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April, 1991***180 A GUIDE TO HANDLING FEDERAL NARCOTICS FORFEITURE CASES**Edward M. Genson [FN_a]
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Although civil drug forfeiture has become an important component of federal practice, the forfeiture rules are obscure. This article provides a guide to handling federal drug forfeiture cases.

I. Introduction

In recent years, prosecutors have unleashed new weaponry in the war against drugs: civil forfeiture. Whether the government seeks forfeiture of a few hundred dollars found in the drug user's pocket, millions of dollars of a drug dealer's assets, or a family car where a marijuana cigarette was found, civil forfeiture proceedings are now a part of many criminal drug cases and investigations.

Criminal defense attorneys thus have been thrust into a new branch of law in which they may lack experience; indeed, many federal forfeiture cases are lost simply because of procedural default. [FN₁] Ironically, the rules in civil forfeiture proceedings are not particularly complex; unfortunately, neither are they widely known. This article is a basic guide for the handling of federal forfeiture cases.

At the outset, you must determine whether to pursue forfeiture proceedings. The forfeiture statutes are broad and favor the government, and after the government meets minimal preliminary requirements the burden shifts to the claimant to demonstrate legitimacy. In forfeiture cases, unlike criminal cases, claimants usually cannot remain silent and have any hope of winning.

Another pitfall - the civil discovery rules that apply in federal forfeiture proceedings may put the client at risk of self-incrimination. Remember that just because a client has had property seized does not mean that he or she has to pursue forfeiture proceedings; it may not be worth the cost, risks, and aggravation.

However, certain fact situations call for pursuit of forfeiture proceedings. This is particularly true where the rights of third parties are implicated (eg., the government threatens forfeiture of property to which a spouse and children have a claim). In addition, the war on drugs has not suspended the Constitution, and forfeiture proceedings may be worth pursuing for property obtained in an apparently illegal search and seizure. Also, where the government has questionable proof and seeks forfeiture of valuable property, [FN₂] the client may

not want to surrender without a contest.

Once having decided to challenge the government's forfeiture bid, it is important to learn the three basic federal forfeiture proceedings: 1) for forfeiture of a vehicle, personal property, or currency valued under \$100,000, the government initially proceeds in the administrative forum. Here, it is up to the claimant to contest the forfeiture administratively and/or compel the filing of a suit in federal district court; 2) for real property or property valued over \$100,000, the government bypasses the administrative route and sues the property targeted for forfeiture in the district court; 3) the government can tack forfeiture allegations onto a RICO or drug indictment.

Under the first and second examples, the burden shifts to the claimant to initiate procedures to attempt to regain his or her property after it is seized. When a forfeiture count is included in a criminal indictment and the claimant is also a defendant in that indictment, forfeiture will be resolved in the context of the criminal case and the defendant need not do anything to perfect the claim. However, as is more fully discussed below, if a nondefendant seeks to claim property targeted for forfeiture in a criminal indictment, he or she must make a claim on the property after the criminal case is resolved.

II. Administrative Proceedings

A. Generally

If the government first proceeds in the administrative forum, there is usually***181** a lag time of several months before claimants can attempt to retrieve the property. The delay results from the sheer volume of forfeiture cases across the country. Not surprisingly, a person who has had property taken is often eager to get it back as soon as possible.

For the seizure of conveyances, the statute provides for expedited resolution of claims. [FN3] For other property, claimants theoretically have several avenues for quick resolution of claims. For example, the United States Supreme Court has said that an equitable suit to compel the government to commence forfeiture proceedings or return property may be appropriate to get the ball rolling. [FN4] Or, an anxious claimant may attempt to invoke jurisdiction under Rule 41 of the Federal Rules of Criminal Procedure before administrative proceedings begin. [FN5] Some cases hold (and the government invariably argues) that Rule 41 jurisdiction is not permissible before administrative forfeiture proceedings begin. [FN6] Because of these obstacles, it is probably best to wait patiently for the government to begin forfeiture proceedings, keeping in mind that undue delay constitutes a defense. [FN7]

Sooner or later, the government will issue notice that it seeks forfeiture. Notice comes in two forms: First, after seizing property the Department of Justice notifies a potential claimant by certified mail; second, the government publishes a list of property for which it seeks forfeiture every Wednesday in *USA Today*. Seizure notices are published for three consecutive Wednesdays.

Once the government gives notice that proceedings have begun, the claimant must move quickly to preserve his or her rights. As is more fully described below, the claimant has a limited time to respond to the notice. The DEA strictly enforces the deadlines and noncompliance results in automatic forfeiture, regardless of the merits of a defense. There is no guarantee that the mail notice will reach a claimant before publication notice in *USA Today*. To be on the safe side, a party who has had property seized should faithfully scan the Wednesday *USA Today* to

avoid missing essential deadlines.

B. Petitions for Remission

After receiving notice, claimants have two options. First, they can file a petition for remission and mitigation with the office of DEA Chief Counsel in Washington, D.C. The petition must be filed within 30 days after notice - late petitions will be denied. In fact, few remission petitions are worth the price of postage. Lawyers for DEA rule on the petitions and usually side with the government, and their decision is not subject to judicial review. [FN8] Those who nonetheless chose to file remission petitions must follow certain guidelines, which are set forth in 28 CFR section 9.1-9.7. In a nutshell, petitioners must establish that they

- a. have a good faith interest in the seized property;
- b. lack knowledge or any *reason to believe* that the property was or would be used illegally;
- c. took all reasonable steps to ensure that the property would not be used illegally;
- d. lack a criminal record or reputation.

In addition, the petitioner (not the attorney) must personally swear to the petition. Noncompliance with any one of these guidelines can result in the DEA denying the remission petition without even considering its merits.

C. Procedures to Compel Forfeiture Suits

The second option is initiating procedures to compel the United States Attorneys Office to file a civil forfeiture lawsuit in federal district court. To do this, the claimant must file a claim of ownership and a cost bond within 20 days after publication of notice. The bond, which must be a certified or cashier's check, is 10 percent of the value of the targeted property up to a \$5,000 maximum and is returned after the forfeiture proceedings if the claimant prevails.

Indigent claimants may apply to proceed in forma pauperis. The application should follow the format of the pauperis declaration shown in Form 4 in the Appendix of Forms following Rule 48 of the Federal Rules of Appellate Procedure. A claim of ownership must be filed along with the bond or indigence petition. The party making the claim, not the attorney, must sign the claim. The bond and claim are filed with the DEA Chief *182 Counsel's Office in Washington, D.C. Again, deadlines are critical when filing a claim seeking institution of a lawsuit. A late cost bond or pauperis application will be rejected and the claimant will have no recourse to the judicial forum.

Finally, use certified mail when filing claims or remission petitions with the DEA Chief Counsel's Office. That way, the DEA cannot claim that it did not receive the correspondence.

III. Civil Forfeiture Proceedings - A Step-by-Step Review

Not all cases involve administrative proceedings before a lawsuit is filed. For real property, the government will bypass the administrative route and file a complaint against the property in the district court. In such a case, a cost bond is not required.

Proceedings against real property typically come in one of two forms. First, for large scale drug dealers who have allegedly purchased real property with drug money and/or used the property for controlled substance violations, the government will obtain an ex parte warrant of seizure and monition from a judge. This warrant, similar to a search warrant, is based on a civil complaint seeking

forfeiture of the property. If the judge issues the warrant, the government will take custody of the property (resulting footage of federal marshals using sledge hammers to break down doors often find its way onto TV).

Second, and more often, the government will seek forfeiture of real property based on claims that narcotics have been sold on premises. In the case of a home, the government will often let the claimant or his family reside there until the forfeiture case is resolved, but require payment of rent or mortgage and the execution of an agreement to maintain the property.

During the course of an arrest or execution of a search warrant, police may seize currency or property valued over \$100,000. In such cases, as we have noted, the administrative route is bypassed and a forfeiture suit is filed in the district court. Again, the claimant need not post a cost bond or claim with the DEA, but must perfect his or her claim in the district court.

Forfeiture proceedings in the district court are civil in nature. Exercising in rem jurisdiction, the government sues the property itself. Thus, the property is the defendant and the owner must intervene in the action by filing a claim. (Federal law also contains criminal forfeiture provisions where jurisdiction is in personam; such forfeiture allegations accompany RICO or criminal drug indictments. This breed of forfeiture will be discussed more fully below.)

Arcane rules - the Supplemental Rules for Certain Admiralty and Maritime Claims - govern civil forfeiture cases. The admiralty rules can be found in the back of the Federal Rules of Civil Procedure. The FRCP also apply to civil forfeiture cases unless inconsistent with the admiralty rules. [FN9] Counsel also should be aware of 21 USC section 881 et seq, which set forth procedures applicable in civil forfeiture cases.

Once a civil forfeiture complaint is filed in the district court, the claimant must move quickly. Within 10 days of publication of notice, an individual seeking return of the property must file a verified claim. Missing this deadline can result in fatal default, although the district court has discretion to extend the time for filing a verified claim. [FN10]

A claim is not an overly complex document; basically, it must allege the claimant's interest in the property sought to be returned. To be a claimant, one need not be the owner of the property, but must at least have a possessory interest. [FN11] The claim must be verified under oath by either the claimant or the claimant's attorney. [FN12] If an attorney verifies the claim, the claim must state that counsel is duly authorized to make the claim. [FN13] Failure to submit a sworn claim can result in dismissal with prejudice. [FN14]

Within 20 days after the filing of a claim, the claimant must answer the complaint by either affirming, denying, professing lack of information (a fair response to allegations based on unconfirmed hearsay or unidentified informants) or pleading the privilege against self-incrimination. While a claimant concerned about collateral criminal proceedings is put in a difficult predicament, he or she should avoid pleading the Fifth Amendment if possible, since it could result in dismissal or an adverse inference down the road. [FN15] A claimant also should plead any affirmative defenses in the answer.

A jury demand, if applicable, should be made when answering the complaint. Under the Seventh Amendment, a claimant is entitled to a jury trial in forfeiture cases if the defendant property has been seized on land. [FN16] If property has been seized on water, the right to a jury trial does not apply.

In the time for answering, a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure can be filed. Several attacks may be possible

here. At the outset, note that the liberal pleading rules contained in ***183** the Federal Rules of Civil Procedure *do not* apply in civil forfeiture cases. [FN17] Rather, Admiralty Rule E(2)(a) establishes the standard by which the sufficiency of forfeiture complaints must be measured. This rule rejects the concept of simple notice pleading, stating that a complaint in an in rem action shall state the circumstances from which the claim arises with such particularity that the defendant or claimant will be able, without moving for a more definite statement, to begin an investigation of the facts and to frame a responsive pleading.

Given this standard, a motion to dismiss should succeed if a complaint lacks sufficient factual allegations. [FN18] However, winning a motion to dismiss on these grounds has a down-side. The government can file an amended complaint with more detailed allegations, requiring the claimant to file an answer to these allegations.

In addition, a complaint also may be attacked on the grounds that it has failed to comply with one of the technical provisions of Admiralty Rule C(2).

Some courts also have recognized a due process problem in the civil forfeiture statute. The government typically seizes property by obtaining, *ex parte*, a warrant of seizure and monition. [FN19] However, under the due process clause, an individual is typically entitled to a hearing *before* the seizure of property. [FN20] Thus, it has been recognized that seizing property by virtue of an *ex parte* monition warrant violates the Due Process Clause. [FN21] If this defense is raised, the victory may be hollow, since the government can simply refile its complaint. [FN22] However, if incriminating evidence is seized during execution of the monition warrant, the appropriate remedy may be suppression.

A complaint should be scrutinized for probable cause. If, accepted as true, the allegations in the government's complaint do not state probable cause for forfeiture, a motion to dismiss will lie. Probable cause in the forfeiture context is similar to probable cause in the Fourth Amendment context. [FN23] Thus, criminal defense lawyers can resort to traditional lack of probable cause arguments in attacking a forfeiture complaint.

Next, discovery begins. In theory, both sides can use the discovery tools set forth in the federal rules of civil ***184** procedure - interrogatories, depositions, requests to admit and so on. However, from the government's perspective, discovery may threaten to undermine pending investigations, force a show of hand in a related criminal case, or be one-sided if the claimant invokes the Fifth Amendment privilege. Likewise, a claimant may resist submitting to discovery because of the risk of incrimination. Thus, both sides may want to forgo discovery, if possible.

However, a claimant may resist the government's motion to stay discovery by requiring the government to show a "compelling need" for a stay. [FN24] The government may move to stay discovery pursuant to 21 USC section 881(i). Such a motion can be filed when a criminal case is pending. While section 881(i) does not grant the claimant a motion to stay discovery, the claimant may pursue such a motion on the basis of Rule 26(c) of the Federal Rules of Civil Procedure. If discovery is not stayed, counsel should keep the Fifth Amendment in mind if discovery response will incriminate the claimant. Again, invoking the privilege against self-incrimination may have unfavorable side-effects. [FN25]

As in any other civil case, a motion for summary judgment is available and should be used when there is no genuine issue of material fact on a dispositive issue.

The United States Supreme Court has held that the exclusionary rule applies in

forfeiture cases. [FN26] Thus, unlike other civil cases, a claimant may file a motion to suppress. However, the admiralty rules, code of civil procedure, and forfeiture statute do not set forth explicit procedural requirements for filing a motion to suppress. Still, a claimant can allege that his or her Fourth Amendment rights were violated in a motion to dismiss (in which all the allegations of the forfeiture complaint are accepted as true), as a part of a summary judgment motion, or in a separate motion to suppress which can be said to derive from the Fourth Amendment. [FN27] A motion to suppress, of course, may require the court to conduct an evidentiary hearing.

Also, Admiralty Rule E4(f) provides a basis upon which a claimant may make a motion for return of property. [FN28] Under this provision, claimants are entitled to a prompt hearing in which they will be required to show why seized property should not be released.

In addition to the foregoing legal challenges, counsel should also be aware of the various defenses available in forfeiture cases. Most frequently invoked is the innocent owner defense, usually where a joint owner of targeted property had nothing to do with the acts giving rise to forfeiture. In such a case, the innocent owner should retain his or her interest in the property.

The innocent owner defense has its origin in statute, as well as the Due Process Clause. The constitutional aspect of the innocent owner defense derives from the Supreme Court's opinion in *Calero-Toledo v Pearson Yacht Leasing Co.* [FN29] There, the Court stated as follows:

[I]t would be difficult to reject the constitutional claim of an owner... who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property. [FN30]

The civil forfeiture statute also contains an innocent owner defense. [FN31] The statutory innocent owner defense is more liberal than the constitutional one. Under statute, innocent owners must show that they did not know of or consent to the act giving rise to forfeiture. Unlike the constitutional defense, the statutory defense does not expressly require claimants to prove they had done all that they reasonably could to prevent the criminal use of their property.

Another available defense stems from the United States Supreme Court's decision in *United States v \$8,850*. [FN32] In that case, the court stated that as a matter of due process, a claimant could prevail if the government unduly delayed the institution of forfeiture proceedings. In this context, the court adopted the Sixth Amendment speedy trial test enunciated in *Barker v Wingo*. [FN33] This test involves balancing the following factors: the length of and reasons for the delay, the claimant's demand for a hearing, and the prejudice to the claimant caused by the delay. If the weight favors the claimant, then he or she is entitled to favorable judgment. However, under the facts in *\$8,850*, the Court found the 18 month delay reasonable and sided with the government.

Other defenses are available, but less frequently invoked. For instance, a common carrier whose property was used illegally has a defense to forfeiture. Also, if property was used illegally while in the possession of someone who stole it, a defense to forfeiture lies.

This discussion should be a basic guide for handling a federal civil forfeiture case. Such cases rarely go to trial; more often, they are resolved through a dispositive pretrial motion, settled, or abandoned by the claimant. But to get to that point, counsel must ***185** have perfected his or her client's claim.

IV. Criminal Forfeiture

Forfeiture allegations can be tacked onto indictments charging violations of drug laws or RICO. These cases are easier to defend procedurally; counsel need not worry about meeting the filing requirements applicable in civil forfeiture proceedings and can remain silent in response to forfeiture allegations. The criminal forfeiture provisions applicable in drug cases appear in 21 USC section 853. The RICO forfeiture provisions are in 18 USC section 1963. These two statutes are nearly identical.

Criminal forfeiture is theoretically a penalty. Therefore, forfeiture allegations are not resolved until after a defendant has been found guilty in a criminal case. At that point, the jury will be asked to return to the jury room and decide whether the property named in the indictment should be forfeited.

Three criminal forfeiture provisions are especially noteworthy. First, the government, pursuant to statute, can apply for a court order allowing seizure or restraint of targeted assets prior to trial. Second, the attorney general has authority to grant remission petitions or settle forfeiture claims. Third, the government can seek forfeiture of substitute property. In other words, if property targeted for forfeiture cannot be located, has been sold to a third party, has substantially diminished in value, or has been commingled and cannot be divided without difficulty, the court can order forfeiture of substitute property belonging to the defendant. Interestingly, the substitute assets remedy is not available under civil forfeiture provisions since such complaints are in rem in nature.

Finally, counsel should know the procedures that a third party must follow in criminal forfeiture cases to preserve a claim to forfeited property. After forfeiture but within 30 days after publication of notice or receipt of written notice, a third party may petition the court to adjudicate the validity of his or her interest in the property. The petition must be under oath, setting forth the nature of the petitioner's interest in the property and the time and circumstances regarding the acquisition of that interest, and including any additional facts and the relief sought.

After a petition has been filed, the court should conduct an evidentiary hearing within 30 days. Under the terms of the statutes, the petitioner is not entitled to a jury trial. At the hearing, the petitioner bears a preponderance burden of proof. To prevail, petitioners must show that 1) their claim of right is superior to the defendant's and was established prior to the act giving rise to forfeiture, or 2) they are a bona fide purchaser without cause to believe that the property was subject to forfeiture at the time of purchase.

V. Conclusion

With the onset of the war on drugs, forfeiture cases become more frequent. While the forfeiture laws are murky, criminal practitioners must have a working knowledge of the nuances involved in forfeiture cases. The foregoing discussion should be a useful guide. [FN34]

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[FN1]. See Anton R. Valukas and Thomas P. Walsh, *Forfeitures: When Uncle Sam Says You Can't Take It With You*, Litigation (Winter 1988).

[FN2]. Cf *United States v \$38,600*, 784 F2d 694 (5th Cir 1986), *United States v One Residence and Attached Garage*, 603 F2d 1231 (7th Cir 1979) (Bauer, J.), *People ex rel Daley v \$53,263.00*, 159 Ill App 3d 114, 512 NE2d 740, 745 (1st D 1987).

[FN3]. See 21 USC § 881-1.

[FN4]. *United States v \$8,850*, 461 US 555, 569 (1983).

[FN5]. See *id*; *Floyd v United States*, 860 F2d 999 (10th Cir 1988). Rule 41 was recently amended so that it no longer require the movant to show that he or she has been aggrieved by an illegal search or seizure.

[FN6]. See, e.g., *In re Seizure Warrant*, 830 F2d 372 (D.C. Cir 1987).

[FN7]. See *United States v \$8,850*, 461 US 555 (1983).

[FN8]. See, e.g., *United States v \$2,857*, 754 F2d 208 (7th Cir 1985).

[FN9]. Supp Rules Admiralty and Marit Claims, Rule A.

[FN10]. *United States v U.S. Currency In The Amount Of \$103,387.27*, 863 F2d 555, 561 (7th Cir 1988).

[FN11]. Supp Rules Admiralty and Marit Claims, Rule C(6), advisory committee note.

[FN12]. *Id*, Rule C(6).

[FN13]. *Id*.

[FN14]. See *United States v \$2,857*, 754 F2d 208 (7th Cir 1985). See also *United States v U.S. Currency In The Amount Of \$103,387.27*, 863 F2d 555, 559-60.

[FN15]. See *United States v 15824 W. 43rd St., Lockport, Ill.*, - F Supp. -, 1990 WL 59794 (ND Ill 1990) (granting government's motion for judgment on the pleadings in a money laundering forfeiture case where the claimant invoked the Fifth Amendment privilege against self-incrimination in her answer).

[FN16]. *C.J. Hendry Co. v Moore*, 318 US 133 (1943); *United States v One 1976 Mercedes Benz 280S*, 618 F2d 453 (7th Cir 1980).

[FN17]. *United States v \$39,000 in Canadian Currency*, 801 F2d 1210, 1216 (10th Cir 1986).

[FN18]. See, e.g., United States v \$38,000.00 in U.S. Currency, 816 F2d 1538 (11th Cir 1987); United States v \$39,000 in Canadian Currency, 801 F2d 1210, 1216 (10th Cir 1986); United States v One 1980 Ford Mustang, 648 F Supp 1305 (ND Ind 1986); United States v Banco Cafetero Intern., 608 F Supp 1394 (SD NY 1985).

[FN19]. At one time the government obtained such warrants from court clerks. Some courts decreed that the practice violates the Fourth Amendment. See, e.g., United States v \$128,035, 628 F Supp 668 (SD Ohio 1986), appeal dismissed, 806 F2d 262 (6th Cir 1986); Application of Kingsley, 614 F Supp 219 (D Mass 1985); United States v One Parcel of Land Commonly Known as 4204 Cederwood, Matteson, Ill., 1986 WL 12816 (1986). Thus, the government now seeks ex parte warrants from judicial officers.

[FN20]. E.g., Fuentes v Shevin, 407 US 67 (1971).

[FN21]. E.g., United States v Premises and Real Property at 4492 S. Livonia Rd., 889 F2d 1258 (1989). United States v 124 E. North Ave., Lake Forest, Ill., 651 F Supp 1350 (ND Ill 1987).

[FN22]. Id.

[FN23]. United States v One 1975 Mercedes 280S, 590 F2d 196, 199 (6th Cir 1978).

[FN24]. See United States v One Parcel of Real Estate Located at 12525 Palm Rd., North Miami, Dade Cty., Fla., 731 F Supp 1057 (SD Fla 1990).

[FN25]. One court has suggested that in the advent of Fifth Amendment invocation, an adverse inference applies at trial. United States v One Assortment of 25 Firearms, 483 F Supp 16 (ED Tenn 1979). Cf Baxter v Palimigano, 425 US 308 (1976). However, another court has disallowed the government's request for jury instruction, stating that an adverse inference could be drawn from the claimant's failure to testify. See United States v \$2,500, 689 F2d 10 (2d Cir 1982).

[FN26]. One 1958 Plymouth Sedan v Pennsylvania, 380 US 693 (1965).

[FN27]. United States v One Parcel of Land, 671 F Supp 544, 545 (ND Ill 1987).

[FN28]. Id.

[FN29]. 416 US 663 (1974).

[FN30]. Id at 688.

[FN31]. See 21 USC §§ 881(a)(4)(A) and 881(a)(7).

[FN32]. 461 US 555 (1983).

[FN33]. 407 US 514 (1972).

[FN34]. For more comprehensive treatment, see D. Smith, *The Prosecution and Defense of Forfeiture Cases* (Matthew Bender 1985).

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