Criminal Forfeiture Procedure in 2010: An Annual Survey of Developments in the Case Law

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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 the past year.

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, or a significant change in the rules or statutes governing criminal forfeiture procedure. Thus a basic familiarity with federal criminal forfeiture procedure is assumed.

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The article begins with the cases that illustrate the concept that criminal forfeiture is part of the defendant’s sentence in a criminal case. It then takes the reader more or less chronologically through the litigation of a case, beginning with the seizure and restraint of the property and continuing through the trial and sentencing of the defendant and the adjudication of third party issues in the post-trial ancillary proceeding. 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 2009.²

II. The Scope of Criminal Forfeiture

Criminal forfeiture is part of the defendant’s sentence

We know from the Supreme Court’s decision in Libretti v. United States³ that forfeiture is imposed as part of the sentencing process in a criminal case; it is not a substantive element of the offense.

As the Tenth Circuit held in United States v. Wittig, this means that on retrial, following the reversal of the defendant’s conviction, the Government may seek the forfeiture of assets that the jury declined to forfeit the first time around. Because forfeiture is part of sentencing and not a substantive offense, the court said, the Double Jeopardy Clause does not bar the Government from taking advantage of a second opportunity to seek the forfeiture of the defendant’s property.⁴

Is forfeiture limited to the offense of conviction?

The general rule is that because forfeiture is part of the defendant’s sentence, the forfeiture must be limited to the property involved or derived from the specific offenses for which the defendant has been convicted.⁵ In cases involving continuing schemes and conspiracies, however, the scheme or conspiracy is the offense of conviction; thus, the defendant must forfeit the amount involved in the entire scheme or

²A 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 Forfeiture Law in the United States, Juris Publishing: New York, 2007 and 2010 (Cumulative Supplement) (hereafter “AFLUS”).
⁴U.S. v. Wittig, 575 F.3d 1085, 1096–97 (10th Cir. 2009) (interlocutory appeal rejecting defendant’s double jeopardy claim but not addressing issue preclusion or law-of-the-case issues).
⁵See U.S. v. Capoccia, 503 F.3d 103, 110, 114 (2d Cir. 2007) (defendant who was convicted of an offense under section 2314 may be made to forfeit only the proceeds of the specific acts alleged in the indictment; if the Government wanted to forfeit property involved in other acts that were part of the scheme (but not alleged because of venue issues) it should have charged a conspiracy or another offense of which a scheme is an element).
conspiracy, even if, in the case of a scheme like mail or wire fraud, he is convicted of only a handful of substantive counts.\(^6\)

For example, in *United States v. Peters*, a defendant who was convicted of a fraud conspiracy was ordered to forfeit to the proceeds of the entire conspiracy, including property involved in the substantive counts of the indictment on which the defendant was acquitted.\(^7\)

Similarly, if a fraud case is alleged as a continuing scheme, the defendant is liable to forfeit the full amount derived from the scheme, regardless of how many substantive counts are alleged in the indictment, or result in convictions. In *United States v. Venturella*, which is now the leading case on this issue, the defendant applied for disability benefits for a disabled child without revealing that the child had already received a large sum of money from the settlement of a malpractice lawsuit. The defendant pled guilty to a single count involving only $477, but the court held that he was liable for a $114,000 money judgment representing the proceeds of the entire scheme to defraud.\(^8\)

As broad as this rule seems to be, the courts may actually be heading toward an even broader one.

Several years ago in *United States v. Genova*, the Seventh Circuit held that a defendant’s forfeiture liability extends beyond the counts of conviction not just to the entire scheme or conspiracy for which he is convicted, but to all of his *related conduct*.\(^8\) That decision appeared to be outside of the mainstream at the time, but this year the Seventh Circuit said the same thing in *Venturella*,\(^9\) and the Third Circuit followed *Genova* in *United States v. Plaskett*, holding that defendants who were found guilty of several bribery and kickback offenses and not guilty of others were liable to forfeit the proceeds of all of the offenses, including those on which they had been acquitted. In the

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\(^6\)See AFLUS § 15-3(b).


\(^8\)U.S. v. Venturella, 585 F.3d 1013 (7th Cir. 2009), cert. denied, 130 S. Ct. 1547, 176 L. Ed. 2d 139 (2010) (forfeiture in a mail fraud case “is not limited to the amount of the particular mailing, but extends to the entire scheme;” defendant’s guilty plea to one substantive count involving $477 rendered her liable for money judgment of $114,000). See U.S. v. Yass, 636 F. Supp. 2d 1177, 1185 (D. Kan. 2009) (defendant convicted of mail fraud is liable to forfeit the proceeds of the entire scheme, not just the proceeds linked to the six executions of the scheme alleged as substantive counts).

\(^9\)U.S. 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).

\(^10\)Venturella, 585 F.3d at 1018.
forfeiture phase of the trial, the court said, the trial judge is free to ignore the jury’s verdict and make a different calculation of the defendant’s liability based on the preponderance of the evidence standard.\textsuperscript{11}

Where the law is heading on this issue is hard to say.

Property belonging to third parties cannot be forfeited in a criminal case

In contrast, when it comes to property held by third parties, the limited nature of criminal forfeiture is fairly clear. Because forfeiture is part of the defendant’s sentence in a criminal case — and because a criminal trial is a proceeding from which all third parties are excluded — the Government cannot use criminal forfeiture to forfeit property that belonged to a third party at the time the act giving rise to the forfeiture took place.\textsuperscript{12} Thus, if the Government obtains the conviction of a stockholder in a criminal case, but not of the corporation that he controls, it can forfeit the defendant’s stock in the corporation, but not the assets of the corporation itself.\textsuperscript{13}

On the other hand, as the court held in Peters, if the court finds that the corporation is really the alter ego of the defendant, it may disregard the corporate form and order the forfeiture of the corporation’s assets as if they were the assets of the convicted defendant.\textsuperscript{14}

III. Seizure Warrants—21 U.S.C. § 853(f)

There were several cases in 2009 dealing with criminal seizure warrants under Section 853(f) that are worth noting.\textsuperscript{15}

\textsuperscript{11}U.S. v. Plaskett, 355 Fed. Appx. 639, 644 (3d Cir. 2009), cert. denied, 130 S. Ct. 3398 (2010) (following Genova; the amount of a money judgment may include the amounts involved in counts on which the jury acquitted the defendant, if the court finds by a preponderance of the evidence that the conduct occurred).

\textsuperscript{12}See AFLUS § 15-3(f).

\textsuperscript{13}See U.S. v. Hosseini, 2009 WL 3242113 (N.D. Ill. 2009) (denying motion to include corporate assets in the order of forfeiture because defendant stockholder could only be ordered to forfeit his stock in the corporation, not the corporate assets).

\textsuperscript{14}U.S. v. Peters, 257 F.R.D. 377, 384 (W.D. N.Y. 2009) (disregarding corporate form and ordering defendant to pay money judgment equal to the value of the property obtained by alter ego corporations in a bank fraud case).

\textsuperscript{15}For a general discussion of criminal seizure warrants see AFLUS § 17-3.
Seizure warrants and substitute assets

Most courts hold that if the Government cannot restrain substitute assets pre-trial, it cannot seize them either. But one district court is not so sure about that. In *United States v. Guba*, the court held that substitute assets may not be restrained pre-trial under Section 853(e), but stated in dicta that this does not foreclose the seizure of substitute assets under Section 853(f).

Pretrial challenges to a section 853(f) warrant

Unlike seizures in civil forfeiture cases, which are governed by the 60-day time limit in the Civil Asset Forfeiture Reform Act (CAFRA), seizures of property with a Section 853(f) warrant do not trigger a statutory deadline for commencing a criminal forfeiture case; but that does not mean that the Government can hold seized property indefinitely. In *Delaware Valley Fish Co. v. Fish and Wildlife Service*, the Fish and Wildlife Service (F&WS) seized a truck that was being used to transport live fish in violation of federal law. There was no civil forfeiture provision applicable to the offense, however, so the Government's only option was to seek criminal forfeiture of the truck if the defendant was convicted. Accordingly, there was nothing the F&WS could do regarding the forfeiture of the truck until the Government was ready to seek an indictment.

When the delay reached the one-year point, the court lost patience with the Government and said that the seizure would be treated like a pre-indictment restraining order under Section 853(e)(1)(B), and that the truck would be released unless the Government could satisfy the requirements of that statute. If nothing else, this case illustrates why it is important for Congress to enact parallel civil and criminal forfeiture provisions when it makes forfeiture a sanction for a criminal offense.

Filing a notice of lis pendens is not a seizure

There have been a number of cases in recent years holding that filing a notice of lis pendens on real property is not a seizure, and thus does not trigger any of the statutory deadlines or due process concerns that arise when property is actually seized by the

16 See, e.g., *U.S. v. Floyd*, 992 F.2d 498, 501–02 (5th Cir. 1993) (dicta) (because substitute assets are not subject to pretrial restraint, neither are they subject to seizure).


18 See 18 U.S.C. § 983(a)(1) (requiring the Government to commence an administrative forfeiture proceeding within 60 days of the seizure of property for administrative forfeiture).

Government. The latest is a case involving the brother of former Rep. William Jefferson, who was indicted on criminal charges in Louisiana while the congressman was standing trial in his corruption case in Virginia. In United States v. Jefferson, the court held that the filing of a lis pendens “is in fact one of the less restrictive means of preserving the Government’s interest” in that it allows the defendant to continue to use and enjoy his property.

IV. Pretrial Restraint of Assets

The scope of a pre-trial restraining order

As a general rule, any property subject to forfeiture under the applicable forfeiture statute (except substitute assets) may be restrained pre-trial. In the Bernie Madoff prosecution in New York, the Government restrained basically everything the defendant owned in the hope that it would be preserved for the benefit of his victims.

Criteria for issuing a pre-trial restraining order

The standard for issuing a pre-trial restraining order is probable cause, and in most cases the Government will rely on the grand jury’s finding of probable cause in the indictment to satisfy the requirement. While the grand jury’s finding is sufficient, however, it is not necessary. As the Eleventh Circuit recognized in United States v. Kaley, the court may base its probable cause finding on an affidavit submitted in support of the Government’s application for the restraining order.

Moreover, the issuance of a pretrial restraining order is not discretionary; if the Government makes the requisite showing, the court must enter the order. In United States v. Amoruso, which was a district court case from within the Fourth Circuit where the pre-trial restraint was granted.

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20 See AFLUS § 17-8 (2010 Cumulative Supplement, replacing entire original section).


22 See AFLUS § 17-5.


24 U.S. v. Kaley, 579 F.3d 1246, 1259 (11th Cir. 2009) (noting that the court relied on the grand jury’s finding of probable cause supplemented by an agent’s affidavit).

25 See U.S. v. Monsanto, 491 U.S. 800, 612-13, 109 S. Ct. 2657, 105 L. Ed. 2d 512 (1989) (the word “may” in section 853(a) means only that the district court may enter a restraining order if the Government requests it, but not otherwise, and that it is not required to enter the order if a bond or other means exists to preserve the property; it “cannot sensibly be construed to give district court[s] discretion to permit the dissipation of the very property that section 853(a) requires to be forfeited upon conviction”).

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restraint of substitute assets is permissible, the court held that this mandatory rule applied to substitute assets.\textsuperscript{26}

\textit{Post-restraint hearings: the Jones-Farmer rule}

The Government generally obtains a pre-trial restraining order by making an \textit{ex parte} application to the court. The question that frequently arises is whether the defendant is entitled to a post-restraint hearing where he can challenge and seek to modify (or vacate) the restraining order.\textsuperscript{27}

Under the Jones-Farmer rule, when the court restrains a defendant’s property pursuant to Section 853(e), a post-restraint, pretrial hearing is required only if the defendant’s 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.\textsuperscript{28}

The district court applied that rule in \textit{Amoruso}.\textsuperscript{29}

To invoke the Jones-Farmer rule, however, the defendant must affirmatively request a hearing. In \textit{United States v. Marker}, the court held that because the defendant never moved for the release of his restrained property, he was not entitled to a probable cause hearing, and so could not complain in his post-conviction Section 2255 petition that his conviction was defective because his property was not available for him to hire counsel.\textsuperscript{30}

Not every circuit applies the Jones-Farmer rule, however. For years, the Eleventh Circuit took the view that the defendant was \textit{never} entitled to a post-restraint, pre-trial hearing, regardless of his need for the restrained property to hire counsel or for any other purpose.\textsuperscript{31} But in \textit{Kaley}, the court adopted a variation on Jones-Farmer, holding that the defendant’s showing that he lacks other funds with which to retain

\textsuperscript{26}\textit{U.S. v. Amoruso}, 2009 WL 1037917 (N.D. W. Va. 2009) (following Monsanto; issuance of a pre-trial restraining order is mandatory; court’s only discretion is to the manner of the restraint; in the Fourth Circuit, this applies to substitute assets).

\textsuperscript{27}\textit{See AFLUS} § 17-6 (2010 Cumulative Supplement, replacing the entire section).

\textsuperscript{28}\textit{U.S. 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); \textit{U.S. 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).

\textsuperscript{29}\textit{U.S. v. Amoruso}, 2009 WL 1037917 (N.D. W. Va. 2009) (applying Farmer; the defendant cannot object to the entry of a pre-trial restraining order without first demonstrating that the property is needed to pay attorney’s fees).


\textsuperscript{31}\textit{See U.S. v. Bissell}, 866 F.2d 1343, 1352 (11th Cir. 1989).
counsel weighs heavily in favor of allowing a probable cause hearing, but is neither necessary nor sufficient to trigger that proceeding.\textsuperscript{32}

**Procedure at hearing on restraining order**

As mentioned earlier, the standard for issuing a pre-trial restraining order is probable cause, but who has the burden of proof if there is a pre-trial hearing? Some courts put the burden on the Government,\textsuperscript{33} but in Kaley, the Eleventh Circuit put the burden on the defendant to show that there was an absence of probable cause.\textsuperscript{34}

As in most circuits, however, the court held that the defendant cannot challenge the grand jury’s finding of probable cause as to the underlying crime: the only thing he can challenge is the forfeitability of the property.\textsuperscript{35}

**Interlocutory appeals**

The district court’s refusal to grant the defendant a hearing on his motion to vacate a pre-trial restraining order is appealable.\textsuperscript{36}

**Restraining the assets of third parties**

Pre-trial restraining orders may be directed at third parties.\textsuperscript{37} In *United States v. Woolf*, the district court issued a standard restraining order regarding a parcel of real property named in a criminal indictment. When the Government learned that a lien holder intended to foreclose on the property, the court promptly issued another order pursuant to Sections 853(e) and (k) specifically enjoining the lien holder from proceeding with the foreclosure.\textsuperscript{38}

\textsuperscript{32}U.S. v. Kaley, 579 F.3d 1246, 1258 (11th Cir. 2009).

\textsuperscript{33}See U.S. v. Jones, 160 F.3d 641, 647 (10th Cir. 1998) (the Government has ultimate burden of establishing probable cause on forfeitability issue in pretrial hearing, but only after defendant makes prima facie showing that he has bona fide reason to believe the property is not traceable to the offense); see also AFLUS § 17-7.

\textsuperscript{34}Kaley, 579 F.3d at 1257 (if the defendant establishes that he has a right to a pre-trial evidentiary hearing, he will bear the burden of proving a lack of probable cause; “the prosecution would thus be saved from having to preview its entire case”).

\textsuperscript{35}Kaley, 579 F.3d at 1257 (defendant has no right to challenge the grand jury’s finding of probable cause that he committed the offense alleged in the indictment; “such a procedure would require the Government to preview its case”). See also AFLUS § 17-7.

\textsuperscript{36}Kaley, 579 F.3d at 1251 n.9, 1252 (district court’s denial of pre-trial probable cause hearing is appealable under § 1292(a)(1); but the doctrine of pendent appellate jurisdiction does not permit interlocutory review of denial of motions raising vindictive prosecution and ex post facto issues).

\textsuperscript{37}See AFLUS § 17-12.

In Madoff, the restraining order applied to the defendant, his wife, and anyone acting in concert with them.\(^{39}\)

**Third party’s right to a pre-trial hearing**

Property belonging to a third party may be restrained pending trial in a criminal case, but does the third party have the same right that the defendant has to a pre-trial hearing if he or she challenges the restraining order? Recall that the issue underlying the Jones-Farmer rule is the need to protect the defendant’s Sixth Amendment right to counsel. Because third parties have no such right, and are generally not in danger of suffering an irrevocable loss if not given an immediate opportunity to challenge the restraining order, most courts, including the Second, Fifth, and Ninth Circuits, require the third party to wait until the ancillary proceeding to contest the forfeiture.\(^{40}\)

In United States v. Datwani, the district court in Puerto Rico followed that trend.\(^{41}\) But in United States v. Petters, a district court in Minnesota said that there may be an exception if there is going to be a lengthy delay before the third party gets to assert his rights in the ancillary proceeding.\(^{42}\)

**Interlocutory sale**

In 2009, Rule 32.2(b)(7) was amended to authorize the court to order the interlocutory sale of real property subject to criminal

\(^{39}\)U.S. v. Madoff, 2009 WL 1055792 (S.D. N.Y. 2009) (restraining defendant, his wife, and anyone acting in concert with them or on their behalf from transferring or dissipating any of their assets).

\(^{40}\)See U.S. v. Holy Land Foundation for Relief and Development, 493 F.3d 469, 476, 477 (5th Cir. 2007) (en banc) (making third party wait until the ancillary proceeding to contest the forfeiture as section 853(k) requires ensures an orderly proceeding and does not violate due process; “it would be a significant burden on the Government to have to defend the forfeiture order from attack by a third party during the course of an ongoing criminal prosecution”, and the third party will get his day in court in the ancillary proceeding); U.S. 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); De Almeida v. U.S., 459 F.3d 377, 381 (2d Cir. 2006) (Section 853(k) bars a third party from using Rule 41(g) to seek the return of seized property pretrial; the ancillary proceeding gives the third party an adequate remedy at law). See also AFLUS § 17-13 (2010 Cumulative Supplement, replacing the entire section).

\(^{41}\)U.S. v. Datwani, 2009 WL 961123 (D.P.R. 2009) (§ 853(k) is jurisdictional; it bars the court from addressing an claim of ownership by a third party outside of the ancillary proceeding, even if the defendant is a fugitive and it is unlikely that there will be an order of forfeiture and an ancillary proceeding any time soon).

\(^{42}\)U.S. v. Petters, 2009 WL 1794799 (D. Minn. 2009) (agreeing with third party that there are instances when a third party may be allowed to challenge a pre-trial restraining order, but holding that a one-year delay before the third party could file a claim in the ancillary proceeding was not an undue burden).
forfeiture to preserve the equity in the property. In United States v. Gianelli, the court ordered the interlocutory sale when the defendant stopped paying the mortgage on the property.43

V. Application of the CAFRA Deadlines to Criminal Forfeiture

It would seem to be obvious that the provisions of the Civil Asset Forfeiture Reform Act (CAFRA) apply only to civil forfeiture cases and not to criminal cases, but in the Fish and Wildlife case, the claimant argued otherwise. The CAFRA deadlines for commencing a civil forfeiture proceeding, the claimant said, should apply even though the property was seized pursuant to a criminal forfeiture statute. Not surprisingly, the court disagreed: when property is seized exclusively for criminal forfeiture, the CAFRA deadlines do not apply; but as mentioned earlier, that does not mean the Government can seize and hold the property indefinitely.44

VI. Indictment

Forfeiture notice in the indictment

Just as the civil forfeiture procedures in CAFRA do not apply in criminal cases, the criminal forfeiture procedures in the Federal Rules of Criminal Procedure do not apply in civil cases. In Dalton v. United States, the defendant argued that he was entitled to notice in his criminal case that the Government would seek the forfeiture of his property in a parallel civil forfeiture case. But the court said no: the requirement in Rule 32.2(a) that the defendant be given notice that the Government will be seeking the forfeiture of his property applies only to the instant criminal case; there is no requirement that the defendant be given notice that the Government is seeking forfeiture in a related civil case.45

The property subject to forfeiture need not be itemized

The new version of Rule 32.2(a) that was enacted in 2009 carries

43U.S. v. Gianelli, 594 F. Supp. 2d 148, 150 (D. Mass. 2009) (Section 853(e) authorizes the court to order the interlocutory sale of real property subject to criminal forfeiture to preserve the equity in the property when the defendant stops paying the mortgage, taxes or insurance). Cf. Murphy v. U.S., 2009 WL 424490 (N.D. Ill. 2009) (defense counsel was not ineffective for failing to object to the interlocutory sale of defendant’s property).

44Delaware Valley Fish Co. v. Fish and Wildlife Service, 2009 WL 1706574 (D. Me. 2009) (the deadlines for commencing a forfeiture proceeding in Section 983(a) do not apply when the property is seized only for criminal forfeiture, but that does not mean the Government can seize and hold property indefinitely pending indictment; holding plaintiff’s vehicle for a year without returning an indictment violates due process).

forward the requirement that the defendant receive notice of the forfeiture in the indictment. The new version, however, expressly provides that the property need not be itemized; it is sufficient if the indictment merely tracks the language of the applicable forfeiture statute, putting the defendant on notice that the Government will be seeking the forfeiture of the proceeds of the offense, or property used to facilitate it, as the case may be. This codified the case law on this point and thus made no substantive change in the law.\textsuperscript{48}

\textit{Specifying the amount of the money judgment}

The same is true with respect to specifying the amount of the money judgment: it is not necessary to make any reference to a money judgment in the indictment, or to specify the particular dollar amount that the Government is seeking to forfeit. In \textit{Plaskett}, for example, the Third Circuit held that notifying the defendant that he will forfeit the proceeds of his offense satisfies the notice requirement and allows the Government to request the entry of a money judgment at sentencing.\textsuperscript{47} A district court said the same thing in \textit{United States v. Kalish}.\textsuperscript{48}

If the indictment does specify the amount of the money judgment, the court is not necessarily limited to that amount when it issues its forfeiture order; if the forfeiture notice includes terms like "at least" or "including but not limited to," the court can impose a money judgment in whatever amount is supported by the evidence.\textsuperscript{49}

In \textit{Peters}, the defendant argued that the Government was estopped from seeking a money judgment for more than the $1.5 million specified in the forfeiture notice in the indictment because the prosecutor represented to defense counsel before trial that the Government would be seeking no more than that amount. But the court disagreed: "The Government's verbal assessment of what it expected to recover by

\textsuperscript{48} \textit{U.S. v. Adams}, 2009 WL 1766794 (W.D. Va. 2009) ("The indictment may use general language tracking the applicable forfeiture statute as long as specific assets are later identified by the Government in a bill of particulars"). See AFLUS § 16-2 (2010 Cumulative Supplement, replacing the entire section).

\textsuperscript{47} \textit{U.S. v. Plaskett}, 355 Fed. Appx. 639, 644 (3d Cir. 2009), cert. denied, 130 S. Ct. 3398 (2010) (indictment need not specify that the Government will seek a money judgment; notice that the defendant will be required to forfeit the proceeds of his offense and that Government may seek substitute assets is sufficient).

\textsuperscript{48} \textit{U.S. v. Kalish}, 2009 WL 130215 (S.D. N.Y. 2009) (forfeiture notice that advised defendant he would have to forfeit an amount of money equal to the proceeds of his offense was sufficient; the indictment need not use the words "money judgment").

\textsuperscript{49} See \textit{U.S. v. Marcello}, 2009 WL 931039 (N.D. Ill. 2009) (prefacing the amount of the money judgment alleged in the indictment with "including but not limited to" allows the Government to seek the forfeiture of a greater amount at the time of sentencing). See also AFLUS § 16-3.
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way of forfeiture,” the court said, “does not nullify, modify, or limit the notice contained in the indictments, which put [defendant] on notice of his full forfeiture exposure.” Accordingly, the court held that the Government was free to seek forfeiture of $28.2 million.

Bill of particulars

If the indictment tracks the language of the forfeiture statute without itemizing the property, the Government can provide the defendant with more particular notice later by listing the property in a bill of particulars. But the bill of particulars serves only to itemize the property; it cannot be used to force the Government to divulge, prior to trial, the evidence that it intends to introduce to establish the forfeitability of the property.51

VII. Guilty Pleas

Defendant’s agreement to forfeit other property

As discussed earlier, because criminal forfeiture is part of the defendant’s sentence, the forfeiture is generally limited to the property involved in the particular offense for which the defendant is convicted. But can the defendant, as part of his plea agreement, simply agree to forfeit other property if he chooses to do so? If the defendant agrees to it, one might ask, who is there to complain if the forfeiture exceeds the scope of the offense of conviction.

The danger to the Government is that such an agreement may not be binding. In Venturella, before holding that the court had the authority to base the forfeiture on all relevant conduct, the Seventh Circuit said that if the court lacked the authority to forfeit other property, the defendant’s agreement to the contrary would not be binding on him.52 If that is correct, the defendant could agree to the forfeiture as part of

50 U.S. v. Peters, 257 F.R.D. 377, 383 (W.D. N.Y. 2009) (it is sufficient for the indictment simply to track the language of the forfeiture statute; even if the indictment includes a specific dollar amount, the Government may seek the forfeiture of a greater amount supported by the evidence adduced at trial; even the AUSA’s pretrial representation as to the amount does not limit the size of the judgment).

51 See U.S. v. Balsiger, 644 F. Supp. 2d 1101 (E.D. Wis. 2009) (denying motion for bill of particulars detailing how the Government calculated the amount subject to forfeiture as fraud proceeds; giving defendants a spreadsheet summarizing the calculation, coupled with the Government’s open file policy was sufficient; the Government need not reveal who made the calculation, who will testify at trial, or what supporting documents it will introduce).

52 U.S. v. Venturella, 585 F.3d 1013 (7th Cir. 2009), cert. denied, 130 S. Ct. 1547, 176 L. Ed. 2d 139 (2010) (noting that in the Seventh Circuit, a defendant’s agreement to a sentence not authorized by law is not binding on the defendant, but holding that defendant’s agreement to forfeit money involved in entire fraud scheme was authorized because the court’s forfeiture authority extends to the entire scheme).
his guilty plea, and then renege on his agreement from the comfort of his jail cell once he had the time to reconsider — figuring that the Government would not think it worth its effort to vacate the conviction and bring him back for trial.

For that reason, the better course in this situation is for the defendant to agree, in his plea agreement, not to contest the civil forfeiture of the property in question in a parallel proceeding.

Breach of plea agreement

Breaching a plea agreement is not without its risks for the defendant. In United States v. Bishop, the Sixth Circuit held that the defendant breached his plea agreement when he did not disclose all of his assets to the Government, and thus relieved the Government of its obligation to move for a downward departure at his sentencing, even though the defendant did provide substantial assistance to the Government in other criminal cases.53

VIII. The Forfeiture Phase of the Trial

The right to a jury under Rule 32.2(b)(5)

Rule 32.2(b)(4), which gave either party the right to request that the jury be retained to determine the forfeiture issues after finding the defendant guilty, was revised and recodified in 2009 as Rule 32.2(b)(5).54 The most significant change in the rule concerns the procedure for determining if the defendant (or the Government) is going to invoke its right to have the jury retained.

The new rule puts the burden on the court to ask the parties what their election will be before the jury begins its deliberation in the guilt phase of the trial. The purpose of this provision is to allow the court to make scheduling arrangements for the jury, and to avoid having the Government waste time lining up witnesses and preparing jury instructions and special verdict forms if they will not be needed in the forfeiture phase of the trial.55

The parties can agree to waive the jury at any time in the course of the trial or before it begins.56 Moreover, in cases where the Government is seeking only a money judgment, most courts hold that Rule

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54 See Advisory Committee Note to Rule 32.2(b)(5) (2009).
55 See Advisory Committee Note to Rule 32.2(b)(5) (2009).
56 United States v. Nicola, 597 F. Supp. 2d 342, 344 (W.D. N.Y. 2009) (noting that the parties stipulated prior to trial that the forfeiture would be determined by the court).
32.2(b)(5) does not give either party the right to have the determination of the amount of the judgment made by the jury.\(^57\)

Finally, Rule 32.2(b)(5)(A) gives the parties the right to have a jury determine the forfeiture only in cases where the guilty verdict is returned by a jury. There is no right to a jury if the case is tried by the court or if the defendant pleads guilty. But one court seems not to have been aware of that rule, and consequently found itself having to adjudicate a unique issue.

In *Murphy v. United States*, the court — for reasons that were not explained — granted the defendant’s request to have a jury determine the forfeiture even though he had pled guilty to the underlying offense.\(^58\) Then, when the court convened the jury for the forfeiture hearing, it allowed the defendant to appear before them in prison clothes. The defendant objected that this prejudiced him in the eyes of the jury, but the court pointed out that to understand the task before them, the jury had to be told that the defendant had been convicted of a crime. Thus, the sight of the defendant in prison garb did not tell the jurors anything that they did not already know.\(^59\)

**Conduct of the forfeiture phase of the trial**

Rule 32.2(b)(1)(B) says that the forfeiture determination may be based on evidence already in the record from the guilt phase of the trial. Thus, it is not necessary for the parties to reintroduce any evidence in the forfeiture hearing.\(^60\) If the parties wish to introduce new evidence, however, they may certainly do so. In *United States v. Sprouse*, for example, the court allowed the defendant to introduce additional evidence regarding the amount of money he obtained from

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\(^57\)See *U.S. v. Tedder*, 403 F.3d 836, 841, 66 Fed. R. Evid. Serv. 1150 (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); *U.S. v. Galestro*, 2008 WL 2783360 (E.D. N.Y. 2008) (following *Tedder*, there is no right to a jury trial if the Government is seeking only a money judgment; therefore there is no need to provide the defendant with a bill of particulars stating the amount the Government is seeking to forfeit); *U.S. v. Roberts*, 631 F. Supp. 2d 223, 226 (E.D. N.Y. 2009) (following *Tedder* and *Galestro*; there is no right to a jury under Rule 32.2(b)(4) where the Government is seeking only a money judgment).

\(^58\)Murphy v. U.S., 2009 WL 424490 (N.D. Ill. 2009) (noting without discussion that court granted defendant’s request for a jury trial on the forfeiture after accepting his guilty plea).

\(^59\)Murphy v. U.S., 2009 WL 424490 (N.D. Ill. 2009) (there was no prejudice in allowing defendant to appear before the jury in prison garb in the forfeiture phase of the trial since they knew he had been convicted).

\(^60\)See *U.S. v. Capoccia*, 503 F.3d 103, 109 (2d Cir. 2007) (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).
the criminal offense. As the district court held in United States v. Nicolò, because the forfeiture phase of the trial is part of sentencing, when a party seeks to introduce new evidence regarding the forfeiture, the rules of evidence do not apply.

Determining the ownership of the property is deferred to the ancillary proceeding

Determining the extent of the defendant's ownership interest in the property vis à vis third parties is deferred to the ancillary proceeding; it is not an issue in the forfeiture phase of the trial. The law is finally well-established on this point.

In United States v. Cox, the defendant's wife complained that the Government should not have been able to obtain an order of forfeiture in the forfeiture phase of the trial without proving that the property belonged to the defendant, but the Fourth Circuit, in perhaps the most important criminal forfeiture case of the year, said that she was wrong. "Rule 32.2 requires the issuance of a preliminary order of forfeiture when the proper nexus is shown," the court said, "whether or not a third party claims an interest in the property." The court simply does not worry about third party interests until the ancillary proceeding.

The district court said the same thing in Nicolò. In the forfeiture phase of the trial, the court said, the court "is not to consider potentially thorny issues concerning third party ownership of property sought to be forfeited."

Tracing analysis

In many cases the court will have to undertake a tracing analysis to determine if the property is traceable to the offense. In United States v. Capoccia, the court explained the "lowest intermediate balance

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61 U.S. v. Sprouse, 2009 WL 1456569 (W.D. N.C. 2009) (defendant has a right to a hearing where he may present evidence regarding the amount of the money judgment to which the Government is entitled).

62 U.S. v. Nicolò, 597 F. Supp. 2d 342, 345 (W.D. N.Y. 2009) (the rules of evidence do not apply in the forfeiture phase of the trial; the court may rely on evidence from the guilt phase supplemented by an agent's affidavit). See also AFLUS § 18-5(a).

63 See U.S. v. Andrews, 530 F.3d 1232, 1236 (10th Cir. 2008) (when the court determines the forfeitability of the property pursuant to Rule 32.2(b)(1), it does not — "and indeed may not" — determine the rights of third parties in the property; the ownership issue is deferred to the ancillary proceeding). See also AFLUS § 18-6.

64 U.S. v. Cox, 575 F.3d 352, 358 (4th Cir. 2009) (emphasis in original).

65 Nicolò, 597 F. Supp.2d at 346 (if the Government establishes the required nexus to the offense, the property must be forfeited; if the property used to facilitate defendant's money laundering offense belonged to his wife, she will have an opportunity in the ancillary proceeding to make that claim).
rule” and how it allows the Government to trace criminal proceeds through commingled bank accounts.66

IX. Money Judgments

As many of the cases mentioned so far have illustrated, it is now well-settled that forfeiture in a criminal case 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.67 To the contrary, the Government is entitled to a money judgment equal to the value of the proceeds of the offense whether the defendant still has any of those proceeds — or any other assets for that matter — in his possession when the forfeiture order is imposed, or not.

United States v. Vampire Nation is still the leading case on this issue.68 In 2009, there were a host of new cases following it and its progeny.69 One district court attempted to buck the trend, but its decision declining to enter a money judgment in United States v. Surgent was overruled by the Second Circuit in early 2010.70

When it comes to entering a forfeiture order in the form of a money judgment, it makes no difference whether the forfeiture is based on a

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67 See AILUS § 19-4(c).
68 U.S. 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).
69 See U.S. v. Plaskett, 355 Fed. Appx. 639, 645 (3d Cir. 2009), cert. denied, 130 S. Ct. 3398 (2010) (following Vampire Nation; district court did not err in imposing money judgment without taking into account defendant’s ability to pay); U.S. v. Abdel-salam, 311 Fed. Appx. 832, 847 (6th Cir. 2009) (forfeiture orders may be issued in the form of a money judgment); U.S. v. Patel, 2009 WL 1579525 (W.D. La. 2009) (overruling objection that forfeiture orders cannot take the form of a money judgment; collecting cases); U.S. v. $7,351.00, more or less, in U.S. Currency, 2009 WL 2998168 (S.D. Ala. 2009) (“the use of money judgments in criminal forfeiture cases . . . is well-established”); U.S. v. Kalish, 2009 WL 130215 (S.D. N.Y. 2009) (following Vampire Nation; defendant required to pay a money judgment equal to the proceeds of his advance fee scheme to defraud investors); U.S. v. Stathakis, 2008 WL 413782 (E.D. N.Y. 2008) (defendant convicted of § 1349 conspiracy to commit bank fraud is liable for a money judgment for the amount obtained through the conspiracy), aff’d, 320 Fed. Appx. 74 (2d Cir. 2009); U.S. v. Morrison, 656 F. Supp. 2d 338, 347 (E.D. N.Y. 2009) (RICO defendant must pay a money judgment equal to the value of the proceeds of the racketeering activity; “a reasonable estimate is permissible”). Cf. U.S. v. Haberman, 338 Fed. Appx. 442, 445 (5th Cir. 2009) (because defendant did not object to the imposition of a money judgment in the district court, the sentence is reviewed under the plain error standard, and in light of the holdings in other circuits, any error the district court may have made in imposing a money judgment was not “plain”).
70 U.S. v. Surgent, 2009 WL 2525137 (E.D. N.Y. 2009) (disagreeing with all other courts, and holding that there is no authority to enter a money judgment), effectively overruled by U.S. v. Awad, 598 F.3d 76, 79 n.5 (2d Cir. 2010) (finding Surgent “unpersuasive”).

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criminal forfeiture statute or a civil statute incorporated into a criminal case by 28 U.S.C. § 2461(c).

**Combining a money judgment and an order forfeiting specific assets**

The forfeiture order may include both a money judgment and any specific assets that the Government has recovered. When that happens, the order should recite that the money judgment is for the full amount of money subject to forfeiture, but that the defendant is entitled to a credit against the judgment for the value of the specific assets that are forfeited as well.

**Does Section 853(p) apply to money judgments?**

Before the Government can forfeit any property as a substitute asset in a criminal case, it must show that the criteria in Section 853(p) are satisfied. Among other things, it must show that due to an act or omission of the defendant, the property directly traceable to the offense of conviction is unavailable for forfeiture. A recurring question is whether those criteria have to be satisfied before the Government can obtain a forfeiture order in the form of a money judgment.

In *United States v. Abdelsalam*, the Sixth Circuit said that they do. Because the only way the Government can enforce the money judgment is by forfeiting substitute assets, the court said, it must show that Section 853(p) is satisfied before the money judgment is entered. But that case appears to be wrongly decided.

There are other ways of satisfying a money judgment besides forfeiting substitute assets. For example, as the court held in *United States v. Coyne*, the Government can use the Federal Debt Collection

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71See U.S. v. Capoccia, 2009 WL 273301 (D. Vt. 2009) (once forfeiture is incorporated into a criminal case via § 2461(c) it is a criminal forfeiture for all purposes; the tracing requirements that apply in in rem civil actions do not apply, even though the authorizing forfeiture statute is § 981(a)(1)(C)).


73See U.S. v. Capoccia, 2009 WL 2601426 (D. Vt. 2009) (forfeiture order includes forfeiture of traceable property, money judgment equal to the total proceeds of the offense offset by the value of the traceable property, and substitute assets).

74See AFLUS § 19-4(b).


76Abdelsalam, 311 Fed. Appx. at 847.
Procedures Act to collect a forfeiture money judgment. If the Government does so, there is no reason for Section 853(p) to come into play at all; there will be plenty of time to apply that statute if and when the Government decides that other methods have failed, and that it must seek the forfeiture of substitute assets to satisfy the money judgment.

X. Preliminary Order of Forfeiture

Rule 32.2(b)(2)

Rule 32.2(b)(2)(A) provides that the court "must promptly enter" a preliminary order of forfeiture after determining what property is subject to forfeiture. In United States v. Marion, the Eleventh Circuit inexplicably read the rule as giving the district court the option of entering an order of forfeiture before sentencing but not requiring it to do so.

Corrections and additions to the preliminary order

New Rule 32.2(b)(2)(B), enacted in 2009, is even more specific regarding the timing of the preliminary order of forfeiture. It says that unless doing so is impractical, "the court must enter the preliminary order sufficiently in advance of sentencing to allow the parties to suggest revisions" before it becomes final. Some courts have been doing this all along, but other courts — and some prosecutors — have been inclined to leave the forfeiture order until the day of sentencing, or have forgotten to address the forfeiture at sentencing at all. The new rule is intended to avoid the problems that inevitably arise in those situations.

When the preliminary order becomes final

Another addition to Rule 32.2, Rule 32.2(b)(4)(A), expressly provides that the preliminary order becomes final as to the defendant at sentencing, and final as to third parties at the end of the ancillary


78See AFLUS § 19-2 (2010 Cumulative Supplement, replacing the entire section).

79U.S. v. Marion, 562 F.3d 1330, 1338 (11th Cir. 2009), cert. denied, 130 S. Ct. 347, 175 L. Ed. 2d 229 (2009) (the court is not required to enter the preliminary order of forfeiture prior to sentencing, but it is authorized by Rule 32.2(b) to do so; discussing 1996 amendment).

80See U.S. v. Kalish, 2009 WL 130215 (S.D. N.Y. 2009) (court enters preliminary order and then gives defendant period of time to assert objections before it becomes final at sentencing). See also AFLUS § 19-3(b) (2010 Cumulative Supplement, replacing the entire section).
proceeding. Again, this codifies the existing practice in most courts, and resolves confusion in others.\textsuperscript{81}

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

\textit{Forfeiture is mandatory}

That forfeiture is mandatory in a criminal case is not news,\textsuperscript{82} but there are two new cases that say so. Referring to the forfeiture statute for a health care fraud offense, the court in United States v. Patel said, "The mandatory language of this statute leaves the Court absolutely no discretion in imposing this portion of the sentence."\textsuperscript{83} And in United States v. Brummer, the court held that the mandatory nature of criminal forfeiture is evident from the wording of Rule 32.2(b), which says that the preliminary order of forfeiture "must" be entered, and "must" be made part of the judgment at sentencing.\textsuperscript{84}

The entry of a forfeiture order is mandatory, however, only if it is supported by the evidence. In United States v. Miller the court granted a Rule 29 motion to set aside a jury's forfeiture verdict in part because the evidence did not support the jury's finding that a boat was traceable to fraud proceeds.\textsuperscript{85}

\textit{The order of forfeiture must be included in the judgment}

The requirement in former Rule 32.2(b)(3), now Rule 32.2(b)(4)(B), that the court include the forfeiture "when orally announcing the sentence," and that it "include the forfeiture order, directly or by reference, in the judgment" has caused a great many problems. Some courts have held that the failure to issue the forfeiture order at the time of sentencing is fatal. In United States v. Young, for example, the defendant agreed to the forfeiture in his guilty plea, but when the court failed to issue the order of forfeiture at sentencing, the court refused to allow the Government to correct the sentence to include the forfeiture later.\textsuperscript{86}

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\textsuperscript{81}See U.S. v. Nicol, 597 F. Supp. 2d 342, 346 (W.D. N.Y. 2009) (explaining that the preliminary order becomes final as to the defendant at sentencing, and then final as to third parties at the conclusion of the ancillary proceeding).
\textsuperscript{82}See AFLUS § 20-2.
\textsuperscript{84}U.S. v. Brummer, 632 F. Supp. 2d 1216, 1218 (S.D. Fla. 2009), aff'd, 598 F.3d 1248 (11th Cir. 2010), cert. denied, 130 S. Ct. 3532 (2010).
\textsuperscript{86}U.S. v. Young, 2009 WL 661901 (S.D. Ala. 2009) (prosecutor's oversight in failing to obtain order of forfeiture prior to sentencing, or to have the court mention the

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But other courts have found ways to avoid handing the defendant a windfall by recognizing exceptions to the rule.\textsuperscript{87}

In United States v. Quintero, the Seventh Circuit held that if the court issues the preliminary order at sentencing (or before) but fails to include it in the judgment, the error is clerical and can be corrected pursuant to Rule 36.\textsuperscript{88} In United States v. Pelullo, the Third Circuit held that the failure to enter the order of forfeiture at sentencing was a clerical error where the jury had returned a special forfeiture verdict, making it clear to the defendant that a forfeiture order would be forthcoming.\textsuperscript{89} And in United States v. Ereme, the Fourth Circuit held that the defendant waived his right to insist on compliance with the rule when he objected to the forfeiture order at sentencing, thus forcing the court to put it off to a later date, and when he did not raise the issue in his direct appeal.\textsuperscript{90} That particular problem would not have occurred if the court had issued the forfeiture order “in advance of sentencing to allow the parties to suggest revisions” — as new Rule 32.2(b)(2)(B) now requires.

New Rule 32.2(b)(4)(B) was enacted to give the court the means of correcting its failure to comply with the letter of the rule in at least some cases. It provides that the forfeiture must be included in the judgment, “but the court’s failure to do so may be corrected at any time under Rule 36.”\textsuperscript{91}

This does not mean that the court can ignore the rule’s other provisions and simply forget about the forfeiture until after sentencing and then invoke the new rule to impose a forfeiture order after the fact. The rule still requires that the forfeiture be made part of the sentence at sentencing, was not a clerical error that court be corrected after the sentence became final, even though Defendant had agreed to the forfeiture in his plea agreement).

\textsuperscript{87}See AFLUS § 20-3 (2010 Cumulative Supplement, replacing the entire section).

\textsuperscript{88}U.S. v. Quintero, 572 F.3d 351, 353 (7th Cir. 2009) (district court’s failure to include a previously-issued preliminary order of forfeiture in the judgment is a clerical error that may be corrected at any time pursuant to Rule 36, even if the defendant has noted an appeal, it was the Clerk’s duty to include the forfeiture order in the J&C “even though no one mentioned the subject at sentencing”).

\textsuperscript{89}U.S. v. Pelullo, 305 Fed. Appx. 823, 827–28 (3d Cir. 2008), cert. denied, 130 S. Ct. 64, 175 L. Ed. 2d 48 (2009) (in light of the jury’s verdict of forfeiture, the district court’s failure to issue an order of forfeiture prior to sentencing or to include it in the judgment was a clerical error that could be corrected pursuant to Rule 36).

\textsuperscript{90}U.S. v. Ereme, 339 Fed. Appx. 340, 342 (4th Cir. 2009), cert. denied, 130 S. Ct. 772 (2009) (defendant who objected to the order of forfeiture at sentencing, and did not object when the court agreed to postpone the forfeiture issue to a later date, cannot later challenge the forfeiture on the ground that the court did not strictly comply with the procedure in Rule 32.2(b)(3)).

\textsuperscript{91}See AFLUS § 20-3 (2010 Cumulative Supplement).
and included in the judgment. What all the cases creating exceptions to the general rule appear to have in common, however, is that the failure to enter the forfeiture order at the time of sentencing, or to include it in the judgment, may be corrected if it was clear from the record that the defendant was aware that his property would be forfeited, and thus cannot claim surprise when the court corrects the sentence to include a forfeiture order at a later time. Thus, it is likely that the new rule will be invoked to correct the defendant’s sentence in cases like *Pelullo*, where there was a jury verdict finding that the defendant’s property was subject to forfeiture, where the defendant agreed to the forfeiture in his plea agreement, or where the court held a hearing on the forfeiture issue prior to sentencing but did not actually issue the forfeiture order until some time thereafter.

In all events, purely clerical errors in the order of forfeiture, like providing the wrong VIN number on a vehicle, the wrong serial number on a gun, or naming the wrong model of computer, may be corrected at any time pursuant to Rule 36.\(^{92}\)

*Forfeiture is not determined by the loss to the victims*

For some reason, there has been a lot of recent litigation over whether the amount of the forfeiture should be measured by the loss to the victim or by the gain to the defendant. The consensus is that these are two separate issues: the amount of restitution and the offense level for sentencing guidelines purposes are governed by the loss to the victim; but the amount of the forfeiture is based on the proceeds of the crime obtained by the defendant.\(^{83}\) So, as the Second, Third and Fifth Circuits all held in 2009, the amount of restitution and the amount of forfeiture may be two different amounts in the same case.\(^{94}\)

Indeed, the difference between the victim’s loss and the amount

\(^{92}\)U.S. v. Wilson, 340 Fed. Appx. 562 (11th Cir. 2009), cert. denied, 130 S. Ct. 815 (2009) (error naming the wrong computer in the oral announcement and the J&C was purely clerical and could be corrected pursuant to Rule 36 at any time).

\(^{83}\)See AFLUS § 20-8 (2010 Cumulative Supplement, replacing the entire section).

\(^{94}\)U.S. v. Statidakis, 320 Fed. Appx. 74, 78 (2d Cir. 2009) (there is no reason the amount of forfeiture and the amount of restitution need to be the same because forfeiture and restitution serve different ends: “Forfeiture is designed to punish, deter and disempower criminals. In contrast, restitution and loss focus on the harm suffered by the victim instead of any benefit to the wrongdoer.”); U.S. v. Plaskett, 355 Fed. Appx. 639, 644 (3d Cir. 2009), cert. denied, 130 S. Ct. 3398 (2010) (forfeiture and restitution serve different goals: restitution is based on the victim’s loss while forfeiture is based on the defendant’s gain; thus the forfeiture may greatly exceed the amount of restitution); U.S. v. Andrad, 309 Fed. Appx. 891, 893 (5th Cir. 2009) (calculation of sentencing range for health care fraud was properly based on victim’s loss and was not bound by the jury’s verdict on the amount subject to forfeiture).
subject to forfeiture can be dramatic. In *Nicolo*, the court said that the defendant must forfeit the gross proceeds of his crime whether or not the victim suffered any loss.\(^{95}\) And in *Kalish*, the court said that the defendant had to forfeit $8.4 million in proceeds even though the victims could demonstrate only $1.2 million in losses.\(^{96}\)

**Amendments to the order of forfeiture**

Rule 32.2(e) permits the Government to ask the court at any time to amend the order of forfeiture to include newly-discovered property and/or substitute assets.\(^{97}\) In *Jefferson*, the defendant tried to turn this around: he moved under Rule 32.2(e) to force the Government to accept a substitute asset in lieu of the property directly traceable to the crime. The court denied his motion. Rule 32.2(e), the court said, is not a vehicle that the defendant may use to have the court substitute an asset that the defendant is willing to surrender for the one that the Government has seized.\(^{98}\)

In *United States v. Cone*, the court held that the Government may also use Rule 32.2(e) to amend the order of forfeiture to strike property that it no longer intends to forfeit.\(^{99}\)

**XII. Joint and Several Liability**

**Liability for the amount subject to forfeiture**

Under the doctrine of joint and several liability, all defendants convicted in a criminal case are liable to forfeit the total amount of money obtained as criminal proceeds, regardless of their respective

\(^{95}\) *U.S. v. Nicolo*, 597 F. Supp. 2d 342, 347 (W.D. N.Y. 2009) (loss to the victim is relevant to restitution, but not to forfeiture; given the punitive purpose of criminal forfeiture, the defendant must forfeit the gross proceeds of his offense whether or not the victims suffered any loss).

\(^{96}\) *U.S. v. Kalish*, 2009 WL 130215 (S.D. N.Y. 2009) (calculation of the amount of proceeds to be forfeited is independent of the calculation of the victims’ losses; that the victims could demonstrate only $1.2 million in losses did not bar the forfeiture of $8.4 million in proceeds obtained by the defendant). Cf. *U.S. v. Boring*, 557 F.3d 707, 714 (6th Cir. 2009) (where defendant overbills Government agency, the order of restitution must be limited to the victim’s loss — i.e., the excess payment that defendant received through fraud; this contrasts with forfeiture which, because it is intended to be punitive, allows forfeiture of the entire payment to the defendant, irrespective of the victim’s loss), following *U.S. v. Webber*, 536 F.3d 584, 602–03 (7th Cir. 2008).

\(^{97}\) See AFLUS § 22–2(e).

\(^{98}\) *U.S. v. Jefferson*, 256 F.R.D. 173, 174 (E.D. La. 2009) (purpose of Rule 32.2(e) is to allow a court to retain jurisdiction to amend an order of forfeiture to include newly-discovered property and substitute assets after the order of forfeiture is final).

\(^{99}\) *U.S. v. Cone*, 2009 WL 2163106 (M.D. Fla. 2009) (Government may move at any time under Rule 32.2(e) to amend the preliminary order of forfeiture by striking certain property from the order).
roles in the offense. In United States v. Stathakis, a defendant who was convicted of only two substantive fraud counts involving false loan applications, plus a conspiracy to commit the offense, was liable for the proceeds of all of the false loans, whether he personally participated in every fraudulent deal or not.

Most courts hold that an individual’s joint and several liability is limited to the amount foreseeable to that person; but that view is no longer unanimous. Two years ago in United States v. Browne, the Eleventh Circuit held that there is no foreseeability requirement for joint and several liability. And this year the court in United States v. Yass followed Browne and took the same view.

Credit for amounts forfeited by others

Each defendant is entitled to credit for the amount forfeited by any codefendants who have been found jointly and severally liable for the forfeiture of the same property. In Ereme, the defendant tried to take advantage of this rule but found that he could not. He argued that he

100 See U.S. v. Marcello, 2009 WL 931039 (N.D. Ill. 2009) (RICO conspirators are jointly and severally liable for the proceeds of the entire conspiracy, irrespective of their lack of personal involvement in some parts of the offense). See also AFLUS § 19-5.

101 U.S. v. Stathakis, 2008 WL 413782 (E.D. N.Y. 2008) (defendant convicted of only two substantive counts of bank fraud plus conspiracy is jointly and severally liable for the proceeds of the entire conspiracy, including the proceeds of false loans in which he did not participate personally). Cf. U.S. v. Torres, 346 Fed. Appx. 983, 991 (5th Cir. 2009), cert. denied, 130 S. Ct. 1922, 176 L. Ed. 2d 392 (2010) (district court erred when it calculated the amount of the money judgment by multiplying the total proceeds by the number of defendants; rather, the defendants are jointly and severally liable for the amount of the proceeds which the Government can recover only once).

102 See, e.g., U.S. v. Fruchter, 411 F.3d 377, 384 (2d Cir. 2005), for additional opinion, see, 137 Fed. Appx. 390 (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).

103 U.S. v. Browne, 505 F.3d 1229, 1279, 183 L.R.R.M. (BNA) 2044, 155 Lab. Cas. (CCH) P 10933 (11th Cir. 2007), cert. denied, 128 S. Ct. 2962, 171 L. Ed. 2d 886, 184 L.R.R.M. (BNA) 2576 (2008) (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).


105 U.S. v. Hurley, 63 F.3d 1, 23 (1st Cir. 1995) (the Government can collect the total amount subject to forfeiture only once, but subject to that cap, it can collect from any defendant so much of that amount as was foreseeable to that defendant).
should be held jointly and severally liable so that he could get credit for any property recovered from his co-defendants. The problem for him, however, was that none of his co-defendants had been ordered to forfeit any property, leaving him not jointly and severally liable, but "solely and individually responsible" for the entire amount of the forfeiture.\textsuperscript{106}

XIII. Substitute Assets

Procedure for obtaining substitute assets

Rule 32.2 specifies two ways in which the court may order the forfeiture of substitute assets: by including them in the preliminary order of forfeiture pursuant to Rule 32.2(b)(2)(A), or by amending a previously-issued order to include substitute assets pursuant to Rule 32.2(e).\textsuperscript{107}

The jury has no role in forfeiting substitute assets. In \textit{United States v. Saccoccia}, the defendant was ordered to pay a $136 million money judgment. Years later, the Government found some substitute assets and moved to amend the order to include them. The defendant argued that he had a Sixth Amendment right to appointed counsel to defend against the motion, but the First Circuit held that if, as the Supreme Court held in \textit{United States v. Libretti},\textsuperscript{108} there is no right to counsel in the forfeiture phase of the trial, there can be no right to counsel when the Government moves to add substitute assets to the forfeiture order.\textsuperscript{108}

\textsuperscript{106}U.S. v. Eremita, 339 Fed. Appx. 340, 342–43 (4th Cir. 2009), cert. denied, 130 S. Ct. 772 (2009) (defendant is entitled to credit against the forfeiture order for the amounts forfeited by co-defendants only if he and the co-defendants where held jointly and severally liable; if the court issues a forfeiture order against only one defendant, that defendant is solely responsible for the entire forfeiture).

\textsuperscript{107}U.S. v. Surgent, 2009 WL 2525137 (E.D. N.Y. 2009) (it is not necessary for the court to order the forfeiture of the directly forfeitable property before ordering the forfeiture of the substitute assets); U.S. v. Gallion, 2009 WL 2242413 (E.D. Ky. 2009) (Government uses Rule 32.2(e) to move to amend an order of forfeiture that already includes a money judgment and substitute assets to add additional substitute assets). See also AFLUS § 22-2.

\textsuperscript{108}Libretti v. U.S., 516 U.S. 29, 49, 116 S. Ct. 356, 133 L. Ed. 2d 271 (1995) ("the nature of criminal forfeiture as an aspect of sentencing compels the conclusion that the right to a jury verdict on forfeitability does not fall within the Sixth Amendment's constitutional protection").

\textsuperscript{109}U.S. v. Saccoccia, 564 F.3d 502, 507 (1st Cir. 2009), cert. denied, 130 S. Ct. 226, 175 L. Ed. 2d 156 (2009) (under Libretti, there is no constitutional right to have the jury determine any issue relating to criminal forfeiture, so there can be no such right with respect to substitute assets; it is unlikely the Supreme Court will overrule Libretti in light of Booker).
Ownership

When a court orders the forfeiture of a substitute asset, ownership issues are deferred to the ancillary proceeding just as they are in cases involving directly forfeitable property.® So, as the court held in United States v. Gallion, the defendant cannot object to the motion to forfeit substitute assets on the ground that the property does not belong to him.®

The criteria set forth in Section 853(p) must be satisfied

To forfeit substitute assets, the Government must show that the criteria set forth in Section 853(p) are satisfied.® For example, it must show that it made an effort to find the directly forfeitable property and could not do so.® In Gallion, the Government satisfied the requirement by showing that the defendants had commingled their fraud proceeds with other funds, making it hard to identify the directly forfeitable property.®

®See U.S. v. Gallion, 2009 WL 2242413 (E.D. Ky. 2009) (Rule 32.2(b)(2) applies to the forfeiture of substitute assets; the court must order the forfeiture of the substitute asset without regard to any third party interest, and must defer the ownership question to the ancillary proceeding); U.S. v. Kitchen, 2009 WL 728498 (D. Utah 2009) (making no distinction between directly forfeitable property and substitute assets in holding that ownership issues must be deferred to the ancillary proceeding per Rule 32.2(b)(2)).

®U.S. v. Gallion, 2009 WL 2242413 (E.D. Ky. 2009) (defendants lacked standing to object to forfeiture of substitute assets on the ground that it belonged to a third party). But see U.S. v. Surgent, 2009 WL 2525137 (E.D. N.Y. 2009) (court must find, by a preponderance of the evidence, that the substitute asset is "property of the defendant" before it can enter an order forfeiting the asset; declining to apply Rule 32.2(b)(2)).

®See AFLUS § 22-3.

®See U.S. v. Candelaria-Silva, 166 F.3d 19, 42, 51 Fed. R. Evid. Serv. 210 (1st Cir. 1999) (the Government satisfied requirements of section 853(p) by submitting motion and affidavit reciting its efforts to trace defendant's drug proceeds); U.S. v. Seher, 562 F.3d 1344, 1373 (11th Cir. 2009) (same; following Candelaria-Silva).

®U.S. v. Gallion, 2009 WL 1702166 (E.D. Ky. 2009), order amended, 2009 WL 2589639 (E.D. Ky. 2009) (criteria in § 853(p) are satisfied by showing defendants commingled fraud proceeds with other funds so that the directly forfeitable property could not be easily identified). See U.S. v. Surgent, 2009 WL 2525137 (E.D. N.Y. 2009) (the requirements in § 853(p) are disjunctive; if the property has been placed beyond the jurisdiction of the court, it is not necessary to show that it cannot be located); id. (it is sufficient to show that the directly forfeitable property cannot be located; it is not necessary to show that traceable property cannot be located either).
Any property of the defendant may be forfeited as a substitute asset

The Government is entitled to forfeit any property of the defendant as a substitute asset.\textsuperscript{115} In \textit{Gallion}, the defendant objected that the Government should not be able to forfeit his IRA retirement account as a substitute asset, but the court held that "any property" means "any property."\textsuperscript{116}

In \textit{Saccocia}, the defendant's objection was that the property actually was traceable to the offense, and thus could not be forfeited as a substitute asset, but the court held that it is no defense that the property could have been forfeited directly. What matters is that the original order of forfeiture remains unsatisfied, and that the newly-discovered property — tainted or untainted — is available to satisfy it. So, if the Government discovers property that it could have seized and forfeited earlier (but did not), it may move to forfeit that property as a substitute asset.\textsuperscript{117}

Substitute assets may be forfeited to satisfy a money judgment

It is well-established that the court can forfeit substitute assets as a way of satisfying a money judgment, but what does it do if the value of the potentially forfeitable property exceeds the amount of the money judgment. In \textit{United States v. Hovind}, the court solved this problem by directing the Government to sell the substitute property piecemeal until the judgment was satisfied and then return the rest to the defendant.\textsuperscript{118}

Post-conviction order restraining substitute assets

Outside of the Fourth Circuit, the Government generally cannot restrain substitute assets prior to trial, but most courts hold that it can restrain such assets between the time the defendant is convicted and

\textsuperscript{115}See \textit{U.S. 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).

\textsuperscript{116}\textit{U.S. v. Gallion}, 2009 WL 2242413 (E.D. Ky. 2009) (following \textit{Fleet}; when the statute says that any property of the defendant may be forfeited as a substitute asset, it means exactly what it says; that includes the defendant's IRA account and property being held by a corporation in receivership).


\textsuperscript{118}\textit{U.S. v. Hovind}, 2009 WL 2369340 (N.D. Fla. 2009) (because value of substitute assets might exceed the amount of the money judgment, court orders Government to sell the assets piecemeal until the judgment is satisfied, and then return unsold property to defendants).
the time the order of forfeiture is issued. In 2009, however, there was an adverse decision on this point: in *United States v. Miller*, the court found, in the forfeiture phase of the trial, that some of the defendant's property was directly traceable to the offense and some was not. The Government asked that the non-traceable part be restrained anyway as a substitute asset needed to satisfy the money judgment, but the court — without discussing the case law authorizing such post-trial restraint or the statutory basis for it — ordered the property returned to the defendant.\footnote{120}

**The forfeiture of substitute assets is mandatory**

The forfeiture of substitute assets is mandatory if the criteria in Section 853(p) are satisfied. In *Gallion*, the defendant argued that the Government had alternative ways of collecting the $30 million money judgment against him and therefore did not need to forfeit substitute assets, but the court held that the Government does not have to show a lack of alternatives.\footnote{122}

**XIV. Property Transferred to Third Parties**

**The relation back doctrine**

*United States v. Grossi* was another case in which the defendant tried to invert the intent of a forfeiture statute to use it against the Government. He argued that because under the relation back doctrine the Government's interest in his property vested as of the date of his offense, it was the Government, not he, that was liable for his mortgage

\footnote{119}{See *U.S. v. Numisgroup Intern. Corp.*, 169 F. Supp. 2d 133, 138 (E.D. N.Y. 2001) (the Second Circuit's decision in *Gotti*, holding that Section 853(e) does not authorize the pretrial restraint of substitute assets, does not preclude the post-conviction restraint of such assets under separate statutory authority); *U.S. v. Kilbridge*, 2007 WL 2990116 (D. Ariz. 2007) (court freezes defendant's commingled bank account so that Government may file a motion under Section 853(p) to forfeit the untainted funds as substitute assets).

\footnote{120}{*U.S. v. Miller*, 2009 WL 2949784, at *10 (D. Kan. 2009), subsequent determination, 2009 WL 3807086 (D. Kan. 2009) (without discussing § 853(g) or the case law, holding that the rule against pre-trial restraint of substitute assets compels the release of any property not traceable to the offense after the jury's return of a forfeiture verdict, even though it would be forfeitable as substitute assets).

\footnote{121}{See *U.S. v. Alamoudi*, 452 F.3d 310, 314 (4th Cir. 2006) ("Section 853(p) is not discretionary . . . . [W]hen the Government cannot reach the property initially subject to forfeiture, federal law requires a court to substitute assets for the unavailable tainted property").

\footnote{122}{*U.S. v. Gallion*, 2009 WL 2242413 (E.D. Ky. 2009) (the forfeiture of substitute assets is mandatory; there is no requirement that the Government show it lacks an alternative way of preserving the assets to satisfy a money judgment).}
payments from that date forward.\textsuperscript{123} Surprisingly, the district court agreed and held that the Government had to reimburse the defendant for all the mortgage payments he had made since the date of his offense. The Government appealed and the Ninth Circuit reversed.

Notwithstanding the relation back doctrine, the court said, the defendant remains liable for the mortgage on his property until it is forfeited.\textsuperscript{124}

Recovering property from a third party

When the defendant has transferred the forfeitable property to a third party, the Government has two options: it may attempt to recover the property from the third party or seek substitute assets from the defendant.

In \textit{Cox}, the Government traced $812,000 of the defendant's fraud proceeds to property held by his ex-wife. This was the case, mentioned earlier, in which the wife complained that the Government should not have been allowed to forfeit the property without first proving the defendant's ownership. In the alternative, she argued that instead of seizing her property, and forcing her to file a claim in the ancillary proceeding, the Government should have tried to forfeit other property still in the defendant's possession. But the Fourth Circuit said that the Government could not be faulted for seizing the property that was directly traceable to the offense of conviction, and resolving third party claims in the ancillary proceeding. When the Government seized the $812,000 and commenced the ancillary proceeding, the court concluded, it was doing nothing more or less than what the statute and the rule required; that the defendant had other property that could have been forfeited as substitute assets made no difference.\textsuperscript{125}

\textbf{XV. Right of a Third Party To Object to the Forfeiture}

\textit{Section 853(k)}

Section 853(k) ensures an orderly process by establishing the post-trial ancillary proceeding under section 853(n) as the exclusive procedure for determining third party rights in criminal forfeiture cases, and expressly barring third parties from contesting the forfeiture in

\textsuperscript{123} For a discussion of the relation back doctrine, see generally AFLUS § 21-2.

\textsuperscript{124} U.S. v. Grossi, 359 Fed. Appx. 830, 831–32 (9th Cir. 2009) (reversing district court that held obligation to keep mortgage current passed to the Government once the property became subject to forfeiture; defendant remains liable on the mortgage despite the pending forfeiture).

\textsuperscript{125} U.S. v. Cox, 575 F.3d 352, 358 (4th Cir. 2009) (“Rule 32.2 requires the issuance of a preliminary order of forfeiture when the proper nexus is shown whether or not a third party claims an interest in the property”) (emphasis in original).
any other forum.\textsuperscript{128} As usual, the cases decided this year have produced a laundry list of things that third parties cannot do to circumvent the ancillary proceeding.\textsuperscript{127}

\textit{Advisory opinions}

In \textit{Jefferson}, the defendant tried to get the court to issue a pre-trial advisory opinion declaring that his attorney's interest in the forfeitable property would be exempt from forfeiture even if the defendant were convicted. The court refused, holding that the attorney, like any other third party, had to file his claim in the ancillary proceeding if he claimed an interest in the property once a preliminary order of forfeiture was entered.\textsuperscript{128}

\textit{Intervening in the criminal case}

In \textit{Cox}, the Fourth Circuit reaffirmed the general rule that third parties cannot intervene in the criminal case itself prior to the entry of an order of forfeiture.\textsuperscript{129} In \textit{United States v. Rashid}, the third parties argued that they could intervene in the criminal case pursuant to Rule 24 of the Federal Rules of Civil Procedure because they had missed the filing deadline for filing a claim in the ancillary proceeding, but the court said that missing the filing deadline was not grounds for an exemption from the rule.\textsuperscript{130}

\textit{Rule 41(g)}

In \textit{Account Services Corp. v. United States}, the court held that a third party has no right to seek the pre-trial release of seized property pursuant to Rule 41(g). Despite the inevitable delay, the court said, the third party's right to contest the forfeiture in the post-trial ancillary proceeding is an adequate remedy at law, as long as the seizure did

\textsuperscript{128} See AFLUS § 21-6.

\textsuperscript{127} See AFLUS § 21-6.

\textsuperscript{129} \textit{U.S. v. Jefferson}, 256 F.R.D. 173, 175 (E.D. La. 2009) (refusing to issue a pretrial advisory opinion that attorney’s lien on defendant's property will be exempt from forfeiture; attorney must file a claim in the ancillary proceeding); \textit{U.S. v. Jefferson}, 632 F. Supp. 2d 608, 618 (E.D. La. 2009) (same case) (“the law provides for the recognition of the third party’s interest after a finding of forfeiture not before”).

\textsuperscript{128} \textit{Cox}, 575 F.3d at 358 (“Third parties claiming an interest in the property have no right to intervene in the criminal proceeding or to receive notice of the forfeiture proceedings before the entry of a preliminary order of forfeiture”).

not involve a "callous disregard" for the third party's Fourth Amendment rights and the third party is not suffering irreparable harm.\footnote{Account Services Corp. v. U.S., 2009 WL 2755649 (S.D. Cal. 2009) (once seized property is included in a criminal indictment, a third party who alleges that the property belongs to it cannot file a Rule 41(g) motion for its return).}

\noindent \textbf{Objecting to the entry of the order of forfeiture}

In the BCCI cases in the 1990s, the court held that a third party cannot object to the entry of the order of forfeiture when the defendant is sentenced, but must wait until the order is entered and then file a claim in the ancillary proceeding.\footnote{See U.S. v. BCCI Holdings (Luxembourg), S.A., 796 F. Supp. 477, 479 (D.D.C. 1992) (third party lacks standing to object to entry of order of forfeiture); U.S. v. BCCI Holdings, Luxembourg, S.A., 69 F. Supp. 2d 36, 42 (D.D.C. 1999) (same).} In Cone, the third party tried to argue the reverse: that he had the right to object to the Government's motion to vacate the order of forfeiture. In that case the Government had decided that it did not want to use the forfeiture laws to recover the property but preferred to try to recover it under the Mandatory Victim Restitution Act. The claimant thought he had a better chance of winning in the ancillary proceeding and objected to the Government's motion, but the court held that a third party cannot force the Government to forfeit property so that it can adjudicate its claim in the ancillary proceeding if the Government does not want to do so.\footnote{U.S. v. Cone, 2009 WL 2163106 (M.D. Fla. 2009) (following BCCI; third party lacked standing to object when Government moved to vacate order of forfeiture with respect to the property in which the third party had an interest).}

\noindent \textbf{Substitute assets}

A third party also cannot object when the Government moves to forfeit a substitute asset. In United States v. Kitchen, the court denied the defendant's wife's motion to intervene to oppose the forfeiture of the substitute assets, holding that she had to wait until the ancillary proceeding.\footnote{U.S. v. Kitchen, 2009 WL 728498 (D. Utah 2009) (denying wife's motion to intervene to oppose forfeiture of defendant's substitute assets; wife must file claim in the ancillary proceeding; "considerations of judicial economy cannot overrule the procedure put in place by rule and statute to determine the rights of third parties in forfeiture proceedings").}

In United States v. Warshak, when the Government moved to amend the forfeiture order to include substitute assets, a third party complained that the Government was trying to do an end-run around a related bankruptcy proceeding, and that the forfeiture would violate the automatic stay provision of the bankruptcy code. But the court held that a third party lacks standing to challenge the entry of a forfeiture order, and that its remedy is to file a claim in the ancillary proceeding.

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proceeding, to file a claim in the bankruptcy, or to petition the Attorney General for remission. 135

**Filing an action in another court**

Finally, a third party cannot circumvent the forfeiture process by commencing an action in another court. In *Firstbank Puerto Rico v. MDS Caribbean Seas Limited*, the court granted a motion to dismiss the claimant’s attempt to obtain a maritime foreclosure lien in another court against a vessel that was listed as subject to forfeiture in a pending indictment. 136 In *Peters v. Timley*, the court said the third party could not seek a declaratory judgment regarding his interest in the property in state court. 137 And, as mentioned earlier, the court in *Woolf* held that a lien holder cannot foreclose on property subject to forfeiture in federal criminal case. 138

**XVI. Ancillary Hearing—Procedural Issues**

**The purpose of the ancillary proceeding**

The ancillary proceeding is the forum for resolving the claims of third parties who have, until then, been excluded from participating in the criminal trial. 139 Though a necessary part of a criminal case, it is essentially civil in nature. 140

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136 FirstBank Puerto Rico v. MDS Caribbean Seas Ltd., 665 F. Supp. 2d 84, 86-87 (D.P.R. 2009) (granting motion to dismiss maritime lien foreclosure on vessel listed as subject to forfeiture in an indictment as barred by § 853(k)).
137 Peters v. Timley, No. 08-00167-CV-W-DW (W.D. Mo. Jan. 13, 2009) (claimant who failed to prevail in the ancillary proceeding was barred by § 853(k) from filing a declaratory judgment action in state court seeking relief under state law).
139 U.S. v. Cox, 575 F.3d 352, 358 (4th Cir. 2009) (the purpose of the ancillary proceeding is to resolve third party claims; the Government cannot be blamed for forfeiting directly traceable property held by a third party and forcing the third party to file a claim in the ancillary proceeding); U.S. v. Marion, 562 F.3d 1330, 1336 (11th Cir. 2009), cert. denied, 130 S. Ct. 347, 175 L. Ed. 2d 229 (2009) (“The court can only determine whether a third party has an interest in the property if she files a claim in an ancillary proceeding under Rule 32.2(c)”; U.S. v. Nolasco, 354 Fed. Appx. 676, 680 (3d Cir. 2009), petition for cert. filed, 78 U.S.L.W. 3689, 79 U.S.L.W. 3016 (U.S. May 10, 2010) (explaining the purpose of the ancillary proceeding: third parties are excluded from the criminal case by § 853(k); thus § 853(n) is their only means of asserting an interest in the forfeited property; if they prevail, the court must exclude the property from the order of forfeiture; proof of ownership “is a complete defense”). See APLUS § 23-2.
140 See U.S. v. Moser, 586 F.3d 1089, 1093–94 (8th Cir. 2009), cert. denied, 130 S. Ct. 3297 (2010) (collecting cases and holding that the ancillary proceeding is more
Criminal Forfeiture Procedure in 2010

Notice requirement to potential claimants

Effective December 1, 2009, Rule 32.2(b)(6) requires the Government to publish notice of a criminal forfeiture order in accordance with Supplemental Rule G(4)(a) of the Federal Rules of Civil Procedure, and to send direct written notice to potential third party claimants in accordance with Rule G(4)(b).\(^\text{141}\) Moreover, the rule requires the Government to send notice to the same categories of people to whom it must send notice in a civil forfeiture case — i.e., any person who appears to have a legal interest in the forfeited property. It need not send direct notice, however, to a person who does not appear to have any interest in the property, even though the person is a relative of the defendant. Thus, in *United States v. Loria*, the court held that the Government was not required to send notice to the defendant’s wife where it had no reason to believe she had any interest in his forfeited bank account or vehicle.\(^\text{142}\)

When the ancillary proceeding is commenced

Under Rule 32.2(b)(3), the Government is authorized to commence the ancillary proceeding immediately after the entry of the preliminary order of forfeiture. In *United States v. Marion*, the Eleventh Circuit finally corrected the confusion it created nine years ago in the *Gilbert* case when it held, incorrectly, that the ancillary proceeding could not begin until the order of forfeiture became final as to the defendant at sentencing. The court now holds that Rule 32.2 allows the Government to commence the ancillary proceeding as soon as the preliminary order is entered, which is generally long before sentencing.\(^\text{143}\)

Similarly, in *United States v. Kalish*, the court held that there is no reason to delay the ancillary proceeding pending the defendant’s appeal.\(^\text{144}\)

\(^\text{141}\) See AFLUS § 23-3 (2010 Cumulative Supplement, replacing the entire section).

\(^\text{142}\) *U.S. v. Loria*, 2009 WL 3103771 (W.D. N.C. 2009) (where there were no documents indicating defendant’s wife had an interest in the forfeited bank account or vehicle, Government was not required to send her direct notice; internet publication was sufficient).

\(^\text{143}\) *Marion*, 562 F.3d at 1337-38 (the court is not required to issue a preliminary order of forfeiture before sentencing, but if it does so, the Government may immediately commence the ancillary proceeding by sending notice to third parties; the third parties then have 30 days to file claims), limiting *U.S. v. Gilbert*, 244 F.3d 888, R.I.C.O. Bus. Disp. Guide (CCH) P 10036 (11th Cir. 2001), to cases decided under the pre-1996 version of the rule.

Subject matter jurisdiction

The court's jurisdiction in the ancillary proceeding is limited to adjudicating claims to property included in the order of forfeiture: if the property is not being forfeited, there is no occasion to litigate a third party's claim to it. Thus, in United States v. Shilman, the court held that if the Government is no longer seeking the forfeiture of the particular asset, any claim filed by a third party to it is moot.\footnote{U.S. v. Shilman, 2009 WL 3319958 (S.D. Fla. 2009) (if the Government advises the court that it is no longer seeking forfeiture of real property because of the absence of equity, and withdraws its lis pendens, any claim pending in the ancillary proceeding becomes moot).}

Pleading requirements under section 853(n)(3)

The third party's petition must be filed under penalty of perjury. If it is not, the Government may move to dismiss it for failure to comply with Section 853(n)(3).\footnote{U.S. v. Loria, 2009 WL 3103771 (W.D. N.C. 2009) (granting motion to dismiss claim not filed under penalty of perjury; following U.S. v. $487,825.00 in U.S. Currency, 484 F.3d 662, 664–65 (3d Cir. 2007), as amended, (May 14, 2007); U.S. v. King, 2009 WL 2525560 (M.D. Fla. 2009) (dismissing petition that was not filed under penalty of perjury and did not contain a description of claimant's legal interest in the property or how it was acquired).} Moreover, the petition must also set forth a factual basis for asserting the legal interest: a bald assertion that one is the owner of the forfeited property is not enough.\footnote{See AFLUS § 23-5.}

In United States v. Chan, the claimant contested the forfeiture of money found in the defendant's car by simply asserting that he was the owner of the property. The court held, however, that to satisfy the statute the claimant had to explain what his money was doing in the defendant's car, and why it was wrapped in fabric softener sheets, as the defendant headed toward the Canadian border.\footnote{U.S. v. Chamroeun Chan, 2009 WL 5195872 (D. Vt. 2009) (claimant who is contesting forfeiture of cash seized from defendant must do more than assert his ownership in a conclusory fashion; where money was found in defendant's rental car wrapped in fabric softener sheets, claimant must explain, in his claim, how his money got there; motion to dismiss for failure to comply with § 853(n)(3) granted).}

In United States v. Salit, the Sixth Circuit held that a person with the claimant's power of attorney could file the claim on the claimant's
behalf, but this seems hard to reconcile with the requirement that the claim be filed by the claimant under penalty of perjury.

**Time for filing a claim**

Third party claims may be dismissed as untimely. In *Marion*, the court said that the statute creates a 30-day window for filing claims, and that claims filed outside that window must be dismissed. The claimant argued that the Government waived its right to challenge the timeliness of her claim when it started taking discovery in the ancillary proceeding, but the panel disagreed. It might have been better, the court said, if the Government had moved to dismiss the claim on timeliness grounds before engaging in discovery, but it was not required to do so.

In *United States v. Osborn*, the Ninth Circuit wasn’t sure if a judge could waive the deadline for excusable neglect, but held that the judge in that case did not abuse his or her discretion in refusing to do so.

For many years, it has been seemingly well-established that the claimant must set forth all of his grounds for recovery within the 30-day period for filing a claim and may not amend his claim to assert additional grounds after the 30 days have expired. But in *United States v. Huntington National Bank*, the Sixth Circuit allowed a third party to raise a bona fide purchaser claim under § 853(n)(6)(B) for the first time at oral argument in the district court.

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149 U.S. v. Salti, 579 F.3d 656, 668 (6th Cir. 2009) (person with third party’s power of attorney may file a claim on the third party’s behalf, but has no greater standing than the third party would have).

150 U.S. v. Jamieson, 2007 WL 275966 (N.D. Ohio 2007) (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).

151 See AFLUS § 23-4.

152 Marion, 562 F.3d at 1342.

153 U.S. v. Osborn, 357 Fed. Appx. 109 (9th Cir. 2009) (even if a district court could waive the 30-day deadline for filing a claim for excusable neglect, the district court did not abuse its discretion on declining to do so).

154 See, e.g., *U.S. v. Soreide*, 461 F.3d 1351, 1355, 98 A.F.T.R.2d 2006-6253 (11th Cir. 2006) (third party petition contesting a criminal forfeiture must be filed within the 30-day period set forth in section 853(n)(2), and must state the grounds upon which the third party is asserting a defense to the forfeiture; once the 30 days expires, the claimant may not amend the petition that was based on section 853(n)(6) (B) to include grounds for recovery under section 853(n)(6)(A)).

155 U.S. v. Huntington Nat. Bank, 574 F.3d 329, 332 (6th Cir. 2009) (without referring to the pleading requirements or what claimant asserted in its claim, court holds that third party may raise a BFP argument under § 853(n)(6)(B) for the first time at oral argument, even though it did not raise it in its pre-trial brief).
Motions to dismiss on the pleadings

No hearing is necessary where the court can dismiss the claim on the pleadings for lack of standing, for failure to state a claim, or for some other lawful reason.\(^\text{156}\) The motion to dismiss is treated like a Rule 12(b) motion in a civil case where all facts alleged in the claim are assumed to be true.\(^\text{157}\) In United States v. Patillo, the Government moved to dismiss a claim in which the claimant asserted that "the defendant wanted me to have his truck." The court granted the motion, holding that even if were true that the defendant wanted the claimant to have his truck, that would not be a claim on which a third party could prevail because it was not an assertion of a legal interest in the forfeited property. In addition, the court granted the motion because the claim was not filed under penalty of perjury.\(^\text{158}\)

In Salti, the Sixth Circuit noted that one of the grounds on which a claim could be dismissed was the fugitive disseitentlement doctrine, but the court refused to dismiss the claim because it was not clear from the pleadings that the reason the claimant refused to reenter the United States was to avoid prosecution. He asserted that he was in ill health, and for purposes of a motion to dismiss on the pleadings, the court had to assume that all facts alleged in the claim were true. Thus, the court remanded the case to develop a factual record.\(^\text{159}\)

Motion for summary judgment

If the Government cannot dispose of the third party's claim on the pleadings, it can develop the record and move for summary judgment.\(^\text{160}\) In Warshak, the court granted the Government’s motion for summary judgment because there was no genuine dispute that the forfeited property had been purchased with the defendant's criminal proceeds, which meant, as a matter of law, that the claimant could not

\(^{156}\) See Rule 32.2(c)(1)(A); AFLUS § 23-6.

\(^{157}\) See U.S. v. Salti, 579 F.3d 656, 669–70 (6th Cir. 2009) (third party claim may be dismissed on the pleadings if, assuming all facts alleged in the claim to be true, claimant has not asserted a legal interest in the forfeited property).

\(^{158}\) Phillips v. Long, 2009 WL 5217055 (M.D. Pa. 2009) (dismissing claim for failure to sign under penalty of perjury and for failure to state a claim on which relief could be granted).

\(^{159}\) Salti, 579 F.3d at 664 n.5, 667 (dismissing a claim on fugitive disseitelment grounds falls into the category of "any other lawful reason" under Rule 32.2(c)(1)(A); claim may be dismissed without a hearing as long as court assumes all facts alleged by claimant to be true and they do not assert a defense under § 2466).

\(^{160}\) See U.S. 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).
possibly have had a pre-existing interest in the property in terms of 21 U.S.C. § 853(n)(6)(A).^{161}

Constitutional challenges to the ancillary proceeding

There continue to be constitutional challenges to the ancillary proceeding, but so far the Government has prevailed on all of them. In Salit, the court rejected the claim that the delay in commencing the ancillary proceeding while the Government apprehended and convicted a fugitive defendant violated due process.^{162}

Right to attorney's fees in the ancillary proceeding

It is well-established that a successful claimant in the ancillary proceeding may be entitled to attorney's fees under the Equal Access to Justice Act (EAJA).^{163} But the petition for EAJA fees will be denied if the Government was "substantially justified" in opposing the third party's claim.

In Cox, the court denied the request for EAJA fees because the Government was substantially justified in opposing the defendant's wife's claim that she acquired the criminal proceeds as a bona fide purchaser for value, when she had in fact acquired them in a divorce settlement. In fact, the panel seemed to wonder why the Government had not appealed that issue when it lost it in the ancillary proceeding.^{164}

It being very difficult to win attorney's fees under EAJA, third party claimants have turned to the attorney-fee provision in CAFRA, 28 U.S.C. § 2865(b), to petition for attorney's fees in the ancillary proceeding. They argue that because the ancillary proceeding is "civil in nature," the civil forfeiture statute should apply there, even though the ancillary proceeding is part of a criminal case. The allure of this argument is clear: because the award of attorneys' fees under CAFRA

^{161} U.S. v. Warshak, 2009 WL 2898824 (S.D. Ohio 2009) (granting Government's motion for summary judgment as to most of third party's claim because there was no genuine issue that claimant lacked a pre-existing interest under § 853(n)(6)(A) in property purchased with defendant's criminal proceeds, but denying summary judgment as to a substitute asset where there was some question as to its ownership).

^{162} Salit, 579 F.3d at 672 (that third party did not have opportunity to contest the forfeiture until fugitive defendant was apprehended and convicted and the property was included in an order of forfeiture did not violate the third party's right to due process).

^{163} See U.S. v. Douglas, 55 F.3d 584, 588-89 (11th Cir. 1995) (awarding attorney's fees because the Government was not substantially justified in opposing the third party's claim); AFLUS § 23-10.

^{164} U.S. v. Cox, 575 F.3d 352, 359 (4th Cir. 2009) (reversing attorney fee award where Government was substantially justified in opposing third party's claim on the law and the facts, and where its decision to seize and forfeit the property and require the third party to file a claim in the ancillary proceeding was nothing less than what the statute and rule required).
is automatic if the claimant prevails, successful third parties would be able to recover attorney’s fees in the ancillary proceeding whether the Government was justified in opposing their claims or not.

This issue was litigated three times last year in three different circuits. In each case, the Government conceded that the ancillary proceeding is “civil in nature” but argued that nevertheless the attorney fee provision in Section 2465(b) did not apply. The statute, the Government pointed out, does not say that attorney’s fees are available in all civil proceedings; it says that they are available in a civil proceeding to forfeit property, and the ancillary proceeding, whatever its nature, is not a proceeding to forfeit property. To the contrary, in criminal cases, the forfeitability of the property is determined in the forfeiture phase of the trial; the ancillary proceeding is simply a proceeding to quiet title to the forfeited property where the only issue is ownership. Forfeitability is not even an issue in the ancillary proceeding, the Government argued, and a proceeding where forfeitability is not an issue cannot be a proceeding to forfeit property.

The three appellate cases all resulted in victories for the Government, but for different reasons. In United States v. Buk, the Fourth Circuit never reached the attorney’s fee issue: it reversed the claimant’s victory on the underlying legal issue in the ancillary proceeding, rendering the attorney’s fee issue moot.185 In United States v. Moser, the Eighth Circuit rejected the claimant’s request for attorney’s fees but on different grounds from those argued by the Government. It held that attorneys’ fees are available only if Congress has clearly and unequivocally waived sovereign immunity, and found that the forfeiture laws are so complicated and hard to understand that it is not possible to say that the waiver of sovereign immunity was “unequivocal.”186

Finally, in United States v. Nolasco, the Third Circuit ruled in the Government’s favor for substantially the reasons outlined above. The successful third party was not entitled to attorney’s fees under Sec-

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186 U.S. v. Moser, 2008 WL 3891489 (E.D. Ark. 2008), aff’d, 586 F.3d 1089 (8th Cir. 2009), cert. denied, 130 S. Ct. 3297 (2010) (denying fee award; ancillary proceeding is not a proceeding to forfeit property; its purpose is to ensure that property of a third party is not forfeited in a criminal case) and (finding it unnecessary to decide if the ancillary proceeding is a “proceeding to forfeit property” because, given the arguments on both sides and the rule that waivers of sovereign immunity must be clear and unequivocal, it was not clear that Congress intended § 2465(b) to apply to the ancillary proceeding). Cf. U.S. v. Certain Real Property, Located at 317 Nick Fitchard Road, N.W., Huntsville, AL, 579 F.3d 1315, 1320 (11th Cir. 2009), cert. denied, 130 S. Ct. 3350 (2010) (reversing fee award under § 2465(b) based on fees incurred in a related criminal case; Congress did not intend § 2465(b) to be used for that purpose; waivers of sovereign immunity must be unequivocal).
tion 2465(b), the court held, because the ancillary proceeding is not a proceeding to forfeit property, but rather is a proceeding in which proof of ownership is a complete defense to the forfeiture whether the property was subject to forfeiture or not.\textsuperscript{167}

XVII. Choice of Law

The role of state law

When a claim is filed in the ancillary proceeding, the court must look to the law of the jurisdiction that created the property right to determine the nature of the claimant's interest in the property. Usually that is state law.\textsuperscript{168}

In \textit{Buk}, the question was whether the claimant was a bailor or an unsecured creditor;\textsuperscript{169} in \textit{Cone}, it was whether a judgment creditor had a valid lien;\textsuperscript{170} and in \textit{Hovind}, it was whether the claimant was a nominee.\textsuperscript{171} In all of these instances, the court determined the claimant's interest in the forfeited property by looking to the law of the state where the interest arose. The court also looks to state law when the third party asserts an interest in the forfeited property based on the doctrine of constructive trust,\textsuperscript{172} even though the imposition of the trust is a matter of discretion exercised by the federal district court.\textsuperscript{173} In such cases, it is incumbent on the federal court to properly apply the principles of equity embodied in the state statute and case law.

In \textit{United States v. Wilson}, a district court noted that the Ninth Circuit had misapplied (or simply ignored) California constructive trust

\textsuperscript{167}U.S. v. Nolasco, 354 Fed. Appx. 676, 679-80 (3d Cir. 2009), petition for cert. filed, 78 U.S.L.W. 3689, 79 U.S.L.W. 3016 (U.S. May 10, 2010) (Section 2465(b) does not apply in the ancillary proceeding; the ancillary proceeding may be civil in nature, but it is not a proceeding to forfeit property, a proceeding in which forfeitability is not an issue and proof of ownership is a complete defense is a quiet title proceeding, not a forfeiture proceeding).

\textsuperscript{168}See AFLUS § 23-12(b).

\textsuperscript{169}United States v. Buk, 314 Fed. Appx. at 568 (whether third party was really a bailor and not an unsecured creditor, and whether he is entitled to the imposition of a constructive trust, turns on the law of the state where the alleged interest arose).

\textsuperscript{170}U.S. v. Cone, 2009 WL 2163106 (M.D. Fla. 2009) (judgment creditor had no valid lien under state law that bars creditor of one spouse from attaching lien to property held as tenants by the entirety).

\textsuperscript{171}U.S. v. Hovind, 2009 WL 2369340 (N.D. Fla. 2009) (using Florida law to determine that one claimant was merely a nominee but another claimant was the recipient of a valid \textit{inter vivos} gift).

\textsuperscript{172}See U.S. v. Boyle, 2009 WL 2391857 (N.D. Ill. 2009) (court looks to state law to determine if the elements of a constructive trust have been satisfied).

\textsuperscript{173}See U.S. v. Ramunno, 599 F.3d 1269 (11th Cir. 2010) (appellate court reviews the district court's refusal to impose a constructive trust for abuse of discretion).
law six years ago in its infamous *Boylan* decision when it allowed a group of fraud victims to intervene in a civil forfeiture case, disrupting the Government’s plan to use the forfeiture laws to distribute the proceeds of the fraud to all of the victims on a *pro rata* basis. If the panel had correctly applied California law, the court said, the Government would have won that case; but that is of little comfort to the Government. As the Wilson court concluded, federal courts in California will have to deal with *Boylan* until the Ninth Circuit’s “erroneous decision” is overruled.

The nature of the claimant’s interest is not always a question of state law, however; the property interest is governed by the law of the jurisdiction that created the property interest being asserted, which in a given case could be federal or foreign law. In *Salti*, the forfeited property was in a Swiss bank account, so the Sixth Circuit held that Swiss law applied to determine whether the defendant’s wife had any legal interest in the account, even though the offense giving rise to the forfeiture occurred in Ohio.

*The role of federal law*

State law determines what interest the claimant has in the property, but federal law determines whether that interest is sufficient to satisfy the standing requirement in 21 U.S.C. § 853(n)(2) or to prevail on the merits under Section 853(n)(6)(A) or (B). Thus, a person who has an interest in the property under state law may nevertheless fail to satisfy the requirements of the federal statute.

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174 *U.S. v. $4,224,958.57, 392 F.3d 1002, 1005 (9th Cir. 2004) (Boylan)* (all fraud victims have standing to contest the forfeiture of the fraudster's property as potential beneficiaries of a constructive trust and are entitled to notice of the forfeiture proceeding).

175 *U.S. v. Wilson, 640 F. Supp. 2d 1257, 1260 (E.D. Cal. 2009)* (under state law, a constructive trust does not arise until decreed by a court, but the Ninth Circuit’s erroneous decision to the contrary in *Boylan* is binding on the district courts in that circuit until overruled). As discussed *infra*, the federal courts in California have been dealing with *Boylan* by applying the doctrine of prudential standing.

176 *U.S. v. Salti, 579 F.3d 656, 668 (6th Cir. 2009)* (the court must look to “the law of the jurisdiction that created the property right to determine the petitioner’s legal interest”; where Ohio resident asserted an interest in a forfeited Swiss bank account, it is Swiss law that applies).

177 See *U.S. v. Buk, 314 Fed. Appx. 565, 568–69 (4th Cir. 2009)* (what interest the third party has in the forfeited property turns on the law of the state where the alleged interest arose; once the legal interest is determined, the court turns to federal law to see if the legal interest is sufficient to prevail under § 853(n)(6)); AFLUS § 23-12(c).

178 See *U.S. v. Hooper, 229 F.3d 818, 821 (9th Cir. 2000)* (even if claimant had an interest in the defendant's drug proceeds as a matter of state law she cannot prevail unless she qualifies for relief under one of the two prongs of section 853(n)(6)).
In *United States v. Avina*, a judgment creditor had obtained a judgment lien against the proceeds of the defendant’s crime. In doing so, he had acquired an interest in the property under state law, but it was not an interest that existed prior to the date when the Government’s interest vested under the relation back doctrine. As the Ninth Circuit held a decade ago in *United States v. Hooper*, because the Government’s interest under the relation back doctrine vests at the moment the crime occurs, no one can ever have a pre-existing interest in the proceeds of the crime. Thus, the *Avina* court held that a claimant who acquires a judgment lien against the proceeds of a crime cannot satisfy the requirements of Section 853(n)(6)(A).

**XVIII. Standing Under Sections 853(n)(2)**

**Prudential standing**

Claimants in the ancillary proceeding must establish statutory standing, Article III standing, and prudential standing. Most experienced forfeiture practitioners have a fairly clear understanding of what Article III standing is and what statutory standing is, but prudential standing is a relatively new concept as applied to forfeiture law. In essence, a person has prudential standing if he shows that he falls within the zone of interests that Congress intended to protect when it created a given cause of action or ground for relief. In *Wilson*, the court held that a person does not have prudential standing to contest a criminal forfeiture if Congress has provided an alternative avenue of relief. For fraud victims, who are unsecured creditors, the court said, Congress has designated the remission process as the appropriate remedy. Therefore, notwithstanding the Ninth Circuit’s decision in *Boylan*, fraud victims lack standing to contest the forfeiture of the defendant’s property as the beneficiaries of a constructive trust.

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179 The relation back doctrine, codified at 21 U.S.C. § 853(c), provides that the Government’s interest in forfeited property vests at the time of the offense.

180 *Hooper*, 229 F.3d at 821–22.

181 *U.S. v. Avina*, 2009 WL 112580 (N.D. Ind. 2009) (following *Hooper*; judgment creditor had an interest in the defendant’s property under state law, but could not satisfy the temporal requirement in § 853(n)(6)(A)).

182 See *U.S. v. Salti*, 579 F.3d 656, 667 n.11 (6th Cir. 2009) (claimant has the burden of proof on the standing issue).

183 See *U.S. v. $500,000.00 in U.S. Currency*, 591 F.3d 402, 404 (5th Cir. 2009) (to establish prudential standing, the party must show that his interest in the property “is arguably within the zone of interests to be protected or regulated by the statute”).

184 *U.S. v. Wilson*, 640 F. Supp. 2d 1257, 1262 (E.D. Cal. 2009) (even if a beneficiary of a constructive trust has Article III standing to contest the forfeiture of
Nominees and general creditors lack standing to file a claim

Nominees lack Article III standing because they have no real interest in the forfeited property. In *Hovind*, the claimant was the titled owner of the property the Government had forfeited as a substitute asset, but the court denied his claim on the ground that he was only a nominee.

Similarly, general unsecured creditors lack standing to contest the forfeiture in the ancillary proceeding. The most recent case on this point, *United States v. Kaplan*, involved the customers of a sports betting business in liquidation who lacked standing to contest the forfeiture of the defendant-owner’s personal funds, which were his profits from the business, because they were merely unsecured creditors with no legal interest in the forfeited property.

The Fourth Circuit makes an exception to this rule where the defendant’s “entire estate” has been forfeited, but the case so holding has been limited to its facts.

The ability to trace is irrelevant

What is interesting is the number of times an unsecured creditor has argued that he is somehow different from other creditors because he can trace his loss to the forfeited property. Unsecured creditors, however, are treated equally: that one can trace his property while another cannot makes no difference. In *Salti*, the forfeited money had once been in the claimant’s bank account, but that made no difference. The former ownership of the forfeited property, the court said, does not confer standing.

See *U.S. v. Weiss*, 467 F.3d 1300 (11th Cir. 2006) (a mere nominee lacks the legal interest necessary to establish Article III standing).

See *U.S. v. Hovind*, 2009 WL 2369340 (N.D. Fla. 2009) (nominee who exercised no dominion or control over the forfeited property lacks a legal interest under state law, and therefore lacks standing, even though he was the titled owner).

See *AFLUS* § 23-13(c).


See *U.S. v. Reckmeyer*, 836 F.2d 200, 206 (4th Cir. 1987) (general creditors have a legal interest in forfeited property if defendant’s entire estate is forfeited).

See *U.S. v. Schecter*, 251 F.3d 490, 496 (4th Cir. 2001) (limiting Reckmeyer; unsecured creditor has no legal interest where less than debtor’s entire estate is forfeited); *U.S. v. Buk*, 314 Fed. Appx. 565, 569 n.4 (4th Cir. 2009) (same, following Schecter); *U.S. v. Jaynes*, 2009 WL 129969 (W.D. N.C. 2009) (Reckmeyer was “outside the norm” and should not be extended beyond its facts to cases where “virtually all” of the defendant’s estate was forfeited); *U.S. v. Boyle*, 2009 WL 2391857 (N.D. Ill. 2009) (refusing to follow Reckmeyer, and collecting cases showing that it is a minority view; brother who invested purchase money in defendant’s property was merely an unsecured creditor).
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not mean that the claimant has a present legal interest in the property.\(^\text{181}\)

This issue usually comes up in fraud cases where the defendant's last victim can trace his money to the assets seized from the defendant but the earlier victims cannot. In *United States v. Ramunno*, the court held that the last victim had no greater interest than any other creditor because when he transferred his property to the defendant, he became an unsecured creditor like everybody else.\(^\text{192}\)

**Tort victims**

In general, victims of a tort committed by the defendant do not have standing to contest the forfeiture of the defendant's property either; they are in the same position as unsecured creditors.\(^\text{193}\) In *Gianelli*, the defendant was convicted of racketeering and agreed to the forfeiture of his sports bar. A third party filed a claim in the ancillary proceeding claiming he was struck by drunk driver who became intoxicated in the bar, but the court granted the Government's motion to dismiss, holding that even if he had a valid tort claim, the claimant had no legal interest in the sports bar.\(^\text{194}\)

The victim of a theft or embezzlement is different, however. Unlike an unsecured creditor, such a person is able to assert an interest in specific property to which he never surrendered title. In *United States v. Monzon*, for example, the court recognized that a robbery victim has a superior, pre-existing interest in the stolen funds.\(^\text{195}\)

**Beneficiary of a constructive trust**

Victims who can trace, but who are otherwise out-of-luck because

\(^{181}\) *U.S. v. Salti*, 579 F.3d 656, 669-701 (6th Cir. 2009) (that forfeited funds were previously in claimant's bank account does not by itself confer standing; former ownership of the forfeited property does not mean claimant has a present legal interest). See also *U.S. v. Boyle*, 2009 WL 2391857 (N.D. Ill. 2009) (third party who invested purchase money in real property but did not obtain a mortgage or lien was merely an unsecured creditor without standing to contest the property's forfeiture).

\(^{192}\) *U.S. v. Ramunno*, 2009 WL 363910 (N.D. Ga. 2009) (defendant's last victim has no greater interest in the defendant's forfeited property than any other unsecured creditor; when he transferred his property to the defendant, title passed and the defendant became the owner).

\(^{193}\) See *U.S. v. Lavin*, 942 F.2d 177, 187, 20 Fed. R. Serv. 3d 969 (3d Cir. 1991) (victim of embezzlement unrelated to the drug offense giving rise to the forfeiture lacked standing to contest the forfeiture).


\(^{195}\) *U.S. v. Monzon*, 2009 WL 361095 (S.D. Fla. 2009) (Government recognizes that robbery victim has pre-existing, superior interest in stolen funds and agrees to amend order of forfeiture to recognize that interest).
they are unsecured creditors, often try to salvage the situation by asserting that they are the beneficiaries of a constructive trust. This is a complicated issue that we will discuss in more detail when we get to the merits of a claim filed in the ancillary proceeding. For present purposes, all we can say is that if a person were entitled to the imposition of a constructive trust, he would have standing to contest the forfeiture.\textsuperscript{198}

A third party cannot raise the defendant’s objections to the forfeiture\textsuperscript{198}

There is one last point to be made on standing: a third party cannot object to the forfeiture on grounds that only the defendant can raise.\textsuperscript{197} In United States v. Andrews, the defendant pled guilty and agreed to forfeit her property. Then, in the ancillary proceeding, her attorney filed a claim objecting that the defendant could have objected to the forfeiture on the ground that the State did not comply with Missouri law when it turned her property over to federal authorities. But the court held that that was not the attorney’s objection to make, even though he was disappointed that the defendant forfeited the money she was planning to use to pay the attorney’s fee.\textsuperscript{198}

XIX. Grounds for Recovery in the Ancillary Proceeding

Two grounds for recovery\textsuperscript{198}

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), both of which have to do with ownership.\textsuperscript{199} Among other things, this means that a claimant cannot relitigate the determination that the property was derived from or used to commit the offense for which the defendant was convicted.\textsuperscript{200} Nor is there any reason for him to do so:

\textsuperscript{198}See U.S. v. Salti, 579 F.3d 656, 671–72 (6th Cir. 2009) (because a constructive trust is a cognizable legal interest that would entitle a claimant to prevail under § 853(n)(6)(A), a person presenting a “facially colorable claim that she should be considered the beneficiary of a constructive trust” has standing to contest the forfeiture); U.S. v. Lesak, 2009 WL 1788411 (S.D. N.Y. 2009) (declining to dismiss claim filed by fraud victim as beneficiary of a constructive trust for lack of standing).

\textsuperscript{199}See U.S. v. Fleet, 498 F.3d 1225, 1231–32 (11th Cir. 2007) (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).


\textsuperscript{199}See U.S. v. Timley, 507 F.3d 1125, 1130 (8th Cir. 2007) (there are two grounds on which to prevail in the ancillary proceeding; the claimant must either demonstrate a priority of ownership under Section 853(n)(6)(A), or that he subsequently acquired the property as a bona fide purchaser under Section 853(n)(6)(B)).

\textsuperscript{200}See AFLUS § 23-14(c).
if the property belongs to the third party, he wins; if it does not, he loses. Either way, the forfeitability of the property is not his problem.\textsuperscript{201}

In \textit{United States v. Lazarenko}, the claimant argued that the court had misapplied the relation back doctrine when it determined the date when the crime began, but the court held that this was just another attempt to re-litigate forfeitability which is not at issue in the ancillary proceeding.\textsuperscript{202}

Limiting the ancillary proceeding to ownership issues also means that the claimants cannot turn the ancillary proceeding into a liquidation proceeding in which the defendant’s assets are distributed among his victims. As the court said in \textit{Ramunno}, dividing up the defendant’s property among the victims is a task Congress left to the Attorney General.\textsuperscript{203}

\textsuperscript{201}See \textit{U.S. v. Andrews}, 530 F.3d 1232, 1237 (10th Cir. 2008) ("a third party has no right to challenge the preliminary order’s finding of forfeitability;" the only issue in the ancillary proceeding is ownership; it is a complete defense to the forfeiture; "if the property really belongs to the third party, he will prevail and recover his property whether there were defects in the criminal trial or the forfeiture process or not; and if the property does not belong to the third party, such defects in the finding of forfeitability are no concern of his"); \textit{U.S. v. Porchay}, 533 F.3d 704, 710 (8th Cir. 2008) (the Government establishes the forfeitability of the property in the criminal case against the defendant; "there is no provision in § 853(n) to re-litigate the outcome of those proceedings"); \textit{U.S. v. Moser}, 586 F.3d 1069, 1095 (8th Cir. 2009), cert. denied, 130 S. Ct. 3297 (2010) (following Porchay; forfeitability issues are determined in the criminal case; the issues in the ancillary proceeding "are claims of ownership and priorities of interest vis-a-vis the Government and the petitioners"). Cf. \textit{U.S. v. Nolasco}, 354 Fed. Appx. 676, 680 (3d Cir. 2009), petition for cert. filed, 78 U.S.L.W. 3689, 79 U.S.L.W. 3016 (U.S. May 10, 2010) (by the time of the ancillary proceeding, forfeitability has already been proven and third party cannot contest it; he has no reason to, because proof of ownership is a complete defense; therefore the ancillary proceeding is not a "proceeding to forfeit property" within the meaning of § 2465(b); rather, the ancillary proceeding "merely ensures that property belonging to a third-party claimant is not inadvertently forfeited as part of a criminal defendant’s property").

\textsuperscript{202}\textit{U.S. v. Lazarenko}, 610 F. Supp. 2d 1063, 1066–67 (N.D. Cal. 2009) ("an ancillary proceeding is not the proper venue for re-litigating the underlying forfeiture," the court said, "thus neither is it the proper place to re-litigate the application of the relation back doctrine").

\textsuperscript{203}\textit{U.S. v. Ramunno}, 2009 WL 363910 (N.D. Ga. 2009) (allowing all victims to file claims in the ancillary proceeding would force the district court to weigh the competing claims and devise a formula for dividing up the defendant’s property; that is a task Congress meant to leave to the Attorney General under 21 U.S.C. § 853(i)).
XX. Superior Legal Interest Under Section 853(n)(6)(A)

Paragraph (6)(A) embodies the relation back doctrine.\(^{204}\)

Section 853(n)(6) divides third party claimants into two categories: those who had a vested interest in the property before the Government’s interest vested under the relation back doctrine, and those who acquired the property later. The former may recover under Section 853(n)(6)(A), while the latter must satisfy the bona fide purchaser requirement in Section 853(n)(6)(B).\(^{205}\)

It makes no difference how the third party acquired the pre-existing interest. In Hovind, for example, the third party had acquired the property as a valid gift under state law.\(^{206}\) What matters is that the interest was in existence at the time the property became subject to forfeiture, and that the interest is still in existence at the time of the ancillary proceeding.

In Grossi, the claimant was able to show that she had a valid lien on the forfeited property at the time her brother used it as a place to grow marijuana, but she no longer had an interest by the time the property was forfeited because by then the lien had been paid off. Without a valid present interest in the property, she could not recover in the ancillary proceeding.\(^{207}\)

The interest must be a pre-existing interest.

As mentioned earlier, a third party can never assert an interest under Section 853(n)(6)(A) to the proceeds of the crime. As the Ninth Circuit held in Hooper, it is not possible to have an interest in the proceeds of a crime before the crime occurs.\(^{208}\) In Warshak, the court extended Hooper, holding that the defendant’s wife could not have had a pre-existing interest either in the proceeds of the defendant’s

\(^{204}\) See AFLUS § 23-15(a).

\(^{205}\) See Lazarenko (Petition of UITCo.), 610 F. Supp.2d at 1066.

\(^{206}\) U.S. v. Hovind, 2009 WL 2369340 (N.D. Fla. 2009) (because the transfer of the forfeited property to third party was a valid gift under state law that occurred before the act giving rise to the forfeiture, claimant prevailed in the ancillary proceeding).

\(^{207}\) U.S. v. Grossi, 359 Fed. Appx. 830 (9th Cir. 2009) (third party who had a lien on the property when she filed her claim in the ancillary proceeding had standing to contest the forfeiture, but because the lien was then paid off, she had no legal interest to recover).

\(^{208}\) U.S. 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).
crime or in any property she or the defendant purchased with those proceeds.\textsuperscript{209}

In \textit{Wilson}, the court applied this idea to a constructive trust, and thus was able to distinguish the Ninth Circuit's decision in \textit{Boylan}. Even if the claimant was entitled to the imposition of a constructive trust, the court said, and even if, as \textit{Boylan} held, the trust came into existence at the moment the crime occurred, it was still not a \textit{pre-existing} interest. To prevail under Section 853(n)(6)(A), the court said, the claimant must have had an interest in the property \textit{before} the crime occurred; if the interest arose simultaneously with the commission of the crime, the "tie" would go to the Government. So, just as a spouse in a community property state who arguably acquires an interest in her husband's criminal proceeds automatically when the crime occurs cannot prevail under § 853(n)(6)(A), neither can a beneficiary of a constructive trust whose interest arises at the moment a fraud occurs.\textsuperscript{210}

\textbf{Judgment liens}

Judgment creditors who acquire liens also come too late in the day to prevail under Section 853(n)(6)(A).\textsuperscript{211} A judgment creditor is merely an unsecured creditor until he converts his judgment to a lien on the forfeited property, and if that does not happen until the Government's interest has vested under the relation back doctrine, the creditor cannot have a claim under Section 853(n)(6)(A).\textsuperscript{212}

\textbf{Nominal ownership and possessory interests}

The legal interest the claimant must have in the forfeited property to prevail in the ancillary proceeding mirrors the interest he must have to establish standing.\textsuperscript{213} Again, nominees cannot succeed. In \textit{United States v. Walker}, the defendant's mother could not demonstrate an actual legal interest in a forfeited vehicle even though it was titled in

\textsuperscript{209}U.S. v. Warshak, 2009 WL 289824 (S.D. Ohio 2009) (following \textit{Hooper}, granting summary judgment as to wife's claims to property purchased with defendant's criminal proceeds because, as a matter of law, she could have no pre-existing interest under § 853(n)(6)(A)).

\textsuperscript{210}U.S. v. Wilson, 640 F. Supp. 2d 1257, 1262 (E.D. Cal. 2009) (applying \textit{Hooper} to claim based on constructive trust; even if the interest arises at the time of the offense, it arises too late to support a claim under § 853(n)(6)(A); if the interests arise simultaneously, the Government prevails).

\textsuperscript{211}See AFLUS § 23-15(a).

\textsuperscript{212}See \textit{U.S. v. Lazarenko}, 610 F. Supp. 2d 1063, 1067 (N.D. Cal. 2009) (judgment creditor is merely an unsecured creditor without standing to contest the forfeiture unless he has converted his judgment into a lien on the forfeited property).

\textsuperscript{213}See AFLUS § 23-15(c).
her name. And in United States v. Drezov, the court rejected the claim filed by the titled owner of real property when the Government produced a recording of the claimant saying, "It's titled in my name but it's his house; I have nothing to do with it."215

Constructive trusts

I mentioned that some courts, like the district court in Wilson, reject constructive trust claims out of hand because the interest acquired could not, in any event, be a pre-existing interest.216 Most courts, however, hold that the beneficiary of a constructive trust can recover under Section 853(n)(6)(A) if all of the elements of a constructive trust are satisfied. The Sixth Circuit said that this year in Salti, without, unfortunately, even mentioning the temporal requirement.217

This means that in most cases whether the claimant is able to prevail in the ancillary proceeding as the beneficiary of a constructive trust will turn not on the requirements of the federal forfeiture statute, but on whether the claimant can satisfy the elements of a constructive trust under state law.218

In virtually every state, a constructive trust is an equitable remedy, which means that the court will impose a constructive trust only if the claimant is able to satisfy all of the applicable principles of equity.219 The following are some of the principles that have been applied, and

214 U.S. v. Walker, 607 F. Supp. 2d 1138, 1144 (S.D. Cal. 2009) (Government is able to defeat a claim of ownership filed by a nominee by showing that defendant, not the nominee, exercised dominion and control over a forfeited vehicle).

215 U.S. v. Drezov, 2009 WL 928928 (D. Ariz. 2009) (person with bare legal title to real property who could not corroborate his claim to have paid the mortgage and utilities while allowing defendant to reside on the property as a tenant failed to exercise sufficient dominion and control to establish a legal interest under state law).

216 See also U.S. v. BCCI Holdings (Luxembourg), S.A., 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(l)(6)(A)).

217 U.S. v. Salti, 579 F.3d 656, 670 (6th Cir. 2009) (holding that a constructive trust is a legal interest that, if established, is sufficient to make a claim under § 853(n)(6)(A); but no discussion of the temporal requirement).

218 See U.S. v. Ramunno, 599 F.3d 1269, 1272 (11th Cir. 2010) (court does not reach the federal question until claimant satisfies all of the elements of a constructive trust under state law; noting that Shefton assumed the existence of a constructive trust). See also AFLUS § 23-15(e) (2010 Cumulative Supplement, replacing the entire section).

219 U.S. v. Ramunno, 599 F.3d 1269 (11th Cir. 2010) (constructive trust is creature of equity; therefore all of the principles of equity apply even though they are not itemized in the state constructive trust statute; the imposition of a constructive trust is not automatic just because claimant can trace).
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found lacking, when third parties have made constructive trust claims in asset forfeiture cases:

1) the ability to trace an interest to particular asset;
2) the lack of an adequate remedy at law;
3) a confidential relationship between the claimant and the defendant;
4) fairness to others who are similarly situated;
5) "clean hands;" and
6) unjust enrichment or fraud.

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220 See U.S. v. Schwimmer, 968 F.2d 1570, 1583–84, 23 Fed. R. Serv. 3d 224 (2d Cir. 1992) (constructive trust is a legal interest, but tracing is required to show property held in constructive trust is the property being forfeited).

221 U.S. v. Ribadeneira, 105 F.3d 833, 837 n.5 (2d Cir. 1997) (constructive trust was not imposed because claimant did not satisfy elements of constructive trust under state law and the opportunity to file a remission petition with the Attorney General gave claimant adequate remedy at law); U.S. v. Contents of Smith Barney Citigroup Account No. 3419 in Name of Warshak, 2009 WL 961228 (S.D. Ohio 2009) (following Ribadeneira; ability to file remission petition gives victims an adequate legal remedy, so there is no basis for the imposition of a constructive trust).

222 See U.S. v. Khan, 129 F.3d 114 (2d Cir. 1997) (Table) (constructive trust requires a confidential relationship and thus is usually imposed in family law cases, not commercial cases); U.S. v. Marx, 844 F.2d 1303, 1307–08 (7th Cir. 1988) (constructive trust requires confidential relationship; trust imposed in favor of wife of convicted defendant).

223 U.S. v. Andrews, 530 F.3d 1232, 1238 (10th Cir. 2008) (district court did not abuse its discretion in refusing to impose a constructive trust on behalf of a victim who could trace his losses to the forfeited property where doing so would have been unfair to the victims who could not 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); U.S. v. Ramunno, 599 F.3d 1269, 1275 (11th Cir. 2010) (following Andrews; similarly situated victims should not be treated differently just because one can trace; allowing "last victim" to claim $2 million of $6 recovered in Ponzi scheme would be unfair to the other 90 victims).

224 See U.S. v. Neidig, 2008 WL 2697189 (M.D. Pa. 2008) (father who transferred property to son to avoid forfeiture, and then tried to reclaim it as the beneficiary of a constructive trust, did not have clean hands).

225 See U.S. v. Buk, 314 Fed. Appx. 565, 569 (4th Cir. 2009) (third party is not entitled to a constructive trust where there is no showing that fraud was involved in inducing him to invest his money with defendant); U.S. v. Boyle, 2009 WL 2391857 (N.D. Ill. 2009) (same; no constructive trust because one of the elements of a constructive trust under state law is that the claimant was deprived of his property by fraud, breach of fiduciary duty, or other wrongdoing or mistake, and claimant made no such showing).
XXI. Bona Fide Purchasers Under Section 853(n)(6)(B)

Creditors and victims are not bona fide purchasers

We know that unsecured creditors lack standing, but some have attempted to file claims anyway, asserting that they are bona fide purchasers for value. They are not.226

In Lazarenko, the claimant argued that he was a bona fide purchaser and not merely an unsecured creditor because he had purchased his cause of action against the defendant from the victim. But the court said there is a difference between being a purchaser of the property subject to forfeiture and a purchaser of a cause of action against the defendant. For Section 853(n)(6)(B) to apply, the third party has to have purchased the thing the Government is trying to forfeit.

The bona fide purchaser provision is an exception to the relation back doctrine.227 While the doctrine gives the Government an interest in a specific asset as of the time of the underlying offense, Section 853(n)(6)(B) allows the claimant to trump that interest if he acquired an interest of his own as a bona fide purchaser for value who was without reason to know that the property was subject to forfeiture. For the exception to apply, the third party must have purchased that specific asset and not just a cause of action.228

The same lesson was applied in a different way in Cox. The defendant's wife filed a claim asserting that she was the purchaser of the property she got from her husband in a divorce settlement. She argued, and the district court accepted, that she gave up something of value when she agreed to submit to an arbitration proceeding, the result of which was that she was awarded certain property traceable to her husband's crime. But the Fourth Circuit held that if she purchased anything, it was a generalized interest in the right to be awarded property in the arbitration proceeding; she did not purchase a specific asset, and it was the specific asset — the asset traceable

226. See U.S. v. Campos, 859 F.2d 1233, 1238 (6th Cir. 1988) (trade creditor is not a bona fide purchaser).

227. See AFLUS § 23-16(a).

228. U.S. v. Lazarenko, 610 F. Supp. 2d 1063, 1069 (N.D. Cal. 2009) (there is a distinction between acquiring the right to file a claim from the victim of the offense and acquiring the property subject to forfeiture; a third party who has done only the former has no legal interest in the forfeited property itself). See also U.S. v. Mendez, 2009 WL 1706354 (E.D. N.Y. 2009) (under state law, defendant who used drug money to place the down payment on the purchase of real property in escrow, retained title to the funds; seller was merely an unsecured creditor with no legal interest in the escrowed funds).
to her husband’s crime — that belonged to the Government under the relation back doctrine.\textsuperscript{220}

\textit{Without cause to believe property was subject to forfeiture}\textsuperscript{230}

The requirement that the claimant be without cause to believe the property is subject to forfeiture makes it particularly difficult for defense attorneys to contest the forfeiture as bona fide purchasers.\textsuperscript{231} In \textit{United States v. Velez}, a money laundering case in which the court held that a defense attorney could not be prosecuted for violating Section 1957 when he accepted a fee paid with drug proceeds, the court noted that his fee was nevertheless subject to forfeiture if he was aware of the source of the money.\textsuperscript{232}

The requirement that the claimant be without reason to believe that the property was subject to forfeiture was also a problem for Mrs. Cox. She admitted that when she got the $812,000 in criminal proceeds in the divorce settlement she knew that her husband was the subject of a criminal investigation, but she thought he was under investigation for health care fraud; she didn’t realize he was actually under investigation for bank fraud. The district court was impressed by the distinction, but the Fourth Circuit was not. What matters, the court said, is that she knew her husband’s property was subject to forfeiture, not that she knew the statutory basis for it.\textsuperscript{233}

\textbf{XXII. Discovery in the Ancillary Proceeding}

Rule 32.2(c)(1)(B) says that the court may permit the parties to conduct discovery in the ancillary proceeding in accordance with the

\textsuperscript{220}U.S. v. Cox, 575 F.3d 352, 356–57 (4th Cir. 2009) (Government was justified in opposing wife’s claim that she was a BFP of money she received in a divorce settlement because she had agreed to an arbitration proceeding; the agreement gave her only a generalized interest in her husband’s property, not a specific interest in any particular asset). See also AFLUS § 23-16(b).

\textsuperscript{230}See AFLUS § 23-16(c).

\textsuperscript{231}See Caplin & Drysdale, Chartered v. U.S., 491 U.S. 617, 633, 109 S. Ct. 2667, 105 L. Ed. 2d 528 (1989) (“given the requirement that any assets which the Government wishes to have forfeited must be 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”); U.S. 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); U.S. v. Andrews, 2009 WL 736683 (W.D. Mo. 2009) (same).

\textsuperscript{232}U.S. v. Velez, 586 F.3d 875 (11th Cir. 2009).

\textsuperscript{233}Cox, 575 F.3d at 356–57 (Government was justified in opposing wife’s claim that she did not know the property she received from her husband in a divorce settlement was subject to forfeiture, where she knew he was under investigation but was mistaken as to the nature of his offense).
Federal Rules of Civil Procedure “if the court determines that discovery is necessary or desirable to resolve factual issues.” In United States v. Jaynes, the court noted that allowing discovery in the ancillary proceeding is discretionary, so the court can bypass discovery and go right to the merits of the claim if discovery appears to be unnecessary. XXIII. Clear Title to Forfeited Property

If a third party fails to file a claim in the ancillary proceeding, whatever interest he or she may have had in the property is extinguished. Thus, the ancillary proceeding gives the Government clear title to the forfeited property, even if no one files a claim.

XXIV. Appeals

Defendant’s appeal

The defendant waives the right to appeal the forfeiture order if he does not raise it at the first opportunity to do so.

Rule 32.2(d) gives the defendant the right to request a stay of the forfeiture order pending appeal. Courts generally deny the request, but in Gallion, the court reached a split decision: it granted the stay as to the forfeiture of real property that could not be restored if it were liquidated, but denied it as to fungible currency.

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234 See AFLUS § 23-7.

235 U.S. v. Jaynes, 2009 WL 129969 (W.D. N.C. 2009) (the court is not required to allow the parties to conduct discovery before considering a motion for summary judgment; it has the discretion to consider the motion on the merits if discovery appears to be unnecessary).

236 See U.S. v. Puig, 419 F.3d 700, 703 (8th Cir. 2005) (if no third party files a timely claim, the United States has clear title to the property pursuant to Section 853(n)(7)); U.S. v. Rashid, 2009 WL 723382, at *4 (E.D. Pa. 2009), order aff'd, 2010 WL 1239550 (3d Cir. 2010) (if third party fails to file a timely claim in the ancillary proceeding, whatever interest the third party had in the property is extinguished per § 853(n)(7); that claimant was a minor at the time the property was forfeited creates no exception). See also U.S. v. Moser, 586 F.3d 1089, 1095 (8th Cir. 2009), cert. denied, 130 S. Ct. 3297 (2010) (noting that “the Government does not possess clear title to the seized property until after the conclusion of § 853(n) proceedings”); AFLUS § 23-17.

237 See U.S. v. Guerra, 307 Fed. Appx. 283, 286 (11th Cir. 2009), cert. denied, 130 S. Ct. 58, 175 L. Ed. 2d 23 (2009) (defendant who did not challenge the forfeiture order in her first appeal waived her right to do so, and thus could not challenge the forfeiture order in a second appeal after the case was remanded for resentencing on an unrelated issue); AFLUS § 24-2.

238 See AFLUS § 24-3.

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Jurisdiction Pending Appeal

The court retains jurisdiction to amend the order of forfeiture to include substitute assets while the defendant’s appeal is pending.\textsuperscript{240} It also retains jurisdiction to correct clerical errors in the order of forfeiture while the appeal is pending.\textsuperscript{241}

XXV. Post-Conviction Issues

Investigation to locate forfeited assets

Section 853(m) allows the Government to conduct post-conviction discovery to locate forfeitable property.\textsuperscript{242} In Madoff, the court denied a request from the media to unseal documents relating to the Government’s efforts to locate and forfeit the defendant’s assets on the ground that disclosure could impede the recovery and restoration of assets to the victims.\textsuperscript{243}

Rule 41(g) motion for the return of property

Rule 41(g) of the Federal Rules of Criminal Procedure may be invoked to seek the return of property that was seized but never forfeited, if the Government still has possession of the property. Such motions are often filed when the law enforcement agents investigating the case seized the defendant’s property at the time of his arrest but no one thought about starting forfeiture proceedings — administrative, civil or criminal.\textsuperscript{244}

In general, if the Government does not forfeit the property, it must return it to the defendant when the criminal case is over. In United States v. Vitrano, however, the court held that the Government could retain the property, even if it was not forfeited, if it was needed to

\textsuperscript{240}See U.S. v. Hurley, 63 F.3d 1, 23 (1st Cir. 1995) (court retains authority to order forfeiture of substitute assets after appeal is filed); U.S. v. Warshak, 2009 WL 113232 (S.D. Ohio 2009) (rejecting defendants’ objection to amending the order of forfeiture to include substitute assets while their appeal was pending); AFLUS § 24–4.

\textsuperscript{241}See U.S. v. Quintero, 572 F.3d 351, 353 (7th Cir. 2009) (district court retains jurisdiction to correct a clerical error in the judgment — such as including the order of forfeiture per Rule 32.2(b)(3) — after the defendant has noted an appeal, if the correction does not affect an issue before the appellate court); Rule 32.2(b)(4).

\textsuperscript{242}See AFLUS § 24–6.


satisfy restitution orders or other debts owed to the Government by the defendant.\textsuperscript{245}

\textit{Habeas corpus}

Defendants also try to attack the forfeiture in \textit{habeas corpus} proceedings, but 28 U.S.C. § 2255 does not authorize relief from criminal forfeiture; it only applies to the incarcerative part of the defendant’s sentence.\textsuperscript{246}

\textit{Double jeopardy}

The Double Jeopardy Clause does not apply to criminal forfeiture because forfeiture is part of the defendant’s sentence, not a substantive offense. In Wittig, as noted earlier, this meant that the Government, on retrial of the defendant following a successful appeal, could seek the forfeiture of property that the jury declined to forfeit in the first trial.\textsuperscript{247}

In Murphy, the defendant argued, based on double jeopardy, that the pre- indictment restraint of his property meant that he could not be brought to trial on the underlying criminal charges. He lost that argument.\textsuperscript{248}

\textit{Prejudgment Interest}

There is a split in the circuits as to whether the Government is liable for pre-judgment interest if the defendant prevails in a criminal forfeiture case. In Nolasco, the Third Circuit held that it was not, declining to follow the Ninth Circuit on this point.\textsuperscript{249}

\textbf{XXVI. Retroactivity / Ex Post Facto Clause}

If a conspiracy or other continuing crime straddles the effective date of either the forfeiture statute or the statute on which the forfeiture is

\textsuperscript{245}Vitrano v. U.S., 73 Fed. R. Serv. 3d 366 (S.D. N.Y. 2009) (money seized from defendant but never forfeited may be retained to satisfy restitution order).

\textsuperscript{246}See Murphy v. U.S., 2009 WL 424490 (N.D. Ill. 2009) (§ 2255 applies only to the custodial aspects of the sentence; defendant had to challenge the forfeiture on direct appeal, and not by raising ineffectiveness of counsel claims under § 2255); Soldier v. U.S., 2009 WL 455830 (D.N.D. 2009) (same). See also AFLUS § 24-11.

\textsuperscript{247}U.S. v. Wittig, 575 F.3d 1085, 1096-97 (10th Cir. 2009) (the Government may seek forfeiture on retrial of property the jury in the first trial declined to forfeit, but defendant may raise issue preclusion and the law of the case doctrine).

\textsuperscript{248}Murphy v. U.S., 2009 WL 424490 (N.D. Ill. 2009) (pre- indictment restraint of property under § 853(e)(1)(B) does not constitute punishment for double jeopardy purposes).

based, the defendant is liable to forfeit the proceeds of the entire conspiracy, including the property obtained before the effective date of the statute in question.\textsuperscript{250} In \textit{United States v. Kalish}, the court held that requiring the defendant to forfeit the proceeds of an “advance fee” conspiracy that straddled the effective date of the statute authorizing forfeiture in fraud cases did not violate the Ex Post Facto Clause.\textsuperscript{251}

**XXVII. Forfeiture and Restitution**

There have been a lot of cases recently discussing the interplay of forfeiture and restitution. Most emphasize that forfeiture and restitution serve different purposes: forfeiture is part of the defendant’s punishment, while restitution is designed to reimburse the victim.\textsuperscript{252} Thus, as a general rule, the defendant is not entitled to an offset against a restitution order to reflect the amount forfeited, or \textit{vice versa}. In \textit{United States v. Taylor}, the Fifth Circuit collected the cases on that issue.\textsuperscript{253} The exception to the no-offset rule applies only when the forfeited funds have been remitted to the victims, so that restitution would amount to double recovery by the victims.\textsuperscript{254}

In \textit{Venturella}, however, the Seventh Circuit said the defendant could

\textsuperscript{250}See \textit{U.S. v. Valladares}, 544 F.3d 1257, 1270 (11th Cir. 2008) (Ex Post Facto Clause does not bar forfeiture of the portion of the proceeds of a federal health care fraud conspiracy that were obtained before the effective date of the conspiracy statute, where the conspiracy continued after that date).

\textsuperscript{251}U.S. v. Kalish, 2009 WL 130215 (S.D. N.Y. 2009).

\textsuperscript{252}See \textit{U.S. v. Browne}, 505 F.3d 1229, 1231, 183 L.R.R.M. (BNA) 2044, 155 Lab. Cas. (CCH) P 10933 (11th Cir. 2007), cert. denied, 128 S. Ct. 2962, 171 L. Ed. 2d 886, 184 L.R.R.M. (BNA) 2576 (2008) (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); \textit{U.S. v. Hoffman-Vaile}, 568 F.3d 1335, 1344–45 (11th Cir. 2009) (same; following \textit{Browne}).

\textsuperscript{253}U.S. v. Taylor, 582 F.3d 558, 566 (5th Cir. 2009), cert. denied, 130 S. Ct. 1116 (2010) (forfeiture and restitution are both mandatory and serve different purposes; one should not be offset against the other; collecting cases). \textit{Accord. U.S. v. Kalish}, 2009 WL 130215 (S.D. N.Y. 2009) (defendant not entitled to any offset against the forfeiture money judgment reflecting the $1.2 million in restitution he is also ordered to pay); \textit{U.S. v. Johnson}, 2009 WL 3734103 (S.D. Ga. 2009) (accepting that forfeiture and restitution are both mandatory, court “begrudgingly” enters forfeiture order despite belief that it will leave no money for defendant to satisfy restitution order).

\textsuperscript{254}Taylor, 582 F.3d at 567–68 (explaining why some courts have allowed an offset against the restitution: to avoid double recovery by a victim to whom the Government remitted the forfeited funds); \textit{U.S. v. Hatten}, 2009 WL 29407 (S.D. Tex. 2009) (defendant was not entitled to an offset against his $67,000 restitution order to reflect the forfeiture of $76,000 seized from his bank account unless he could show that the Government had used the forfeited funds to reimburse the victim, and in any event was not entitled to the return of the $9,000 excess); \textit{United States v. Williams, 07-CR-437-BR} (D. Or. May 26, 2009) (where Government has already promised to
be ordered to pay both restitution and forfeiture even where a Government agency was the victim: there was no double recovery because the Justice Department gets the forfeited funds and the victim agency gets the restitution.  

Also, the defendant is not entitled to a reduction in the forfeiture to reflect voluntary restitution payments to the victims.

XXVIII. Award to Informants/Bias of Witness

The Eleventh Circuit addressed an interesting issue regarding the impeachment of a Government witness in a criminal case. In *United States v. Sarras*, the court refused to allow a defense attorney to assert on cross-examination that a police officer was biased in favor of the prosecution because his department would benefit financially from the forfeiture of defendant’s property if defendant were convicted.

XXIX. Application of Section 2461(c)

Title 28, United States Code, Section 2461(c) was enacted as part of CAFRA to establish a uniform set of procedures for all criminal forfeiture cases in 21 U.S.C. § 853, and to allow the Government to seek criminal forfeiture in any case for which any form of forfeiture — civil or criminal — was authorized. As the Fifth Circuit explained in *Taylor*, the latter provision is what allows the Government to seek

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255 See *U.S. v. Venturella*, 585 F.3d 1013, 1019–20 (7th Cir. 2009), cert. denied, 130 S. Ct. 1547, 176 L. Ed. 2d 139 (2010) (defendant may be ordered to pay both restitution and forfeiture even when a Government agency is the victim; there is no double recovery because the Dept. of Justice and the victim agency are different entities).


257 *U.S. v. Sarras*, 571 F.3d 1111, 1134, 79 Fed. R. Evid. Serv. 1255 (11th Cir. 2009), opinion vacated and superseded on denial of reh’g, 575 F.3d 1191 (11th Cir. 2009).
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forfeiture as part of the defendant's sentence for any crime listed in 18 U.S.C. § 1956(c)(7).\footnote{U.S. v. Taylor, 582 F.3d 558, 565 (5th Cir. 2009), cert. denied, 130 S. Ct. 1116 (2010) (explaining how § 981(a)(1)(C) incorporates the money laundering predicates from §§ 1956(c)(7) and 1961(1)).}

In United States v. Capoccia, the defendant argued that Section 2461(c) only incorporates the procedures from 21 U.S.C. § 853, and thus did not incorporate the substitute assets provision in Section 853(p). But the court held that the forfeiture of substitute assets is mandatory in criminal forfeiture cases, including those in which the Government relies on Section 2461(c), and that there is no basis for reading the language in Section 2461(c) to exclude the substitute asset provision in Section 853(p).\footnote{U.S. v. Capoccia, 2009 WL 273301 (D. Vt. 2009).}

XXX. Conclusion

Once again, the courts in 2009 produced an enormous number of decisions applying and interpreting the criminal forfeiture laws in virtually every type of case for which forfeiture is authorized. With the Government continuing to increase the resources dedicated to the recovery of assets from criminal defendants, and to improve the training available to criminal prosecutors, there is every reason to suspect that the trend will continue for some time to come.