

Federal *Forfeiture* Guide

By Eric Honig, Attorney at Law

Vol. 19, No. 7
July 2015

District Court Highlights:

Maryland district court holds that publication of forfeiture notice and notice to a person's residence while he is imprisoned are inadequate mere gestures, however notice sent to an attorney representing the potential claimant who is a defendant in a criminal proceeding satisfies the government's burden.

Seventh Circuit holds that an assertion of ownership, combined with evidence that the claimant was in possession of currency when it was seized, is sufficient to establish standing at the summary judgment stage of a civil forfeiture action.

Nevada district court denies motion to strike claim where claimant makes a good-faith effort to file claim and the government cannot show prejudice by granting an extension of time.

District of Columbia district court denies government's motion for restraining order prohibiting defendant from transferring two cars to satisfy potential restitution, where there is no criminal forfeiture allegation in indictment.

Indiana district court denies motion to enforce civil forfeiture stipulated judgment to release portion of defendant currency to claimant because Treasury Department was entitled to use funds to offset for claimant's child support debts.

Eleventh Circuit reverses summary judgment against criminal forfeiture petitioner's claim to car, finding name on title was prima facie evidence of ownership and conferred standing.

North Carolina district court grants stay of discovery only and not full proceedings so as to allow determination of claimant's summary judgment motion based on lack of probable cause when civil forfeiture complaint was filed.

Administrative Forfeitures, Notice of Seizure and Intent to Forfeit

Maryland district court holds that publication of forfeiture notice and notice to a person's residence while he is imprisoned are inadequate mere gestures, however notice sent to an attorney representing the potential claimant who is a defendant in a criminal proceeding satisfies the government's burden. (210) Bostic was arrested after audio and vid-

eo surveillance captured him buying cocaine from an unidentified "cartel representative" at a hotel. A search incident to arrest found, and among other things, the DEA seized a stainless steel wristwatch, and began administrative forfeiture proceedings. The DEA sent written notice of the seizure to Bostic at his address in Baltimore and to one in Pennsylvania, and in care of his attorney, Van Hoven. It also sent a wristwatch notice by certified mail to Bostic at the Maryland Correctional Adjustment Center ("MCAC"), and published notice. Someone accepted delivery of the wristwatch notice sent to Bostic's attorney, and a person signed and printed "James Bostic" in the signature block of the return receipt accepting delivery of the wristwatch notice to the Pennsylvania address. On the same day, "Karen Gibson" accepted delivery of the wristwatch notice at the MCAC. After the time for filing a claim had expired and no claim was received, the wristwatch was forfeited. Three years later, Bostic filed a Fed.R.Crim.P. 41(g) complaint for the return of the wristwatch and other personal property. Bostic never alleged that the government failed to provide adequate notice; rather, he stated he believed the property would be returned to him at the close of his criminal case. Nonetheless, applying the liberal construction afforded to pro se pleadings, the court construed Bostic's motion as challenging the adequacy of the government's notice. The court found that it must grant an interested party's motion to set aside a nonjudicial civil forfeiture if he lacked notice, and the government knew, or reasonably should have known, of the moving party's interest and failed to take reasonable steps to provide such party with notice, and the moving party did not know or have reason to know of the seizure within sufficient time to file a timely claim. Actual notice is not required rather, notice must be "reasonably calculated, under all the circumstances, to apprise interested parties." Publication notice and notice to a person's residence while he is imprisoned, however, are mere gestures. The government could not reasonably rely on Bostic's apparent signature on the Pennsylvania address return receipt because Bostic was then in federal custody. Nor did the government show that the wristwatch notice sent to the prison housing Bostic was adequate. To meet its burden the government must show that 1) it sent a certified letter, return receipt requested, to the facility at which the prisoner was being housed, 2) a prison official signed the return receipt, and 3) mail delivery procedures at that facility were reasonably calculated to ensure that the notice would reach the inmate and would be accepted only where the inmate was actually present. Here, the record showed that the first requirement was met, however, the government has offered no proof that the signatory was a prison official or that mail delivery procedures at MCAC were reasonably calculated to

ensure that mail reached Bostic. Nevertheless, notice sent to an attorney representing the plaintiff during the pendency of his criminal proceedings satisfies the government's burden of providing notice. The record showed that a wristwatch notice was received by someone authorized to receive mail on behalf of Bostic's then-attorney. The court thus dismissed his complaint.

Bostic also sought return of eyeglasses, a wedding band, and documents, which the government contended were never referred to the DEA or other federal agency for forfeiture, and, thus, that the court lacked jurisdiction over them. Rule 41(g) presupposes that the property sought to be returned is in the possession of the government and that it is empowered to return the property. Bostic did not show that the government possessed the eyeglasses or wedding band, however the DEA Receipt reflected that the government seized Bostic's documents. Thus, the court ordered the government to show cause why the documents should not be returned to him. *Bostic v. United States*, 2015 WL 4389329 (D. Md. July 14, 2015).

Pretrial Seizure or Restraint of Property

District of Columbia district court denies government's motion for restraining order prohibiting defendant from transferring two cars to satisfy potential restitution, where there is no criminal forfeiture allegation in indictment.

(510) Defendant was charged with conspiracy to commit money laundering. The government moved to modify the condition of Defendant's release to restrict her from "transferring, conveying, or moving within the United States or removing from the United States, without court permission, any property valued at more than \$500, or funds cumulatively valued at more than \$1,000 except to pay for legal expenses or ordinary and necessary living expenses." The government argued the modification would protect assets so that they would be available to be used to make victims whole as required by the Mandatory Victim Restitution Act, 18 U.S.C. §3664, and the Crime Victims' Rights Act, 18 U.S.C. § 3771. After the motion was filed, the parties reached a partial agreement in which the defendant agreed not to transfer funds valued at more than \$1,000 except to pay for legal expenses or ordinary and necessary living expenses, and to permit a government agent to search shipping boxes containing household furnishings she wished to ship back to Kuwait to ensure that no cash was concealed inside. The motion thus was denied as moot as to further restriction on the transfer of defendant's funds. As for the government's request that the defendant be prohibited from shipping her two automobiles back to Kuwait or post in an escrow account the dollar equivalent value of the cars to be accessed in the event of a conviction and order of restitution the defendant stated that she did not have the money to post the escrow. The Bail Reform Act, 18 U.S.C. §3142(c), requires the judicial officer to consider whether any Court-ordered conditions will reasonably ensure the safety of the community and the appearance of the defendant at future proceedings.. This Court was aware of no authority

that would permit the Court to restrain the defendant's property under the Bail Reform Act for any other reasons. Instead, the government cited as support the Mandatory Victim Restitution Act, 18 U.S.C. §3664, and the Crime Victims' Rights Act, 18 U.S.C. §3771, both of which concern the rights of victims to restitution in criminal cases. However, neither statute expressly grants courts the authority to restrain the defendant's assets *prior* to a criminal conviction. Given the defendant's presumption of innocence, the court said it was wary of assuming the authority to further restrain her property pending trial in the absence of an express statutory grant to do so, especially in light of the fact that Congress has provided such an express grant to restrain assets prior to conviction in other contexts, such as a pretrial restraining order or injunction under 21 U.S.C. §853(e), where property is subject to criminal forfeiture. There was no allegation here, however, that the two vehicles were subject to criminal forfeiture. Moreover, pretrial restraining orders on a criminal defendant's property in the forfeiture context are permissible only where there is probable cause to believe that the defendant committed an offense permitting forfeiture, and the assets in dispute are traceable or otherwise sufficiently related to the crime charged. Had the government sought restraint of the defendant's cars under the forfeiture statute, its claim would have clearly failed since the government did not allege the cars were in any way connected to the defendant's alleged criminal activity. Indeed, it was undisputed the two cars were purchased before the criminal activity described in the complaint was alleged to have begun. The court was further troubled by the government's delay in making the request, that the requested restraint might be onerous for the defendant, and that the government had not identified anywhere near the amount of assets necessary to satisfy the restitution needs of the victim in this case. The complaint alleged approximately \$2 million in embezzled funds while the amount recoverable on the cars totaled less than \$50,000. The government's request struck the Court as unduly burdensome on the defendant where the benefit to the victim that may result from restraint of the property would be minimal. Finally, since the defendant is presumed to be innocent until the United States proves her guilt beyond a reasonable doubt. The court was unwilling to restrain the defendant's property where it was undisputedly not derived from, nor in any way connected to, the defendant's alleged criminal activity. *United States v. Sharaf*, 2015 WL 4238784 (D.D.C. July 13, 2015).

Standing of Claimant, Generally

Seventh Circuit holds that an assertion of ownership, combined with evidence that the claimant was in possession of currency when it was seized, is sufficient to establish standing at the summary judgment stage of a civil forfeiture action. (320) During a layover in Chicago, DEA agents approached Valdes because he fit their profile of a drug courier: He was traveling on a one-way ticket for a private sleeper car, and his ticket had been purchased just before departure with a

credit card issued to another person. The agents searched Valdes's luggage and found four bundles of cash totaling \$239,400. Valdes told agents the money was his and he was traveling to California to purchase computers for his computer recycling business. No drugs were found in his luggage but a drug-sniffing dog alerted to the bag containing the currency. The DEA agents told Valdes he was free to go but seized the currency. The government filed a civil forfeiture complaint against the currency and Valdes and his wife filed claims asserting an ownership and/or possessory interest in the property. Before they filed their answers to the complaint, the government served special interrogatories under Rule G(6), which are limited to the claimant's identity and relationship to the defendant property. The claimants provided limited responses and also objected to the scope of the interrogatories. Ultimately the government moved to strike both sets of claims and answers per Rule G(8)(c)(I), arguing that the claimants failed to respond and lacked standing. The government also moved for summary judgment arguing that even if the claims were not struck, the claimants had not produced sufficient evidence to create a genuine issue of material fact regarding their standing to contest the forfeiture. The district court said that several of the claimants' responses to the interrogatories were essentially "non-responses," but rather than striking the claims and answers on that ground, the district court instead drew an adverse inference against the claimants with respect to standing, along with credibility determinations, and granted the motions. On appeal, the court held that Valdes' assertion in sworn responses to the special interrogatories that he was the owner of the defendant currency and that it was in his possession when it was seized was sufficient evidence to establish standing at summary judgment. The government argued that Rule G required more than Article III standing, and in particular it requires a claimant to establish that his or her claim to the defendant property is "legitimate" to show standing. The court held that satisfying procedural requirements – not demonstrating "legitimate" ownership – is all that Rule G asks of claimants aside from showing constitutional standing. It said the claims of Valdes and Brown in this case were not frivolous ... they may or may not succeed on the merits, but that is a different matter. Its holding, that an assertion of ownership combined with evidence that the claimant was in possession of currency when it was seized is sufficient to establish standing at the summary judgment stage of a civil forfeiture action, would not open the floodgates to frivolous claims. Rather than relying on supposed standing concepts that are not rooted in Article III, the court said Valdes fell within the class of people whom Congress has authorized to contest a forfeiture under Rule G. If the court were to read Rule G to require a claimant to demonstrate "legitimate" ownership, it would nullify a central reform of CAFRA, i.e. the government's burden of proof. Putting the pieces together from the previous two paragraphs makes this easy to see. Demonstrating legitimate ownership is tantamount to demonstrating that "property is not subject to forfeiture. Any time the government moves for summary judgment on standing in a civil forfeiture action, then, the claimant would have to "carry the burden" of establishing by a

preponderance of the evidence that his property is not subject to forfeiture. That would effectively shift the burden of proof from the government back to the claimant. Such erroneous melding of standing and the merits in civil forfeiture actions would undermine other legal protections for claimants, as well, such as claimants' right to a jury trial under Rule G(9). Standing is decided by judges rather than juries. Further, if claimants obtain discovery it would often be only by the grace of the government. The government would rarely be put to its proof in a civil forfeiture action unless it elected not to file a summary judgment motion challenging standing, and it would be the rare case indeed where a claimant could convince a district court that he needed discovery to establish his own standing. The judgment was reversed. *United States v. Funds in the Amount of \$239,400*, 2015 WL 4530529 (7th Cir. July 28, 2015).

Timeliness/Waiver, Claimant

Nevada district court denies motion to strike claim where claimant makes a good-faith effort to file claim and the government cannot show prejudice by granting an extension of time. (355) In a civil forfeiture action brought by the government against a sum of money based on allegations that the funds represented drug proceeds, Alvarez, filed an answer, and the government filed a motion to strike the answer on the basis that Alvarez had failed to timely file a verified claim of interest. Alvarez subsequently filed his claim, which led the government to file a second motion to strike on the ground that he failed to file a verified claim to the property, a jurisdictional prerequisite to participation in the forfeiture proceedings. In Alvarez's opposition to the motion to strike the answer, his counsel contended he submitted a claim opposing forfeiture to the DEA, Asset Forfeiture Section, and Alvarez also had filed a petition for remission or mitigation. Nevertheless, Alvarez conceded that after the filing of the complaint, he failed to file a verified claim along with his answer. Alvarez's counsel said he believed he sent the verified claim to Alvarez for his signature, but was unsure whether it was lost by the department of corrections or if his counsel's office failed to include it along with the answer in its mailing to Alvarez. Counsel claimed he had difficulty corresponding with Alvarez in part due to the language barrier and in part due to Alvarez's relocation to different prisons, but that the government was on notice of Alvarez's claim by the original filings with the DEA and that it was not unduly prejudiced by the late filing of the verified claim. There was no dispute the claim was filed outside the time allotted by statute. The parties agree the court may, for good cause, set a different time, pursuant to Supplemental Rule G(5)(a)(ii). The court noted Alvarez became officially aware of the seizure through direct notification by the government, however it was clear Alvarez anticipated forfeiture proceedings even before the direct notification, given his counsel's administrative filings with the DEA. The delay was not excused through injury or illness, and thus Alvarez's argument principally rested on the degree of notice and prejudice. There was no contention or evidence suggesting the United States Attorney may have encouraged the

delay, however the government was aware of Alvarez's intention to contest the forfeiture: Alvarez sent the government's attorney, who filed the pending motions to strike, 222 pages of discovery related to his ownership of the assets and his claim. Alvarez's actions reflected a clear desire to contest the forfeiture and were directed to the government attorney who was handling the forfeiture. Moreover, his answer requested return of the property within its prayer for relief. The answer was filed timely, but did not include the verified claim. Although court and statutory rules and deadlines are not to be lightly cast aside, and parties have an interest in predictable and efficient outcomes, the parties acknowledged the court may in limited circumstances permit a late filing of the verified claim. In this case, the government made no claim of prejudice, but relied solely on the failure of Alvarez to timely file his verified claim. The apparent lack of prejudice and the evident attempts by Alvarez to comply with the rules and pursue his claim militated in favor of permitting the late filing. Where a claimant has made a good-faith effort to file a claim and the government can show no prejudice by the granting of an extension of time, it is proper to allow such an extension, and the court concluded there was good cause to permit the untimely verified claim. *United States v. \$102,283.44 in U.S. Currency Seized From Bank of Am. Account*, 2015 WL 4172720 (D. Nev. July 10, 2015).

Judgments (Including default judgments)

Indiana district court denies motion to enforce civil forfeiture stipulated judgment to release portion of defendant currency to claimant because Treasury Department was entitled to use funds to offset for claimant's child support debts. (450) The government filed a forfeiture complaint against currency, and the claimant entered into a stipulated judgment in which he was to receive \$11,100 of the seized currency, with the remaining \$25,900 forfeited to the United States. The Court approved the agreement in an Order of Forfeiture and Judgment. The government requested that the U.S. Marshal release \$11,100 held in the Seized Assets Detention Fund, and the Marshal moved to disburse the monies via a payment from the Treasury Department's disbursing agent, the Bureau of Fiscal Service. Before making any payment, the Bureau first checks to see if the payee owes any outstanding debts, in accordance with 31 U.S.C. §3716. Should an obligation in the payee's name be found, the Bureau will offset the payment in the amount of the debt before returning the remainder to the payee pursuant to §3716(c)(1)(A). As it turned out, the claimant owed two delinquent child support debts to the State of Indiana, so the Bureau initiated an administrative offset to apply the payment of \$11,100 to the outstanding obligations. This offset resulted in the claimant receiving only \$1 of the \$11,100 established in the parties' settlement agreement, so he moved to enforce the court's forfeiture order in an attempt to recover the remaining the \$11,099. He contended the plain language of the

order clearly required the United States to return the currency. The government argued that the Debt Collection Improvement Act of 1996 and corresponding regulations make clear that the money at issue constitutes a "federal payment" subject to offset. The statute authorizing the offset, 31 U.S.C. §3716(c)(1)(A), and a regulation, 31 C.F.R. §285.5(e)(1), states that all federal payments are eligible, including, but not limited to, federal wage, salary, and retirement payments, vendor and expense reimbursement payments, certain benefit payments, travel advances and reimbursements, grants, fees, refunds, judgments, tax refunds, *and other payments made by Federal agencies*. The court said the broad language of the regulation, which essentially encompasses all payments made by federal agencies unless explicitly exempted, appears to include the payment made by the Treasury Department in this case. Here, for the claimant to receive his money, the Marshal requests that the Bureau of Fiscal Service (the Treasury Department's disbursing agent) make a payment to him. The language of 31 C.F.R. §285.5(e)(1) makes explicit that "all Federal payment are eligible for offset" unless expressly excluded, and this includes certain payments specifically listed and "other payments made by Federal agencies." And for Claimant to receive his money, the Marshal must request that a *payment* be made to him by the Bureau; it is not simply that the Marshal seizes then returns the money. The Court's order was silent with respect to the issue of administrative offset. Merely because the money was ordered "released" to Claimant did not mean that the money was not subject to administrative offset. *United States v. \$37,000 U.S. Currency*, 2015 WL 4606076 (S.D. Ind. July 15, 2015).

Standing to Assert Third-Party Claims

Eleventh Circuit reverses summary judgment against criminal forfeiture petitioner's claim to car, finding name on title was prima facie evidence of ownership and conferred standing. (595) Officers executed a search warrant on a residence of a defendant in a criminal case, Henry, and seized an Audi parked in the garage of the residence, 10 feet from a bag containing 25 pounds of marijuana. Later, a narcotics canine sniffed the exterior of the Audi and alerted to the presence or residue of controlled substances. The operative fourth superseding indictment included a provision for forfeiture of the Audi. The district judge eventually issued a preliminary forfeiture order authorizing forfeiture of the Audi and other property. Nugen timely filed a 21 U.S.C. §853(n) petition, stating 1) it had acquired legal title by purchasing the Audi from Triple M Auto Consultants; 2) it was a bona fide purchaser of the Audi; and 3) Henry had not purchased the Audi or obtained any right, title, or interest in it. In a deposition, Paul Hue, Nugen's sole shareholder and CEO, testified Henry approached him concerning financing purchase of the Audi. At Henry's request, Hue purchased the Audi from Triple M with cash belonging to him, not Nugen. The bill of sale for the Audi was signed by Hue with no indication he was acting as Nugen's representative. The Audi was insured in Hue's name, but the certificate of title showed Nugen as the owner. Hue did not have a bill of sale showing he

had sold the Audi to Nugen. Hue testified Henry was to buy the Audi pursuant to an unwritten agreement, which the court found to be inconsistent. Nugen and the government each moved for summary judgment. The government argued Nugen lacked Article III standing to contest forfeiture of the Audi, because Hue's deposition testimony showed Nugen did not pay value for the Audi, have an actual ownership interest in it, or invest in it, and Nugen was a mere nominee titleholder. Nugen contended it had intended to make a profit by selling the Audi to Henry under their unwritten agreement. The district judge granted the government's summary judgment motion and denied Nugen's motion. On appeal, Nugen argued it had Article III standing, based on its acquisition of legal title, a financial stake in the Audi under the purported transaction with Henry, and alleged right to repossess the Audi after Henry defaulted on his payments. The government responded that Hue, not Nugen, was the true owner of the Audi, and Nugen stood to lose only bare title, which is insufficient to confer standing. The appeals court stated that the record contained conflicting evidence. On one hand, Nugen held title to the Audi, which was prima facie evidence Nugen owned it. On the other hand, the bill of sale listed Hue as purchaser of the Audi, Hue testified at his deposition he did not think about why he titled the Audi in Nugen's name, and the Audi also was insured in Hue's name. While the district judge did not make a credibility determination, he improperly weighed the evidence and determined the truth of the matter and concluded the contradictory evidence rebutted Nugen's prima facie evidence of ownership. Although the appeals court said this was a close case, on balance, it concluded Nugen provided sufficient evidence of an ownership interest in the Audi and injury resulting from its forfeiture to confer standing, at least at the summary judgment stage. Nugen supported its claim of ownership with citation to specific record evidence, the certificate of title. Moreover, Hue did not specify whether Henry agreed to make the monthly payments to Hue personally or to Nugen. Since there was at least some support in the record for Nugen's assertions it owned the Audi and suffered an economic injury because of forfeiture of the Audi, the court concluded Nugen made a sufficient showing of injury at the summary judgment stage to confer Article III standing. In support of its own motion, Nugen argued its legal interest in the Audi arose from acquiring title, and Henry's payments went toward leasing or using the Audi, but Henry never acquired any interest in the Audi, because he failed to make all payments under the verbal agreement with Nugen. The government Nugen had, if anything, an unperfected security interest in the Audi, which is insufficient to establish statutory standing. The court noted that in determining Nugen lacked statutory standing, the district judge concluded that if Nugen had any interest in the Audi, it was an unperfected-security interest and, citing state law, the judge determined that interest was insufficient to challenge the government's vested interest in the Audi. The appeals court held the judge's reliance on state law to resolve what amounted to a determination Nugen could not prevail under §853(n)(6)(A) was improper, because federal law determines whether a claimant's interest renders the forfeiture order inva-

lid. Finally, the government argued the government's interest relates back to the beginning of the drug conspiracy, so Nugen obtained any interest it had in the Audi after Henry had obtained proceeds from his drug conspiracy. The acts giving rise to the forfeiture in this case, however, were not the beginning of the drug conspiracy but Henry's payment for the Audi using ill-gotten funds. It also was unclear whether Henry began making payments before or after Nugen purportedly became owner of the Audi and whether those payments were made to Hue personally or to Nugen. With this ambiguity in the record, the court could not determine how the relation-back doctrine, 21 U.S.C. §853(c), applied. Therefore, the court vacated the summary judgment and remand the case to the district judge with instructions to conduct a hearing under §853(n) to determine whether Nugen had any interest in the Audi; if so, what its interest was; and whether Nugen's interest in the Audi, if any, was sufficient to prevail under §853(n)(6)(A). *United States v. Henry*, 2015 WL 3971579 (11th Cir. July 1, 2015).

Stays of Proceedings

North Carolina district court grants stay of discovery only and not full proceedings so as to allow determination of claimant's summary judgment motion based on lack of probable cause when civil forfeiture complaint was filed. (380) The government filed a forfeiture complaint and three claimants filed claims alleging ownership and possessory interests in the seized funds. The government filed a motion to stay the case, pursuant to 18 U.S.C. §981(g)(1), contending that civil discovery would impede an ongoing criminal investigation. The court stayed the case until the parties filed a joint motion to amend the Case Management Order proposing a new discovery deadline, which the court granted. Claimants filed a motion for summary judgment. One week prior to the close of discovery, claimants filed a motion to stay discovery pending resolution of their motion for summary judgment. In response, the government filed another motion to stay the entire proceedings. To date, discovery had not been concluded and the government filed no response to claimants' motion for summary judgment. Because all parties consented to a stay of discovery until at least resolution of claimants' motion for summary judgment, the court granted such a stay. To assist the parties in their planning, the court noted that it would not decide claimants' motion for summary judgment in its entirety prior to the completion of all discovery. Claimants' motion rested on two alternative grounds. First, they contended the government did not have probable cause at the time it initiated the lawsuit, and thus was not entitled to conduct further discovery. Second, claimants contended the government could not sustain its ultimate burden of proof under 18 U.S.C. §983(c). Claimants' first argument was potentially dispositive of the case. If the pre-suit probable cause requirement, found at 19 U.S.C. §1615, survived the 2000 amendment to 18 U.S.C. §983(c), which put in place a preponderance of the evidence burden of proof, and the government could not satisfy that requirement, then the court must dismiss the case. Accordingly, the court directed the government to file a reply to claimants' motion for summary judgment, insofar as it rested on the pre-suit probable cause requirement. In any event,

claimants' second argument was not susceptible to address absent full and fair discovery. After resolution of claimants' motion for summary judgment grounded in the government's purported lack of probable cause, the court said it would grant the parties additional time to complete discovery and to litigate the summary judgment motion. *United States v. \$307,970.00, in U.S. Currency*, 2015 WL 4066409 (E.D.N.C. July 2, 2015).

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