

# Federal *Forfeiture* Guide

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## District Court Highlights:

Third Circuit orders seized coins returned to claimant, because nonjudicial civil forfeiture proceeding is commenced when the government seizes property and thus claimant had the right to submit a seized asset claim after the seizure, which triggered the government's obligation to bring a judicial civil forfeiture proceeding or to return the property within 90 days.

Seventh Circuit holds that defendant funds were seized and arrested for forfeiture by United States and not "blocked" under Terrorism Risk Insurance Act and thus Claimants could not attach the funds to satisfy their judgment against al Qaeda.

North Carolina district court awards EAJA attorney fees in criminal forfeiture ancillary proceeding, although fees were not enhanced based on market rates but only for cost of living.

California district court denies motion to strike because claimant's responses to special interrogatories were sufficient.

Kentucky district court orders government to pay interest on funds ordered returned after criminal forfeiture ancillary proceeding.

## Administrative Forfeitures, Notice of Seizure and Intent to Forfeit; Timeliness, Government

Third Circuit orders seized coins returned to claimant, because nonjudicial civil forfeiture proceeding is commenced when the government seizes property and thus claimant had the right to submit a seized asset claim after the seizure, which triggered the government's obligation to bring a judicial civil forfeiture proceeding or to return the property within 90 days. (210, 350) Langbord discovered ten 1933 double eagle gold coins in a safe deposit box originally belonging to her deceased father. Several decades earlier, the Secret Service suspected that her father, an antique dealer in Philadelphia, and George McCann, a former Philadelphia Mint cashier, unlawfully smuggled 1933 double eagles out of the Philadelphia Mint. Langbord's counsel informed the Mint about the Double Eagles and made them available to the government for the sole purpose of authentication. The

agencies involved – the U.S. Attorney's Office for the District of Columbia, the Secret Service, the U.S. Department of the Treasury, and the Mint – met to discuss how to proceed, and the agencies involved were in favor of pursuing forfeiture, while the Mint asserted that the coins were government property and should be returned to it without the need for forfeiture. Treasury sided with the Mint, deciding not to institute a judicial civil forfeiture proceeding. When the Langbords' counsel requested return of the coins, the Mint refused. In response, the Langbords' counsel submitted a "seized asset claim" on September 9, 2005, demanding the return of the Double Eagles or the institution of a judicial civil forfeiture proceeding. The claim starts the process whereby the government must either institute a judicial civil forfeiture proceeding or return the seized property. Nevertheless, the Mint returned the claim and stated there was no basis for the government to initiate forfeiture proceedings on property to which the United States holds title. The Langbords then instituted this civil action and the parties cross-moved for summary judgment. The district court ruled in favor of the government, holding that CAFRA's 90-day deadline in 18 U.S.C. §983(a)(3) did not apply because it applies only to nonjudicial civil forfeitures and no such forfeiture had occurred here. It reasoned that a "non-judicial civil forfeiture is commenced when the government sends notice of the forfeiture proceeding to potential claimants, but the government never sent Langbord such a notice, and thus the government never began an administrative forfeiture proceeding so that the 90-day deadline did not apply. The court did find, however, that the government had violated Langbord's Fourth Amendment right against unreasonable seizures and Fifth Amendment due process right, and that the remedy was for the government either to return the coins or to institute a judicial civil forfeiture proceeding. The government filed a forfeiture complaint, and after a trial the jury returned a verdict for the government. The Court of Appeals reversed, holding that the government was required either to file a judicial civil forfeiture complaint or to return the Double Eagles within 90 days of receipt of Langbord's seized asset claim, and that because the government failed to do so, Langbord was entitled to the return of the coins. Langbord had a possessory right that was preserved in writing when she turned the Double Eagles over for authentication. Even if the Double Eagles ultimately were stolen government property, the government's seizure of them was unconstitutional. Moreover, the government cannot unilaterally ignore a seized asset claim. Instead, it must either return the seized property or file a complaint in court to seek forfeiture of the seized property within 90 days of receipt of the seized asset claim. The District Court incorrectly reasoned that

the seized asset claim and 90-day provisions are activated only if written notice is sent under §983(a)(1). This was incorrect. The government erred in urging that, when notice of forfeiture is either not required or not given within 60 days of a seizure, that insulates it from its obligation to act within 90 days of receiving a seized asset claim. Instead, §983(a)(2) and (a)(3) act independently from §983(a)(1): whether notice has been sent has nothing to do with the government's duty to respond to a seized asset claim. Here, the government's seizure of the property was rightfully considered a nonjudicial civil forfeiture proceeding. It is when the agency "seizes property" that the "administrative forfeiture begins." Because a nonjudicial civil forfeiture proceeding occurred when the government seized the coins, Langbord had the right to submit a seized asset claim, which triggered the government's obligation to bring a judicial civil forfeiture proceeding or to return the property within 90 days. The frivolity of the government's position that a proceeding is initiated only when the government sends notice was demonstrated by the fact that it would afford the government total discretion to avoid CAFRA altogether by unilaterally deciding not to notify the putative owner of the seizure. *Langbord v. U.S. Dep't of the Treasury*, 2015 WL 1741451 (3d Cir. 2015)(Apr. 17, 2015).

## **Standing of Claimant, Generally**

**Seventh Circuit holds that defendant funds were seized and arrested for forfeiture by United States and not "blocked" under Terrorism Risk Insurance Act and thus Claimants could not attach the funds to satisfy their judgment against al Qaeda. (320)** As a result of the events of September 11, 2001, Congress passed the Terrorism Risk Insurance Act ("TRIA") of 2002, a sweeping statute that authorizes execution on blocked assets that are seized or frozen by the United States, in satisfaction of judgments against terrorists. The United States filed a civil forfeiture complaint in the Northern District of Illinois against al Tayyeb's blocked bank account funds. After learning of al Qaeda's ties to the defendant funds, claims were filed by insurance companies who paid more than \$2.5 billion in property-damage and business-interruption claims following the September 11 attacks. They cited as their interest a "default judgment as to liability" award issued in their favor (and against al Qaeda) by the Southern District of New York. The initial claimed interest rested on tenuous ground, since the judgment did not state the amount of damages. It was not until January 25, 2012, when the Clerk of Court entered final judgment in the amount of \$9,351,247,959.99. After the claims were filed but before the claimants registered their final judgment against al Qaeda in the Southern District of New York, the United States moved to strike their claims and answers in the Northern District of Illinois. The court initially held the claimants lacked the requisite ownership and legal interest in the funds because their judgment against al Qaeda was not final and because they were general unsecured creditors, so they lacked statutory and prudential standing. As a result, the claimants quickly served on the U.S. Marshals Service a citation to discover assets, and the district court issued a writ of execution. Recognizing the changed

circumstances (their lien), the court allowed Claimants to amend their claims and then found they possessed statutory and prudential standing. On appeal, the Court held that under the circumstances of the case the district court acted within its discretion when it allowed Claimants to amend their claims. However, Claimants did not acquire an ownership interest in the defendant funds until well after al Tayyeb's deposits of the funds into his account ceased. Moreover, Claimants did not purchase or sell anything, and thus were not bonafide purchasers for value. The civil forfeiture statute does not contemplate that kind of relief. Nevertheless, TRIA's broad language supersedes the innocent ownership requirement of civil forfeiture. Otherwise, once the United States commences a forfeiture action, it is impossible for qualified albeit unrelated victims of terror (here, the insurance companies) to comply with civil forfeiture's innocent owner requirement *and*, at the same time, execute against the blocked funds. Thus, the district court correctly relied on TRIA in finding that Claimants could proceed with their claims notwithstanding the conflicting provisions of civil forfeiture. Forfeiture's standing requirements cannot overcome TRIA's sweeping mechanism for recovery. But the Court found the funds had been arrested for the forfeiture action and no longer were blocked (as required by TRIA), so Claimants could not proceed under that statute. Without any waiver of sovereign immunity, Claimants could not attach the defendant funds, seized and held by the United States, to satisfy their judgment against al Qaeda. Consequently, the victims of al Qaeda could use only the remission process to submit claims for relief. Although the result may have seemed unfair, it was the only permissible reading under the statute. *United States v. All Funds on Deposit with R.J. O'Brien & Associates*, 2015 WL 1476044 (7th Cir. 2015)(Apr. 2, 2015).

## **Third-party Claims and Ancillary Proceedings, Generally; Attorneys' Fees, Reimbursement by Government**

**North Carolina district court awards EAJA attorney fees in criminal forfeiture ancillary proceeding, although fees were not enhanced based on market rates but only for cost of living. (590, 870)** Following the entry of final orders for forfeiture in the criminal case, Petitioners filed motions for attorneys' fees under the Equal Access to Justice Act ("EAJA"), which the Government opposed. The court held that although the EAJA is directed to "civil actions," the Fourth Circuit previously has applied the statute in the context of a criminal forfeiture ancillary proceeding. As the Supreme Court recognized, the specific purpose of the EAJA is to eliminate for the average person the financial disincentive to challenge unreasonable governmental actions. By expressly authorizing the award of attorneys' fees, Congress sought to eliminate the barriers that prohibit small businesses and individuals from securing vindication of their rights in civil actions and administrative proceedings brought by or against the Federal Government. The government also objected to any fee award

based on an hourly rate in excess of \$125 per hour, citing 28 U.S.C. §2412(d)(2)(A)(ii), which provides for an hourly rate with \$125 with “limited exceptions.” The court held the government’s objections were so conclusory as to warrant summary treatment, and increased the hourly rate based on the cost of living increases, although not to the market rate since there was not a limited number of qualified attorneys available to litigate the Petitioners’ claims. The exception for “limited availability of qualified attorneys for the proceedings involved” must refer to attorneys “qualified for the proceedings” in some specialized sense, rather than just in their general legal competence. It refers to attorneys having some distinctive knowledge or specialized skill needful for the litigation in question—as opposed to an extraordinary level of the general lawyerly knowledge and ability useful in all litigation. While the claims at issue required a degree of familiarity and competence in state property law as well as federal forfeiture law, there was nothing that required some distinctive knowledge or specialized skill needful for the litigation. *United States v. Bailey*, 2015 WL 1893610 (W.D.N.C. 2015)(Apr. 27, 2015).

## Discovery

**California district court denies motion to strike because claimant’s responses to special interrogatories were sufficient. (370)** The government moved to strike claimant Figueroa’s verified claim and answer in a civil forfeiture action involving \$209,815 in cash seized from his luggage during a consensual encounter with Drug Enforcement Agency agents at San Francisco International Airport. The government argued Figueroa repeatedly failed to provide sufficient responses to special interrogatories authorized by Supplemental Rule for Admiralty or Maritime Claims and Asset Forfeiture Actions G(6). The court ordered Figueroa to supplement his answers to the government’s special interrogatories on three occasions. Figueroa argued his supplemented responses were sufficient. Special interrogatories are intended to aid the Government in ferreting out unmeritorious or fraudulent claims. The special interrogatories here probed, among other things, how and from whom Figueroa acquired the \$209,815, the facts and records supporting his claim of lawful ownership of the money, and the identities and contact information of individuals with knowledge of Figueroa’s interest in the money. The court rejected Figueroa’s initial contentions that the special interrogatories exceeded the scope permitted by Supplemental Rule G(6), and that because Figueroa’s responses and verified claim were sufficient to show his standing, they were no longer necessary as to him. In a subsequent order, the court found that Figueroa’s answers to three of the ten special interrogatories remained insufficient (asking him to identify documents supporting his claim, a list of sources from which the currency was derived with dates, amounts, and the identity of individual sources, and the identity of individuals he knew or believed had information relevant to his claim and a summary of what information they might have). Rather than supplement his answers for a fourth

time, Figueroa filed a motion to stay his obligation to supplement his answers and certify an interlocutory appeal to the Ninth Circuit under 28 U.S.C. 1292(b). The court refused. Figueroa eventually provided supplemental answers to the three remaining interrogatories, but the government again moved to strike his claim and answer. The court found that Figueroa fully answered the government’s special interrogatories. He stated he did not have any further documents to provide or specifically identify at the time, while still leaving open the possibility that he might be able to obtain invoices from work he performed. Figueroa’s response made clear he did not have further documents to identify, and “a reasonable effort,” not “extensive research” is all that is required to adequately respond to interrogatories. Moreover, to the extent Figueroa was in possession of responsive documents not listed or later came into possession of such relevant materials, he would have a duty to supplement his earlier responses. As for the sources and exact amounts of the currency he obtained from each source, including dates, and the names and contact information for individuals from whom the amounts were derived, his latest answers provided a list of five individuals or organizations for which he performed paid work along with their contact information and the ranges for various services he performed. This was sufficient. Given that Figueroa seemed to have not kept exacting records, the court found the burden of requiring more exacting answers outweighed the likely benefit at this stage of proceedings. Finally, as for the identity of individuals having information relating to his claim over the currency and a description of the information they have, Figueroa identified his father and two individuals from an organization with which he worked. Aside from these, Figueroa said he did not believe any other person had information pertaining to his interest. Accordingly, the court denied the government’s motion. *United States v. \$209,815 in United States Currency*, 2015 WL 1927431 (N.D. Cal. 2015)(Apr. 28, 2015).

## Third-party Claims and Ancillary Proceedings, Generally; Liability of Government, Its Agents and Attorneys, Generally

**Kentucky district court orders government to pay interest on funds ordered returned after criminal forfeiture ancillary proceeding. (590, 860)** After a jury trial, defendants Bryan Coffman and Gary Milby were found guilty of mail fraud, wire fraud, securities fraud, and money laundering. Megan Coffman, Bryan’s wife, was also charged but acquitted of all charges. At trial and in the forfeiture proceedings, the government proved that the proceeds derived from the fraud were at least \$33 million. The court entered a preliminary order of forfeiture determining that all of the funds in 13 financial accounts were subject to forfeiture because they were involved in or facilitated money laundering. After third parties moved for an ancillary hearing under 21 U.S.C. §853(n) asserting a right to some of the

forfeitable property, the court determined that it should amend the preliminary order of forfeiture to omit \$30,046.51 and \$259,000 from the petitioner's two bank accounts and ordered the government to release those funds. The petitioner then asserted it was entitled to pre- and post-judgment interest on those amounts, which the government opposed. As support for its argument, the petitioner cited two provisions of the Civil Asset Forfeiture Reform Act ("CAFRA"), 28 U.S.C. §2465(b)(1)(B) and (C), which entitle claimants to interest on seized funds "in any civil proceeding to forfeit property ... in which the claimant substantially prevails. In a previous opinion in the case, the court agreed with the Eighth Circuit that it was unclear whether a §853(n) proceeding is either a "civil proceeding" or a "proceeding to forfeit property" as required under §2465(b)(1). Accordingly, the court did not permit an award of attorney's fees to another claimant in this case because such an award against the government required a "clear and unequivocal" waiver of sovereign immunity. As with attorney's fees, "interest cannot be recovered in a suit against the government without an express waiver of sovereign immunity from an award of interest." But in another case the Sixth Circuit determined that the government can be required to pay interest on seized funds to a successful §853(n) claimant even if there is no waiver of sovereign immunity because requiring the government to pay the successful claimant interest on wrongfully seized funds is not the same as assessing "pre-judgment" interest against the government. The court said the government obtained tangible and calculable financial benefit from the retention of the seized funds, which is constructively part of the *res*, and that monetary amount must also be returned as an aspect of the seized *res*. Although the Sixth Circuit case was decided before CAFRA was enacted, it remains good law. Also, in a post-CAFRA opinion, the Ninth Circuit explicitly rejected the argument that CAFRA supplanted all pre-CAFRA forfeiture law. Thus, the petitioner was entitled to all the interest the government actually or constructively earned on the seized funds while they were in the government's possession. The interest earned simply was part of the *res* that must be returned. *United States v. Coffman*, 2015 WL 1737395 (E.D. Ky. 2015)(Apr. 16, 2015).

*United States v. \$209,815 in United States Currency*, 2015 WL 1927431 (N.D. Cal. 2015)(Apr. 28, 2015).

*United States v. Coffman*, 2015 WL 1737395 (E.D. Ky. 2015)(Apr. 16, 2015).

## **This Issue**

210, 320, 350, 370, 590, 860, 870

## **Table of Cases**

*Langbord v. U.S. Dep't of the Treasury*, 2015 WL 1741451 (3d Cir. 2015)(Apr. 17, 2015).

*United States v. All Funds on Deposit with R.J. O'Brien & Associates*, 2015 WL 1476044 (7th Cir. 2015)(Apr. 2, 2015).

*United States v. Bailey*, 2015 WL 1893610 (W.D.N.C. 2015)(Apr. 27, 2015).