Federal Forfeiture Guide

By Eric Honig, Attorney at Law

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District Court Highlights:

Second Circuit holds that although 18 U.S.C. §982(a) does not permit a defendant to offset loan proceeds that were repaid, since the government failed to invoke an applicable forfeiture provision in one count of the indictment, and failed to correct that error prior to entry of a final judgment, forfeiture was limited to that authorized by §981(a)(1)(c), which entitles her to offset the amount of the loan she repaid at no loss to the bank.

Fourth Circuit holds that district court must order forfeiture, and cannot withhold forfeiture based on equitable considerations such as the defendant's lack of assets.

Eighth Circuit reverses order striking claim to portion of currency because Claimant stated a colorable "ownership interest," but it affirms order to strike as to other currency since bailor was not identified.

Maryland district court vacates default judgment of forfeiture because incarcerated claimant reasonably appeared to be a person entitled to direct written notice of proceedings, and prior oral conversation with agents was not sufficient notice.

Vermont district court holds that sovereign immunity bars claims for seized currency pursuant to Rule 41(g) where the government has already disbursed the funds, and refuses to find claimant constructively knew of forfeiture proceedings when both state and local authorities were involved in seizure.

West Virginia district court sets aside clerk's second entry of default against defendant property where court did not set deadline for filing claim after first default set aside, and Claimant indicated a meritorious defense, prompt action, and no prejudice to government.

Attorneys' Fees, Reimbursement by Government

Ninth Circuit holds that because the criminal defendant repaid a loan to the prevailing claimant in the related civil forfeiture action and was her successor in interest, he stood in her shoes for the purpose of collecting an award for the attorney fees she incurred in that action. (870) Grossi and Weimer appealed from the district court's order denying their motion for attorneys' fees under the Civil Asset Forfeiture Reform Act, 28 U.S.C. §2465. The court held that the government that Weimer was not entitled to an attorney fee award because she did not "substantially prevail under CAFRA. Grossi, not the government or court order, provided Weimer with her relief by voluntarily repaying a loan she made to him to purchase the forfeited property. The district court denied Grossi's fees motion because CAFRA prohibits fee shifting in favor of a claimant whose property interest was determined to be subject to criminal forfeiture. However, after Grossi repaid Weimer, he was her successor in interest and stood in her shoes when he continued to pursue her interest from the government. That is why a prior panel of this court awarded Grossi $87,666 as reimbursement for "Weimer's interest," notwithstanding the plain statutory language that criminally forfeited property "shall not revert to the defendant" under 21 U.S.C. §853(h). Under the law of the case doctrine, the circuit court adopted the legal fiction that once Grossi repaid Weimer, and was her successor in interest and stood in her shoes, he was not statutorily precluded from recovering fees incurred in pursuing her interest. Instead, to the extent that Grossi, as Weimer's successor, substantially prevailed in a "civil proceeding to forfeit property," he was entitled to reasonable attorneys' fees and costs. The bulk of the litigation to recover Weimer's interest, however, did not take place in a civil proceeding to forfeit property, but rather, the civil forfeiture proceeding was stayed pending resolution of the criminal action. Subsequent to Grossi's criminal conviction, Weimer initiated ancillary proceedings under 21 U.S.C. §853(n). Section 853(n) proceedings are "civil proceeding[s] *to forfeit property*," and because §2465(b) constitutes a waiver of sovereign immunity, any ambiguity in whether a §853(n) proceeding to exclude property from forfeiture might constitute a proceeding to forfeit property under §2465(b) would be construed against Grossi. Thus, Grossi did not carry his burden of establishing that he was entitled to recover fees incurred in proceedings ancillary to his criminal conviction. As a result, the court said Grossi should be awarded only those fees incurred in pursuing Weimer's interest in the civil forfeiture action up to the point at which that action was stayed. Because Grossi did not acquire Weimer's interest until after the civil forfeiture action was stayed, he was entitled – again, as her successor in interest – to the fees that *she* incurred in that civil action. The court did not award Grossi the fees that he himself incurred in the underlying forfeiture proceedings, but only those fees that Weimer incurred as a claimant in the initial civil proceeding. Finally, Grossi also was entitled to that portion of the fees he reasonably incurred in pursuing civil forfeiture fees through his fees motion below and on appeal, since time spent in establishing the entitlement to

and amount of the fee is compensable. The court thus remanded to the district court to determine an appropriate fee award, and Grossi, but not Weimer, was awarded costs on appeal. *United States v. Grossi*, 2015 WL 3855297 (9th Cir. 2015)(June 23, 2015).

Fed. R. Crim. P. 41(e) Motions, Jurisdiction of District Court

North Carolina district court holds that even if defendant's Rule 41(g) motion was time-barred (although his claim ordinarily would accrue only after his criminal action concluded), it was moot in this case because all evidence seized had been either destroyed pursuant to court order, returned to its proper owner, or transferred for us in a murder prosecution. (615) Defendant was found guilty following a jury trial, which was affirmed on appeal. Defendant then moved for return of property seized from him under Rule 41(g) of the Rules of Criminal Procedure, which has a statute of limitations of six years after the right of action accrues. Defendant's cause of action accrued on the date his property was seized, which meant his motion was time-barred. Defendant contended, however, that the relevant date to begin the limitations period was the conclusion of his criminal proceeding. Although the general principle in a case of seizure and wrongful refusal to return property where no forfeiture proceeding had been instituted against the property is that the cause of action accrual date is when the plaintiff discovered or had reason to discover that he has suffered injury due to the government's actions, i.e., the conclusion of criminal proceedings against him, defendant's motion nevertheless was moot. The government submitted an agent's affidavit stating that all evidence seized had been either destroyed pursuant to court order, returned to its proper owner, or forwarded to the county sheriff's office for in its murder investigation against the defendant. Therefore, the evidence seized during the investigation of defendant was no longer in the custody or possession of the United States, and no relief was available under Rule 41(g). *United States v. Barefoot*, 2015 WL 3649786 (E.D.N.C. 2015)(June 11, 2015).

Summary Judgment; Fourth Amendment Issues

Nevada district court denies government motion for summary judgment because evidence was seized from the claimant without his consent to search. (390, 670) The Reno, Nevada Police Department conducted routine drug interdiction activities on a westbound Amtrak train that was stopped in Reno. After a search officers discovered the defendant currency. The government filed a complaint for forfeiture and then moved for summary judgment. It contended the claimant consented to a search; the claimant in turn claimed he was not aware that the plain-clothed individuals who requested to search were police officers, and that one of the individuals threatened him with a knife to obtain consent. Although the claimant was not in custody in the traditional sense, he was confined to a train compartment with the officer near the door, and the claimant testified that he did not feel free to leave. The government did not allege the claimant was read Miranda warnings, told that he had a right not to consent, or told that a search warrant could be obtained. Also, the officers did not take any steps to confirm the claimant consented to the search of his bag, i.e., he was not given a consent to search form and no officer other than the searching one was present during the claimant's questioning to confirm that the search was consensual. The court held that such corroborating evidence could refute genuine disputes of material fact, and the absence of such evidence contributed to the failure of proof in this case, and the government did not meet its burden to establish that the claimant freely consented to the search of his luggage. If he did not consent, or if consent was obtained by intimidation, then the court said it could not find in the government's favor on the currency seized as a result of the search, because defective consent would taint all evidence discovered based on said consent. The court held the claimant was entitled to judgment as a matter of law that he did not consent to the search of his luggage, and thus denied summary judgment. *United States v. $40,000.00 in U.S. Currency*, 2015 WL 3887129 (D. Nev. 2015)(June 24, 2015).

Maryland district court denies claimants' motion for summary judgment because Attorney General's Order prohibiting most adopted state seizures did not apply in this case because the adoption had occurred prior to the issuance of the AG Order. (310, 390) The Baltimore City Police Department seized $21,087,00 from the residence of Harmon and $32,965.10 from his bank accounts as the alleged proceeds of unlawful drug trafficking. At some point before December 3, 2014, the seized currency was turned over to the United States Drug Enforcement Administration in Maryland. The United States filed a complaint for forfeiture, and then Hannon filed a claim for all of the seized currency, and his mother, Smith, filed a claim for the bank funds. They then moved for summary judgment, asserting the government lacked the capacity to sue and the authority to sue in a representative capacity, in contravention of Federal Rule of Civil Procedure 9(a), based on a January 16, 2015 Order issued by Attorney General Eric H. Holder, Jr., which directed "all Department of Justice attorneys and components" to follow a new policy prohibiting "Federal adoption of property seized by state or local law enforcement under state law," except in certain circumstances not present here. Since the Order expressly stated that the policy applied prospectively to all federal adoptions, the government argued either it applied only to seizures occurring after January 16, 2015, or it did not apply to federally adopted forfeiture cases that were filed in court before the effective date of the Order. The currency was seized on May 29-30, 2014, and the action was commenced on December 3, 2014. The government thus argued that under either standard the case would fall outside the Order's ambit. Harmon and Smith argued that because the action was being litigated in

federal court, the federal government had not yet "adopted" the property seized by the state, so the Order applied. The court stated that whether the Order applied to the forfeiture action depended on when the federal government could be said to have adopted the state-seized property. Although the relevant statutes do not delineate when adoption is complete, the Fourth Circuit has stated that a federal agency "adopts seizures by state or local law enforcement officials when it takes custody of seized property and treats the properly as if it had made the initial seizure. The district court agreed that the federal adoption of state-seized property occurs when the federal government gains physical and decisional control over the property; the heart of the adoption process was the transfer of control from state to federal officials. Harmon and Smith's contrary proposal – that adoption is not complete as long as the forfeiture proceedings remain contested – would key adoption not to any transfer in control from state to federal government, but to the resolution of the dispute between the government and the claimants. Such an approach would be untenable because it would allow a federal forfeiture action to unfold without the federal government ever having officially gained control over the property at issue. Thus, the federal government's adoption of the state-seized property was complete more than a month before the Attorney General issued the Order on January 16, 2015 and the Order's prohibition on federal adoptions did not apply to this action, so summary judgment was denied. *United States v. $54,052.10 in U.S. Currency*, 2015 WL 3775894 (D. Md. 2015)(June 16, 2015).

Discovery

California district court denies government motion to strike claim based on claimant's incomplete discovery responses because of lack of prejudice to the government, availability of less drastic sanctions, and claimant's lack of willfulness or bad faith. (370) The government alleged that the defendant funds were involved in a fraudulent scheme to obtain money held by Bank of America and Washington Mutual, two federally insured banks. In this alleged scheme, Clark – a real estate agent who owned two real estate investment companies – would use information about home buyers to submit loan applications listing false employers, misstated income or assets, and untrue representations that the borrowers would reside on the subject property. Significant proceeds from these loans were transferred to accounts in the names of Clark's mother, sister, and boyfriend. The banks also made commission payments to Clark's investment companies. The government seized $743,856.34 in funds from several bank accounts Clark contended $178,518 of the seized funds were lawfully earned by her husband in his job as an engineer and loaned to their daughter. Clark filed a claim for $292,680.33 of the defendant funds, representing the entirety of the seized funds in a Wells Fargo Bank account in her name. After a five-year stay of the action was lifted, the government served Clark with special interrogatories pursuant to Supplemental Rule G(6), as well as standard interrogatories and requests for production of documents. After a discovery dispute, the magistrate judge assigned to the case issued an order directing Clark to answer, without objection, numerous discovery requests. On the last day they were due Clark served responses, but represented that she had been unable to locate responsive documents to some of the requests. Government counsel argued in letters to Clark's counsel that her responses were insufficient, and the government moved to strike her claim. In her opposition Clark conceded some of her discovery responses were "incomplete," but contended were as complete as possible and had been augmented as documents became available through subpoena and from the government. She represented that she has produced approximately 800 pages of responsive documents, and added that her burden had been exacerbated by the fact that the records were several years old because of the lengthy stay. Clark denied her failure was willful or indicative of bad faith and said she was willing to stipulate to extend time so the government would not be prejudiced by any delay. The court held that as for the public's interest in expeditious resolution of litigation and the court's need to manage its docket, these factors supported the imposition of sanctions where, as here, a court order had been violated. As for the risk of prejudice to the government, the court did not find any significant risk that could not be cured by continuing the scheduled dates in the action, which claimant was amenable to doing. The property at issue, bank funds, was at no risk of spoiling or otherwise being irreparably harmed, and the action has already been delayed for over five years at the government's request. Because of the public policy in favor of deciding cases on the merits, this factor weighed against the imposition of terminating sanctions. As to whether less drastic sanctions other than striking Clark's claim were available, the court had not previously imposed any alternative sanctions or warned about the possibility of terminating sanctions, so this factor counseled against the harsh penalty the government sought. Finally, the court found no clear indication of bad faith or willfulness that would justify the extreme remedy of striking claimant's answer and entering a default judgment. Clark had produced significant (albeit insufficient) discovery, and continued to produce supplemental responses (albeit not to the government's liking). She also represented she will continue to produce discovery and provide supplemental responses. Thus, the court concluded the appropriate sanction was a warning that serious sanctions would follow if Clark did not produce the requested discovery within 60 days. *United States v. $743,856.34 in Bank Funds*, 2015 WL 3867092 (C.D. Cal. 2015)(June 22, 2015).

Distribution of Forfeiture Proceeds, Generally

First Circuit holds that government can be a "victim" for the purpose of mandatory victim restitution act and forfeiture does not automatically offset against restitution order. (880) Defendants' appeals presented two questions of first impression in the circuit court: 1) whether, given the language of the Mandatory Victim Restitution Act (MVRA), 18 U.S.C. §3663A, the United States (through one of its agencies)

is a "victim"; and 2) if so, whether the amount of restitution imposed under the MVRA should be offset by the value of property forfeited to the Attorney General under 18 U.S.C. §982. Defendants had been charged with conspiracy to harbor and aiding and abetting the harboring of illegal aliens for commercial advantage and private financial gain, launder money, and to file false employer's quarterly tax returns with the Internal Revenue Service,. The government seized $18,529.66 from two bank accounts, and the Attorney General retained those funds as forfeiture proceeds. Both defendants pled guilty to all three charged counts. At sentencing, the district court held that the MVRA required it to issue an order of restitution compelling defendants to pay to the IRS the taxes wrongfully withheld as a result of defendants' failure to report the compensation paid to the undocumented workers at defendants' restaurants. The court ordered the two to pay $88,087 and $54,288, respectively, in restitution to the IRS, but the court did not offset the restitution obligation by the forfeiture proceeds. The appeals court held the context indicated unequivocally that the word "person" as used in the MVRA included the government since, *inter alia*, the statute's enforcement provision explicitly recognized the government as a possible victim. As for the offset question, the Attorney General had the responsibility for disposing of funds seized under the criminal forfeiture statute, and a restitution order is required in addition to any other penalty authorized by law, such as an order of forfeiture. No offset is appropriate, at least where, as here, the victim had not received any of the forfeiture proceeds. Thus, the district court correctly concluded that it was without authority to offset the restitution owed by the amount seized from the bank accounts. *United States v. Mei Juan Zhang*, 2015 WL 3652602 (1st Cir.2015)(June 15, 2015).

Jurisdiction and Venue; Summary Judgment

Maryland district court denies claimants' motion for summary judgment because Attorney General's Order prohibiting most adopted state seizures did not apply in this case because the adoption had occurred prior to the issuance of the AG Order. (310, 390) The Baltimore City Police Department seized $21,087,00 from the residence of Harmon and $32,965.10 from his bank accounts as the alleged proceeds of unlawful drug trafficking. At some point before December 3, 2014, the seized currency was turned over to the United States Drug Enforcement Administration in Maryland. The United States filed a complaint for forfeiture, and then Hannon filed a claim for all of the seized currency, and his mother, Smith, filed a claim for the bank funds. They then moved for summary judgment, asserting the government lacked the capacity to sue and the authority to sue in a representative capacity, in contravention of Federal Rule of Civil Procedure 9(a), based on a January 16, 2015 Order issued by Attorney General Eric H. Holder, Jr., which directed "all Department of Justice attorneys and components" to follow a new policy prohibiting "Federal adoption of property seized by state or local law enforcement under state law," except in certain circumstances not present here. Since the Order expressly stated that the policy applied prospectively to all federal adoptions, the government argued either it applied only to seizures occurring after January 16, 2015, or it did not apply to federally adopted forfeiture cases that were filed in court before the effective date of the Order. The currency was seized on May 29-30, 2014, and the action was commenced on December 3, 2014. The government thus argued that under either standard the case would fall outside the Order's ambit. Harmon and Smith argued that because the action was being litigated in federal court, the federal government had not yet "adopted" the property seized by the state, so the Order applied. The court stated that whether the Order applied to the forfeiture action depended on when the federal government could be said to have adopted the state-seized property. Although the relevant statutes do not delineate when adoption is complete, the Fourth Circuit has stated that a federal agency "adopts seizures by state or local law enforcement officials when it takes custody of seized property and treats the properly as if it had made the initial seizure. The district court agreed that the federal adoption of state-seized property occurs when the federal government gains physical and decisional control over the property; the heart of the adoption process was the transfer of control from state to federal officials. Harmon and Smith's contrary proposal – that adoption is not complete as long as the forfeiture proceedings remain contested – would key adoption not to any transfer in control from state to federal government, but to the resolution of the dispute between the government and the claimants. Such an approach would be untenable because it would allow a federal forfeiture action to unfold without the federal government ever having officially gained control over the property at issue. Thus, the federal government's adoption of the state-seized property was complete more than a month before the Attorney General issued the Order on January 16, 2015 and the Order's prohibition on federal adoptions did not apply to this action, so summary judgment was denied. *United States v. $54,052.10 in U.S. Currency*, 2015 WL 3775894 (D. Md. 2015)(June 16, 2015).

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