470445, at *5 (M.D. Fla. 2007) (setting out text of jury instruction and overruling objection to telling the jury that the Government is
Moreover, as mentioned earlier, courts have used the forfeiture instructions to make clear to the jury that it should not concern itself with the ownership of the property. As the court explained in *United States v. Brown*, because the jury doesn’t know anything about the post-trial ancillary proceeding where third party rights are protected, it might be reluctant to forfeit property held in a third party’s name without such an instruction.  

In *Brown*, the court also instructed the jury regarding use of the special verdict form. Where the Government had based the forfeiture of the property on more than one ground, the court said, the jury should use the special verdict form to indicate each ground on which it found the property to be subject to forfeiture.  

VII. Money Judgment

It is now well-established that a court may enter an order of forfeiture in the form of a money judgment that is not limited to the amount of money still in the defendant’s possession at the time he is sentenced, or by the availability of substitute assets.  

This was a major issue as recently as two years ago, but the Government prevailed on this issue in a series of cases in 2006, and that trend has continued to this day.

100 *Brown*, 2007 WL 470445, at *5 (setting out text of instruction telling the jury not to concern itself with the interest of any third party in the property; because the jury is unaware of the ancillary proceeding, it may be hesitant to forfeit property held in a third party’s name without such an instruction); *see also United States v. Armstrong*, 2007 WL 809508, at *4 (E.D. La. 2007) (jury was instructed not to concern itself with anyone’s ownership interest in the property).

101 *Brown*, 2007 WL 470445, at *6 (there was nothing improper about an instruction advising the jury that the special verdict form allowed it to indicate that the property was forfeitable on more than one basis).

102 *See AFLUS*, note 3, supra, § 19-4.

103 *See United States v. Vampire Nation*, 451 F.3d 189, 202 (3d Cir. 2006) (expressly rejecting the argument that a forfeiture order must order the forfeiture of specific property); *United States v. Hall*, 434 F.3d 42, 59 (1st Cir. 2006) (“the Government need not prove that the defendant actually has the forfeited proceeds in his possession at the time of conviction;” it is entitled to a money judgment whether the defendant has the forfeited proceed, or any other assets, in his possession at all); *United States v. Casey*, 444 F.3d 1071, 1074-76 (9th Cir. 2006) (same).
continued in 2007. As the First Circuit held in United States v. Misla-Aldarondo, “If the Government has proven that there was at one point an amount of cash that was directly traceable to the offenses, and that thus would be forfeitable under 18 U.S.C. § 982(a), that is sufficient for a court to issue a money judgment, for which the defendant will be fully liable whether or not he still has the original corpus of tainted funds – indeed, whether or not he has any funds at all.”

One of the reforms in the Civil Asset Forfeiture Reform Act of 2000 (CAFRA) was a provision authorizing the Government to pursue forfeiture as part of a criminal case even though the only forfeiture authority for a particular offense is found in a civil forfeiture statute. See 21 U.S.C. § 2461(c). This provision is frequently used in mail and wire fraud cases, where the principal forfeiture statute is the civil provision in 18 U.S.C. § 981(a)(1)(C).

In several cases, the defendants argued that even if the Government is generally entitled to a money judgment in a criminal forfeiture case, that is not so when the forfeiture is based on a civil forfeiture statute that is incorporated into a criminal case pursuant to Section 2461(c). In those cases, the defendants argued, in essence, that a forfeiture based on a civil forfeiture statute somehow retains its in rem quality when it is incorporated into a criminal case. But the courts have uniformly rejected this view. Once the Government brings a criminal forfeiture action, the in personam attributes of the forfeiture apply, which means that in criminal forfeitures based on mail and wire fraud, the court can issue a forfeiture order in the form of a money judgment and order the forfeiture of substitute assets.

104 United States v. Misla-Aldarondo, 478 F.3d 52, 73-74 (1st Cir. 2007). See also United States v. Jennings, 487 F.3d 564, 586 (8th Cir. 2007) (affirming money judgment for amount of proceeds defendant derived from “honest services” mail fraud scheme; the Government does not have to rely on the fungible property provision in § 984 to obtain a money judgment in a criminal case); United States v. Awad, 2007 WL 3120907, at *4 (S.D.N.Y. 2007) (holding that Vampire Nation, Hall and Casey apply in drug cases, not just RICO cases); United States v. Basciano, 2007 WL 29439, at *3-4 (E.D.N.Y. 2007) (defendants are jointly and severally liable for money judgment based on reasonable estimate of the proceeds of their various racketeering activities; estimate does not have to be precise, but cannot be “overly speculative”).

105 See United States v. Black, 526 F. Supp.2d 870, 878 (N.D. Ill. 2007) (Congress enacted section 2461(c) to allow the Government to seek forfeiture through an indictment rather than commencing a separate civil action).

106 See United States v. Alamoudi, 452 F.3d 310, 313 (4th Cir. 2006) (the cross-reference in section 2461(c) to the procedures in section 853 includes the substitute asset
**Determining the amount of the money judgment**

Among the cases discussing the manner of determining the amount of the money judgment, the Eleventh Circuit’s decision in *United States v. Crumpler* is particularly interesting. In that case, the defendant acquired stock options through a securities fraud scheme but had sold the options by the time he was convicted. The forfeiture order therefore had to take the form of a money judgment, but it was unclear whether the amount of the judgment should reflect the value of the options at the time the defendant obtained them, or the price for which he later sold them.

The defendant had sold the options for less than what they were worth when he acquired them, so he naturally argued that the money judgment should be based on the lower amount, but the court held that the Government was entitled to a judgment equal to the property’s original value. Just as a defendant is liable to pay a money judgment equal to the proceeds of his crime even if he has dissipated the money before he is sentenced, the court said, a defendant remains liable to pay a money judgment equal to the fair market value of the asset illicitly acquired at the time he acquired it, even if it is worth much less by the time he is sentenced.\(^{107}\)

When the Government seeks a forfeiture order in the form of a money judgment, it can satisfy its burden of proof with circumstantial evidence. For example, as we saw a moment ago, a jury is permitted to calculate the amount of a money judgment in a drug case by multiplying the quantity of drugs sold by their street value. The First Circuit affirmed a forfeiture judgment calculated on that basis in *United States v. Pierre.*\(^{108}\)

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\(^{107}\) *United States v. Crumpler*, 229 Fed. Appx. 832, 840 (11th Cir. 2007).

\(^{108}\) *United States v. Pierre*, 484 F.3d 75, 85-86 (1st Cir. 2007).
In that case, the Government estimated the drug dealer's proceeds by calculating that he earned $3,000 a week for 3 years. The Court of Appeals held that that evidence was sufficient to support a forfeiture judgment in the amount of $500,000.\textsuperscript{109}

VIII. Preliminary Order of Forfeiture

Rule 32.2(b)(2) provides that the court must enter a preliminary order of forfeiture "promptly" after determining what property is subject to forfeiture.\textsuperscript{110} The order remains preliminary as to the defendant until sentencing, and preliminary as to third parties until they have had an opportunity to contest the forfeiture in the ancillary proceeding.\textsuperscript{111} In 2007, the courts dealt with a number of procedural issues regarding the preliminary order of forfeiture.

Defendant's presence not required

In Segal, the Seventh Circuit held that the defendant need not be present when the court enters the preliminary order.\textsuperscript{112}

Preserving property subject to the preliminary order

Section 853(g) authorizes the Attorney General to seize property named in the preliminary order of forfeiture or take other steps necessary to preserve the property.\textsuperscript{113} In United States v. MacInnes, the Ninth Circuit held that this included

\textsuperscript{109} Pierre, 484 F.3d at 86 (the Government may satisfy its burden of proof as to the amount of the money judgment with circumstantial evidence; evidence that the defendant sold $3,000 worth of drugs per week for more than 3 years was sufficient to support a $500,000 money judgment); see also United States v. Odom, 2007 WL 2433957, at *7 (S.D. Miss. 2007) (Government establishes amount of money judgment by multiplying number of kilos of cocaine defendant admitted to distributing by the estimated street value of the cocaine).

\textsuperscript{110} See AFLUS, note 3, supra, § 19-2.

\textsuperscript{111} Fed. R. Crim. P. 32.2(b)(3).

\textsuperscript{112} United States v. Segal, 495 F.3d 826, 837-38 (7th Cir. 2007) (defendant’s absence from the hearing where the court entered the preliminary order of forfeiture did not violate due process where he was represented by counsel and was present at other proceedings involving the forfeiture).

\textsuperscript{113} See AFLUS, note 3, supra, § 19-6.
the authority to set aside a foreclosure sale in which the property was sold to a third party.\textsuperscript{114}

A recently recurring issue is whether the Government has the authority to seize real property named in a preliminary order of forfeiture even if there are third parties occupying the property. A district court in Michigan held in \textit{Jebril v. Pettit} that the Government does have that right even if the third parties are contesting the forfeiture in the ancillary proceeding. The seizure in that case, however, was limited to entering and inspecting the home and changing the locks; the claimant, the defendant’s wife, was allowed to remain on the premises.\textsuperscript{115}

In \textit{United States v. Delgado}, the defendant forfeited his interest in the property but his ex-wife filed a claim asserting a 100 percent interest in it. The court granted a writ of entry allowing the Government to inspect and secure the property, but refused to evict the tenant – the son of the defendant and the claimant – while the claim was pending.\textsuperscript{116}

\textbf{Property located in another district}

Section 853(l) authorizes the court in one district to order the forfeiture of property located in another district. In \textit{United States v. Floyd}, a court in the Eastern District of Kentucky ordered the defendant to forfeit property in the District of Nevada. The third-party claimant in the ancillary proceeding wanted a change of venue to Nevada but the court said that was unnecessary. Because the court with jurisdiction over the criminal case has the authority to issue a

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\textsuperscript{114} \textit{United States v. MacInnes}, 223 Fed. Appx. 549, 552 (9th Cir. 2007) (district court has authority under section 853(g) to set aside a foreclosure sale and to enjoin other activity to protect the Government’s interest in criminally forfeited property).

\textsuperscript{115} \textit{Jebril v. Pettit}, 2007 WL 1017600, at *4 (E.D. Mich. 2007) (Rule 32.2 and Section 853 give the Government the right to seize real property named in the preliminary order of forfeiture even it is occupied by third parties who are contesting the forfeiture in the ancillary proceeding).

\textsuperscript{116} \textit{United States v. Delgado}, 2007 WL 4163636, at *3 (M.D. Fla. 2007) (granting Government writ of entry to inspect, inventory and secure real property named in preliminary order of forfeiture, but holding that eviction of the tenants was premature before third party’s claim was adjudicated in the ancillary proceeding).
\end{flushleft}
forfeiture order regarding property in another district, it also has the authority to conduct the ancillary proceeding to determine the title to that property.\textsuperscript{117}

\section*{IX. Order of Forfeiture / Sentencing}

Rule 32.2(b)(3) provides that the order of forfeiture “shall be made part of the sentence and included in the judgment.”\textsuperscript{118} Failure to comply with the letter of this rule has caused a number of problems.

The forfeiture order must be issued at, or before, sentencing

As a general rule, failure to issue the forfeiture order at the time of sentencing is a fatal error.\textsuperscript{119} As several courts have held, the defendant has a right to have all aspects of his sentence imposed at one time in a proceeding where he has a right of allocution, and he therefore has good cause to object when the Government comes to court long after the sentence is final to request the issuance of an order of forfeiture.\textsuperscript{120} But as more convicted defendants have become aware of this issue — filing post-conviction challenges to the forfeiture order based on technical violations of the Rule while serving their sentences in federal prison — the courts have found ways to honor the Rule without having to release forfeited property.

The Eighth Circuit, for example, held in \textit{United States v. Koch}, that there is no problem if the defendant expressly waived the requirements of Rule 32.2(b)(3) in his plea agreement.\textsuperscript{121}

\begin{thebibliography}{99}
\bibitem{117} \textit{United States v. Floyd}, 2007 WL 316910, at *1 (E.D. Ky. 2007) (section 853(l) gives the district court authority to order the forfeiture of property regardless of where it is located).
\bibitem{118} See \textit{AFLUS}, note 3, \textit{supra}, § 20-3.
\bibitem{119} See \textit{id. at} § 20-3(c).
\bibitem{120} See \textit{United States v. Yeje-Cabrera}, 430 F.3d 1, 15 (1st Cir. 2005) (Rule 32.2(b)(3)’s requirement that the forfeiture be part of the sentence ensures that all aspects of the defendant’s sentence are part of a single package that is imposed at one time); \textit{United States v. Petrie}, 302 F.3d 1280, 1284 (11th Cir. 2002) (district court lacked jurisdiction to enter a preliminary order of forfeiture 6 months after defendant was sentenced).
\bibitem{121} \textit{United States v. Koch}, 491 F.3d 929, 931 (8\textsuperscript{th} Cir. 2007) (defendant expressly waived Rule 32.2(b)(3)’s requirement that the forfeiture be made part of the judgment in his plea agreement); \textit{see also United States v. Odom}, 2007 WL 2433957, at *4 n.2 (S.D. Miss. 2007) (entry of the order of forfeiture 30 months after sentencing was proper where defendant
Other courts have held that if the court fails to comply with Rule 32.2(b)(3), the defendant’s remedy is direct appeal; he can’t simply file a Rule 41(g) motion for the return of his seized property long after the time to appeal has expired.\(^{122}\) Because most defendants will not realize that the court’s failure to follow the letter of the rule has created a potential windfall for them until after the time for direct appeal has expired, these cases effectively prevent most defendants from recovering the forfeited property.

**Rule 29 motion**

In lieu of issuing a preliminary order of forfeiture, the court may grant a Rule 29 motion to set aside the forfeiture verdict if it is not supported by the evidence. In *United States v. Armstrong*, the court held that when a defendant files a motion to set aside the jury’s forfeiture verdict the question “is whether the evidence was sufficient to permit a reasonable jury to conclude that the Government has proven, by a preponderance of the evidence, that the property is subject to forfeiture.”\(^{123}\)

**Forfeiture is not a basis for reduction of defendant’s period of incarceration**

Defendants often ask that the court take the forfeiture into account in determining their period of incarceration, but that is generally not a proper sentencing consideration.

In *United States v. Milo*,\(^{124}\) a drug dealer was sentenced to only 18 days served. One of the reasons given by the district court for the departure from the Sentencing Guidelines was that defendant had been ordered to pay a $9.9 million money judgment. Many defendants are ordered to pay large money judgments, but this defendant was different, the court said, because unlike most defendants,

\[^{122}\text{Young v. United States, 489 F.3d 313, 315 (7th Cir. 2007) (refusing to reach merits of defendant’s Rule 41(g) motion for return of his property based on district court’s failure to include the order of forfeiture in the Judgment and Commitment order; the defendant’s remedy was direct appeal).}\]

\[^{123}\text{United States v. Armstrong, 2007 WL 809508, at *2 (E.D. La. 2007).}\]

\[^{124}\text{United States v. Milo, 506 F.3d 71 (1st Cir. 2007).}\]
he was wealthy and therefore was going to end up actually having to pay the $9.9 million.\textsuperscript{125}

The Government appealed, and the First Circuit vacated the sentence and remanded for resentencing. The panel said that while a court could give “some minor weight” to the forfeiture in determining a defendant’s sentence, giving it any significant weight would create the appearance that the wealthy could buy their way out of jail.\textsuperscript{126}

\textit{Inconsistent findings}

In determining the appropriate offense level under the advisory sentencing guidelines, courts must determine the amount of money involved in, or derived from, the criminal offense. This is similar to the determination a jury would make of the amount subject to forfeiture in the form of a money judgment, in a case where the money judgment issue is submitted to the jury. Often those two determinations yield different results.\textsuperscript{127}

In \textit{United States v. Foley},\textsuperscript{128} the jury found that the defendant was liable for a $2 million money judgment. For sentencing purposes, the Government argued that the losses suffered by the victims of the defendant’s Ponzi scheme totaled $7 million, but the court felt itself bound by the jury’s forfeiture verdict and accordingly used the $2 million figure to determine the offense level. On the Government’s appeal, the Eleventh Circuit held that the district court erred in failing to make its own, independent determination of the victims’ losses for sentencing purposes. Forfeiture, the court said, is based on the proceeds of the crime, whereas the guidelines range is based on the loss to the victims. These are not necessarily the same in every case.\textsuperscript{129}

\textsuperscript{125} Id. at 74.

\textsuperscript{126} Id.

\textsuperscript{127} See AFLUS, note 3, supra, § 20-6.

\textsuperscript{128} \textit{United States v. Foley}, 508 F.3d 627, 633 (11th Cir. 2007).

\textsuperscript{129} Id., following \textit{United States v. Hamaker}, 455 F.3d 1316, 1336 (11th Cir. 2006) (the calculation of the defendant’s sentencing guidelines range is entirely independent of the jury’s finding of the amount subject to forfeiture; forfeiture is based on the proceeds of the crime whereas the guidelines range is based on loss to the victim; the district court erred in using the jury’s forfeiture verdict to limit the defendants’ sentences).
Adding newly discovered property

Rule 32.2(e) permits the Government to ask the court at any time to amend an order of forfeiture to include newly-discovered property that falls within the scope of the forfeiture order. In *United States v. Kilbride*, the defendant’s statements regarding his finances during the pre-sentence investigation prompted the Government to move under Rule 32.2(e) to amend the order of forfeiture to include such additional property.

Joint and several liability

It is well-established that co-defendants are jointly and severally liable for the amount subject to forfeiture, but most courts hold that an individual’s liability is limited to the amount foreseeable to that person. But in one of the more important developments in the case law in 2007, the Eleventh Circuit held that foreseeability is *not* a requirement for joint and several liability.

In *United States v. Browne*, the court held that the foreseeability requirement that applies in other contexts – such as the liability of co-conspirators for each other’s criminal acts – does not apply in the forfeiture context and should not be inferred.

Moreover, the district court in the Conrad Black case held that joint and several liability is not limited to conspiracy cases: if co-defendants are convicted of the same mail fraud scheme, the court said, they are jointly and severally liable for the proceeds of that scheme.


132 *United States v. Fruchter*, 411 F.3d 377, 384 (2d Cir. 2005) (RICO defendant is liable for forfeiture of all proceeds of the offense foreseeable to him including proceeds traceable to conduct committed by others and on which he was personally acquitted).

133 *United States v. Browne*, 505 F.3d 1229, 1279 (11th Cir. 2007) (RICO defendants are liable for the full amount of proceeds even if the amount obtained by one was not foreseeable to the other; the foreseeability requirement should not be imported from the sentencing guidelines or from *Pinkerton* theory to forfeiture matters).

134 *United States v. Black*, 526 F. Supp.2d 870, 878 (N.D. Ill. 2007) (defendants are jointly and severally liable if the evidence establishes by a preponderance of the evidence that they jointly participated in a scheme to defraud); *but see United States v. McKay*, 506 F.
X. Substitute Assets

*Any property of the defendant may be forfeited as a substitute asset*

If the directly forfeitable property is unavailable, the Government is entitled to an order forfeiting any other property of the defendant as a substitute asset. In *United States v. Fleet*, the defendant argued that notwithstanding the broad language of the substitute assets statute, certain property – such as his residence – should be immune from forfeiture if it is not directly involved in the criminal offense. But the Eleventh Circuit held that there were no exceptions. A residence, the court said, may be forfeited as a substitute asset notwithstanding State homestead protection laws, and notwithstanding the fact that the property is held by the defendant and his wife as tenants by the entireties.

*Post-conviction restraint of substitute assets*

As mentioned earlier, most circuits do not permit the *pre-trial* restraint of substitute assets. The majority rule on this issue is based on language in the statute authorizing pre-trial restraints, 21 U.S.C. § 853(e), that appears to make a distinction between directly forfeitable property and substitute assets. Once a guilty verdict is returned, however, the court’s authority to restrain property for forfeiture is found not in Section 853(e) but in Section 853(g), and there is no problem in restraining substitute assets under that statute. In 2007, there were two district court cases in which the court restrained substitute assets following

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Supp. 2d 1206, 1214-15 (S.D. Fla. 2007) (although convicted of other offenses, co-defendant cannot be jointly and severally liable for the forfeiture resulting from the offense on which he was acquitted).


136 *United States v. Fleet*, 498 F.3d 1225, 1231 (11th Cir. 2007) (Congress chose broad language providing that *any* property of the defendant may be forfeited as a substitute asset; it is not for the courts “to strike a balance between the competing interests” or to carve out exceptions to the statute; thus, defendant’s residence can be forfeited as a substitute asset notwithstanding state homestead and tenancy by the entireties laws).

conviction to preserve the property while the Government prepared a preliminary order of forfeiture.138

*Application of relation back doctrine to substitute assets*

Under the relation back doctrine, codified at 21 U.S.C. § 853(c), the Government’s interest in the forfeitable property vests as of the time of the offense giving rise to the forfeiture. An unresolved issue in most circuits is whether and how the relation back doctrine applies to the forfeiture of substitute assets.139

Unlike the other circuits, the Fourth Circuit has long held that the relation back doctrine does apply to substitute assets.140 In *United States v. Wittig*, a district court in Kansas adopted the Fourth Circuit’s position.141

**XI. Right of a Third Party to Object to the Forfeiture**

It is quite common for third parties to attempt to find ways of objecting to the forfeiture of their interests in the defendant’s property without having to wait for the post-trial ancillary proceeding. The courts generally have been vigilant in preventing third parties from doing so.

*Section 853(k) bars third parties from intervening in the criminal case*

Section 853(k) ensures an orderly process by establishing that the ancillary proceeding is the exclusive forum for determining third party rights in criminal

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138 See *United States v. Kilbride*, 2007 WL 2990116, at *2 (D. Ariz. 2007) (court freezes defendant’s commingled bank account so that Government may file a motion under § 853(p) to forfeit the untainted funds as substitute assets); *United States v. Wittig*, 2007 WL 1875677, at *3 (D. Kan. 2007) (noting that following conviction “the court imposed a post-verdict restraining order to restrain forfeited assets and potential substitute assets).

139 See AFLUS, note 3, supra, § 21-3.

140 See *United States v. McHan*, 345 F.3d 262, 271 (4th Cir. 2003) (relation back doctrine applies to substitute assets and vests title in the Government as of the date of the offense).

forfeiture cases. As the Fifth Circuit held in the Holy Land case, this allows the Government to concentrate on the criminal case without being distracted by third party issues until it is resolved. At the same time, having the right to contest the forfeiture in the ancillary proceeding preserves the third party’s right to due process.

While the language in Section 853(k) seems quite clear, third parties nevertheless continue to attempt to find ways to insert themselves into the criminal case prior to the ancillary proceeding, or to circumvent the criminal case entirely by attempting to establish their rights to the forfeited property in another forum. All of these attempts have been unsuccessful.

We have already seen, for example, that the Fifth and Ninth Circuits have held that third parties cannot contest the pre-trial restraint or seizure of property in which they are asserting an interest. One other case on that point was the district court’s decision in United States v. Phillips, which held that the defendant’s husband had to wait until the ancillary proceeding to contest the forfeiture even though the property had been under restraint for four years.

In DSI Associates LLC v. United States, the third-party claimants argued that they could not wait to file claims in the ancillary proceeding because they were unsecured creditors whose claims would be denied in the ancillary proceeding for lack of standing, but the Second Circuit said that that was no

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142 See AFLUS, note 3, supra, § 21-6.

143 United States v. Holy Land Foundation for Relief and Development, 493 F.3d 469, 477 (5th Cir. 2007) (en banc) (§ 853(k) ensures an orderly process that relieves the Government of the burden of having to defend the forfeiture against third party claims during an ongoing prosecution while protecting the third party’s right to a day in court in the ancillary proceeding; this procedure does not violate the third party’s right to due process); see also United States v. Lazarenko, 476 F.3d 642, 648 (9th Cir. 2007) (forcing a third party to wait until the ancillary proceeding to contest a forfeiture, rather than granting an immediate hearing on a motion to vacate a seizure pursuant to section 853(f), does not violate the third party’s right to due process).

144 See note 56 supra.

145 Phillips v. United States, 2007 WL 1468642, at *3 (N.D. Ill. 2007) (dismissing complaint filed against the Government by defendant’s husband seeking release of property restrained for 4 years pending trial; husband’s remedy is to file a claim in the ancillary proceeding once defendant is convicted).
reason to ignore Section 853(k) and allow the claimants to intervene in the civil case pursuant to Rule 24 of the Federal Rules of Civil Procedure.\(^{146}\)

Section 853(k) bars a third party from filing an action in another court

Section 853(k) also bars a third party from attempting to litigate its rights to the property in another court. For example, the statute bars a lender from foreclosing on the defendant’s property instead of filing a claim in the ancillary proceeding.\(^{147}\) In United States v. Corpus, the third party conceded he was barred by Section 853(k) from filing a State court action to void the defendant’s interest in the property,\(^{148}\) and in Jebril v. Pettit, the court held that Section 853(k) barred the third party from contesting the forfeiture by filing a Bivens action against the Marshals Service.\(^{149}\)

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\(^{146}\) DSI Associates LLC v. United States, 496 F.3d 175, 183 (2\(^{nd}\) Cir. 2007) (§ 853(k)’s bar on intervention by third parties applies to attempts to intervene pursuant to Rule 24, even though that means that an unsecured creditor, who will lack standing to file a claim in the ancillary proceeding, will be left with no judicial remedy); see also United States v. Smith, 2007 WL 2310061, at *2 (D. Minn. 2007) (once property is forfeited, court has no power to grant a request to transfer the forfeited property to defendant’s judgment creditor to satisfy a debt; instead of attempting to intervene, the creditor should have filed a claim in the ancillary proceeding).

\(^{147}\) See United States v. Phillips, 185 F.3d 183, 188 (4th Cir. 1999) (third party cannot commence foreclosure action to recover lienholder’s interest in forfeited real property even though defendant has stopped paying mortgage; once the property is forfeited, it belongs to the Government under the relation back doctrine, and any attempt at foreclosure is barred by section 853(k)); United States v. Maclnnes, 223 Fed. Appx. 549, 554 (9th Cir. 2007) (foreclosure sale is an “action against the United States” and is therefore barred by section 853(k); following Phillips); United States v. West, 2007 WL 1100437, at *1 (E.D. Tenn. 2007) (following Maclnnes; lienholder’s right under state law to foreclose on the property is not a property interest that trumps the Government’s right to forfeit the property under federal law; the only rights exempted from forfeiture are those protected by section 853(n); section 853(k) bars the lienholder from commencing a state foreclosure).

\(^{148}\) United States v. Corpus, 491 F.3d 205, 208 (5\(^{th}\) Cir. 2007) (claimant concedes that he was barred by § 853(k) from filing suit in state court to void the transfer of the property from a third party to defendant once the Government commenced criminal forfeiture action and filed a lis pendens on the property).

\(^{149}\) Jebril v. Pettit, 2007 WL 1017600, at *4 (E.D. Mich. 2007) (§ 853(k) bars third party from using a Bivens action against the U.S. Marshal to adjudicate her interest in the forfeited property).
XII. Ancillary Hearing—Procedural Issues

In 2007, there was an outpouring of a case law involving the post-trial ancillary proceeding and the procedure for resolving third party challenges to a criminal order of forfeiture. Most of the remainder of this article will be devoted to the case law on these issues, beginning with the procedural requirements for publishing notice of the forfeiture order and for filing a valid third-party claim, and continuing through the decisions dealing with the grounds on which a third party may successfully challenge a forfeiture order on the merits.\(^\text{150}\)

The notice requirement under section 853(n)(1)

The Government has the same obligation to send notice to potential third-party claimants in criminal cases as it has in civil cases.\(^\text{151}\) That includes sending direct notice to potential claimants that the Government is able to identify, and publishing notice in a newspaper of general circulation.\(^\text{152}\) In December 2007, the Government began the process of converting from newspaper publication to publication on the Internet on the Government’s forfeiture website: www.forfeiture.gov.

Subject matter jurisdiction

The purpose of the ancillary proceeding is to allow the third party to contest title to the property that has been forfeited in the defendant’s criminal case. A third party cannot use the ancillary proceeding to raise other claims against the defendant or to contest title to property that was not forfeited. For example, in United States v. Jamieson, the defendant’s wife wanted to assert a claim to a sum of money held by the defendant that was not included in the order of forfeiture, but the court held that it lacked subject matter jurisdiction over such claims in the ancillary proceeding.\(^\text{153}\)

\(^{150}\) See generally AFLUS, note 3, supra, Chapter 23.

\(^{151}\) See United States v. Armstrong, 2007 WL 809508, at *5 n.2 (E.D. La. 2007) (the Government is required takes steps to provide notice to third parties who may file claims in the ancillary proceeding, just as it must do in civil forfeiture cases).

\(^{152}\) See AFLUS, note 3, supra, § 23-3.

\(^{153}\) United States v. Jamieson, 2007 WL 275966, at *5 (N.D. Ohio 2007) (third party may not used the ancillary proceeding to adjudicate her interest vis a vis the defendant in property not included in the order of forfeiture because the district court lacks subject matter jurisdiction.
Pleading requirements under section 853(n)(3)

The third party's petition must be filed under penalty of perjury and signed personally by the claimant. This requirement has been strictly enforced. In United States v. Wellington, the district court granted a motion to dismiss a claim on the ground that it was signed only by counsel and not by the claimant.

The petition must also assert the basis for the claim by describing the claimant's legal interest in the property in some detail. For example, the claimant cannot just say he is a bailee and not identify the bailor. In United States v. Kokko, a courier was caught smuggling watches into the United States. The claimant, the company that had hired the courier, contested the forfeiture of the watches, asserting it had been entrusted with them by the true owner, but it refused to identify who the true owner was. The court held that that did not satisfy Section 853(n)(3).

Similarly, the claimant cannot just say “the property came from a business that we owned.” As the court said in United States v. Edwards, “the law requires

over such property).

154 See United States v. Freedman, 2007 WL 1068484, at *2 (S.D. Fla. 2007) (claim that is not filed under penalty of perjury is not in proper form and is subject to motion to dismiss); Jamieson, 2007 WL 275966, at *2 (the purpose of the “under penalty of perjury” requirement in Section 853(n)(3) is to protect the Government’s interest in the forfeited property against false claims; a claim that is certified to be true and sworn before a notary is “sufficient to comport with the spirit and purpose behind the statute” even though it is “bereft of the magic words”). See generally AFLUS, note 3, supra, § 23-5.


156 See United States v. BCCI Holdings (Luxembourg) S.A. (Final Order of Forfeiture and Disbursement), 69 F. Supp. 2d 36, 55 (D.D.C. 1999) (collecting cases in which a claim was dismissed for failure to describe the nature of the claimant’s interest as required by the statute).


158 Id. (claimant asserting an interest in the forfeited property as a bailee must identify the bailor; a conclusory statement that claimant was the bailee of the property at the time it was seized from defendant does not comply with § 853(n)(3)).
more than a bare assertion of legal title to establish the nature and extent of petitioner’s right, title or interest in the subject property.”

**Time for filing a claim**

Section 853(n)(2) provides that third party petitions must be filed within 30 days of the final publication of notice, or the receipt of actual notice, whichever is earlier. In *United States v. Grossman*, the Seventh Circuit affirmed the dismissal of a claim filed five months after the claimant-lienholder received notice of the order of forfeiture because it was untimely.

**Change of venue**

Venue for the ancillary proceeding lies in the district court where the criminal case took place and where the order of forfeiture was entered. There is no basis for a change of venue.

**Disposing of the third party claim on a motion to dismiss**

No hearing is necessary where the court can dismiss the third party’s claim on the pleadings, *e.g.*, for lack of standing or for failure to state a claim on which relief can be granted. See Rule 32.2(c)(1)(A). For example, in *United States v. Ward*, the district court dismissed a claim because even if all of the allegations

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159 *United States v. Edwards*, 2007 WL 2088608, at *2 (W.D. La. 2007) (statement that the forfeited money “came from our business . . . which we owned” does not comply with § 853(n)(3)); see *Wellington*, 2007 WL 81848, at *1 (granting motion to dismiss claim for failing to specify the property claimed, the nature and extent of the claimant’s interest, or the time and circumstances of the claimant’s acquisition of that interest).

160 See AFLUS, note 3, supra, § 23-4.

161 *United States v. Grossman*, 501 F.3d 846, 848-49 (7th Cir. 2007).

162 See *United States v. Floyd*, 2007 WL 316910, at *1 (E.D. Ky. 2007) (that the forfeited property is located in another district is no basis for granting a change of venue for the ancillary proceeding).

163 See AFLUS, note 3, supra, § 23-6.

164 See *United States v. Grossman*, 501 F.3d 846, 848 (7th Cir. 2007) (under Rule 32.2(c)(1)(A), the Government may move to dismiss a third party claim on any ground to which a Rule 12(b) motion would apply in a civil case).
in the claim were true, the claimants – the defendant’s parents – had not stated a basis on which they could recover under Section 853(n)(6). To the contrary, their claim – that they had given the forfeited property to the defendant as a gift – was an admission that they no longer had any interest in it.\textsuperscript{165}

\textit{Motion for summary judgment}

The Government may also ask the court to dispose of the third party claim on a motion for summary judgment, just as it may in a civil case.\textsuperscript{166}

\textit{The court may consider the record in the criminal case}

Testimony given in the case in chief is technically hearsay in the ancillary proceeding as far as the claimant is concerned, but Section 853(n)(5) says that the court may consider it.\textsuperscript{167} In \textit{United States v. Cohen},\textsuperscript{168} the key witness in the forfeiture phase of the trial was a jailhouse informant who testified that the money in a safe deposit box was the defendant’s drug proceeds. In the ancillary proceeding, the claimant argued that if the court applied Section 853(n)(5), she would have no opportunity to cross-examine this witness, but the Eleventh Circuit held there was no due process violation because claimant could have called the witness herself in the ancillary proceeding.\textsuperscript{169}

\textsuperscript{165} \textit{United States v. Ward}, 2007 WL 2993870, at *3-4 (W.D. La. 2007) (granting motion to dismiss on the pleadings because even if all of the allegations in the claim were true, claimant-donor who allegedly gave defendant forfeited truck as a gift lacked standing to contest the forfeiture).

\textsuperscript{166} See \textit{United States v. Corpus}, 491 F.3d 205, 208-09 (5th Cir. 2007) (Rule 32.2 allows the court to apply the civil rules in ancillary proceeding, which includes filing a motion for summary judgment pursuant to Rule 56); \textit{United States v. Brown}, 509 F. Supp. 2d 1239, 1241 (M.D. Fla. 2007) (Rule 32.2(c)(1)(B) expressly makes Rule 56 applicable in the ancillary proceeding; thus either party may move for summary judgment); \textit{United States v. Floyd}, 2007 WL 2229214, at *4 (E.D. Ky. 2007) (court grants partial summary judgment for the Government when facts make recovery under § 853(n)(6)(A) impossible, even viewing the facts in the light most favorable to claimant).

\textsuperscript{167} See AFLUS, note 3, supra, § 23-8.

\textsuperscript{168} \textit{United States v. Cohen}, 243 Fed. Appx. 531, 533 (11th Cir. 2007).

\textsuperscript{169} Id. at 533-34 (pursuant to § 853(n)(5), the district court was entitled to consider the testimony of a witness who gave evidence in the forfeiture phase of the trial, even though the claimant had no opportunity to cross-examine the witness at that time; there is no due process
Right to Attorneys Fees

A successful claimant in the ancillary proceeding may be entitled to attorneys fees under the Equal Access to Justice Act (EAJA), but the petition for fees will be denied if the Government was substantially justified in believing the third party was not the true owner.

In United States v. Bogacki, the defendant and the claimant were involved in a real estate swapping scheme. When the defendant was convicted, the Government sought the forfeiture of a particular parcel of property as part of the defendant’s sentence, even though the property was titled in the claimant’s name. The claimant contested the forfeiture in the ancillary proceeding, and ultimately the Government agreed to the exclusion of the property from the order of forfeiture when it turned out there was little equity in the property.

Claimant then filed a motion for attorneys fees, but in light of the pattern of illegal activity regarding the title to the forfeited property, the court found that the Government had acted reasonably in seeking the forfeiture of the property in the defendant’s case, and thus denied the claimant’s motion.

It is worth noting how the attorney fee provision in EAJA contrasts with the attorney fee provision in CAFRA. Under 28 U.S.C. § 2465(b), the prevailing party in a civil forfeiture case has an automatic right to attorneys fees regardless of the merits of the Government’s case. Section 2465(b), however, applies only to civil

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violation because claimant could have called the witness herself in the ancillary proceeding).

170 See United States v. Douglas, 55 F.3d 584, 588-89 (11th Cir. 1995) (the Government’s position in obtaining preliminary order of forfeiture not substantially justified where the Government failed to take notice that property had been awarded to third party in action enforcing civil judgment).

171 See AFLUS, note 3, supra, § 23-10.


173 Id. at 5-6 (assuming Government’s motion to release the property following discovery made claimant the ‘prevailing party,’ evidence that Claimant was a nominee with questionable credibility meant Government was substantially justified in seeking preliminary order of forfeiture and pursuing discovery in the ancillary proceeding).
forfeiture actions and not to the ancillary proceeding in a criminal forfeiture case. 174

Settlement of third party claims

A settlement with a third party in the ancillary proceeding survives the reversal of the defendant’s conviction. Thus, if the defendant is retried, and the property is forfeited a second time, the third party will have no claim in the ancillary proceeding.

In United States v. Wittig, the Government reached a settlement with the defendant’s wife whereby she dropped her claim to certain property forfeited in the defendant’s criminal case as a substitute asset. When the defendant’s conviction was overturned on appeal, the Government had to release the forfeited property to the defendant pending his retrial, but the court noted that the wife’s agreement to withdraw her claim to the property would remain binding on her in the event the defendant were convicted a second time and the property were again subject to forfeiture.175

XIII. Choice of Law

The role of state law

When a claim is filed in the ancillary proceeding, the court must look first to the law of the jurisdiction that created the property right to determine the nature of the claimant’s interest in the property.176 For example, in United States v. Timley, when the defendant’s attorney contested the forfeiture of the defendant’s property on the ground that he had an attorney’s lien on the property, the court had to look

174 See United States v. Gardiner, 512 F. Supp.2d 1270, 1271-72 (S.D. Fla. 2007) (denying request for fees under § 2465(b) because that statute does not apply to the ancillary proceeding, and denying the request under EAJA because the Government was substantially justified in forfeiting criminal proceeds that, unknown to the Government, were deposited into the account of an innocent owner).

175 United States v. Wittig, 525 F. Supp.2d 1281, 1286 (D. Kan. 2007) (settlement agreement remains binding on third party even if defendant’s conviction is reversed; if defendant is retried and convicted and property is forfeited a second time, third party will have no right to make a claim).

176 See AFLUS, note 3, supra, § 23-12(b).
to State law regarding attorneys’ liens to determine the nature and extent of the attorney’s interest.\textsuperscript{177}

If the court finds that the claimant has no interest under state law, the inquiry ends and the claim fails.\textsuperscript{178} In \textit{United States v. Jamieson}, the court held that defendant’s wife had no interest under State law in property that the defendant held in his own name. Thus, the court dismissed the claim without further inquiry into its merits under Section 853(n).\textsuperscript{179}

\textit{The role of federal law}

While state law determines what interest the claimant has in the property, federal law determines whether that interest is sufficient to satisfy the standing requirement in section 853(n)(2) or to prevail on the merits under section 853(n)(6)(A) or (B).\textsuperscript{180} For that reason, a person who has an interest in the property under state law may nevertheless fail to satisfy the requirements of the federal statute.

\textit{Timley} is an example of how this works. Because he had filed an attorney’s lien on his client’s property, the defense attorney in that case had a

\textsuperscript{177} \textit{United States v. Timley}, 507 F.3d 1125, 1130-31 (8th Cir. 2007) (court looks first to the law of the jurisdiction that created the legal interest that the claimant is asserting to determine if he has statutory standing; defense attorney who filed an attorney’s lien under state law on his client’s property had statutory standing); \textit{see also United States v. Ward}, 2007 WL 2993870, at *3 (W.D. La. 2007) (court looks to state law to determine if parents who gave forfeited truck to defendant as a gift retained any legal interest in it); \textit{United States v. DeGregory}, 2007 WL 949804, at *1 (S.D. Fla. 2007) (court looks to state law to determine what interest a shareholder has in the corporation’s assets).

\textsuperscript{178} \textit{Timley}, 507 F.3d at 1130 (if the asserted property right arises under state law, the federal court will look first to state law to see what interest the claimant has in the property; if he has no interest under state law, “the inquiry ends, and the claim fails for lack of standing”); \textit{United States v. Corpus}, 491 F.3d 205, 210 (5th Cir. 2007) (even if sale of property to defendant was fraudulent under state law in that it deprived claimant of his opportunity to use the property to satisfy a debt owed by the seller, claimant could not recover under § 853(n)(6)(A) because state law gives the defrauded party no legal interest in the property).

\textsuperscript{179} \textit{United States v. Jamieson}, 2007 WL 275966, at *3 (N.D. Ohio 2007) (because defendant’s wife had no interest under state law in property held by defendant in his own name, she could not recover under Section 853(n)).

\textsuperscript{180} \textit{See AFLUS}, note 3, supra, § 23-12(c).
legal interest in the property under State law, and thus was able to satisfy the standing requirement in § 853(n)(2), but he could not prevail on the merits under § 853(n)(6) because, as a matter of federal law, he had no pre-existing interest in the property (as required by Section 853(n)(6)(A)), and was not a bona fide purchaser for value (as required by Section 853(n)(6)(B)).

XIV. Standing Under Section 853(n)(2)

Many third-party challenges to the order of forfeiture in a criminal case are made by persons whose standing to contest the forfeiture is uncertain. The standing requirement is set forth in Section 853(n)(2). In 2007 there was once again a great deal of litigation over who can and cannot satisfy the requirements of the statute.

*The defendant may not file a claim*

The standing provision in Section 853(n)(2) specifically bars the defendant from filing a claim in the ancillary proceeding because his interest in the property was extinguished when the court issued the preliminary order of forfeiture. It follows that if the defendant lacks standing to file a claim on his own behalf, he lacks standing to appeal the denial of a third party’s claim.

*General creditors do not have a legal interest in the forfeited property*

To have standing under Section 853(n)(2), the third party must have a specific interest in the forfeited property, not just a general interest in the estate of the defendant. So if the only interest a third party has under State law is that of a

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181 *Timley*, 507 F.3d at 1131 (a court should not conflate the standing requirement in § 853(n)(2) with the requirements of a claim on the merits under § 853(n)(6); defense attorney who filed an attorney’s lien on his client’s property had statutory standing to contest the forfeiture under § 853(n)(2), but he could not establish a pre-existing legal interest under § 853(n)(6)(A) or that he was a BFP under § 853(n)(6)(B)).


183 See id. at § 23-13(b).

184 See *United States v. Bufkin*, 251 Fed. App. 930, 930 (5th Cir. 2007) (because defendant cannot file a claim in the ancillary proceeding, it follows that he lacks standing to appeal from the denial of a third party’s claim).
general creditor, he lacks standing to contest the forfeiture in the ancillary proceeding.\textsuperscript{185}

For example, if a person voluntarily transfers his property to the defendant without retaining any legal interest in it, he cannot contest the forfeiture of that property in the ancillary proceeding, even if the defendant still owes him money, because at that point he is merely an unsecured creditor of the defendant.

In \textit{DSI Associates LLC v. United States}, a third party sold property to the defendant but had not been fully paid in return. The third party had not retained any secured interest in the property, however, so when it was forfeited from the defendant in a criminal case, the third party had no basis to object to the forfeiture.\textsuperscript{186}

\textit{The ability to trace assets is irrelevant}

What \textit{DSI Associates} and other cases illustrate is that a third party’s ability to trace his former interest to a particular asset is not enough to give him standing to contest its forfeiture. In \textit{United States v. Eldick}, the claimant conceded that he had transferred title to the forfeited property to the defendant voluntarily but said that he had been induced by fraud to do so. But the Eleventh Circuit held that a fraud victim who can trace his property to the asset that is forfeited is just another unsecured creditor without standing to contest the forfeiture.\textsuperscript{187}

\textsuperscript{185} See AFLUS, note 3, supra, § 23-13(c).

\textsuperscript{186} \textit{DSI Associates LLC v. United States}, 496 F.3d 175, 184 (2\textsuperscript{nd} Cir. 2007) (because claimant did not retain a secured interest in the property it sold to defendant, it lacked standing to contest the forfeiture of that property in the ancillary proceeding); \textit{see also United States v. Eldick}, 223 Fed. Appx. 837, 839-40 (11th Cir. 2007) (a fraud victim who voluntarily transfers his property to the defendant, retaining no interest in it, has a cause of action in tort against the defendant, but has no interest in the property other than that of an unsecured creditor, which is insufficient to establish standing to contest the forfeiture in the ancillary proceeding), following \textit{United States v. BCCI Holdings (Luxembourg) S.A.}, 69 F. Supp. 2d 36, 59 (D.D.C. 1999); \textit{United States v. Corpus}, 491 F.3d 205, 211 (5\textsuperscript{th} Cir. 2007) (third party who was an unsecured creditor of the person who sold the property to the defendant in exchange for drug proceeds had no legal interest in the property at the time it became subject to forfeiture, and thus could not recover under § 853(n)(6)(A)).

\textsuperscript{187} \textit{United States v. Eldick}, 223 Fed. Appx. 837, 839-40 (11th Cir. 2007) (that fraud victim can trace his losses to the defendant’s property makes no difference; to have standing, the claimant must have a present interest in the property).
Stockholders do not have standing to challenge forfeiture of corporate assets

Stockholders lack standing to contest the forfeiture of corporate assets because, as a matter of State property law, they have no legal interest in such assets.\(^{188}\)

Bailees and lienholders

Bailees have standing to contest the forfeiture of property in their possession if they identify the bailor and describe the nature of the bailment.\(^{189}\) And as we’ve already seen in *Timley*, the case involving the attorney’s lien, lienholders have standing to contest the forfeiture of the property to the extent of their lien.\(^{190}\)

Person adversely affected by the forfeiture

That a person will be adversely affected by the forfeiture of the defendant’s property is not a reason to confer standing on that person to contest the forfeiture. In *United States v. Fleet*, the case involving forfeiture of the family home as a substitute asset, the defendant’s wife claimed the right to contest the forfeiture of her *husband’s interest* in jointly-held property because the forfeiture would have an adverse affect on her, but the Eleventh Circuit was unimpressed. That an innocent spouse may be adversely affected by the forfeiture of her husband’s interest in jointly held property does not give her the right to object to the forfeiture of his interest.\(^{191}\)

\(^{188}\) *See United States v. Wyly*, 193 F.3d 289, 304 (5th Cir. 1999) (because stockholders, as a matter of state law, do not have a legal interest in corporate assets, they cannot challenge the forfeiture of those assets when the corporation is convicted); *United States v. DeGregory*, 2007 WL 949804, at *1 (S.D. Fla. 2007) (because under State law, shareholder and corporation are separate entities, shareholder does not have standing to contest forfeiture of corporation’s assets).

\(^{189}\) *See United States v. Kokko*, 2007 WL 2209260, at *5 (S.D. Fla. 2007) (a bailee has standing to contest the forfeiture of property, but to comply with the pleading requirements in § 853(n)(3), he must identify the bailor, and he must submit to discovery regarding the nature of the bailment); AFLUS, note 3, supra, § 23-13-(d).

\(^{190}\) *United States v. Timley*, 507 F.3d 1125, 1131 (8th Cir. 2007) (attorney who filed an attorney’s lien on client’s property had standing to contest its forfeiture under § 853(n)(2)).

\(^{191}\) *United States v. Fleet*, 498 F.3d 1225, 1231-32 (11th Cir. 2007).
XV. Grounds for Recovery in Ancillary Proceeding

There are only two grounds for recovery in the ancillary proceeding.

The only grounds on which a third party can prevail in the ancillary proceeding are those set forth in Sections 853(n)(6)(A) and (B). Those two provisions set forth two ways of proving ownership of the property. Under paragraph (A), the third party may attempt to show that he, not the defendant, was at all times the owner of the property, or that he had an interest in the property before the Government’s interest vested under the relation back doctrine – i.e., at the time of the offense. Under paragraph (B), the third party can attempt to show that he acquired the property as a bona fide purchaser for value without reason to know that the property was subject to forfeiture.

Proof of ownership in either of these ways is a complete defense to forfeiture. If the third party can establish ownership of the forfeited property under Section 853(n)(6)(A) or (B), he will prevail. If he is not the owner of the property, however, the doctrine of prudential standing will prevent him from raising any objections to the forfeiture of someone else’s property. Accordingly, the only issue litigated in the ancillary proceeding is ownership.

For these reasons, a claimant cannot use the ancillary proceeding to challenge the forfeitability of the property or to raise procedural objections to the way the defendant’s conviction was obtained or the way the order of forfeiture was entered. That is, unless it somehow bears on his ownership of the property, the court’s determination that the property was derived from or used to commit the offense for which the defendant was convicted is not the third party’s problem. As the court said in United States v. Armstrong, “the [ancillary] proceeding does not involve relitigation of the forfeitability of the property, but

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192 See Timley, 507 F.3d at 1130 (there are two grounds on which to prevail in the ancillary proceeding; the claimant must either demonstrate a priority of ownership under § 853(n)(6)(A), or that he subsequently acquired the property as a BFP under § 853(n)(6)(B)).

193 See AFLUS, note 3, supra, § 23-14.

194 See AFLUS, note 3, supra, § 23-14(c).

195 See United States v. Dejanu, 163 Fed. Appx. 493, 498 (9th Cir. 2006) (“Whether the criminal forfeiture of the property was proper is not an issue subject to litigation by third parties in the ancillary proceeding”).
only the determination of whether any third party has a legal interest in the forfeited property.\footnote{United States v. Armstrong, 2007 WL 809508, at *5 (E.D. La. 2007).}

Similarly, in United States v. Guerra, the Eleventh Circuit held that a third party lacked standing to contest the forfeiture in the ancillary proceeding on the ground that it violated the defendant’s rights under the Excessive Fines Clause of the Eighth Amendment.\footnote{United States v. Guerra, 216 Fed. Appx. 906, 908 n.2 (11th Cir. 2007). \textit{But see United States v. Lazarenko}, 504 F. Supp. 2d 791, 794 (N.D. Cal. 2007) (third party permitted to challenge forfeiture order on statute of limitations and res judicata grounds, but loses on the merits).}

\textit{Exception to the rule against challenging forfeitability}

The above discussion contains an important caveat: the third party cannot challenge forfeitability of the property \textit{unless it somehow bears on his assertion of ownership of the property}. It is worth taking a moment to explain this exception.

In some circumstances, the source of the property may be intertwined with the claimant’s assertion that the property was vested in him or her, not the defendant. For example, the third party might say, “that property isn’t my husband’s drug proceeds, it’s the money I earned working at the phone company.” The third party has the right make that argument because she isn’t challenging forfeitability \textit{per se}, she’s asserting that she is really the owner of the property.\footnote{See United States v. Corey, 2006 WL 1281824, at *8-9 (D. Conn. 2006) (if claimant had been able to show that the forfeited property was acquired with legitimate funds in a commingled bank account, not with criminal proceeds, he would have prevailed under § 853(n)(6)(A) because he had a superior ownership interest in the untainted funds).}

The distinction is important: If the third party were challenging the Government’s proof that the property was forfeitable, the question would be whether the Government established the forfeitability of the property by a preponderance of the evidence at trial, but because the third party is actually making an ownership claim, it is the third party who bears the burden of proving...
that there was a legitimate source for the property. The Eleventh Circuit made this point last year in *United States v. Foley*.

### XVI. Superior Legal Interest Under Section 853(n)(6)(A)

*Paragraph (6)(A) embodies the relation back doctrine*

The requirement in Section 853(n)(6)(A) that the third party establish a legal interest in the property that existed at the time of the offense is a restatement of the relation back doctrine. Under the relation back doctrine, the Government’s interest vests at the time of the offense; so, to defeat the Government’s interest, the third party has to show that his interest pre-dated the date of the offense.

It is for that reason that a person who acquired an interest in the property after it became subject to forfeiture (i.e., after Government’s interest vested) cannot recover under Section 853(n)(6)(A). For example, in *Grossman*, a third party lender who acquired a lien on the property after it became subject to forfeiture could not establish a pre-existing interest; its only avenue of relief was to show that it was a bona fide purchaser for value under § 853(n)(6)(B).

In *United States v. Floyd*, the claimant had had an interest in the forfeited property in the past but had surrendered that interest by the time the crime occurred. Specifically, the claimant owned the property from 1989 to 1997, but a third party owned it from 1997 to 2002 when the claimant allegedly reacquired it. The crime giving rise to the forfeiture occurred in 1999. When the claimant reacquired the property, there was no legitimate source.
attempted to contest the forfeiture of the property, the court held that because he had no interest in the property at the time the crime occurred, he could not recover under Section 853(n)(6)(A) but had to rely on the bona fide purchaser provision in Section 853(n)(6)(B).

In United States v. Catrett, the defendant's father had an interest in the property at the time of the offense occurred and could have filed a claim under § 853(n)(6)(A), but by the time the property was forfeited, he had transferred the property to his grandson. Under a literal reading of the statute, the grandson did not have the right to file a claim under Section 853(n)(6)(A) because he did not acquire his interest in the property until after it because subject to forfeiture and the Government's interest vested, but he argued that his claim was basically an assignment of the valid claim that his grandfather could have filed under that statute if he had retained his interest in the property. The court agreed with the grandson and allowed him to make his claim under paragraph (A).

Lienholder's pre-existing interest in the property

Suppose the third party contesting the forfeiture was a lender who had a lien on the property at the time the crime occurred, but who no longer had a lien by the time the property was forfeited because the loan had been paid. In United States v. Grossi, the district court agreed with the Government that a lienholder in that situation no longer had an interest in the property and therefore could not file a claim, but the court nevertheless reached a bizarre result.

Applying the relation back doctrine, the court held that because the Government’s interest in the property vested when the crime occurred, the defendant’s obligation to pay the loan ceased at that point. Therefore, the court

203 Id. (third party who was the original owner of the forfeited property but lost his title in a mortgage foreclosure before the Government’s interest vested under the relation back doctrine, could not recover under § 853(n)(6)(A); his assertion that he later reacquired the property would, at best, support a claim as a BFP under § 853(n)(6)(B)).

204 United States v. Catrett, 2007 WL 2081271, at *3 (M.D. Ala. 2007) (third party who acquires property after the act giving rise to its forfeiture may make his claim under Section 853(n)(6)(A), instead of having to show that he was a bona fide purchaser for value under Section 853(n)(6)(B), if he acquired the property not from the defendant but from another third party who would have had a meritorious claim as a pre-existing owner if he had retained his title to the property until the ancillary proceeding).

reasoned, any payments the defendant made to the lienholder on the mortgage were payments he made on the Government’s property. Thus, the court concluded, while the lender could not make a claim, the Government had to reimburse the defendant for the amounts he paid.\footnote{206 United States v. Grossi, 2007 WL 2317629, at *3-4 (N.D. Cal. 2007) (defendant’s obligation to keep his mortgage payments current ceases at the moment he uses the property to commit a criminal offense; from that moment on, the obligation is the Government’s; so if the defendant pays off a lien while the forfeiture action is pending, the Government must reimburse the defendant).}

This case appears wrongly decided. If the property owner’s obligation to pay his mortgage passes to the Government at the moment the property owner uses the property to commit a crime, then every time the Government succeeds in forfeiting such property from a criminal, it would be obligated to reimburse the criminal for all of his past mortgage payments! For a variety of reasons, that is simply not the law; most important, the property owner’s personal obligation to pay his mortgage remains just that – a personal contractual obligation – even if the Government later perfects a retroactive interest in the property under the relation back doctrine. The Grossi decision has been appealed.

\textit{Contesting the forfeiture of criminal proceeds}

Several years ago, in \textit{United States v. Hooper}, the Ninth Circuit held that a third party can \textit{never} assert an interest under Section 853(n)(6)(A) in property constituting the proceeds of a crime, because the Government’s interest will have already vested in such property before the third party could have acquired any interest in it.\footnote{207 United States v. Hooper, 229 F.3d 818, 821-22 (9th Cir. 2000) (to prevail under section 853(n)(6)(A), the claimant must have a preexisting interest in the forfeited property; because proceeds do not exist before the commission of the underlying offense, section 853(n)(6)(A) can never be used to challenge the forfeiture of proceeds). See AFLUS, note 3, supra, § 21-2.} \textit{Hooper} is the seminal case on this point, and other courts regularly follow it. For example, in \textit{Timley}, the Eighth Circuit held that the defense attorney who asserted an interest in his client’s criminal proceeds could not make a successful claim under § 853(n)(6)(A) because the proceeds did not exist before the offense was committed, and the Government’s interest vested immediately when it was committed.\footnote{208 United States v. Timley, 507 F.3d 1125, 1130 (8th Cir. 2007); see also United States v. Eldick, 223 Fed. Appx. 837, 840 (11th Cir. 2007) (following Hooper; if the forfeited property}
This rule applies not only to the proceeds themselves but to any property traceable to the proceeds. In United States v. Davis, the Government forfeited a boat that the defendant had purchased with his fraud proceeds. The court held that the Government’s interest in the boat vested as soon as the defendant purchased it (because he purchased it with money in which the Government already had a vested interest). Accordingly, the third party who acquired the boat from the defendant thereafter could not make his claim under Section 853(n)(6)(A) but had to be a bona fide purchaser for value under Section 853(n)(6)(B).

Innocence is not required

The defense to the forfeiture under § 853(n)(6)(A) is not an innocent owner defense. As noted earlier, because a third party’s property cannot be forfeited in a criminal case, proof of ownership is a complete defense to the forfeiture in the ancillary proceeding. Thus, as the Eleventh Circuit held in Fleet, the claimant is not required to show that she was innocent when making a claim under Section 853(n)(6)(A).

Marital property

A pre-existing marital interest is sufficient to satisfy the requirements of Section 853(n)(6)(A), but if the spouse’s interest was inchoate under State law at the time the crime occurred, she will not prevail. In Jamieson, the defendant’s

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is traceable to the proceeds of the crime, the Government’s interest under the relation back doctrine will always be superior to that of third party asserting an interest in the property under section 853(n)(6)(A); United States v. Brown, 509 F. Supp. 2d 1239, 1244 (M.D. Fla. 2007) (following Hooper; defendant’s wife cannot contest forfeiture of his criminal proceeds under § 853(n)(6)(A) because, under the relation back doctrine, the Government’s interest in the proceeds will have vested before any third party could have acquired any interest in them).


210 Id. at *6 (if defendant’s boat is traceable to defendant’s fraud proceeds, person who later purchased boat from defendant cannot make a claim under § 853(n)(6)(A); if he is to prevail, it must be as a BFP under § 853(n)(6)(B)).

211 United States v. Fleet, 498 F.3d 1225, 1232 (11th Cir. 2007) (there is no innocent owner defense to criminal forfeiture because the only property being forfeited is property that belongs to the defendant). See AFLUS, note 3, supra, § 23-15(b).

212 See AFLUS, note 3, supra, § 23-15(d).
wife had a dower interest under State marital property law, but the court held that it was extinguished before it matured when the defendant forfeited his property to the Government. Thus, the wife could not recover under Section 853(n)(6)(A).\textsuperscript{213}

\textit{Constructive trusts}

Third parties whose claims would otherwise fail because, as unsecured creditors, they have no specific interest in the forfeited property, may attempt to satisfy the legal interest requirement by asserting that the defendant is holding the property for them in constructive trust.\textsuperscript{214} As at least one appellate court has held, however, that a constructive trust is an equitable remedy that does not give the beneficiary any interest in the forfeited property until it is imposed by a court. For that reason, the beneficiary of a constructive trust can \textit{never} assert a pre-existing interest in the forfeiture property that would allow him to recover under Section 853(n)(6)(A).\textsuperscript{215}

Even if a constructive trust could constitute a pre-existing interest for purposes of Section 853(n)(6)(A), it is rarely the case that a third party is able to satisfy all of the requirements of a constructive trust under the applicable law. Among other things, because a constructive trust is an equitable remedy, the court will not impose one where doing so on behalf of one party would be unfair to others who are similarly situated.\textsuperscript{216} This is often the case where one victim can trace his losses to the defendant’s property and other victims cannot.

\textsuperscript{213} \textit{United States v. Jamieson}, 2007 WL 275966, at *3, *5 (N.D. Ohio 2007) (wife who has no interest in husband’s property under State law cannot recover in the ancillary proceeding; wife’s dower interest under State law is inchoate and is extinguished before it matures if the property is forfeited to the Government).

\textsuperscript{214} See AFLUS, note 3, supra, § 23-15(c).

\textsuperscript{215} See \textit{United States v. BCCI Holdings (Luxembourg) S.A. (Petition of Chawla)}, 46 F.3d 1185, 1190-91 (D.C. Cir. 1995) (constructive trusts are “legal interests,” but they do not exist until they are imposed by the court, and so cannot support a claim under section 1963(I)(6)(A)); \textit{United States v. Strube}, 58 F. Supp. 2d 576, 585 (M.D. Pa. 1999) (same; following \textit{BCCI}).

\textsuperscript{216} See \textit{United States v. BCCI Holdings (Luxembourg) S.A. (Petition of BCCI Depositors)}, 833 F. Supp. 9, 14 (D.D.C. 1993) (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 at the expense of others).
In *United States v. Andrews*, the district court refused to impose a constructive trust because granting such relief to one victim would have been unfair to other victims of the same crime.\(^{217}\) The decision in that case has been appealed to the Tenth Circuit.

**XVII. Bona Fide Purchasers Under Section 853(n)(6)(B)**

*The defense under section 853(n)(6)(B) has three elements*

A third party making a claim under Section 853(n)(6)(B) must show three things: (1) that he has a legal interest in the property; (2) that the interest was acquired as a bona fide purchaser for value; and (3) that the interest was acquired at a time when the claimant was reasonably without cause to believe that the property was subject to forfeiture.\(^{218}\) Thus, at the district court held in *Davis*, the court does not reach the bona fide purchaser element if the claimant does not first establish a legal right, title, or interest in the forfeited property because he is merely a nominee.\(^{219}\)

*Donees / family members are not bona fide purchasers*

A person who acquires the forfeited property as a gift, by operation of marital property law, or as an heir, cannot recover as a bona fide purchaser for value because he has given no consideration for the property: he is not a

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\(^{217}\) *United States v. Andrews*, 2007 WL 837250, at *7 (W.D. Okla. 2007) (a court should refuse to impose a constructive trust on behalf of a victim who can trace his losses to the forfeited property if doing so would be unfair to the victims who cannot trace; in that situation, it is better to allow the Government to forfeit the property and distribute it to all of the victims on a pro rata basis).

\(^{218}\) See *United States v. Timley*, 507 F.3d 1125, 1130-31 (8th Cir. 2007) (the BFP defense under § 853(n)(6)(B) has three elements: legal interest; bona fide purchase for value; and the absence of reason to know that the property was subject to forfeiture); *United States v. Brown*, 509 F. Supp.2d 1239, 1247 (M.D. Fla. 2007) (denying claimant’s motion for summary judgment because she could not satisfy any of the three requirements of § 853(n)(6)(B): that she was an owner and not a nominee, that she had given something of value, and that she was without reason to know the property was subject to forfeiture when she acquired her interest in it); AFLUS, note 3, supra, § 23-16.

\(^{219}\) *United States v. Davis*, 2007 WL 1362614, at *6 (S.D. Fla. 2007) (a nominee cannot be a BFP under § 853(n)(6)(B); if defendant sells property to A, it is A who must file a claim; that A titled the property in B’s name does not make B a bona fide purchaser for value).
“purchaser.” In *Guerra*, the defendant’s husband claimed that the defendant had given him the property in exchange for his “love and affection,” but the Eleventh Circuit was not persuaded that that made him a bona fide purchaser.221

In *United States v. White*,222 the defendant, a former professional football player, was convicted of submitting fraudulent claims to the Medicare program for services rendered (or not rendered) at a substance abuse clinic. The defendant agreed to the forfeiture of certain real property that he had acquired with the fraud proceeds, but a charity controlled by the defendant’s brother filed a claim contesting the forfeiture, claiming that the defendant had conveyed the property to it as a gift.

The essence of the charity’s argument was that even if it could not be considered a bona fide purchaser of the property itself, it should be regarded as a purchaser of the improvements that it made to the property at its own expense after it took title. But the Fifth Circuit said this was not so.223

**Creditors who have acquired a judgment lien**

Creditors who convert the debt owed to them by the defendant to a judgment lien on the defendant’s property after the property becomes subject to forfeiture cannot satisfy the purchaser requirement. In *Jamieson*, the local taxing authority and a landscaper each converted their debts to judgment liens after the Government’s interest in the property vested under the relation back doctrine. Because a person who merely attaches a lien to the property gives no new

220 *See AFLUS*, note 3, *supra*, § 32-16(b).

221 *United States v. Guerra*, 216 Fed. Appx. 906, 910-11 (11th Cir. 2007) (defendant’s husband was not a BFP in terms of section 853(n)(6)(B) because he gave no consideration in exchange for defendant’s transfer of her property; that he made improvements to the property with no expectation of being paid, and gave his wife “love and affection” was not sufficient); *see also United States v. Claire*, 2007 WL 294245, at *2 (N.D. Ga. 2007) (defendant’s wife who alleged only that she received car traceable to fraud proceeds as a gift at the time of her separation from defendant was not a bona fide purchaser for value; motion to dismiss petition granted).


223 *Id.* at *2 (charity that received defendant’s forfeitable real property as a gift was not a “purchaser” and thus could not recover under § 853(n)(6)(B), even though it had spent money maintaining and making improvements to the property).
consideration in exchange for the lien, he is not a “purchaser” of his interest in the property, and thus cannot recover under Section 853(n)(6)(B). 224

Claimant must give something of value

To qualify as a bona fide purchaser, the claimant must show that whatever he gave to the defendant in exchange for the property had real value. If the court determines that the transfer of the property from the defendant to the claimant was a fraudulent conveyance or gift disguised as a business transaction, the claim will fail.

In United States v. Brown, the defendant’s wife claimed she was a bona fide purchaser for value of the defendant’s health care fraud proceeds because he had transferred the money to her as compensation for work in his medical practice and filed a motion for summary judgment. But the court denied the motion, holding that the claimant had not yet shown that this was a bona fide business transaction and not a gift. 225

Claimant must be without cause to believe the property was subject to forfeiture

The third element of the bona fide purchaser defense is that the claimant was reasonably without cause to believe that the property was subject to forfeiture at the time he or she acquired it. 226 Thus, a claimant who was aware when he acquired the property that it was named in an indictment, or that the Government had filed a lis pendens against it, cannot prevail as a bona fide purchaser under Section 853(n)(6)(B). 227

224 United States v. Jamieson, 2007 WL 275966, at *2 (N.D. Ohio 2007) (a person who converts his debt to a judgment and attaches a judgment lien to the defendant’s property after it becomes subject to forfeiture cannot recover under Section 853(n)(6)(B) because he is not a bona fide purchaser for value).

225 United States v. Brown, 509 F. Supp.2d 1239, 1247 (M.D. Fla. 2007)(denying claimant’s motion for summary judgment because there was a material issue a to whether the services she alleged rendered in exchange for the forfeited money were of real value).

226 See AFLUS, note 3, supra, § 23-16(c).

227 But see United States v. Grossman, 501 F.3d 846, 849-50 (7th Cir. 2007) (whether lis pendens provided constructive notice depends on state law; because county in which lis pendens was filed did not maintain a tract index, but only a grantor-grantee index, lis pendens that did not name the title holder did not provide constructive notice).
In Guerra, the defendant’s husband – the one who claimed to be a purchaser because he gave love and affection in exchange for an interest in his wife’s property – could not prevail on the third requirement because he acquired the property after attending the hearing where the Government requested a pre-trial restraining order to preserve the property for forfeiture, and after he appeared as a witness in the grand jury that was investigating his wife’s criminal activity.\footnote{228 United States v. Guerra, 216 Fed. Appx. 906, 910 (11th Cir. 2007) (spouse who obtained an interest in the proceeds of defendant’s offense after attending hearings on the Government’s request for an order restraining defendant from transferring her property was not without reasonable cause to believe the property was subject to forfeiture).}

The requirement that the third party be reasonably without cause to believe that the property is subject to forfeiture at the time he acquires it makes it particularly difficult for defense attorneys to contest the forfeiture of property transferred to them as their fee as bona fide purchasers. As the Supreme Court said many years ago in Caplin & Drysdale v. United States, if the assets subject to forfeiture are specified in the indictment, “the only way a lawyer could be a beneficiary of section 853(n)(6)(B) would be to fail to read the indictment of his client.”\footnote{229 Caplin & Drysdale v. United States, 491 U.S. 617, 633 n.10 (1989).} In 2007, the Eighth Circuit said the same thing in Timley.\footnote{230 United States v. Timley, 507 F.3d 1125, 1131 (8th Cir. 2007) (defense attorney who acquired a legal interest in his client’s drug proceeds after the client was indicted could not establish that he was without reason to know that the money was subject to forfeiture; quoting Caplin & Drysdale).}

Willful blindness

A person who is willfully blind cannot satisfy the “without cause to believe” requirement. In Brown, the defendant’s wife said she had purchased her husband’s property in a business transaction. As noted, there was some doubt about that, but the court said even if it were true, she could not prevail because she was willfully blind to her husband’s criminal activity.\footnote{231 United States v. Brown, 509 F. Supp.2d 1239, 1246-47 (M.D. Fla. 2007) (wife who was willfully blind to husband’s criminal activity cannot recover under § 853(n)(6)(B) even if she “purchased” his criminal proceeds in an bona fide business transaction).}
XVIII. Discovery in the Ancillary Proceeding

Rule 32.2(c)(1)(B)

Rule 32.2(c)(1)(B) states that the court may permit the parties to conduct discovery in the ancillary proceeding in accordance with the Federal Rules of Civil Procedure “if the court determines that discovery is necessary or desirable to resolve factual issues.” In Kokko, the case involving the watches being smuggled into the United States from overseas, the claimant asserted that it had an interest in the property as a bailee. Thus, the court allowed the Government to take discovery to determine the nature and circumstances of the bailment.

Foreign claimants / location of deposition

With foreign claimants, there is often a dispute about where the claimant’s deposition should take place. In Kokko, the court said the claimant, a Swiss corporation, was not a mere witness; it was a party subject to the jurisdiction of the court. Therefore the Government could insist that the corporation send a representative to the United States so that it conduct the deposition in the district where the case was filed.

XIX. Post-Conviction Issues

Clear Title to Forfeited Property

If no one files a claim in the ancillary proceeding, the Government obtains clear title to the property.

References


233 United States v. Kokko, 2007 WL 2209260, at *5-6 (S.D. Fla. 2007) (where claimant asserts that it has an interest in the forfeited property as a bailee, Government is entitled to take discovery to determine the nature and circumstances of the bailment, including serving claimant with a Rule 30 subpoena duces tecum and scheduling a deposition).

234 Id. at *4 (foreign national who files a claim is not a mere witness; it is a party subject to the jurisdiction of the court; thus it must comply with discovery requests and the Government may insist that any deposition must take place in the United States, not in the country where the claimant resides).

235 See United States v. Armstrong, 2007 WL 809508, at *5 n.2 (E.D. La. 2007) (the Government is deemed to hold clear title to property if no third party files a claim in the ancillary
Stay pending appeal

Courts appear to be reluctant to grant the defendant a stay of the forfeiture order pending appeal. In United States v. Wilk, the court denied the defendant's request to stay the forfeiture of the proceeds of the sale of his forfeited residence because the property had already been liquidated, and because the defendant's likelihood of success on the merits of his appeal were "slim." In United States v. Clark, the court denied the defendant's request for a stay pending appeal, citing the risk to the Government of holding the property in a declining market.

Appeals by third parties

A third party who does not assert a theory of recovery in the ancillary proceeding in the district court cannot raise it for the first time on appeal. For example, in Eldick, the Eleventh Circuit refused to allow the third party to raise a constructive trust theory for the first time on appeal.

Abatement

A criminal forfeiture judgment abates if the defendant dies before his or her appeal is final. If that happens, the Government's only option is to file a civil proceeding); AFLUS, note 3, supra, § 23-17.

236 See generally AFLUS, note 3, supra, § 24-3.


238 United States v. Clark, 2007 WL 1140913, at *1 (E.D. Mich. 2007) (denying defendant's motion for stay on ground that, in the exercise of its discretion, court finds Defendant's likelihood success on the merits to be small, and the Government's risk of loss due to declining market conditions and maintenance costs to be great).

239 United States v. Eldick, 223 Fed. Appx. 837, 839 n.2 (11th Cir. 2007) (third party who wants to rely on a constructive trust theory must do so in the district court; he cannot raise it for the first time on appeal). See generally AFLUS, note 3, supra, § 24-5.

240 See AFLUS, note 3, supra, § 24-8.
forfeiture action, provided the statute of limitations has not expired. This is often cited as a reason why the Government might want to file a parallel civil forfeiture action and ask the district court to stay it pursuant to 18 U.S.C. § 981(g) until the criminal forfeiture order is final.

**Rule 41(g) motion for the return of property**

Rule 41(g), F.R.Crim.P., may be invoked to seek the return of property that was seized but never forfeited. For example, the rule will apply if the Government seizes the defendant’s property at the time of his arrest but never includes it in a forfeiture order. But the motion will be denied if the Government no longer has the property, or if the property is “derivative contraband” that the defendant may not possess.

On the other hand, if the property was forfeited criminally, Rule 41(g) is not the proper vehicle for seeking the return of the property. Because the forfeiture is part of the defendant’s sentence, it may be challenged only on direct appeal.

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241 See United States v. $96,100.00 in U.S. Currency, 2007 WL 701249, at *3 (W.D. Tenn. 2007) (when defendant died pending appeal, the criminal forfeiture judgment abated, leaving civil forfeiture as the Government’s only option, except that the statute of limitations had expired).

242 See United States v. Suggs, 256 Fed. Appx. 804, 805 (7th Cir. 2007) (defendant properly invoked Rule 41(g) to seek return of property seized at the time of his arrest but not included in the order of forfeiture).

243 See United States v. Stevens, 500 F.3d 625, 628 (7th Cir. 2007) (Rule 41(g) motion for the return of property that was never forfeited must be denied if the Government is no longer in possession of the property, but the court cannot determine that the Government no longer has the property without receiving evidence on that issue; it cannot simply accept the representations to that effect in the Government’s briefs); United States v. Uribe-Londono, 238 Fed. Appx. 628, 629 (1st Cir. 2007) (Rule 41(g) motion for the return of property that was seized but not forfeited may be denied if the property is “derivative contraband” that the defendant may not possess, but unless the nature of the property is self-evident, the court cannot deny the motion without developing an evidentiary record).

244 Suggs, 256 Fed. App. at 806 (affirming denial of Rule 41(g) motion for the return of cash and guns forfeited as part of defendant’s sentence; only remedy is direct appeal); United States v. Rhodes, 2007 WL 2735559, at *2 (E.D. Mo. 2007) (if defendant agrees to forfeiture in his guilty plea, he waives any right to file Rule 41(g) motion when Government fails to follow through with the forfeiture).
A Rule 41(g) motion for the return of property that was seized but never forfeited will be denied if the Government has a basis to retain the property to satisfy a restitution order or other debts owed to the Government. In United States v. Bell, the court said that the Government could, in theory, retain the defendant’s seized currency as reimbursement for the cost of court-appointed counsel, but it ultimately denied the Government’s request to do so on the ground that the defendant needed the money to support his daughter.

Habeas corpus

The federal habeas corpus statute, 28 U.S.C. § 2255, does not apply to criminal forfeiture. It only provides relief from confinement, not from a judgment forfeiting property.

XX. Miscellaneous Issues

Obstruction of Forfeiture

A defendant who hides or conveys his property to avoid forfeiture may be guilty of an offense under 18 U.S.C. § 2232. In United States v. Russo and United States v. Sutley, two related criminal cases, the court said that to convict a defendant of a substantive offense under Section 2232 it is not enough to show that the defendant intended to conceal his property from the Government; there must be evidence, other than the inclusion of the property in the indictment, that the Government was about to seize the property for forfeiture when the defendant


246 United States v. Bell, 2007 WL 2303587, at *3 (N.D. Ill. 2007) (under 18 U.S.C. § 3006A, the court may allow the Government to retain seized property that is not forfeited to reimburse the Government for the cost of court-appointed counsel, but court denies such request where defendant shows that he needs to money to support his daughter).

247 See AFLUS, note 3, supra, § 24-11.

248 Aswege v. United States, 2007 WL 487002, at *2 (C.D. Ill. 2007) (criminal defendant cannot challenge forfeiture order under section 2255 which provides relief from confinement, not monetary penalties), following United States v. Ramsey, 106 F.3d 404 (7th Cir. 1997); Gasanova v. United States, 2007 WL 2815696, at *8 (W.D. Tex. 2007) (because § 2255 applies only to the custodial aspects of a sentence, defendant’s complaints regarding the forfeiture order cannot be the basis of an ineffective assistance of counsel claim).
made his attempt to conceal it. Nevertheless, the court held that a defendant could be convicted of conspiring to violate the statute because factual impossibility is not a defense to conspiracy.\textsuperscript{249}

In addition, the court said, if the defendant’s efforts to conceal his property from the Government to avoid forfeiture do not constitute a violation of Section 2232, they may nevertheless constitute an obstruction of justice in violation of 18 U.S.C. § 1512.\textsuperscript{250}

\textbf{Offenses that “straddle” the effective date of the forfeiture statute}

If a change in the criminal forfeiture laws occurs while a crime is in progress, there is no violation of the Ex Post Facto Clause if the new law is applied to the entire offense. In \textit{United States v. Jennings}, the Eighth Circuit held that the Government could forfeit the proceeds of a mail fraud that straddled the effective dates of 18 U.S.C. § 981(a)(1)(C) and 28 U.S.C. § 2461(c) – the statutes that, among other things, authorize the forfeiture of mail and wire fraud proceeds in criminal cases.\textsuperscript{251}

\begin{quotation}
\textit{United States v. Russo}, 2006 WL 2374822, at *5 (S.D. Ala. 2006) (denying motion to dismiss section 2232(a) from an indictment, but noting that it does not appear that the statute applies when the property subject to forfeiture was merely named in an indictment; Government must show that it had authority to seize the property when the alleged obstruction occurred);\textit{United States v. Sutley}, 2007 WL 329148, at *6 (S.D. Ala. 2007) (later ruling on Rule 29 motion in same case) (defendant who could not be convicted of a substantive violation of section 2232(a) because there was no evidence, other than the indictment, that the Government was about to seize his property could nevertheless be convicted of conspiring to violate the statute; because factual impossibility is not a defense to conspiracy, it was not necessary to show that the Government was actually about to seize the property; defendant’s intent to conceal the property to prevent such seizure was sufficient).
\end{quotation}

\begin{quotation}
\textit{Sutley}, 2007 WL 329148, at *6 (return of an indictment listing certain property in a forfeiture count signals that an official proceeding regarding the forfeiture of that property is underway; any attempt thereafter to impede the forfeiture may be prosecuted as a violation of section 1512). \textit{See also AFLUS}, note 3, supra, § 20-4 (discussing sentencing enhancements applicable to a defendant who obstructs forfeiture).
\end{quotation}

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\textit{United States v. Jennings}, 487 F.3d 564, 585-86 (8th Cir. 2007) (Ex Post Facto Clause does not bar forfeiture of the proceeds of a mail fraud scheme that straddled the effective dates of §§ 981(a)(1)(C) and 2461(c), even though the majority of the proceeds were obtained prior to August 23, 2000); see also \textit{United States v. Crumpler}, 229 Fed. Appx. 832, 839-40 (11th Cir. 2007) (the criminal forfeiture statutes enacted by CAFRA apply to conspiracies that straddle the effective date; defendant convicted of a conspiracy that began in 1996 and continued to 2002 must forfeit the proceeds of the entire conspiracy without

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Division of jointly held property

Unlike the civil forfeiture statute, there is no provision in the criminal statute giving the courts guidance as to how to divide jointly held property when one party’s interest has been forfeited but another party’s has not. 252 Nevertheless, courts have overruled objections to orders that direct the forfeiture of just one party’s interest and divide the property. For example, in Fleet, the Eleventh Circuit upheld the forfeiture of the husband’s interest in a residence as a substitute asset, even though it would be inconvenient to his wife to have to divide the property. 253

In a Fifth Circuit case, the court held that forfeited property could be sold so that defendant’s wife could receive her non-forfeitable 9 per cent interest out of the proceeds of the sale. 254

Forfeiture and Restitution

Forfeiture and restitution serve different purposes and are not mutually exclusive. 255 As the Eleventh Circuit held in United States v. Browne, the purpose of criminal forfeiture is punishment while the purpose of restitution is to reimburse the victim. Both are mandatory. 256

252 Compare 18 U.S.C. § 983(d)(5) (setting forth alternative ways of dividing property that has been forfeited, in part, in a civil forfeiture case). See AFLUS, note 3, supra, § 24-10.

253 United States v. Fleet, 498 F.3d 1225, 1230-31 (11th Cir. 2007) (defendant’s interest in his residence can be forfeited as a substitute asset, notwithstanding state tenancy by the entireties law; adopting the Supreme Court’s reasoning in Craft, infra, and rejecting the holding in United States v. Lee, 232 F.3d 556, 562 (7th Cir. 2000), that the defendant’s interest in property held as tenancy by the entireties cannot be forfeited as a substitute asset).

254 See United States v. Lot 6 Block 4 Lakewood Oak Estates, ___ Fed. App. ___, 2007 WL 4532711, at *1 (5th Cir. Dec. 26, 2007) (affirming district court order to sell forfeited real property and pay defendant’s wife her nine percent interest; federal forfeiture law trumps state homestead protection).

255 See AFLUS, note 3, supra, § 20-8.

256 United States v. Browne, 505 F.3d 1229, 1281 (11th Cir. 2007) (restitution focuses on the victim; forfeiture focuses on the defendant, imposing punishment and forcing him to disgorge the proceeds of the offense; both are mandatory).
The courts are split, however, as to whether the defendant is entitled to credit against the forfeiture for the amount paid as restitution. Most courts hold that defendant may be ordered to pay restitution and forfeit property without offsetting one against the other. In *United States v. Madison*, for example, the Sixth Circuit affirmed an directing the defendant to pay a $578,000 forfeiture judgment and $751,000 in restitution after determining that he had the resources to pay both. But some courts have allowed an off-set against a restitution order for the amount forfeited, or vice versa.

The court will not second guess the Government’s decision to pursue forfeiture versus restitution. In *United States v. Zaranek*, the defendant objected to the Government’s garnishing his pension to satisfy his restitution order, arguing that the Government should have used the forfeited property to do that. But the court said it was the Government’s prerogative whether to use the forfeited property for restitution or not.

XXI. Conclusion

The enormous number of criminal forfeiture cases coming out of the federal courts illustrates once again that forfeiture has become a routine part of federal criminal practice. Many basic propositions are now well-established, but the number of unresolved issues is still large, as is the number of judges and

\(^{257}\) *United States v. Madison*, 226 Fed. Appx. 535, 548 (6th Cir. 2007). See Browne, 505 F.3d at 1281 (defendant gets no credit against the forfeiture for the amount paid to the victim as voluntary restitution; under relation back doctrine, Government has a vested interest in the proceeds that is not affected by defendant’s payment of restitution); *United States v. Graham*, 2007 WL 895239, at *2 (S.D.W.Va. 2007) (because forfeiture and restitution serve different purposes, that defendant has already repaid his victim “is irrelevant to the court’s obligation to impose an order of forfeiture, whose purpose is not to make the victim whole, but to punish a defendant….”).

\(^{258}\) See *United States v. McKay*, 506 F. Supp.2d 1206, 1213 (S.D. Fla. 2007) (refusing to order defendant to pay a forfeiture money judgment equal to the value of housing received as part of RICO offense because defendant had already reimbursed victim).

\(^{259}\) *United States v. Zaranek*, 2007 WL 1455923, at *1 (E.D. Mich. 2007) (overruling defendant’s objection that Government should use his forfeited property to satisfy his restitution order rather than garnishing his pension to do so; “the Government has the sole discretion to decide if forfeited assets will be used to pay a restitution obligation”).
practitioners who remain unfamiliar with the process. Thus, we can expect to see increasing numbers of published forfeiture decisions for years to come.