Criminal Forfeiture Procedure in 2011: 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 2010. 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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1 The author is an Assistant U.S. Attorney serving as the Chief of the Asset Forfeiture and Money Laundering Section in the Office of the United States Attorney for the District of Maryland. Previously, he served for many years as the Deputy Chief for Legal Policy of the Asset Forfeiture and Money Laundering Section of the United States Department of Justice. This article is an edited version of a presentation made by the author at the Asset Forfeiture Chiefs and Experts Conference at the National Advocacy Center, University of South Carolina, on February 15, 2011. The views expressed in this article are solely those of the author and do not necessarily reflect the views or policies of the Department of Justice or any of its agencies.

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 2010.³

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 States*,⁴ that forfeiture is imposed as part of the sentencing process in a criminal case; it is not a substantive element of the offense.⁵ The Eleventh Circuit's decision in *United States v. Knowles* provides a good illustration.

³ A complete discussion of each of the issues covered in this article, along with the citations to the relevant cases, may be found in Chapters 15-24 of Stefan D. Cassella, *Asset Forfeiture Law in the United States*, Juris Publishing: New York, 2007 and 2010 (Cumulative Supplement) (hereafter “AFLUS”).


⁵ See AFLUS § 15-2.
In *Knowles* the defendant was extradited from the Bahamas to stand trial on drug charges. He argued that because he could only be tried on the charges for which he was extradited, and because the forfeiture was not mentioned in the extradition request, forfeiture could not be part of his sentence. But the court held that because forfeiture is part of the defendant’s punishment, and not a separate criminal offense, forfeiture may be imposed without violating the rule that a defendant extradited from another country may only be tried on the offenses for which he was extradited. The forfeiture, the court said, was simply part of the sentence for the offense on which the defendant could be lawfully prosecuted.6

*Criminal forfeiture is* in personam

Forfeiture is an *in personam* punishment, not an *in rem* action against property. That distinction is one of the things that distinguishes civil forfeiture from criminal forfeiture.7 And as the district court held in *United States v. Roberts*, it is the reason why criminal forfeiture orders can take the form of a personal money judgment.8

7 *See United States v. Vampire Nation*, 451 F.3d 189, 202 (3d Cir. 2006) (a criminal forfeiture order is a judgment *in personam* against the defendant; this distinguishes the forfeiture judgment in a criminal case from the in rem judgment in a civil forfeiture case).
8 *United States v. Roberts*, 696 F. Supp.2d 263, 270 (E.D.N.Y. 2010) (forfeiture order may take the form of a money judgment because the forfeiture order is an *in personam* judgment). *See AFLUS § 15-3(e).*
Criminal forfeiture requires a conviction on a count for which forfeiture is authorized

Because forfeiture is part of the defendant’s sentence, however, the court can impose forfeiture only for an offense on which the defendant has been convicted. If the defendant’s conviction is vacated or overturned on appeal, the forfeiture order must be vacated as well.⁹

In *United States v. Warshak*, a mother and son were both found guilty of money laundering and were held jointly and severally liable for a $44 million money judgment, but when the mother’s conviction was reversed on appeal, the forfeiture order was vacated as to her as well — which left only the son liable for the $44 million.¹⁰

Moreover, the Government has no common law right to forfeiture. Criminal forfeiture may be imposed only if Congress has specifically authorized forfeiture for the offense of conviction.

In *United States v. Simon*, the defendant lied on his child’s application for financial aid and was convicted of mail fraud and of the specific fraud offense involving a federal financial aid application. In the indictment, the Government said it was seeking forfeiture under both statutes, but it later had to concede that Congress has not authorized forfeiture for the latter offense. Accordingly, the

⁹ See AFLUS § 15-3(a).

Government was limited to seeking a forfeiture order only for the mail fraud conviction.11

_The nexus between the property and the offense of conviction_

But that wasn't the end of the Government's problems in _Simon_. The defendant _was_ convicted of an offense for which forfeiture is authorized: mail fraud; but that is not enough. The Government must also prove by a preponderance of the evidence that there is a nexus between the property it wants to forfeit and that offense.

Applying the "but for" test, the court held that the Government had not proved that the defendant's child would not have received the financial aid but for the defendant's having misstated his income on the financial aid application. So the court refused to enter a forfeiture order.12

In drug cases, the problem is not that the Government cannot prove that the money is drug money; the problem is that it cannot always prove that it is the proceeds of _the particular drug offense for which the defendant was convicted_.13

If the defendant is convicted of possession with intent to distribute drugs, and was arrested before he was able to distribute the drugs in his possession, any money found in his possession at the time of his arrest is likely to be the


12 Simon, 2010 WL 5359708 at *2.

13 See AFLUS § 15-3(b).
proceeds of earlier drug deals, not the proceeds of the offense with which he is currently charged. For that reason, money found in a defendant’s possession at the time of his arrest often cannot be forfeited as proceeds in his criminal case.\(^{14}\)

In \textit{United States v. Herder}, however, the Fourth Circuit found a way around this problem. The defendant was convicted of possession with intent to distribute and argued that the money in his possession could not be forfeited as the proceeds of that offense. But the court said it was forfeitable not because it was drug proceeds, but because it was used to facilitate the offense.\(^{15}\)

\textit{Schemes and conspiracies}

The way around the problem of having to link the property to a particular offense is to charge the defendant with a continuing scheme or conspiracy. In such cases the amount involved in the entire scheme or conspiracy is forfeitable.\(^{16}\)

In \textit{United States v. Capoccia}, for example, the defendant argued that the forfeiture order should not have included the proceeds of aspects of his conspiracy

\footnotesize{\textsuperscript{14} See \textit{United States v. Juluke}, 426 F.3d 323, 328-29 (5th Cir. 2005) (the Government must prove that the property subject to forfeiture was the proceeds of the drug activity that formed the basis for the defendant’s conviction, not of the defendant’s drug trafficking generally).}

\footnotesize{\textsuperscript{15} \textit{United States v. Herder}, 594 F.3d 352,364-65 (4th Cir. 2010); 21 U.S.C. § 853(a)(2) (authorizing the forfeiture of facilitating property in drug cases).}

\footnotesize{\textsuperscript{16} See \textit{United States v. Hasson}, 333 F.3d 1264, 1279 n.19 (11th Cir. 2003) if defendant is convicted of a conspiracy, the forfeiture may be based on amounts defendant conspired to launder, including amounts derived from uncharged substantive conduct, or substantive counts for which he has been acquitted).}
offense that were not alleged as substantive acts in the indictment. But the court held that it is not necessary for the Government to allege every aspect of a conspiracy as a substantive offense for it to recover the proceeds of the entire conspiracy through forfeiture.\textsuperscript{17}

Similarly, if a fraud case is alleged as a continuing scheme, the defendant is liable for the full amount derived from the scheme even if he is convicted of only a few substantive counts.\textsuperscript{18}

In \textit{United States v. Hatfield}, the defendant was charged with insider trading and securities fraud. Some of the counts were dismissed under Rule 29 of the Federal Rules of Criminal Procedure at the end of the Government’s case, but he was convicted of the remaining counts.

The defendant then argued in the forfeiture phase of the trial that the Government should be barred from relying on the evidence relating to the counts that were dismissed. But the court held that granting a Rule 29 motion as to a given count does not preclude the Government from seeking forfeiture based on that conduct. Any evidence in the record, including evidence relating to the

\textsuperscript{17} \textit{United States v. Capoccia}, ___ Fed. Appx. ___, 2010 WL 4942213 (2\textsuperscript{nd} Cir. Dec. 7, 2010).

\textsuperscript{18} See \textit{United States v. Venturella}, 585 F.3d 1013, 1015, 1016-17 (7th Cir. 2009) (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).
conduct on which the defendant was acquitted, the court said, is admissible to establish the forfeiture.\textsuperscript{19}

*United States v. Kahale* involved an investment fraud scheme in which the defendant argued that the forfeiture should be limited to the money taken from the three investors named in the indictment. But again, the court held that a defendant charged with a conspiracy to defraud is liable for the proceeds of the entire conspiracy, as long as the Government made clear in the indictment that the conspiracy extended beyond the three victims named in the indictment.\textsuperscript{20}

### III. Seizure Warrants / Preserving Property Pre-Trial

**Application of the “hardship” provision to criminal forfeiture**

In the Civil Asset Forfeiture Reform Act of 2000 (CAFRA), Congress went into great detail in describing the procedures that apply when the Government seizes or restrains a person’s property for administrative or civil forfeiture, but it said virtually nothing about the procedures that apply in criminal forfeiture cases. In the absence of such procedures, some defendants have argued that the civil procedures should apply in criminal cases, but for the most part they do not.

In *United States v. Egan*, when the court restrained some property pre-trial, third parties argued that the “hardship provision” in CAFRA, 18 U.S.C. § 983(f), should apply, and that therefore they were entitled to petition for the release of


the property pending trial. As will be discussed later, third parties are procedurally barred from intervening in criminal cases prior to the post-conviction ancillary proceeding. See 21 U.S.C. § 853(k). But in Egan, the court held that even if the third parties could be heard, the hardship provision in Section 983(f) does not apply in criminal cases. In so holding, the court relied on another part of CAFRA, Section 983(a)(3)(C), which provides, “If criminal forfeiture is the only forfeiture proceeding commenced by the Government, the Government’s right to continued possession of the property shall be governed by the applicable criminal forfeiture statute.”

\textit{Rule 41(g) motions}

It is not uncommon for the Government to commence an administrative forfeiture proceeding against a defendant’s property while simultaneously charging the defendant in a criminal case. In \textit{United States v. Rasco}, the court held that a defendant may not circumvent the procedures for contesting the administrative forfeiture proceeding under CAFRA by filing a Rule 41(g) motion for the return of his property in the criminal case. His remedy, the court said, is to file a claim in the administrative proceeding pursuant to Section 983(a).

\textbf{IV. Pretrial Restraint of Assets}

\begin{itemize}
  \item \textit{United States v. Egan}, 2010 WL 3258085, *2 n.1 (S.D.N.Y. Aug. 16, 2010) (§ 983(f) has no application in a criminal case; per § 983(a)(3)(C), the Government’s possession of property in a criminal case is governed by “the applicable criminal forfeiture statute”).
\end{itemize}
The scope of a post-indictment restraining order

The Government’s alternative to seizing property to preserve it pending trial is to request a pre-trial restraining order pursuant to Section 853(e). The majority rule, however, is that Section 853(e) does not permit the pre-trial restraint of substitute assets. The major exception is the Fourth Circuit, where courts not only will restrain substitute assets but will order the defendant to repatriate substitute assets from abroad. In United States v. Adams, the court did precisely that, relying on the repatriation authority in Section 853(e)(4).

Outside of the Fourth Circuit, the Government can sometimes preserve substitute assets by using a statute other than Section 853(e). In United States v. Petters, a bank fraud case, the Government preserved property that was not traceable to the offense for forfeiture or restitution by commencing a receivership pursuant to 18 U.S.C. § 1345(a)(2)(B).

Criteria for issuing a post-indictment restraining order

To issue a pre-trial restraining order, the court may rely on the grand jury’s finding of probable cause. In Adams, the grand jury found probable cause to

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23 See AFLUS § 17-4.


26 See United States v. Jamieson, 427 F.3d 394, 405 (6th Cir. 2005) (initial issuance of restraining order may be based on grand jury’s finding of probable cause; probable cause may be challenged in post-restraint hearing if defendant satisfies the Jones-Farmer requirements). See also AFLUS § 17-5.
believe that $1.6 million was subject to forfeiture. Based on that, the court ordered the defendant to repatriate $1.6 million from overseas as part of his pre-trial restraining order.  

The issuance of a pretrial restraining order is not discretionary: if the Government makes the required probable cause showing, the court must enter the order. In *Egan*, the defendant argued that even if there was probable cause to believe his property was subject to forfeiture, the court had the discretion to allow him to use the money to pay his attorney’s fees, but the court followed the Supreme Court’s decision in *United States v. Monsanto* and held that it had no such discretion.

The Government may obtain the restraining order *ex parte*, and in most cases does so by relying on the grand jury’s finding of probable cause. In other cases, however, the Government meets the probable cause requirement by submitting a law enforcement agent’s affidavit. In such cases, the courts are divided as to whether the defendant may obtain a copy of the affidavit.

_27 Adams_, 2010 WL 4069009 at *2._

_28 See United States v. Monsanto_, 491 U.S. 600, 612-13 (1989) (the word “may” in section 853(e) 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”).

In *United States v. Simpson*, the Government agreed to give the defendant a copy of the affidavit but asked the court to allow it to redact the names of 14 unindicted persons named in connection with the alleged crimes to protect their privacy, but the court denied that request.\(^{30}\)

In *Egan*, however, the court held that the defendant had no right to obtain a copy of the affidavit that was used to obtain the *ex parte* restraining order at all. The affidavit, the court said, is Jencks material that the Government need not disclose until the witness testifies at trial.\(^{31}\)

**Post-restraint hearings: the Jones-Farmer rule**

Defendants often seek a post-restraint, pre-trial hearing if for no other reason than to obtain a preview of the evidence the Government intends to use in its criminal trial. Under the *Jones-Farmer* rule, however, a post-restraint, pretrial hearing is required only if the Sixth Amendment 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.\(^{32}\)


\(^{31}\) *Egan*, 2010 WL 3000000 at *1* n.2.

\(^{32}\) See *United States v. Jones*, 160 F.3d 641, 647 (10th Cir. 1998) (defendant has initial burden of showing that he has no funds other than the restrained assets to hire private counsel or to pay for living expenses, and that there is bona fide reason to believe the restraining order should not have been entered); *United States v. Farmer*, 274 F.3d 800, 804-05 (4th Cir. 2001) (following *Jones*; same two-part test applies where property defendant says he needs to hire counsel in criminal case has been seized or restrained in related civil forfeiture case). See also AFLUS § 17-6.
In circuits where the Court of Appeals has not yet formally adopted *Jones-Farmer*, the district courts typically do so on a case-by-case basis. For example, in *United States v. Vogel*, a district court in Texas adopted the rule, even though the Fifth Circuit has not formally done so, based on favorable statements in two Fifth Circuit cases.\(^{33}\)

Likewise in *Egan*, a district court in New York adopted the rule even though the Second Circuit has not formally done so. There is a tension, the court said, between a defendant’s right to a pre-trial probable cause hearing and the Government’s right to prevent the premature disclosure of the evidence it intends to present at trial. The defendant’s interest is greatest when he needs the restrained funds to preserve his Sixth Amendment right to counsel, and it diminishes greatly if he is able to fund his defense from other sources. In the latter situation, the court said, the balance tips in favor of the Government’s right to preserve assets for forfeiture, conserve prosecutorial resources, and avoid premature disclosure of its trial strategy.\(^ {34}\)

Courts also apply *Jones-Farmer* where the property was seized or restrained in a parallel civil forfeiture case. In fact, *Farmer* itself was a civil forfeiture case. In *In re Return of Seized Property (Chandler and Bobel)*,


\(^{34}\) *Egan*, 2010 WL 3000000 at *5.
however, the court denied the request for post-seizure probable cause hearing where the property was seized for civil forfeiture and no criminal charges had yet been filed. The Sixth Amendment was not implicated, the court said, because under the Supreme Court’s decision in *Brewer v. Williams*, the right to counsel does not attach until the defendant has been charged and had his initial appearance before a judicial officer.

**Applying Jones-Farmer**

Under the first *Jones-Farmer* requirement, the defendant has the burden of showing that he lacks other funds with which to retain counsel. In *Vogel*, the court held that the defendant failed to make that showing even though the court, “in the abundance of caution,” had previously granted the defendant’s request to have counsel appointed to represent him.

The issue, however, is the defendant’s present access to resources to hire counsel: a formerly wealthy defendant who has exhausted her resources may satisfy the first *Jones-Farmer* requirement.

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36 *In Re Return of Seized Property (Chandler and Bobel)*, 270 F.R.D. 576 (S.D. Cal. 2010).


38 *Vogel*, 2010 WL 547344 at *2 (that court previously granted defendant’s motion for appointed counsel “in the abundance of caution” does not establish that defendant can satisfy the first *Jones-Farmer* requirement).
In *United States v. Hatfield*, the Government argued that it had left the defendant with substantial funds when it obtained its pre-trial restraining order and that therefore the defendant’s Sixth Amendment right to counsel was not implicated. But the court found that the defendant had dissipated those unrestrained funds and no longer had them available to pay her attorney. “The fact that [the defendant] once had substantial assets says nothing about whether she has substantial assets today, nearly four years into a complex criminal prosecution,” the court said.\(^{39}\)

Under the second *Jones-Farmer* requirement, the defendant must show that there is a bona fide reason to believe that the grand jury or the court erred in finding probable cause to believe that the property was subject to forfeiture. In *Simpson*, the court explained that this requirement is needed to preserve the Government’s legitimate interest in protecting its witnesses and evidence from premature exposure in a criminal case. “The Government should not be required to put on a dress rehearsal performance of part or all of its case-in-chief,” the court said, “as the price for protecting its valid interest in preserving assets that are allegedly subject to forfeiture.”\(^{40}\) For similar reasons, in *Vogel* the court held that the defendant cannot satisfy the second *Jones-Farmer* requirement with a


self-serving declaration stating that some of the restrained funds came from legitimate sources.\textsuperscript{41}

To invoke the \textit{Jones-Farmer} rule, the defendant must request a hearing: he cannot go to trial, be convicted, and then appeal on the ground that the Government deprived him of his Sixth Amendment rights by keeping his property restrained if he never asked for the property to be released.\textsuperscript{42} This rule was applied in an unusual way in \textit{United States v. Omondi}. In that case, the Government seized $202,435 in criminal proceeds from the defendants' account, leaving behind another $82,565 that the bank kept in an escrow account, waiting for the defendants to ask for it, which they never did. Two years later, the defendants went to trial represented by the public defender and were convicted. They appealed, arguing that the seizure of their funds had deprived them of their right to counsel, but curiously, their argument was \textit{not} that they needed the $202,435 in seized funds to hire counsel. Rather, they argued that they did not realize — until it was too late — that the Government had \textit{not seized} the excess amount ($82,565) and that it had actually been available for them to use to hire counsel. Their failure to use the money was the

\textsuperscript{41} Vogel, 2010 WL 547344 at *3.

\textsuperscript{42} See Marker v. United States, 2009 WL 511052, *4 (M.D.N.C. Feb. 27, 2009) (because defendant never filed a motion for the release of his restrained assets, he was not entitled to a hearing under \textit{Farmer}, and thus cannot complain that the asset was not available to use to hire counsel).
Government's fault, they said, because the Government did not tell them that it had seized only $202,435, leaving them with the impression that it had seized the entire amount. The Court of Appeals was unimpressed with that argument.43

Procedure at the restraining order hearing

It is not clear who has the burden of establishing probable cause, or lack thereof, at the post-restraint hearing, if such a hearing is required.44 The courts are divided, even within the same circuit.

In Hatfield, a court in New York put the burden on the Government even though the Second Circuit seems to say the opposite.45

Filing a notice of lis pendens

The Government has a legitimate interest in filing a notice of *lis pendens* on real property that is subject to forfeiture in a criminal case. In *United States v. Parrett*, the Sixth Circuit acknowledged that that interest extends to substitute assets, but noted that nothing in the federal forfeiture statute gives the Government the authority to file a notice of *lis pendens*, and it left unresolved


44 See AFLUS § 17-7.

45 United States v. Hatfield, 2010 WL 1685826, *2 (E.D.N.Y. Apr. 21, 2010) (the burden is on the Government to establish probable cause if the restraining order was obtained *ex parte*). *But see United States v. Monsanto*, 924 F.2d 1186, 1194 (2d Cir. 1991) (the Supreme Court’s decisions in Monsanto and Caplin & Drysdale “compel a defendant to establish lack of probable cause either as to guilt or forfeitability of restrained assets in order to obtain any relief from a pretrial restraint”).
whether the Government had the authority under State law to do so, at least where substitute assets are involved.\textsuperscript{46}

Three years after \textit{Parrett} was decided, the courts remain divided on that question, but the trend in the cases is against the Government. The leading case is the Tenth Circuit’s decision in \textit{United States v. Jarvis}, which held that under New Mexico law, a \textit{lis pendens} may not be used to secure a money judgment.\textsuperscript{47} A number of district courts adopted that reasoning this year.\textsuperscript{48}

In one of those cases, \textit{United States v. Coffman}, the Government asked the district court to stay its order vacating the notice of \textit{lis pendens} pending appeal. The court found that the failure to grant the stay could result in

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46 \textit{United States v. Parrett}, 530 F.3d 422, 428-29 (6th Cir. 2008) (recognizing that the Government has a legitimate interest in filing a notice of \textit{lis pendens} on a substitute asset to prevent a third party who acquires title to the property before an order of forfeiture is entered from contesting the forfeiture as a BFP in the ancillary proceeding pursuant to \S\ 853(n)(6)(B)). See AFLUS (2010 Cumulative Supp.) \S\ 17-8.

47 \textit{United States v. Jarvis}, 499 F.3d 1196, 1203 (10th Cir. 2007) (under New Mexico law, a \textit{lis pendens} may only be filed on property involved in pending litigation; it may not be used merely to secure a future money judgment; substitute assets are not involved in the pending criminal case except to the extent they may be used to satisfy a money judgment; therefore a \textit{lis pendens} cannot be filed against such property).

48 See \textit{United States v. Coffman}, 2010 WL 3984886, *3-4 (E.D. Ky. Oct. 7, 2010) (following Jarvis; forfeiture of substitute asset to satisfy an anticipated money judgment is analogous to a private litigant’s hope of filing a judgment lien on an asset to secure an anticipated judgment; in neither case does the party seeking to file the \textit{lis pendens} have a present interest in the named property); \textit{United States v. Becker}, 2010 WL 1408589, *3 (D. Kan. Apr. 2, 2010) (court treats a notice of \textit{lis pendens} as if it were a pre-trial restraining order and grants a third party’s motion to vacate it); \textit{United States v. Queri}, 679 F. Supp.2d 295 (N.D.N.Y. 2010) (Government cannot file \textit{lis pendens} when it can only speculate that it will “likely” be able to satisfy the requirements of \S\ 853(p) when the defendant is convicted); \textit{United States v. Kavalchuk}, 2010 WL 703105, *4 (D.N.H. Feb. 23, 2010) (same, following Queri).
\end{flushright}
irreparable harm to the Government’s attempt to use the defendant’s substitute assets to satisfy a forfeiture judgment and provide restitution to his victims, because once the notice is vacated, the defendant could sell the property to a bona fide purchaser for value who would then prevail in the ancillary proceeding under 21 U.S.C. § 853(n)(6)(B). So the court granted the stay.49

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

The Second, Fifth, and Ninth Circuits do not allow third parties affected by a pre-trial restraining order to intervene in the criminal case to contest it. They hold that such pre-trial intervention by a third party is barred by Section 853(k), which says that third parties must wait until the ancillary proceeding to contest the forfeiture.50 In Egan, the district court applied that rule,51 but the district court in United States v. Becker treated a notice of lis pendens as if it were a pre-trial

49 Coffman, 2010 WL 4683761 at *2-3.

50 See United States v. Holy Land Foundation for Relief and Development, 493 F.3d 469, 476 n. 10, 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); United States v. Lazarenko, 476 F.3d 642, 648 (9th Cir. 2007) (third party has no right to an immediate hearing on validity of seizure pursuant to section 853(f); he must wait until the ancillary proceeding); De Almeida v. United States, 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 (2010 Cumulative Supp.) § 17-13.

restraining order and allowed a third party to contest it.\textsuperscript{52} The case appears to be wrongly decided on both points.

\textit{Interlocutory sales}

Rule 32.2(b)(7) of the Federal Rules of Criminal Procedure was enacted in 2009 to permit the interlocutory sale of property subject to criminal forfeiture. In \textit{United States v. Smith}, the court allowed the interlocutory sale of real property forfeited as a substitute asset while the defendant's appeal was pending. The defendant objected to the sale on the ground that the property was unique and could not be restored to him if he succeeded in having the forfeiture order vacated, but the court was unpersuaded. That the property may be unique is of little consequence, the court said, if the defendant has stopped paying the mortgage.\textsuperscript{53}

In \textit{United States v. King}, the Government was allowed to sell nine horses that were subject to forfeiture as the proceeds of a fraud scheme because the cost of their upkeep outweighed their value.\textsuperscript{54}

V. Indictment

\textit{The property subject to forfeiture need not be itemized in the indictment}


It is well-established that Rule 32.2(a), which requires the Government to include a notice of forfeiture provision in the indictment if the Government will be seeking forfeiture at sentencing, does not require the Government to itemize the specific assets.\(^{55}\) In *United States v. Woods*, the defendant moved to dismiss the forfeiture notice from his child pornography indictment on the ground that it did not list the specific assets subject to forfeiture, but the court followed the established rule and held that a forfeiture notice that tracks the language of 21 U.S.C. § 2253 is sufficient to give the defendant notice of what property will be forfeited if he is convicted.\(^{56}\)

*Specifying amount of money judgment*

Just as it is not necessary to list the assets subject to forfeiture in the indictment, It is not necessary to make any reference to a money judgment in the indictment, or to specify a particular dollar amount.\(^ {57}\)

In *United States v. Kalish*, the defendant argued that the Government did not give him proper notice in the indictment that it would be seeking a forfeiture order in the form of a money judgment. The indictment said only that the defendant would be

\(^{55}\) See AFLUS (2010 Cumulative Supp.) § 16-2.


\(^{57}\) See AFLUS § 16-3.
required to forfeit an amount of money equal to the proceeds of his offense. But the court held that this was sufficient to convey the Government’s intent.\(^{58}\)

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. In *United States v. Poulin*, the court said that if the Government is not required to specify any dollar amount in the indictment, notice that the Government would forfeit at least $850,000 gave the defendant more notice than he was entitled to. Thus, he could not claim surprise when the Government sought forfeiture of $1.3 million when he was convicted.\(^{59}\)

VI. Bifurcated Proceeding

Rule 32.2(b)(1) provides that the court must determine what property is subject to forfeiture at a hearing conducted after the entry of a guilty plea or the return of a guilty verdict. Courts uniformly construe this to mean that the criminal trial must be bifurcated into guilt and forfeiture phases.\(^{60}\)

In *United States v. Meffert*, the defendant moved to bifurcate the trial but the court said the motion was unnecessary because bifurcation is automatic under Rule 32.2(b)(1).\(^{61}\)

\(^{58}\) *United States v. Kalish*, 626 F.3d 165, 169 (2\(^{nd}\) Cir. 2010).


\(^{60}\) See AFLUS § 18-2.

VII. Burden of Proof / Jury Instructions

**Preponderance of the evidence**

Because forfeiture is part of sentencing, the Government’s burden is to establish the forfeitability of the property by a preponderance of the evidence.\(^{62}\) In 2010, there were three new cases that applied this well-established rule.\(^{63}\)

Alone among the Courts of Appeals, the Third Circuit applies a statute by statute analysis to determine the appropriate standard of proof.\(^{64}\) In *United States v. Cheeseman*, the court applied that analysis to the forfeiture of a firearm under 18 U.S.C. § 924(d) and held that the preponderance standard applies.

**The Government bears the burden of proof**

There is no question that the Government bears the burden of proof in the forfeiture phase of the trial, but that does not mean that the defendant's silence in

\(^{62}\) See AFLUS § 18-5-(d).

\(^{63}\) See *United States v. Kalish*, 626 F.3d 165, 168 (2nd Cir. 2010) (the Government must establish the amount of money subject to forfeiture as fraud proceeds under § 981(a)(1)(C) by a preponderance of the evidence); *United States v. Hull*, 606 F.3d 524, 527 (8th Cir. 2010) (the preponderance standard applies to the forfeiture of property used to commit a child pornography offense; 18 U.S.C. § 2253); *United States v. George*, 2010 WL 1740814, *1 (E.D. Va. Apr. 26, 2010) (“As forfeiture constitutes an aspect of the sentence imposed and not a substantive element of an offense, the Government must establish the nexus by a preponderance of the evidence”).

\(^{64}\) See *United States v. Sandini*, 816 F.2d 869, 875-76 (3d Cir. 1987) (preponderance standard applies to forfeitures under section 853 in drug cases); *United States v. Voigt*, 89 F.3d 1050, 1083 (3d Cir. 1996) (reasonable doubt standard applies to RICO forfeitures because the scope of forfeiture is greater under RICO than under section 982, but holding that the preponderance standard applies to money laundering).
the face of evidence establishing the forfeitability of his property has no consequence.

In *United States v. Mullins*, court said that “in the absence of evidence to the contrary” it would accept the Government’s calculation of the amount subject to forfeiture. The defendant complained that this impermissibly shifted the burden of proof, but the panel disagreed. The defendant is “under no obligation to provide evidence” regarding the forfeiture, the court said, but “it can hardly surprise that the Government’s forfeiture evidence may . . . constitute a preponderance of all evidence” if the defendant provides none. 65

**VIII. Guilty Pleas**

*Rule 11(b)(1)(J)*

Rule 11(b)(1)(J) of the Federal Rules of Criminal Procedure requires the court to warn the defendant during the change-of-plea colloquy that his property may be forfeited, but the court’s failure to comply with the rule is unlikely to vitiate the guilty plea.

In *Cansler*, the panel said that the court’s failure to warn the defendant that his property could be forfeited as required by Rule 11(b)(1)(J) was not plain error where defendant was aware that forfeiture would be part of his sentence from the notice in the indictment. 66

65 *United States v. Mullins*, 613 F.3d 1273, 1295 (10th Cir. 2010).

Plea agreements

When the Government drafts a plea agreement with the defendant, it should make reference to any property that is being forfeited administratively, if for no other reason than to avoid a later misunderstanding as to whether the property is being forfeited in the criminal case, or in the on-going administrative forfeiture proceeding.

In *United States v. Rankin*, the defendant was entering a plea in his criminal case while the DEA – unknown to the prosecutor handling the case – was administratively forfeiting his property. The plea agreement provided that the court would determine what property was subject to forfeiture as part of the sentencing process, but once the property was forfeited administratively, without the defendant’s filing any claim, the Government contended that there was no longer any need for a forfeiture hearing in the district court.

The defendant argued that the Government’s position violated the plea agreement, but the Fifth Circuit held that it was the defendant’s fault that he didn’t oppose the administrative forfeiture and refused to void the plea.68

There is a better way to deal with parallel administrative and criminal forfeiture proceedings, however. Once property has been forfeited

67 See generally AFLUS (2010 Cumulative Supp.) § 18-3 (discussing written plea agreements).

administratively the Government should move to strike the forfeiture from the
criminal indictment, thus making it clear that the forfeiture has been concluded
and that the defendant has no reason to expect there to be a forfeiture
proceeding in the district court. In that case, the only thing that needs to be
included in the plea agreement regarding the forfeiture is an acknowledgment by
the defendant that he did not oppose the administrative forfeiture and that he had
proper notice.

**IX. Forfeiture Phase of the Trial**

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

Rule 32.2(b)(5) of the Federal Rules of Criminal Procedure allows either
party to make a specific request to have the jury be retained to determine the
forfeiture at the conclusion of the criminal case. But if the request is not make,
the statutory right to a jury is waived.

In *United States v. Poulin*, the court held that a defendant who did not
request that the jury be retained before it was dismissed waived his right to do so.
But the court noted that it was applying the pre-2009 version of the rule. As
revised in 2009, the rule places a burden on the court to inquire if the defendant
will request the jury. Moreover, the court hinted that a defendant who fails to
request a jury may be able to claim that his waiver was the court’s fault for not

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making the required inquiry.\textsuperscript{70} Nothing in the legislative history of Rule 32.2(b)(5), however, suggests that there was any intent to give the defendant a windfall if the court failed to inquiry regarding his intent to have the forfeiture determined by the jury. To the contrary, the purpose of the 2009 amendment was to force defendants to make their election regarding the jury determination known to the court and to the Government in a timely fashion so that appropriate arrangements could be made to prepare jury instructions and special verdict forms, and to make logistical arrangements for the jury.\textsuperscript{71}

\textit{Money judgments}

Most courts hold that Rule 32.2(b)(5) does not give either party the right to have the jury determine the amount of a money judgment: the right to a jury is limited to determining the nexus between the crime and specific property.\textsuperscript{72} So what happens if the Government is seeking both a money judgment and the forfeiture of specific assets?

In \textit{United States v. Warshak}, the court had the jury determine if there was a nexus between the offense and the 33 specific assets that the Government


\textsuperscript{71} See AFLUS (2010 Cumulative Supp.) § 18-4(b).

\textsuperscript{72} See \textit{United States v. Tedder}, 403 F.3d 836, 841 (7th Cir. 2005) (the defendant’s right under Rule 32.2(b)(4) is to have the jury determine if the Government has established the required nexus between the property and his crime; the rule does not give the defendant the right to have the jury determine the amount of a money judgment). See also AFLUS § 18-4(a).
wanted to forfeit; but it then held a separate hearing to determine the amount of
the money judgment.\textsuperscript{73}

Conduct of the forfeiture phase of the trial

Rule 32.2(b)(1)(B) provides that the court’s determination of what property
is subject to forfeiture may be based on evidence already in the record, and on
any additional “evidence or information submitted by the parties and accepted by
the court as relevant and reliable.” As the Seventh Circuit held in \textit{United States v.
Ali}, this includes hearsay.\textsuperscript{74}

In \textit{Hatfield}, the court held that the “evidence already in the record” may
include evidence from the guilt phase of the trial that was submitted in connection
with counts on which the defendant was ultimately acquitted.\textsuperscript{75} And in \textit{United
States v. Sabhnani}, the Second Circuit held that it could include evidence of the
harm done to the victims.\textsuperscript{76}

\textsuperscript{73} \textit{United States v. Warshak}, ___ F.3d ___, 2010 WL 5071766 (6th Cir. Dec. 14, 2010).

\textsuperscript{74} \textit{United States v. Ali}, 619 F.3d 713, 720 (7th Cir. 2010). See AFLUS § 18-5(a).

in the forfeiture phase of the trial may include evidence that was already in the record when
the court granted a Rule 29 motion as to certain parts of the alleged fraud; the granting of a
Rule 29 motion has no res judicata or collateral estoppel effect on the forfeiture proceedings).

\textsuperscript{76} \textit{United States v. Sabhnani}, 599 F.3d 215, 262-63 (2nd Cir. 2010).
Finally, in *Roberts*, the court held that the forfeiture could be based on a combination of evidence already in the record and evidence that the parties introduced solely in connection with the forfeiture determination.\(^77\)

The forfeiture phase of the trial is *not* a second opportunity for the defendant to litigate the legality of the conduct that led to his conviction. In *Warshak*, the defendant attempted to introduce evidence to show that his conduct was not illegal, but the court said that in the forfeiture phase of the trial, the legality of the conduct is “no longer a live issue;” the only question is the nexus between the property subject to forfeiture and the offense. Accordingly, the court concluded that any evidence concerning the legality of the defendant’s conduct was irrelevant.\(^78\)

*Inconsistent verdicts*

In *United States v. Morales*, a jury found the defendant guilty of drug and money laundering charges but refused to return a forfeiture verdict. The defendant appealed, arguing that this must mean that there was insufficient evidence to convict him of the criminal offenses, but the court held that the jury

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\(^77\) *United States v. Roberts*, 696 F. Supp.2d 263, 271 (E.D.N.Y. 2010) (court is not limited to evidence admitted in the guilt phase of the trial; defendant’s proffer statements regarding the quantity of drugs sold was admissible to rebut his assertion that the Government’s expert witness was overestimating that quantity in calculating the amount of the money judgment).

was probably just giving the defendant a break, and that its inconsistent verdict
did not undermine the conviction.\textsuperscript{79}

\textbf{X. Money Judgments}

\textit{The court may order the forfeiture of an amount of money}

Forfeiture 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.
To the contrary, it is now well-established that a forfeiture order may take the
form of a judgment for a sum of money that the defendant must pay to the
Government.\textsuperscript{80} The leading cases were decided in 2006 in the Third and Ninth
Circuits,\textsuperscript{81} and all of the other circuits have been following suit ever since.\textsuperscript{82}

In 2009, a judge in New York tried to sail against the wind, but was
reversed by the Second Circuit in \textit{United States v. Awad}.\textsuperscript{83} There remains one

\footnotesize


\textsuperscript{80} See AFLUS § 19-4(c).

\textsuperscript{81} See \textit{United States v. Vampire Nation}, 451 F.3d 189, 202 (3d Cir. 2006) (expressly
rejecting the argument that a forfeiture order must order the forfeiture of specific property; as
an in personam order, it may take the form of a judgment for a sum of money equal to the
proceeds the defendant obtained from the offense, even if he no longer has those proceeds,
or any other assets, at the time he is sentenced; such a construction of the statute is
consistent with the mandatory nature of criminal forfeiture and the provision in section 853
directing courts to liberally construe its provisions to effectuate their remedial purposes);
\textit{United States v. Casey}, 444 F.3d 1071, 1074-76 (9th Cir. 2006) (same).

\textsuperscript{82} See \textit{United States v. McGinty}, 610 F.3d 1242, 1246 (10th Cir. 2010) (same; joining all
other circuits and collecting cases).

(disagreeing with all other courts, and holding that there is no authority to enter a money
judge in Nevada, however, who is still unconvinced and has repeatedly refused to enter money judgments in forfeiture cases on the ground that he has the discretion to do so.\(^{84}\) Those cases have been appealed to the Ninth Circuit.

For purposes of determining whether to impose a money judgment, it makes no difference whether the forfeiture is based on a criminal forfeiture statute or a civil forfeiture statute incorporated into a criminal case by 28 U.S.C. § 2461(c).\(^{85}\) In two Second Circuit cases, \textit{United States v. Kalish} and \textit{United States v. Capoccia}, the defendants tried to distinguish \textit{Awad} by arguing that \textit{Awad} was a drug case where the forfeiture was \textit{in personam} under 21 U.S.C. § 853, whereas their cases were fraud cases where the forfeiture was based on an \textit{in rem} civil forfeiture statute: 18 U.S.C. § 981(a)(1)(C) made criminal through judgment, effectively overruled by \textit{United States v. Awad}, 598 F.3d 76, 79 (2\textsuperscript{nd} Cir. 2010) (finding \textit{Surgent} “unpersuasive” and following all other circuits; contrary interpretation would create an incentive for criminals to spend their proceeds to avoid forfeiture). \textit{See also United States v. Roberts}, 696 F. Supp.2d 263, 269 (E.D.N.Y. 2010) (following \textit{Awad} and expressly rejecting \textit{Surgent}; “Section 853(a) permits imposition of a money judgment at sentencing on a defendant who possesses no assets at the time of sentencing”) (collecting cases); \textit{United States v. Poulin}, 2010 WL 538722, *6-7 (E.D. Va. Feb. 12, 2010) (the Government is entitled to a money judgment for the gross amount of defendant’s fraud proceeds in a health care fraud case, but a money judgment by itself does not allow the Government to seize any assets; to do so, the Government must move under Rule 32.2(e)).

\(^{84}\) \textit{See, e.g., United States v. Ganaway}, 2010 WL 5172909 (D. Nev. Dec. 13, 2010) (holding that there is no statutory authority to issue a forfeiture order in the form of a money judgment, and that because forfeiture is punishment, the district court has the discretion to refuse to issue such an order); \textit{United States v. Parsons}, 2010 WL 5387474 (D. Nev. Dec. 21, 2010) (same).

\(^{85}\) \textit{See United States v. Padron}, 527 F.3d 1156, 1162 (11\textsuperscript{th} Cir. 2008) (when a civil forfeiture statute is incorporated into a criminal case via section 2461(c), it becomes an in personam criminal forfeiture statute under which the defendant is liable for a money judgment).
Section 2461(c). But the Second Circuit refused to go along: all criminal forfeitures, the court said, are in personam and all can take the form of money judgments whether the forfeiture language is found in a criminal forfeiture statute such as Section 853 or is incorporated from a civil forfeiture statute such as Section 981(a)(1)(C).\textsuperscript{86}

When the bulk cash smuggling statute was enacted in 2001, Congress made the authority to issue a forfeiture order in the form of a money judgment explicit in the criminal forfeiture provision, 31 U.S.C. § 5332(b)(4). In Roberts, the defendant tried to turn this against the Government and argued that Congress’s inclusion of money judgment language in one statute implies that money judgments are not otherwise authorized. But the court rejected that argument, holding that when Congress enacted Section 5332(b)(4) it was merely codifying what by then was a well-established proposition.\textsuperscript{87}

Combining a money judgment with the forfeiture of specific assets

Before Rule 32.2(b)(2) was amended in 2009, it said that a forfeiture order could include specific assets or a money judgment. In United States v. McGinty, _______.

\textsuperscript{86} United States v. Kalish, 626 F.3d 165, 168-69 (2nd Cir. 2010) (following Awad; defendant required to pay a money judgment equal to the proceeds of his advance fee scheme to defraud investors; that the forfeiture was based on a civil forfeiture statute made no difference; criminal forfeitures are in personam whether based on Section 853 directly or through Section 2461(c)); United States v. Capoccia, ___ Fed. Appx. ___, 2010 WL 4942213 (2nd Cir. Dec. 7, 2010) (following Awad and Kalish; the court may enter a forfeiture order in the form of a money judgment whether the forfeiture is based on a criminal forfeiture statute or on a civil forfeiture statute incorporated by § 2461(c)).

\textsuperscript{87} United States v. Roberts, 696 F. Supp.2d 263, 269 n.4 (E.D.N.Y. 2010).
the defendant argued that this meant that the court must order the forfeiture of one or the other but not both. But the Tenth Circuit held, and the Rule has been amended to make clear, that the same forfeiture order can include directly forfeitable property, substitute assets, and a money judgment to the extent that the amount subject to forfeiture remains unsatisfied. In *McGinty* this meant that the court properly ordered the defendant to pay a $500,000 money judgment with credit for a house and boat forfeited as directly traceable to the offense.\(^{88}\)

In *United States v. Moses*, the defendant had to pay a money judgment equal to gross receipts from his drug sales, less the value of assets forfeited as proceeds or substitute assets. He did not get credit, however, for the value of a house forfeited as facilitating property. The money judgment represented the property forfeited as *the proceeds* of the offense, whereas facilitating property is forfeited *in addition* to the proceeds of the offense, not in substitution for them.\(^{89}\)

*Enforcement of money judgment*

A money judgment issued in a criminal forfeiture case remains in effect until it is satisfied.\(^{90}\) In *United States v. Fischer*, the defendant was convicted of a drug offense in 1988 and was ordered to pay a $30 million forfeiture judgment.

\(^{88}\) *United States v. McGinty*, 610 F.3d 1242, 1248 (10th Cir. 2010).


\(^{90}\) See *United States v. Baker*, 227 F.3d 955, 970 (7th Cir. 2000) (a forfeiture order may include a money judgment for the amount of money involved in the money laundering offense; the money judgment acts as a lien against the defendant personally for the duration of his prison term and beyond).
When the judgment remained unsatisfied 20 years later, he argued that it had expired under the 20-year limitation on judgments in the Federal Debt Collection Procedures Act (FDCPA), 28 U.S.C. § 3201. But the Seventh Circuit held that the statute did not apply, that criminal forfeiture judgments “remain in effect until satisfied,” and that the Government may enforce the judgment by forfeiting substitute assets at any time.\textsuperscript{91}

\textit{Burden of proof on the money judgment}

Section 853(p) says that the Government can forfeit substitute assets only if it first establishes that the directly forfeitable property is unavailable, due to an “act or omission of the defendant.” A perennial issue is whether that requirement also applies to the entry of a money judgment. In \textit{Roberts}, the court said it does not.\textsuperscript{92}

\textbf{XI. Preliminary Order of Forfeiture}

\textit{Rule 32.2(b)(2)}

Rule 32.2(b)(2) provides that the court must enter a preliminary order of forfeiture “promptly” after determining what property is subject to forfeiture.\textsuperscript{93} As

\textsuperscript{91} \textit{United States v. Fischer}, ___ Fed. Appx. ___, 2010 WL 3724612 (7th Cir. Sept. 20, 2010).

\textsuperscript{92} \textit{United States v. Roberts}, 696 F. Supp.2d 263, 268 n.3 (E.D.N.Y. 2010).

\textsuperscript{93} \textit{See United States v. Marion}, 562 F.3d 1330, 1338 (11th Cir. 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).
amended in 2009, the rule requires the court to enter the order sufficiently in advance of sentencing to allow the parties to review it and suggest revisions.94

In United States v. Fitzmartin, the defendant agreed to the forfeiture in his plea agreement but objected when the Government waited until the day before sentencing to submit the proposed forfeiture order, arguing that the delay violated the rule, but the court held that the error did not prejudice the defendant.95

In United States v. Perez, the court was aware of the new rule and asked the Government to submit the preliminary order of forfeiture in advance of sentencing, but the Government argued that the rule did not apply because it was only seeking a money judgment. The court disagreed: the entry of a preliminary order of forfeiture in advance of sentencing is mandatory, the court said, even if the Government is only seeking a money judgment.96

Orders issued in general terms

Rule 32.2(b)(2)(C) provides that if the court cannot identify all of the specific property subject to forfeiture, or calculate the amount of the money judgment, before sentencing, it may enter an order that describes the property in general terms.


In United States v. Johnson, the court did not cite the rule, but it did what the rule allowed when it ordered the defendant to forfeit “all property, real and personal, involved in the offense or traceable to such property,” adding, “This property has yet to be determined.”

Protecting property subject to preliminary order

Section 853(g) gives the court broad power to protect the Government’s interest in property subject to forfeiture. In United States v. Peterson, the defendant was ordered to forfeit his house but his domestic partner filed a third party claim and tried to take out a home equity loan against the house while the claim was pending. The court entered an order under Section 853(g) enjoining the claimant from encumbering the property, and directing him to maintain the property and to keep the mortgage current.

XII. Order of Forfeiture / Sentencing

Forfeiture is mandatory

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98 See AFLUS § 19-6.

Everyone – or just about everyone – agrees that criminal forfeiture is mandatory.\textsuperscript{100} The Supreme Court said so in \textit{United States v. Monsanto},\textsuperscript{101} and no appellate court has disagreed.

In \textit{McGinty}, the defendant argued that the court should not enter a forfeiture order because he had already been ordered to pay restitution. The district court agreed, but the Tenth Circuit reversed, holding that criminal forfeiture is mandatory even if there has been a restitution order.\textsuperscript{102}

In \textit{United States v. Brummer}, the Eleventh Circuit pointed out that all criminal forfeitures are now governed by 28 U.S.C. § 2461(c), which expressly provides that “the court shall order the forfeiture of the property as part of the sentence.” That means that forfeiture must be ordered in all cases where the Government seeks it, including gun cases, even though the forfeiture statute for firearms, 18 U.S.C. § 924(d), does not itself contain mandatory language.\textsuperscript{103}

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\textsuperscript{100} See AFLUS § 20-2.

\textsuperscript{101} \textit{United States v. Monsanto}, 491 U.S. 600, 607 (1989) (“Congress could not have chosen stronger words to express its intent that forfeiture be mandatory in cases where the statute applied…”).

\textsuperscript{102} \textit{United States v. McGinty}, 610 F.3d 1242, 1246 (10\textsuperscript{th} Cir. 2010) (criminal forfeiture is mandatory under § 982(a)(2); the district court erred in refusing to order the defendant to pay a money judgment equal to the proceeds of his offense).

\textsuperscript{103} \textit{United States v. Brummer}, 598 F.3d 1248, 1250 (11th Cir. 2010).
\end{flushleft}
And in *United States v. Petters*, the defendant asked the court to exercise its discretion not to enter a forfeiture order, but the court said it had no such discretion.\(^{104}\)

The only exception to his well-established rule is, once again, the District of Nevada, where the court refused to issue a forfeiture order in the form of a money judgment on the ground that it had discretion under 18 U.S.C. § 3553 to refuse to do so.\(^{105}\)

*The order of forfeiture must be included in the judgment*

Rule 32.2(b)(4) provides that the order of forfeiture “must include the forfeiture when orally announcing the sentence or must otherwise ensure that the knows of the forfeiture at sentencing.” It also provides that the court must “include the forfeiture order, directly or by reference, in the judgment.”\(^{106}\)

As a general rule, failure to issue the forfeiture order at or before the time of sentencing is fatal.\(^{107}\) In *United States v. Ferguson*, the prosecutor completely ignored the rule, presenting no evidence in support of the forfeiture and not

\(^{104}\) *United States v. Petters*, 2010 WL 1254353, *1 (D. Minn. Mar. 24, 2010) (court lacks discretion to decline to enter preliminary order of forfeiture once the proper nexus is shown under Rule 32.2(b)(1)).


\(^{106}\) See AFLUS (2010 Cumulative Supp.) § 20-3.

\(^{107}\) *See United States v. Petrie*, 302 F.3d 1280, 1284 (11th Cir. 2002) (district court lacked jurisdiction to enter a preliminary order of forfeiture 6 months after defendant was sentenced; the scheme set forth in Rule 32.2 is “detailed and comprehensive”).
requesting a forfeiture order until the case was over and the defendant asked for his property back. The Sixth Circuit was unsympathetic to the Government. If the Government completely ignores Rule 32.2(b), the court said, and forgets about the forfeiture until the criminal case is over, it cannot salvage the forfeiture by opposing the defendant’s post-trial Rule 41(g) motion for the return of his property, and have the court enter an order of forfeiture at that time.\textsuperscript{108}

In \textit{United States v. Westmoreland}, a district court reached the same conclusion even though the defendant had agreed to the forfeiture in his plea agreement.\textsuperscript{109} And in \textit{United States v. Crutcher}, where the jury returned a forfeiture verdict but the Government never asked for an order of forfeiture and there was no discussion of the forfeiture at sentencing, the court granted the defendant’s Rule 41(g) motion for the return of his $165,000 in drug proceeds, holding that it was too late for the Government to correct the error.\textsuperscript{110}

Other courts hold, however, that the belated entry of an order of forfeiture is permissible as long as the record is clear that the defendant was aware, at the time he was sentenced, that a forfeiture order would be part of his punishment.\textsuperscript{111}

\begin{itemize}
\item \textsuperscript{108} \textit{United States v. Ferguson}, 385 Fed. Appx. 518, 530 (6th Cir. 2010)).
\item \textsuperscript{110} \textit{United States v. Crutcher}, 689 F. Supp.2d 994 (M.D. Tenn. 2010).
\item \textsuperscript{111} \textit{See United States v. Pelullo}, 305 Fed. Appx. 823, 827-28 (3rd Cir. 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).
\end{itemize}
In *United States v. Holder*, for example, the court found that the property was subject to forfeiture at the sentencing hearing and entered a preliminary order at that time, but forgot to make the order part of the judgment. In that case, the court said, it could correct the judgment under Rule 32.2(b)(4)(B), which treats the failure to make a forfeiture order part of the judgment as a clerical error.\(^\text{112}\)

In *Cohen v. United States*, a district court in Arizona held that Rule 32.2(b)(4)(B), which was enacted in 2009, applies retroactively because it merely clarified existing law as to when the failure to include a forfeiture order in the judgment would be considered a clerical error.\(^\text{113}\)

All of this case law may be rendered moot, however, by the Supreme Court’s 2010 decision in *Dolan v. United States*. In *Dolan*, the district court failed to enter a restitution order within the time limit imposed by the applicable statute, and the defendant argued that the court lacked jurisdiction to issue a belated order. But the Supreme Court held that the statute was not jurisdictional and does not deprive the court of the authority to enter a belated order if it misses the deadline, at least in cases where the defendant was aware at sentencing that a restitution order would be forthcoming. Making the defendant aware of all aspects of his sentence at one time is an important policy consideration, the


Court suggested, but it does not mandate a rule rendering aspects of the sentence entered belatedly null and void.\textsuperscript{114}

There is no reason the same reasoning should not apply to the belated entry of a forfeiture order.

\textbf{XIII. Joint and Several Liability}

All defendants are liable to forfeit the total amount obtained as criminal proceeds, or involved in a money laundering offense.\textsuperscript{115} In \textit{United States v. Stivers}, a defendant who had personally received little or no part of the proceeds of a $3.4 million extortion scheme, but had played a major role in the crime, was held jointly and severally liable to forfeit the entire $3.4 million.\textsuperscript{116}

\textbf{XIV. Substitute Assets}

\textit{Procedure for obtaining substitute assets}

Rule 32.2. was amended in 2009 to make clear that the court may include substitute assets in the preliminary order of forfeiture pursuant to Rule 32.2(b)(2)(A), or it may amend the order to include substitute assets as set forth

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\textsuperscript{114} \textit{Dolan v. United States}, ___ U.S. ___, 130 S. Ct. 2533 (June 14, 2010).

\textsuperscript{115} \textit{See United States v. Corrado}, 227 F.3d 543, 554-55 (6th Cir. 2000) (\textit{Corrado I}) (all defendants in a RICO case are jointly and severally liable for the total amount derived from the scheme; the Government is not required to show that the defendants shared the proceeds of the offense among themselves, nor to establish how much was distributed to a particular defendant). See also AFLUS § 19-5.

\end{flushright}
in Rule 32.2(e).\textsuperscript{117} The district court in \textit{United States v. Smith} explained these alternatives.\textsuperscript{118}

\textit{The criteria set forth in section 853(p) must be satisfied}

To forfeit substitute assets the Government must show that the directly forfeitable assets are unavailable due to an act or omission of the defendant.\textsuperscript{119} In \textit{Holder}, the preliminary order of forfeiture directed a defendant convicted of bank fraud to forfeit a diamond ring and substitute assets if the ring itself could not be found. The Government responded with an affidavit from an FBI agent stating that he had interviewed a jeweler who had purchased the ring from the defendant. That statement, the court said, even though it was hearsay, was sufficient to satisfy the requirement in Section 853(p) by showing that the directly forfeitable property was unavailable.\textsuperscript{120}

Similarly, in \textit{Poulin}, an agent’s affidavit stating that the defendant commingled health fraud proceeds with legitimate income satisfied the

\textsuperscript{117} See AFLUS § 22-2.

\textsuperscript{118} See \textit{United States v. Smith}, 2010 WL 4962917, *1 (E.D. Ky. Dec. 1, 2010) (“the court may order the forfeiture of substitute assets in two ways – by including the substitute property in the preliminary order of forfeiture before it becomes final at the time of sentencing or by amending the order of forfeiture ‘at any time’ after sentencing to include substitute property pursuant to [Rule 32.2(e)])”.

\textsuperscript{119} See \textit{United States v. Alamoudi}, 452 F.3d 310, 315 (4th Cir. 2006) (courts interpret section 853(p) liberally to prevent defendants from frustrating the forfeiture laws; it is sufficient if a law enforcement agent submits that she has searched for the missing assets and that despite the exercise of due diligence she has been unable to find them). See also AFLUS § 22-3.

requirement that the forfeitable property could not be separated without
difficulty.\textsuperscript{121}

In \textit{United States v. Mahaffy}, the defendant claimed that the unavailability of
the proceeds of his crime was not do to his own act or omission because he had
not personally received the criminal proceeds. Rather, he explained, the money
had been paid directly to a third party. But the court held that the statute does not
require a showing that the defendant personally handled the criminal proceeds
and passed them on to someone else. To the contrary, it is sufficient, the court
said, if the defendant, by his criminal act, caused the money to be paid directly to
the third party in the first instance.\textsuperscript{122}

\textit{Substitute assets may be forfeited to satisfy money judgment}

Satisfying money judgments is not the only reason the Government seeks
to forfeit substitute assets but its probably the most common. In \textit{Moses}, the court
said that any property not forfeited as proceeds or facilitating property may be
forfeited as substitute assets to satisfy a money judgment.\textsuperscript{123}

\begin{flushright}
forfeiture of substitute assets, the Government cannot satisfy the “due diligence” prong of
Section 853(p) with a conclusory statement that its agents exercised due diligence but could
not locate the directly-forfeitable property; it must state what the agents did and why they
failed).


\end{flushright}
In *United States v. George*, the defendant was ordered to forfeit annuity payments she was entitled to receive for the next ten years as a substitute asset in partial satisfaction of a money judgment.\(^\text{124}\)

**The forfeiture of substitute assets is mandatory**

If the Government satisfies the criteria in Section 853(p), the forfeiture of substitute assets is mandatory.\(^\text{125}\) The district court decisions in *Smith* and *George* are the two most recent illustrations of that rule.\(^\text{126}\)

The defendant cannot oppose the forfeiture of the substitute assets on the ground that the property belongs to a third party. In *Mahaffy*, for example, the defendant argued that the substitute property actually belonged to his son. But the court held that the defendant lacked standing to make that objection on his son’s behalf; it was up to his son to file a claim challenging the forfeiture in the ancillary proceeding after the property was included in the order of forfeiture.\(^\text{127}\)

**XV. Property Transferred to Third Parties**

*The relation back doctrine*


\(^{125}\) See *United States 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”).


Under the relation back doctrine, the Government’s interest in property derived from or used to commit a crime vests as of the date of the offense giving rise to the forfeiture. In conspiracy cases, that date is the date when the first overt act in furtherance of the conspiracy occurs.

This issue arose in *United States v. Monea*, when the defendant was convicted of a money laundering conspiracy when he attempted to sell a diamond to drug dealers in exchange for $19 million in drug proceeds. The defendant was ordered to forfeit the diamond as property involved in the money laundering offense, but a family trust established for the benefit of the defendant’s children filed a claim in the ancillary proceeding asserting that the diamond actually belonged to the trust when the offense occurred.

The trust’s interest arose sometime after the conspiracy began, but before the defendant attempted to see the diamond to the drug dealer. Because the Government’s interest vests – and thus trumps a third party’s interest – when the first overt act in a conspiracy takes place, the court held that the Government’s interest had already vested before the earliest date when the family trust could have acquired its interest in the diamond.

*Application of relation back doctrine to substitute assets*

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128 See AFLUS § 21-2.

129 *United States v. Monea Family Trust I*, 626 F.3d 271, 276 (6th Cir. 2010).
It is unclear when the Government’s interest in substitute assets vests for purposes of applying the relation back doctrine.\textsuperscript{130} The Fourth Circuit and some district courts hold that the Government’s interest in substitute assets vests at the time of the offense, just as it does for directly forfeitable property.\textsuperscript{131} For example, in \textit{United States v. Gallion} a district court in the Eastern District of Kentucky held that because the relation back doctrine applies to substitute assets, a defendant’s attempt to convey property to his wife to protect it from forfeiture years after he committed the underlying fraud did not permit the wife to contest the forfeiture on the ground that she had a superior, pre-existing ownership interest when the Government’s acquired its interest.\textsuperscript{132} But just three weeks later, another court in the same district reached the opposite conclusion in \textit{United States v. Coffman}.\textsuperscript{133}

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

\textit{A third party has no right to intervene in a criminal case until after conviction}

When it enacted the criminal forfeiture statutes, Congress included a provision at 21 U.S.C. § 853(k) that expressly bars third parties from intervening in criminal cases until the post-conviction ancillary proceeding. Thus, as

\textsuperscript{130} See AFLUS § 21-3.

\textsuperscript{131} See \textit{United States v. McHan}, 345 F.3d 262, 271 (4th Cir. 2003) (relation back doctrine applies to substitute assets and vests title in the Government as of the date of the offense).


discussed below, third parties must wait until the defendant has been convicted and ordered to forfeit his property before they can assert that all or part of the property actually belongs to them.\[134\]

This principle arose in an unusual way, however, in an Eleventh Circuit case where the third parties, instead of trying to intervene to stop the Government from forfeiting their property, tried to intervene to require the Government to forfeit it.

In *United States v. Cone*, the defendants were convicted of bankruptcy fraud and the Government initially sought to forfeit their property as a convenient way of securing it for the purpose of paying restitution to the defendants’ victims. But when a number of third parties filed claims contesting the forfeiture in the ancillary proceeding it became apparent to the prosecutor that the victims would recover sooner if the Government abandoned the forfeiture and let the court take care of the victims under the restitution laws. Accordingly, the Government moved to vacate the forfeiture order, but the third parties objected, arguing that they had a better chance of recovering *vis a vis* their fellow victims under the forfeiture laws. In the end, the Eleventh Circuit, relying on Section 853(k), held

\[134\] See AFLUS § 21-6.
that third parties have no right to insist that their property be forfeited so that they
could litigate their claims in the criminal case.¹³⁵

Third parties cannot seek the release of seized or restrained property

Section 853(k) bars third parties from commencing any action against the
United States concerning the property subject to forfeiture after an indictment has
been filed. In United States v. Rogers, a third party filed a motion under Rule
41(g) of the Federal Rules of Criminal Procedure to recover a firearm that was
subject to a pending criminal forfeiture action, claiming it had been stolen from
him. But the court held that Section 853(k) bars third parties from filing Rule
41(g) motions once the criminal case is underway.¹³⁶

The timing of the third party’s attempt to recover his property is important,
however. In United States v. Chaim, a third party’s Rule 41(g) motion for the
return of the property subject to forfeiture was already pending when the
Government included the property in a criminal indictment. Overruling the
Government’s objection, the court held that even though Section 853(k) would
have barred the claimant from filing a Rule 41(g) motion after the indictment was
filed, it did not render the pre-existing motion moot. Rather, the court held that it
would proceed to address the Rule 41(g) motion on the merits.

¹³⁵ United States v. Cone, ___ F.3d ___, 2010 WL 5129300 (11th Cir. Dec. 17, 2010)
(“Section 853(k) affirmatively bars interference by non-party petitioners outside of the ancillary
proceeding”).

In the end, this made little difference to the claimant, however. The court held that a third party’s right to file a post-trial claim to the property in the ancillary proceeding gave the claimant an adequate remedy at law, and therefore there was no reason to grant the claimant equitable relief under Rule 41(g).\(^{137}\)

**Other attempts to intervene**

Every year, the case law contains new examples of attempts by third parties to circumvent the bar on premature interventions in the criminal case. Last year was no exception.

In *United States v. Muckle*, the court held that a third party who missed her chance to contest the forfeiture in the ancillary proceeding because she filed her claim too late could not move separately to vacate the order of forfeiture.\(^{138}\)

In *United States v. Rashid*, the court said that a third party who missed the filing deadline in the ancillary proceeding could not use Rule 24 of the Federal Rules of Civil Procedure to intervene in the forfeiture case.\(^{139}\)

\(^{137}\) *Chaim v. United States*, 692 F. Supp.2d 461, 475 (D.N.J. 2010) (absent a showing that the third party will suffer “great and certain irreparable harm” if not afforded an immediate hearing, or that the seizure was in “callous disregard” of the third party’s rights, the right to file a claim in the post-trial ancillary proceeding provides a third party with an adequate remedy at law; Rule 41(g) motion dismissed).


\(^{139}\) *United States v. Rashid*, 373 Fed. Appx. 234, 238 (3rd Cir. 2010).
And in Cognac, LLC v. Tandy, the court said that the claimant could not file a separate lawsuit in another court to establish his interest in the forfeited property. 140

There are limits to the Government's ability to keep third parties out of criminal cases, however. In United States v. Power Company, Inc., the court agreed with the Government that the entity holding a lien on the forfeited real property – a strip club – could not foreclose on the property. But the court also held that at some point the Government’s failure to sell the property so that the claimant could realize its interest would violate the claimant’s right to due process. Accordingly, the court set a deadline by which the Government would have to sell the property and pay off the third party’s lien. 141

Interlocutory sales may present an exception to the rule

Another exception to the bar on third party interventions prior to the ancillary proceeding involves interlocutory sales. In United States v. King, the case involving the forfeiture of the horses derived from the embezzlement scheme, a third party moved to intervene in opposition to the interlocutory sale, arguing that the horses actually belonged to him. The Government responded

140 Cognac, LLC v. Tandy, LLC, 2010 WL 1959533, *1 (E.D. Ky May 17, 2010) (district court grants Government’s motion to remove lawsuit against defendant’s forfeited business to federal court, and consolidates the lawsuit with the ancillary proceeding).

that Section 853(k) bars third parties from intervening, but the court recognized that the normal rule could violate the third party’s due process rights if it meant that he could not object to the irrevocable sale of what he claimed to be his property. So the court allowed the third party to object to the sale, but overruled the objection on the ground that the third party had utterly failed to show that he had any legal interest in the horses.\textsuperscript{142}

XVII. Ancillary Hearing—Procedural Issues

\textit{Purpose of the ancillary proceeding}

Two Eleventh Circuit cases – \textit{United States v. Ramunno} and \textit{United States v. Cone} – do a nice job of explaining the purpose of the ancillary proceeding. It is the one and only opportunity for third parties, who have been barred from participating in the criminal case in any way up to that point, to intervene in the proceeding in a limited way to protect their interests in the forfeited property.\textsuperscript{143}

\textit{Notice to potential claimants}

Effective December 1, 2009, Rule 32.2(b)(6) requires the Government to publish notice of the criminal forfeiture in accordance with Supplemental Rule


\textsuperscript{143} \textit{United States v. Ramunno}, 599 F.3d 1269, 1273 (11th Cir. 2010) (the court does not consider third party issues in entering the forfeiture order; the purpose of the ancillary proceeding is to exempt the interests of qualifying third parties); \textit{United States v. Cone}, ___ F.3d ___, 2010 WL 5129300 (11th Cir. Dec. 17, 2010) (Section 853(n) protects third parties who may have interest in the property subject to forfeiture by giving them a “limited right” to participate “temporarily” in the criminal case through the ancillary proceeding). See AFLUS § 23-2.
G(4)(a) and to send direct written notice in accordance with Rule G(4)(b) to all potential claimants to the forfeited property. As the district court pointed out in *Muckle*, this was generally the practice in criminal forfeiture cases before 2009, but the amendment codified the practice and adopted the procedures set forth in the corresponding provision in the civil rules.

Among other things, *Muckle* held that the incorporation of Rule G(4)(b) means that the notice is sufficient if it is sent to the attorney who represented the claimant in the criminal case and a related administrative forfeiture proceeding.

**Pleading requirements under section 853(n)(3)**

The pleading requirements governing third party claim are set forth in Section 853(n)(3). Among other things, the third party’s claim must be filed under penalty of perjury. In *United States v. Weekley*, the court held that a claim that did not conform to that requirement should be dismissed.

As the court held in *United States v. Aitken*, strict enforcement of the pleading requirement is necessary in light of the “substantial danger of false

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144 See AFLUS (2010 Cumulative Supp.) § 23-3(b).


146 *Muckle*, 709 F. Supp.2d at 1373-74.

147 See AFLUS 23-5.

In United States v. Owens, the claimant argued that it was her attorney’s fault that the claim was not filed under oath because he had never told her of the requirement. But the court responded that even if her attorney “is not the most experienced federal litigator in the Southern District of Indiana” there is no excuse for not following an unambiguous federal rule.\textsuperscript{150}

In addition to being filed under oath, the claim must state the time and circumstances of the claimant’s acquisition of an interest in the property. Thus, in Weekley, the court held that a claim stating that the claimant was the owner of the property was insufficient; the statute, the court said, requires that the claimant state the time and circumstances of his acquisition of an interest in the property.\textsuperscript{151}

The claim must also describe the property being claimed. But in United States v. Rothstein, the court excused the claimant’s vague description of the jewelry she was claiming on the ground that the Government’s description of the jewelry in the preliminary order of forfeiture was just as vague.\textsuperscript{152}

\textit{Time for filing claim}


\textsuperscript{151} Weekley, 2010 WL 5247936. See Aitken, 2010 WL 2951171 at *2 (granting motion to dismiss claim that failed to state the time and circumstances of claimant’s acquisition of an interest in the forfeited property).

Section 853(n)(2) provides that third-party petitions must be filed within 30 days of the final publication of notice, or the receipt of actual notice, whichever is earlier.\textsuperscript{153} Third-party claims that are filed outside of these deadlines must be dismissed as untimely.\textsuperscript{154}

Most such claims are dismissed because they are late by a matter of days or weeks. In \textit{Muckle}, for example, the claim was filed 22 days after the filing deadline, and in \textit{Weekley} it was four days late.\textsuperscript{155} The claim in \textit{United States v. Kahnaake-Mohawk Industries, Inc.} was unusual – it was eight years late!\textsuperscript{156}

Section 853(n)(3) requires that the claim state the grounds on which the third party is contesting the forfeiture. Reading Sections 853(n)(2) and (3) together, courts generally hold that all of the grounds for recovery must be stated within the 30-day period, and that a claimant may not amend a claim to assert additional grounds thereafter.\textsuperscript{157}

\begin{itemize}
\item \textsuperscript{153} See AFLUS § 23-4.
\item \textsuperscript{154} See \textit{United States v. Marion}, 562 F.3d 1330, 1339-40 (11th Cir. 2009) (§ 853(n)(2) creates a 30-day window for third parties to file claims; claims not filed within that window must be dismissed as untimely; if the Government sends notice to third parties immediately after the court issues the preliminary order of forfeiture, the 30-day period begins to run from the receipt of the notice, not from the date of the defendant's sentencing).
\item \textsuperscript{157} See \textit{United States v. Soreide}, 461 F.3d 1351, 1355 (11th Cir. 2006) (third party petition contesting a criminal forfeiture must be filed within the 30-day period set forth in
\end{itemize}
Thus, in *United States v. Caro*, the court refused to allow a claimant to expand his claim to include the assertion that he was a bona fide purchaser for value under Section 853(n)(6)(B),\(^{158}\) and in *United States v. Tarraf*, the court declined to allow the claimants to add a constructive trust theory to their claim after the 30-day deadline had expired.\(^{159}\)

*Hearing to be held within 30 days where practicable*

Most ancillary proceedings do not involve a live evidentiary hearing, but in *United States v. Reyes*, the court scheduled a hearing and the Government appeared with three witnesses. When the claimant failed to show up, however, the court held that the claim had been abandoned.\(^{160}\)

*Motion for summary judgment*

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section 853(n)(2), and must state the grounds upon which the third party is asserting an interest in the property; 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); *United States v. Strube*, 58 F. Supp. 2d 576, 585 (M.D. Pa. 1999) (to the extent that claimant amended her claim to add a constructive trust theory after the 30-day period for filing a claim had expired, it was untimely, and the court was free to ignore the additional ground for relief).


Rule 56 of the Federal Rules of Civil Procedure applies in the ancillary proceeding, thus, either party may seek summary judgment on the merits of the third party’s claim.

To oppose a motion for summary judgment filed by the Government, the claimant must offer affirmative evidence sufficient to create a genuine factual issue. In *United States v. Gamory*, the court entered summary judgment for the Government where the claimant relied on her deposition testimony and no other evidence in support of her claim that she had paid for the forfeited property with her own money.

A common ground for seeking summary judgment is that the claimant lacks standing. In *Gamory*, the court carefully distinguished between a claimant who clearly lacked standing and one who, while probably only a nominee with no legal interest in the property, had adduced enough evidence to create a triable issue of fact on the standing issue. Accordingly, the court entered summary judgment as to the former claimant’s claim but not as to the latter.

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161 See AFLUS 23-6.

162 See *United States v. Corpus*, 491 F.3d 205, 208-09 (5th Cir. 2007) (Rule 32.2 allows the court to apply the civil rules in ancillary proceeding, which includes filing a motion for summary judgment pursuant to Rule 56).


164 *Gamory*, 2010 WL 3880880 at *5 (Government is entitled to summary judgment on claimant’s standing if no reasonable finder of fact could conclude that claimant exercised dominion and control, but summary judgment must be denied – despite substantial evidence that claimant is a nominee – if there is some evidence, beyond legal title, that claimant has a
XVIII. Choice of Law

The role of state law

When a claim is filed in the ancillary proceeding, the court must look first to state law – the law of the jurisdiction that created the property right – to determine the nature of the claimant’s interest in the property, and then to federal law – Section 853(n) – to see if the claimant is entitled to recover the property.\(^{165}\) If the third party has no interest in the property under the applicable state law, the case is over and the court never reaches the federal question.

In *Monea*, the claimant claimed that it had received the forfeited property as gift, so the court looked to Ohio law to see if the requirements of a valid gift were satisfied.\(^{166}\) In *United States v. Stuber*, the bank where the forfeited funds were deposited claimed that it had a security interest in the money under Art. 9 of the UCC, so the court looked to the version of the UCC enacted by the State legislature to see if the provision on which the bank was relying applied to the type of account where the money was deposited.\(^{167}\) And in *Caro*, the claimant

\(^{165}\) See AFLUS § 23-12.

\(^{166}\) *United States v. Monea Family Trust I*, ___ F.3d ___, 2010 WL 4398578 (6th Cir. Nov. 8, 2010) (to prevail under § 853(n)(6)(A), the claimant must show that it had a valid legal interest under state law, and that the interest vested before the Government’s interest vested under the relation back doctrine; claim denied because claimant could not show that the conditions of a valid gift under Ohio law were satisfied).

was asserting a lien on the forfeited property, so the court looked to the provisions of Florida law that require a lien to be recorded before it is valid.\footnote{United States v. Caro, 2010 WL 680939, *4 (S.D. Fla. Feb. 23, 2010).}

This rule applies in cases where the claimant asserts a constructive trust. Accordingly, when a third party asserts a claim in the ancillary proceeding based on a constructive trust, the threshold question is whether he can satisfy the requirements of a constructive trust under state law.\footnote{See United States v. Ramunno, 599 F.3d 1269,1273-74 (11th Cir. 2010) (the threshold question is whether the claimant was entitled to a constructive trust under State law, if so, the court must move on to the federal question: whether the trust was a pre-existing interest within the meaning of § 853(n)(6)(A)); United States v. Dreier, 2010 WL 1223087, *2 (S.D.N.Y. Mar. 24, 2010) (applying State law to determine that claimant not entitled to constructive trust) (\textit{but note:} the list of the elements of a constructive trust under state law cited by the court did not include the requirement on which the court relied: that the trust may not be unfair to similarly situated victims). \textit{Cf. FTC v. Network Services Depot, Inc.}, 617 F.3d 1127, 1144-45 (9\textsuperscript{th} Cir. 2010) (the imposition of a constructive trust is governed by “common law principles of equity”).} As discussed later, most constructive claims filed by third parties in the ancillary proceeding are resolved when the court finds that the elements of a constructive trust under state law have not been satisfied.

If the claimant cannot establish an interest in the property under state law, the inquiry ends and the claim fails; there is no need to go on to determine deposit account; because the UCC excludes deposit accounts from the definition of “account”, the bank had no claim to the forfeited funds).
whether the requirements of the federal statute, Sections 853(n)(6)(A) or (B), are satisfied.\textsuperscript{170}

\textbf{The role of federal law}

While state law determines what interest the claimant has in the property, federal law determines whether that interest is sufficient to satisfy the standing requirement in section 853(n)(2) or to prevail on the merits under section 853(n)(6)(A) or (B).\textsuperscript{171} As the Eleventh Circuit held in \textit{Ramunno}, “we apply federal law to determine whether [claimant’s] interest is a ‘legal interest’ under § 853(n)(6)(A) and whether it was superior to [defendant’s] interest at the time of the fraud.”\textsuperscript{172} Therefore, a person who has an interest in the property under state law may nevertheless fail to satisfy the requirements of the federal statute.

\textbf{XIX. Standing Under Sections 853(n)(2)}

\textit{A nominee lacks standing to file a claim}

\textsuperscript{170} \textit{See Ramunno}, 599 F.3d 1269 at 1272 (claimant must show he had an interest in the property under state law; “if not, the inquiry ends”); \textit{Monea Family Trust I}, ___ F.3d ___, 2010 WL 4398578 (because claimant could not show it was the recipient of a gift under state law, the court did not need to decide whether its interest vested before the Government’s interest under the relation back doctrine); \textit{Gamory}, 2010 WL 3880880 at *2 (because under Georgia law a wife has no interest in property acquired by her husband until the marriage ends, the Government was entitled to summary judgment on the wife’s claim without having to address federal law).

\textsuperscript{171} \textit{See United States v. Lester}, 85 F.3d 1409, 1412 (9th Cir. 1996) (when claim is filed in the ancillary proceeding, court looks to state law to see what interest the claimant has in the property and looks to the federal statute to see if that interest is subject to forfeiture); \textit{United States v. Kennedy}, 201 F.3d 1324, 1334 (11th Cir. 2000) (same).

\textsuperscript{172} \textit{Ramunno}, 599 F.3d 1269 at 1274..
The Government can challenge a claim in the ancillary proceeding based on the claimant's lack of standing, and one of the typical grounds for doing so is that the claimant was a mere nominee with no real legal interest in the forfeited property. For example, in Gamory, the court held that the defendant's father lacked standing to contest forfeiture of vehicle titled in his name because the undisputed evidence was that he exercised no dominion and control over it.

Standing to contest the forfeiture of proceeds

As discussed later, it may be very difficult for a third party to prevail on the merits in the ancillary proceeding when the property was the proceeds of the offense, but that doesn’t mean that he cannot have standing to file a claim. A person who received the proceeds as a gift, or who acquired them by virtue of state marital property law, for example, may have standing to contest the forfeiture, but would likely lose on the merits.

The ability to trace lost assets to the forfeited property is irrelevant


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


176 See AFLUS 23-14(b).

177 See United States v. Rothstein (Petition of Chapter 11 Trustee of RRA, P.A.), 2010 WL 2730749, *4 (S.D. Fla. July 9, 2010) (rejecting Government’s argument that no one has standing to contest the forfeiture of proceeds; and a person who has present possession of the proceeds has standing even though he may not succeed on the merits under § 853(n)(6)(A) or (B)).
Standing, however, requires a showing that the claimant has a present legal interest in the property. That someone once had a legal interest in the property does not mean that he has a present legal interest in the property. If I see a car on the street that I used to own but do not own any longer, I have no greater right to oppose the forfeiture of that car than any one else. The point is that the claimant’s ability to trace the forfeited property to property that he once owned does not, by itself, establish standing to contest the property’s forfeiture.

In Caro, the seller of property who did not retain any legal interest in the form of a recorded lien had no interest in the property other than that of an unsecured creditor, even though he had not been paid.

In Tarraf, the court held that third parties who had given cash to a travel agent as deposits on a pilgrimage to Mecca were no longer the owners of the money at the time it was seized from the travel agent for failure to file a Currency and Monetary Instrument Report (CMIR) in violation of 31 U.S.C. § 5316, and thus would not have standing to contest the forfeiture even if they could trace their deposits to the seized funds.

178 See United States 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).


And in *Ramunno*, the defendant’s last victim had no greater interest in the defendant’s forfeited property than any other unsecured creditor, even though he could trace his money to the funds that were seized and forfeited. When he transferred his property to the defendant, the court said, title passed and the defendant became the owner of the funds. Thus, the last victim had the same lack of standing to contest the forfeiture as any other victim / unsecured creditor, unless he could establish that he was the beneficiary of a constructive trust.\textsuperscript{181}

*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. Tort victims may have claim for damages, but do not have a legal interest in the defendant’s property.\textsuperscript{182} In *Rothstein*, however, the court pointed out an important exception to this rule: the victim of a theft or embezzlement, unlike an unsecured creditor, has standing because he is able to assert an interest in specific property to which he never surrendered title.\textsuperscript{183}

*Person whose title is invalid does not have standing*


\textsuperscript{182} See *United States v. Lavin*, 942 F.2d 177, 187 (3d Cir. 1991) (victim of embezzlement unrelated to the drug offense giving rise to the forfeiture lacked standing to contest the forfeiture).


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A person whose lien or title is invalid as a matter of State law does not have standing to contest the forfeiture of the property. In Gallion, the court held that the claimant’s title was invalid because she acquired it via a fraudulent conveyance, and thus lacked standing even though the property was titled in her name.\(^\text{184}\)

XX. Grounds for Recovery in the Ancillary Proceeding

Section 853(n)(6)

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).\(^\text{185}\) As a general matter, that means that third parties cannot challenge the forfeitability of the property, or assert that the forfeiture suffered from procedural defects in the defendant’s trial or sentencing.\(^\text{186}\) The leading case on this point remains the Tenth Circuit’s 2008 decision in \textit{United States v. Andrews}.\(^\text{187}\)


\(^{185}\) \textit{See United States v. Monea Family Trust I, ___ F.3d ___, 2010 WL 4398578 (6th Cir. Nov. 8, 2010)}.

\(^{186}\) \textit{See AFLUS 23-14}.

\(^{187}\) \textit{United States 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”).
Following Andrews, the district court in Chaim explained that filing a claim in the ancillary proceeding protects the rights of third parties even though they cannot contest the forfeitability of the property because proof of ownership is a complete defense: if the third party was the owner of the property at the time the offense occurred, he will prevail, but if he cannot establish ownership, he has no right to contest the forfeitability of the property.188

Accordingly, in Muckle, when the claimant moved to vacate the order of forfeiture on the ground that the Government had not established a nexus between the property and the offense in the forfeiture phase of the defendant’s trial, the court followed Andrews and held that the claimant was not allowed to relitigate the forfeitability of the property in the ancillary proceeding.189

And in Stuber, when the third party claimed that forfeited property was not forfeitable under the Contraband Cigarette Trafficking Act, the court held that a third party cannot challenge the legal basis for the forfeiture. The ancillary proceeding, the court said, “does not involve relitigation of the forfeitability of the property; its only purpose is to determine whether any third party has a legal interest in the forfeited property.”190

Just as a third party cannot challenge the legal or factual basis for the forfeiture order, he cannot argue that the court committed a procedural error in issuing the forfeiture order, or that the forfeiture was barred by another provision of law.\textsuperscript{191}

In \textit{Tarraf}, the claimants argued that the forfeiture of the entire $100,000 seized from the travel agent who was carrying the money overseas violated the Excessive Fines Clause of the Eighth Amendment, but the court held that the Eighth Amendment right belonged to Defendant, not to the claimants.\textsuperscript{192}

\textbf{XXI. Superior Legal Interest Under Section 853(n)(6)(A)}

\textit{Paragraph (6)(A) embodies the relation back doctrine}

The first ground for recovery in the ancillary proceeding is that the claimant had a legal interest in the forfeiture property that was superior to the defendant’s interest at the time of the offense giving rise to the order of forfeiture. This is nothing more than a restatement of the relation back doctrine: If the Government’s interest vests at the time of the offense giving rise to the forfeiture – which is what the relation back doctrine says — the only way the claimant can

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\textsuperscript{191} \textit{See United States v. Guerra}, 216 Fed. Appx. 906, 908 n.2 (11th Cir. 2007) (third party lacked standing to contest the forfeiture in the ancillary proceeding on the ground that it violated the defendant’s Eighth Amendment rights).
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trump the Government’s interest is to show that he had a pre-existing interest in the property, which is precisely what § 853(n)(6)(A) provides.\footnote{See United States v. Timley, 507 F.3d 1125 (8th Cir. 2007) (“Section 853(n)(6)(A)—the priority of ownership ground—embodies the relation back doctrine”); United States v. Eldick, 223 Fed. Appx. 837, 840-41 (11th Cir. 2007) (to recover under § 853(n)(6)(A), the claimant must have had an interest in the property that preceded the commission of the crime because, under § 853(c), “the Government’s interest will be superior to that of anyone whose interest does not antedate the crime”). See also AFLUS § 23-15(a).}

So, in Stuber, the court held that even if the defendant’s bank did obtain an interest in his bank account to secure a loan, it was an inchoate interest that did not vest until more than a year after the offense giving rise to the forfeiture, and thus could not support a claim under Section 853(n)(6)(A).\footnote{United States v. Stuber, 2010 WL 3430499, *5 (W.D. Wash. Aug. 30, 2010).}

The embodiment of the relation back doctrine in Section 853(n)(6)(A) is the reason why a third party can never prevail under that statute if the forfeited property represents the proceeds of the crime.\footnote{See United States v. Hooper, 229 F.3d 818, 821-22 (9th Cir. 2000) (to prevail under section 853(n)(6)(A), the claimant must have a preexisting interest in the forfeited property; because proceeds do not exist before the commission of the underlying offense, section 853(n)(6)(A) can never be used to challenge the forfeiture of proceeds); United States v. Eldick, 223 Fed. Appx. 837, 840 (11th Cir. 2007) (following Hooper; if the forfeited property is traceable to the proceeds of the crime, the Government’s interest under the relation back doctrine will always be superior to that of third party asserting an interest in the property under section 853(n)(6)(A)).} As the court held in Rothstein, fraud proceeds do not exist until the fraud occurs, and the Government’s interest
vests precisely at that moment; so no one can have an interest that pre-dates the Government's interest in those proceeds.\footnote{United States v. Rothstein, 2010 WL 4064809,*3 (S.D. Fla. Oct. 14, 2010) (following Eldick).}

One court has noted, however, that if the third party acquired his interest from another third party who had a valid interest before the Government’s interest vested, he may have a claim under Section 853(n)(6)(A) that is derivative of the original owner’s claim.\footnote{United States v. Power Company, Inc., 2010 WL 5387618, *5 (D. Nev. Dec. 22, 2010) (assignee of loan and related secured interest in forfeited real property stands in the shoes of the assignor with respect to asserting a claim in the ancillary proceeding).}

\textit{Actual trusts / escrow accounts}

If a third party had the forfeited funds in a trust or escrow account before the crime giving rise to the forfeiture occurred, he can recover under Section 853(n)(6)(A).\footnote{See United States v. Rothstein (Petition of Five Former RRA Non-Investor Clients), 2010 WL 2813454, *3 (S.D. Fla. July 14, 2010) (denying motion to dismiss; person who alleges that defendant held his funds in particular trust or escrow account has asserted a sufficient claim because the grantor of such a trust retains ownership until a specified event occurs); United States v. Rothstein (Petition of Vine), 2010 WL 2927489, *3 (S.D. Fla. July 21, 2010) (denying motion to dismiss claim of person who asserted that funds transferred to the defendant were not an investment, but were to be held his law firm’s escrow account; under state law, money held in an escrow account remains the property of the client).} But constructive trusts are a different story.

\textit{Constructive trusts}

Some courts hold that a constructive trust can \textit{never} give a third party the right to recover under § 853(n)(6)(A) because the trust does not exist until
imposed by a court, and thus cannot be the pre-existing interest that the statute requires. But others hold that a constructive trust comes into existence when the fraud occurs.

There are two answers to this. Two years ago in United States v. Wilson, a district court in California held that even if the constructive trust springs into existence at the time of the fraud, it cannot support a claim under Section 853(n)(6)(A) because an interest that arises at the same time as the Government’s interest under the relation back doctrine is not a pre-existing interest. Thus, a claim filed by the beneficiary of a constructive trust will fail for the same reason that a claim to the proceeds of the crime must always fail, even

199 See United States v. BCCI Holdings (Luxembourg) S.A. (Petition of Chawla), 46 F.3d 1185, 1190-91 (D.C. Cir. 1995) (constructive trusts are “legal interests,” but they do not exist until they are imposed by the court, and so cannot support a claim under section 1963(l)(6)(A)); United States v. $2,340,000.00 in Lieu of One Parcel of Property, 718 F. Supp.2d 215, 232, 234 (D. Conn. 2010) (agreeing that a constructive trust arises at the time of the underlying crime, but not applying the pre-existing interest requirement because there was no such requirement in civil forfeiture cases prior to CAFRA).

200 See United States v. Shefton, 548 F.3d 1360, 1366 (11th Cir. 2008) (disagreeing with BCCI and following the Ninth Circuit’s decision in United States v. $4,224,958.57, 392 F.3d 1002, 1005 (9th Cir. 2004) (Boylan), holding that a constructive trust exists at the moment of the fraud); United States v. Rothstein (Petition of Chapter 11 Trustee of RRA, P.A.), 2010 WL 2730749, *7 (S.D. Fla. July 9, 2010) (following Shefton; beneficiary of a constructive trust has standing to contest forfeiture, but court may refuse to impose the trust on the merits).

201 United States v. Wilson, 640 F. Supp.2d 1257, 1262 (E.D. Cal. 2009) (applying Hooper, infra, and distinguishing Boylan; even if a constructive trust arises at the moment of the fraud, it arises too late for a claim under § 853(n)(6)(A) which requires a pre-existing interest in the property).
if it is filed by a person whose interest arose at the moment the crime occurred: under the relation back doctrine, ties go to the Government.\textsuperscript{202}

The other answer is to point out that the court does not reach the federal law question – whether the interest created by a constructive trust was a pre-existing interest – if the third party is not entitled to the imposition of a constructive trust as a matter of state law.

Remember we said earlier that the court never reaches the federal question – whether the claimant can recover under Section 853(n)(6)(A) – if he cannot show that he has an interest in the property under state law. Accordingly, the court does not have to worry about the split in the circuits over whether a constructive trust claim is or is not cognizable under Section 853(n)(6)(A) if the claimant is not entitled to the imposition of a constructive trust under state law. If the claimant has no interest in the property under statute law, the inquiry ends and the claim must be dismissed.

That is the holding in \textit{Ramunno}, and is what makes \textit{Ramunno} perhaps the most important criminal forfeiture decision of the year.\textsuperscript{203}

\textsuperscript{202} \textit{United States v. Hooper}, 229 F.3d 818, 821-22 (9th Cir. 2000) (to prevail under section 853(n)(6)(A), the claimant must have a preexisting interest in the forfeited property; because proceeds do not exist before the commission of the underlying offense, section 853(n)(6)(A) can never be used to challenge the forfeiture of proceeds).

\textsuperscript{203} \textit{United States 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 \textit{Shefton} assumed the existence of a constructive trust).
What are the elements of a constructive trust under State law? Every state statute is different, but they all agree that a constructive trust is an equitable remedy. So in every state, the claimant asserting a constructive trust must show that he can satisfy the principles of equity. Among other things, these elements include the ability to trace, the absence of an adequate remedy at law, and a confidential relationship between the wrongdoer and the beneficiary. The courts are now routinely rejecting constructive trust claims in the ancillary proceeding on the ground that at least one of these equitable elements is not satisfied.

The ability to trace / relationship in particular asset

A claimant asserting a constructive trust must be able to trace his property to the forfeited property. In Tarraf, the claimants’ constructive trust claim failed because they could not show that the money they gave to the travel agent to pay for the pilgrimage to Mecca was the currency seized from the travel agent at the airport.

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204 See Ramunno, 599 F.3d at 1274 (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).


206 See United States v. Schwimmer, 968 F.2d 1570, 1583-84 (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); County of Oakland v. Vista Disposal, 826 F. Supp. 218 (E.D. Mich. 1993) (same).

In *Rothstein*, the investors in a Ponzi scheme conceded that they could not trace their individual losses to the forfeited property, but they argued that collectively all victims could trace their assets. But the court held that such “aggregate tracing” does not satisfy the tracing requirement and granted a motion to dismiss the claim on the pleadings.\(^{208}\)

*Lack of an adequate remedy at law*

Because a constructive trust is an equitable remedy, the claimant is not entitled to the imposition of a constructive trust if he has an adequate remedy at law.\(^{209}\) In *Rothstein*, the court held that the remission process – whereby the Attorney General is authorized to use forfeited funds to pay restitution to the defendant’s victims – gives third parties an adequate remedy at law where the Government agrees to submit its distribution plan to judicial review.\(^{210}\)

*Unfairness to others who are similarly situated*

\(^{208}\) *United States v. Rothstein (Petitions of 23 Ponzi Scheme Investors)*, 2010 WL 2943315 (S.D. Fla. July 26, 2010); see also *United States v. Rothstein (Petition of Committee of Unsecured Creditors)*, 2010 WL 3396765, *2* (S.D. Fla. Aug. 26, 2010) (even if collective tracing were allowed, it would not apply to a group of unsecured creditors that included both fraud victims and trade creditors, because the latter group never transferred money to the defendant’s forfeited accounts).

\(^{209}\) *See United States 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).

A fraud victim is not entitled to an equitable remedy where giving him the lion’s share of the forfeited property would be unfair to the other victims. This is often the case where one victim can trace his losses to the defendant’s property and other victims cannot.\footnote{See United States 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).}

In Ramunno, the “last victim” could trace his losses while the others could not. If the court had allowed that victim to recover as the beneficiary of a constructive trust, he would have recovered $2.1 million of the $6 million that was forfeited, leaving 90 other victims who lost $18 million to split the remaining $3.9 million among themselves. The court held that that would be inequitable and declined to impose the constructive trust.\footnote{United States v. Ramunno, 599 F.3d 1269, 1275 (11th Cir. 2010).} The district court in United States v. Drier reached the same conclusion.\footnote{United States v. Dreier, 2010 WL 1223087, *2 (S.D.N.Y. Mar. 24, 2010) (granting motion to dismiss claim asserting constructive trust where imposing a trust on behalf of one fraud victim would be unfair to others, even though they were defrauded in different ways; following Andrews); In re Dreier LLP, 429 B.R. 112, 137-38 (S.D. Bankruptcy 2010) (“The imposition of a constructive trust . . . is fundamentally at odds with the principle of equal distribution among creditors”; holding that constructive trusts are not imposed in bankruptcy for the same reason they are not imposed in forfeiture proceedings).}

In Rothstein, the court followed Ramunno and denied the constructive trust on behalf of victims who filed claims because it would be unfair to others who
chose to rely on the Government’s promise to distribute the forfeited property equitably through the remission process. The court also said it would be unfair to create a trust that would reduce the pool of funds available to the actual victims of the criminal offense by allowing other creditors to claim a share.

*Unjust enrichment / fraud*

Another element of a constructive trust is that the defendant obtained the property unjustly or through fraud. In *Tarraf*, the court held that a constructive trust will not be imposed if there is no showing that the defendant intended to convert the property to his own use, and that the trust is necessary to avoid unjust enrichment.

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

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

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214 *United States v. Rothstein (Petitions of 23 Ponzi Scheme Investors)*, 2010 WL 2943315 (S.D. Fla. July 26, 2010); see also *United States v. Rothstein (Petition of Chapter 11 Trustee of RRA, P.A.)*, 2010 WL 2730749, *10 (S.D. Fla. July 9, 2010) (declining to impose constructive trust on behalf of bankruptcy trustee where it would be inequitable to return forfeited funds to the trustee for the defendant’s bankrupt firm when they can be returned directly to the victims through the remission process)

215 *United States v. Rothstein (Petition of Committee of Unsecured Creditors)*, 2010 WL 3396765, *2 (S.D. Fla. Aug. 26, 2010) (applying *Ramunno*; where creating constructive trust in favor of all of defendant’s unsecured creditors would reduce the funds available to the fraud victims by letting his trade creditors also claim a share would be unjust).

216 See *United States 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).

A person who acquires an interest in the forfeited property after the Government's interest has vested cannot recover under § 853(n)(6)(A) because of the relation back doctrine, but there is an exception to the relation back doctrine for bona fide purchasers under § 853(n)(6)(B). To recover under that statute, the claimant must show three things:

(1) a legal interest in the property;

(2) that the interest was acquired as a bona fide purchaser for value; and

(3) that the interest was acquired at a time when the claimant was reasonably without cause to believe that the property was subject to forfeiture.

_Bona fide purchaser provision comes from state commercial law_

The bona fide purchaser provision comes from state commercial law. In _United States v. Watson_, the defendant's bank argued that it “purchased” an interest in the forfeited bank account when it extended the defendant a line of credit secured by the funds in the account, but the court held that the common

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219 See AFLUS § 23-16(a).

220 See _United States v. Timley_, 507 F.3d 1125, 1130-31 (8th Cir. 2007) (the bona fide purchaser defense under section 853(n)(6)(B) has three elements: legal interest; bona fide purchase for value; and the absence of reason to know that the property was subject to forfeiture); _United States v. Carter_, 2010 WL 3721046, *3 (E.D. Ky. Sept. 15, 2010) (same, following _Timley_).

221 See _United States v. Harris_, 246 F.3d 566, 575 (6th Cir. 2001) (bona fide purchaser provision comes from “hornbook commercial law”); _United States v. Lavin_, 942 F.2d 177, 185-86 (3d Cir. 1991) (same). See also AFLUS § 23-16(b).
meaning of “purchaser” in the UCC does not include persons who acquire an intangible secured interest in a bank account.\textsuperscript{222}

\textit{Donees / family members are not bona fide purchasers}

Similarly, a person who receives the forfeited property as a gift is not a “purchaser.”\textsuperscript{223} In \textit{Gamory}, the defendant’s wife claimed that the defendant had given her many of the forfeited assets as a gift, but the court held that preventing criminal defendants from avoiding forfeiture by transferring property to third parties as gifts is precisely why the BFP requirement was included in § 853(n)(6)(B).\textsuperscript{224}

\textit{Claimant must give something of value}

To prove that he made an actual purchase, the claimant must show that he or she obtained the property in an arms-length transaction and in exchange for something that had real value; it cannot be a fraudulent conveyance or gift disguised as a business transaction.

In \textit{Gallion}, the defendant was a lawyer who had defrauded his clients. The Government obtained a $30 million money judgment and wanted to forfeit six parcels of real property as substitute assets. The defendant’s wife claimed that


\textsuperscript{223} \textit{See United States v. Kennedy}, 201 F.3d 1324, 1335 (11th Cir. 2000) (the relation back doctrine was included in section 853 as a way of avoiding gift transfers from the defendant to his wife).

the defendant had conveyed the property to her and that it therefore was no
longer available to forfeit as substitute assets, but the court held that she was not
a bona fide purchaser for value under Section 853(n)(6)(B) because the transfer
was a fraudulent conveyance designed to avoid forfeiture.\textsuperscript{225}

A third party who merely records a judgment lien on the forfeited property,
or receives the forfeited property as the payment on a debt, cannot recover under
Section 853(n)(6)(B) because he did not “purchase” anything. In \textit{Caro}, the
claimant had recorded a judgment lien on the forfeited property long after the
Government’s interest vested, but the court denied the claim, holding that to allow
a creditor to claim bona fide purchaser status merely by filing a lien on the
defendant’s property “would, in effect, turn this Court into a bankruptcy court and
prevent any forfeiture order from becoming final.”\textsuperscript{226}


\textsuperscript{226} \textit{United States v. Caro}, 2010 WL 680939, *5-6 (S.D. Fla. Feb. 23, 2010). \textit{See also}
a judgment against defendant after its lien on defendant’s property proved insufficient to cover
a debt was merely an unsecured creditor with respect to the amount of the judgment, not a
bona fide purchaser of any of defendant’s substitute assets). \textit{But see United States v. Carter,
forgiving a loan is a “purchase” within the meaning of Section 853(n)(6)(B) where the amount
of the loan was equal to the fair market value of the property).
Banks exercising a right of set-off to satisfy an antecedent debt are in the same situation.\textsuperscript{227} As the court held in \textit{Stuber}, a bank’s exercise of its right of set-off is not a purchase within the meaning of § 853(n)(6)(B).\textsuperscript{228}

\textit{Claimant must be reasonably without cause to believe the property was subject to forfeiture}

Even if the claimant can show that he purchased the forfeited property, he cannot recover if, at the time he did so, he had cause to believe that the property was subject to forfeiture.\textsuperscript{229} Thus in \textit{Caro}, the court held that even if the filing of a lien could be regarded as a “purchase”, the claimant could not satisfy the “without cause to believe” requirement because the Government had already filed a notice

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\textsuperscript{227} See United States v. BCCI Holdings (Luxembourg) S.A. (Final Order of Forfeiture and Disbursement), 69 F. Supp. 2d 36, 62 (D.D.C. 1999) (“A creditor who attempts to satisfy the debt by obtaining a judgment lien, or exercising a right of set-off, against specific property is not a bona fide purchaser of that property because he has given nothing of value in exchange for the property interest. This is so irrespective of how the antecedent debt came into existence.”).

\textsuperscript{228} United States v. Stuber, 2010 WL 3430499, *7 (W.D. Wash. Aug. 30, 2010) (following BCCI; bank cannot exercise set-off against criminal proceeds to make a claim under § 853(n)(6)(B)). See also United States v. Watson, 2010 WL 2573478, *4 (W.D. Mich. June 22, 2010) (bank that extends a line of credit to a depositor, obtaining a secured interest in the depositor’s bank account, is not a bona fide purchaser of that secured interest within the meaning of Section 853(n)(6)(B) because Article 9 of the UCC does not regard a person who acquires an secured interest in a bank account to be a bona fide purchaser), distinguishing United States v. Frykholm, 362 F.3d 413 (7th Cir. 2004) (suggesting that satisfying an antecedent debt is a purchase).

\textsuperscript{229} See AFLUS § 23-16(c).
\end{quote}
of *lis pendens* against the property, and obtained a preliminary order of forfeiture.\(^{230}\)

The requirement that the claimant be without cause to believe that the property is subject to forfeiture makes it particularly difficult for defense attorneys to contest the forfeiture of their fees as bona fide purchasers if the fee is paid out of the defendant’s criminal proceeds.\(^{231}\) In *FTC v. Network Services Depot, Inc.*, the Ninth Circuit held that a defense attorney must undertake an “objectively reasonable and diligent inquiry” into the source of his fee, and that an attorney who remains “willfully ignorant of how his fees are paid,” or who “simply take[s] his client at this word that the fees are not tainted,” cannot be a bona fide purchaser.\(^{232}\)

A person who is aware of the defendant’s criminal conduct in connection with the property likewise cannot be a bona fide purchaser for value. In *Gallion*, the court held that the defendants’ wives and girlfriends, who were aware of


\(^{231}\) *See Caplin & Drysdale v. United States*, 491 U.S. 617, 633 n.10 (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”); *FTC v. Assail, Inc.*, 410 F.3d 256 (5th Cir. 2005) (“The mere fact that an attorney has read the indictment against his client is enough to put him on notice that his fees are potentially tainted and to destroy his status as a bona fide purchaser for value.”).

\(^{232}\) *FTC v. Network Services Depot, Inc.*, 617 F.3d 1127, 1144-45 (9th Cir. 2010) (following *Assail*).
defendants’ legal difficulties when property forfeited as substitute assets was transferred to them, were not bona fide purchasers under § 853(n)(6)(B).\textsuperscript{233}

**XXIII. Discovery in the Ancillary Proceeding**

*Rule 32.2(c)(1)(B)*

Rule 32.2(c)(1)(B) states that the court may permit the parties to conduct discovery in the ancillary proceeding in accordance with the Federal Rules of Civil Procedure “if the court determines that discovery is necessary or desirable to resolve factual issues.”\textsuperscript{234} In contrast, 21 U.S.C. § 853(m) authorizes the taking of depositions in furtherance of post-conviction discovery “to facilitate the identification and location of property declared forfeited” pursuant to the procedures in Rule 15 of the Federal Rules of Criminal Procedure. This is an important distinction: what is discoverable under the Civil Rules in the ancillary proceeding is different from what is discoverable under the Criminal Rules when the Government is trying to locate the forfeitable property under Section 853(m).

Thus in *Smith*, the court held that because the Criminal Rules apply to post-conviction discovery, the defendant’s deposition could not be taken without


\textsuperscript{234} See AFLUS § 23-7.
his consent. But there would have been no such bar to taking his deposition in the ancillary proceeding.

XXIV. Appeals

Stay pending appeal

Courts generally deny the defendant’s request to stay the forfeiture order pending appeal pursuant to Rule 32.2(d). In Petters, the court analyzed four factors and found that the defendant’s likelihood of success on appeal was remote; that the property lacked particular intrinsic value or historical significance to the defendant; and that the maintenance costs on the property were high and that the property was depreciating. Moreover, the court held that whether the defendant’s girlfriend and their children would have to move was not the court’s concern, whereas the delay in distributing the defendant’s assets to his victims that a stay would cause was very much its concern.

XXV. Post-Conviction Issues

Enforcement of judgment


236 See AFLUS § 24-3.

In *United States v. Coyne*, the court held that the Government may use the Federal Debt Collection Procedures Act to collect a criminal forfeiture judgment.\(^{238}\) At the same time, the Seventh Circuit held in *United States v. Fischer* that even if that is true, it does not preclude the Government from satisfying the judgment by forfeiting substitute assets.\(^{239}\)

**Abatement**

In general, a criminal forfeiture judgment abates if the defendant dies before his or her appeal is final.\(^{240}\) But in *United States v. Stokes*, the Sixth Circuit held that while a conviction and fine abate when the defendant dies pending appeal, forfeiture and restitution orders do not.\(^{241}\)

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


\(^{240}\) See *United States v. Oberlin*, 718 F.2d 894, 895 (9th Cir. 1983) (criminal forfeiture proceeding abates upon the post-verdict suicide of defendant); *United States v. Lay*, 456 F. Supp. 2d 869 (S.D. Tex. 2006) (the normal rule is that a conviction abates if the defendant dies after he is sentenced but before his appeal is final, but it applies equally where the defendant dies before sentencing, and thus before judgment is even entered). See also AFLUS § 24-8.

If property is forfeited criminally, the forfeiture is part of the defendant's sentence and may be challenged only on direct appeal.\textsuperscript{242} Thus, in \textit{United States v. Wilcox}, the court held that a defendant who did not appeal the forfeiture could not use Rule 41(g) to relitigate the issue in the district court.\textsuperscript{243}

Even if the property was \textit{not} forfeited as part of the defendant's criminal case, the Government can resist a motion for the property's return on the ground that it must be retained to satisfy restitution orders or other debts owed to the Government.\textsuperscript{244} But in \textit{United States v. Flores-Rivera}, the First Circuit held that the court violated due process when it directed that unforfeited property be retained to satisfy criminal fine without giving defendant notice and an opportunity to be heard.\textsuperscript{245}

\textit{Habeas corpus / Section 2255 Petitions}

Title 28, Section 2255 – which provides federal prisoners with an avenue for post-conviction relief on various grounds – applies only to the part of a

\textsuperscript{242} \textit{See United States v. Suggs}, 256 Fed. Appx. 804, 806 (7th Cir. 2007) (affirming denial of Rule 41(g) motion for the return of cash and guns forfeited as part of defendant’s sentence; only remedy is direct appeal).


\textsuperscript{244} \textit{See Ikelionwu v. United States}, 150 F.3d 233, 239 (2d Cir. 1998) (if claimant prevails in civil forfeiture action, seized money may nevertheless be retained by the Government to offset defendant’s criminal fine); \textit{United States v. Lavin}, 299 F.3d 123, 127 (2d Cir. 2002) (no forfeiture necessary where Government applied seized funds to satisfy restitution order; Rule 41(e) motion denied). \textit{See also AFLUS} (2010 Cumulative Supp.) § 24-13.

\textsuperscript{245} \textit{United States v. Flores-Rivera}, 601 F.3d 41 (1st Cir. 2010).
defendant’s sentence resulting in incarceration and thus does not apply to
criminal forfeiture.\textsuperscript{246} The rule is the same for a writ of \textit{habeas corpus} filed under
Section 2254.\textsuperscript{247}

\textit{Coram nobis petitions}

In \textit{United States v. Bazauye}, the Fourth Circuit held that a court’s error in
imposing criminal forfeiture for an offense for which it was not authorized is not
“fundamental” in the sense that it impacts the integrity of a guilty plea, and thus
does not require the court to vacate the defendant’s conviction.

\textit{Parallel Forfeitures}

As all prosecutors specializing in asset forfeiture know, filing a parallel civil
case can save a forfeiture if something goes wrong in the criminal case.\textsuperscript{248} In
\textit{United States v. Crutcher}, the court’s failure to enter a criminal forfeiture order at
sentencing, while fatal to the criminal forfeiture, left the Government free to
pursue the forfeiture of the same property in a parallel civil case that was stayed
while the criminal case was pending.\textsuperscript{249}

(challenge to forfeiture cannot be raised under § 2255 because it does not relate to
defendant’s being held in custody in violation of the Constitution).


\textsuperscript{248} \textit{See AFLUS § 24-9}.

\textsuperscript{249} \textit{United States v. Crutcher}, 689 F. Supp.2d 994, 1003 (M.D. Tenn. 2010).
XXVI. Retroactivity

The Ex Post Facto Clause bars retroactive application of substantive changes to the criminal forfeiture laws. *United States v. Ali* was a food stamp fraud case in which the fraud scheme began before August 23, 2000, the effective date of CAFRA. Thus, the defendant acquired some of the fraud proceeds before the criminal forfeiture statute for the food stamp fraud offense was enacted. Accordingly, when the defendant was convicted, the court allowed the Government to recover the gross proceeds of the offense, but only for the transactions that occurred after CAFRA took effect.250

*Offenses that “straddle” the effective date of the forfeiture statute*

Prosecutors may work around the limitations imposed by the Ex Post Facto Clause, however, by charging the defendant with a conspiracy offense. If a conspiracy straddles the effective date of either the forfeiture statute or the conspiracy statute on which the forfeiture is 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.251

*Retroactive Application of Rule 32.2*

250 *United States v. Ali*, 619 F.3d 713, 717 (7th Cir. 2010).

251 *See United States v. Kalish*, 626 F.3d 165, 168 (2nd Cir. 2010) (requiring defendant to forfeit proceeds of advance fee conspiracy that straddled Aug. 23, 2000 did not violate the Ex Post Facto Clause).
The 2009 amendments to Rule 32.2 apply to cases that were pending when the new rule took effect.\footnote{252}{See United States v. Poulin, 2010 WL 538722, *2 n.4 (E.D. Va. Feb. 12, 2010) (version of Rule 32.2 that took effect 12/1/09 applies to pending cases per the Supreme Court’s Order of March 26, 2009). But see United States v. Daniel, 2010 WL 749873, *6-7 (C.D. Cal. Feb. 22, 2010) (the Supreme Court’s order that the new rule apply to pending cases does not apply to the provision in Rule 32.2(a) directing that the forfeiture notice not be designated as a count; it would not be appropriate to strike all forfeiture notices from indictments returned prior to December 1, 2009 just because the forfeiture had been designated as a “count”).}

**XXVII. Forfeiture and Restitution**

*Restitution and forfeiture are both mandatory*

As a general rule, the defendant is not entitled to an offset against a restitution order to reflect the amount forfeited, or *vice versa*\footnote{256}{See AFLUS (2010 Cumulative Supp.) § 20-8.} There were a host of cases in 2010 affirming that view, including the Tenth Circuit’s decision in *McGinty* which collected the cases from other circuits on that issue.\footnote{257}{United States v. McGinty, 610 F.3d 1242, 1247-48 (10 th Cir. 2010) (forfeiture and restitution serve different purposes and both are mandatory; ordering a defendant to pay a money judgment equal to the proceeds of his offense and to pay restitution to his victim is not unfair) (collecting cases). See United States v. Martinez, 610 F.3d 1216, 1231-32 (10 th Cir. 2010) (defendant is not entitled to an offset against his restitution obligation for the value of the property he is ordered to forfeit if the forfeited property is not used to reimburse the victim; whether there should be an offset if the forfeited property is *paid* to the victim is an open question); United States v. Kalish, 626 F.3d 165, 169-70 (2 nd Cir. 2010) (defendant not entitled to any offset against the forfeiture money judgment reflecting the $1.2 million in restitution he is also ordered to pay); United States v. Fitzmartin, 2010 WL 2994216, *3 (E.D. Pa. July 27, 2010) (courts are permitted to order both forfeiture and restitution because they serve different purposes), following United States v. Various Computers, 82 F.3d 582, 588 (3 rd Cir. 1996). See also United States v. Ali, 619 F.3d 713, 718 (7 th Cir. 2010) (noting without discussion that defendant convicted of food stamp fraud was ordered to pay restitution to USDA and forfeit like amount as proceeds of the offense).}
The theme in all of these cases is that forfeiture and restitution serve different purposes – one punishes the defendant, the other provides restitution to victims – and therefore are not mutually exclusive. For that reason, as the court held in *United States v. Simon*, a defendant may be ordered both to forfeit property and to pay restitution even when the victim of his crime is the Government, and hence it is the Government that is on the receiving end of both the forfeiture and the restitution payment.  

The Government is free, of course, to apply the forfeited property to satisfy a restitution order, and generally will do so unless the defendant appears to have sufficient assets to pay both, but Congress left the decision whether to apply forfeited funds to restitution to the Attorney General’s discretion.

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259 See *United States v. Hurley*, 2010 WL 5082223 (N.D. Ga. Dec. 2, 2010) (Congress left the decision whether to apply forfeited funds to restitution to the discretion of the Attorney General, AFMLS’s decision whether to follow the recommendation is not subject to judicial review); *United States v. Guidant LLC*, 708 F. Supp.2d 903, 921 (D. Minn. 2010) (court acknowledges that it has no role in the disposition of forfeited funds, but “respectfully requests” that the Justice Department consider directing a “significant portion” to the Medicare program). See also *United States v. Pescatore*, ___ F.3d ___, 2011 WL 644150 (2nd Cir. Feb. 23, 2011) (AFMLS did not abuse the discretion given to the Attorney General in § 981(e)(6) when it followed its restoration policy and denied a request to apply forfeited funds to restitution on the ground that defendant was a wealthy person who could pay the restitution order in addition to forfeiting the proceeds of his crime).
XXVIII. Conclusion

The large number of published decisions on criminal forfeiture issues provides evidence once again that forfeiture has become a routine part of federal criminal practice. The number of undecided issues remains vast, and the flood of cases dealing with issues of first impression will likely continue for some time, but a significant number of points are now well-established and have even been codified in the statutes and rules.