

Federal *Forfeiture* Guide

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Vol. 19, No. 8
August 2015

District Court Highlights:

Ninth Circuit in affirming forfeiture judgment holds that where a defendant was aware of the scope of the racketeering enterprise, its proceeds were necessarily foreseeable to him.

D.C. Circuit holds that doctrine of joint and several liability does not apply because defendant cannot be ordered to forfeit proceeds obtained by someone else, and thus vacates forfeiture judgment.

New York district court denies third party petition, finding that the government stepped into the defendant's shoes at the moment of preliminary forfeiture, and thus third party could not place a judgment lien on defendant's property because he no longer had any interest in it.

New Jersey district court denies default judgment because government failed to show probable cause for forfeiture based on false statements made to investigators, prior arrests for suspected drug-related activity, lack of an identified legitimate source for the seized cash, and a dog's detection of a controlled substance on the currency.

Second Circuit holds that defendant did not waive hearing for judicial determination of probable cause for restraint of assets based on alleged Fourth and Fifth Amendment violations.

Ninth Circuit holds that expected loss of tax revenue can constitute a sufficient injury for purposes of Article III standing but that Administrative Procedures Act did not provide a basis for City of Oakland to bring collateral action to enjoin civil forfeiture proceeding against medical marijuana clinic.

Ninth Circuit holds that Anti-Assignment Act voids claimants' assignment of CAFRA attorney fee awards, however government must contend with attorney's lien arising under California law before it can enforce income tax liens.

Criminally Forfeitable Property, Generally

Ninth Circuit in affirming forfeiture judgment holds that where a defendant was aware of the scope of the racketeering enterprise, its proceeds were necessarily

foreseeable to him. (530) As part of their sentences, defendants were ordered to forfeit \$2,008,250, representing the proceeds they obtained from their RICO enterprise. On appeal, defendants argued that they had a right to a jury trial on the forfeiture amount, the district court used the incorrect standard of proof in ordering forfeiture, the district court incorrectly calculated the forfeiture amount, and liability should not have been joint and several. The court held there is no constitutional right to have a jury decide forfeiture, and Federal Rule of Criminal Procedure 32.2 does not require a jury determination for forfeiture in the form of a personal money judgment, which is what the government obtained here. Moreover, forfeiture is an aspect of the sentence, not an element of the underlying crime, so a district court or jury need only find facts warranting forfeiture by a preponderance of the evidence. Thus, the district court did not err in using the preponderance of the evidence standard to compute the forfeiture amount. The district court determined that defendants' gross receipts, rather than its profits, constituted the "proceeds" properly subject to forfeiture under 18 U.S.C. §1963(a)(3). The appeals court agreed. If "proceeds" in the money laundering statute included gross receipts from the illegal gambling enterprise, then payments to winners and the people who helped run the enterprise would constitute money laundering. If "proceeds" was limited to profits, such payments would not. RICO forfeiture is a form of punishment rather than a substantive criminal offense. When §1963(a)(3) requires forfeiture of proceeds obtained from racketeering activity, such forfeiture does not create the problem that the same conduct will give rise to two different crimes. One defendant also argued that the extent of the proceeds from the racketeering activities was not foreseeable to him, and therefore he should not have been held jointly and severally liable for the RICO forfeiture. The court said this argument misstated the legal standard. So long as the sentencing court finds by a preponderance of the evidence that the criminal conduct through which the proceeds were made was foreseeable to the defendant, the proceeds should form part of the forfeiture judgment. Where a defendant was aware of the scope of the racketeering enterprise, its proceeds were necessarily foreseeable to him. *U.S. v. Christensen*, 2015 WL 501059 (9th Circuit August 25, 2015).

D.C. Circuit holds that doctrine of joint and several liability does not apply because defendant cannot be ordered to forfeit proceeds obtained by someone else, and thus vacates forfeiture judgment. (530) The district judge ordered a \$15 billion forfeiture against defendant Cano-Flores pursuant to 21 U.S.C. §853(a)(1), essentially accepting what the government claimed was a "conservative" interpretation of evidence on

gross cartel proceeds that were reasonably foreseeable to him. The cartel employed tens of thousands of people, and Cano–Flores argued that to impose a forfeiture so calculated on him violated the Eighth Amendment's prohibition against excessive fines. The court concluded that the calculation procedure employed by the district court was inconsistent with the language of §853(a)(1), which does not authorize imposition of a forfeiture based on the total revenues of a conspiracy simply because they may have been reasonably foreseeable. Under both §853 and 18 U.S.C. §1963, a similarly-worded forfeiture provision also enacted as part of the Comprehensive Forfeiture Act of 1984, courts have characterized the resulting forfeiture calculation as one of “joint and several liability.” The court here disagreed, reading the statutory language as providing for forfeiture only of amounts “obtained” by the defendant on whom the forfeiture is imposed. In ordinary English a person cannot be said to have “obtained” an item of property merely because someone else (even someone else in cahoots with the defendant) foreseeably obtained it. The statutory word “indirectly” might be seen as embracing property received by persons or entities under the defendant's control (such as a closely held corporation, or an employee or other subordinate of the defendant), or property applied to the benefit of persons for whom that defendant has a legal or moral obligation of support (such as his children). In these cases the defendant would normally be seen, as a matter of ordinary language, as having obtained the amount in question. Forfeiture amounts calculated under the government's view, by contrast, may consist almost entirely of amounts that the defendant has never obtained. The language of “joint and several liability” is derived from torts, but the courts invoking it have not deeply considered where there is a sound analogy between forfeiture and tort law. In torts, the doctrine of joint and several liability rests on a serious policy rationale: the judgment that it is better that the risk of an insolvent co-defendant should fall on a partially guilty defendant than on a completely innocent victim. This suggests that the tort analogy might well apply to restitution in a criminal case, and 18 U.S.C. §3664(h) does indeed authorize (but does not require) application of joint and several liability as a means of protecting victims. But the reasoning doesn't extend to forfeitures, which are collected by the government. Moreover, in the normal tort case a defendant who is jointly and severally liable has at least a chance of securing contribution from co-defendants, but there appears to be no suggestion by any court imposing joint and several liability that defendants would have a right of contribution among themselves. The court thus vacated the \$15 billion forfeiture assessment against him and remanded to the district court for determination of the proper amount to be forfeited under §853(a)(1). *U.S. v.Cano-Flores*, 2015 WL 4666891 (D.C. Circuit August 7, 2015).

Third-party Claims and Ancillary

Proceedings, Generally

New York district court denies third party petition, finding that the government stepped into the defendant's shoes at the moment of preliminary forfeiture, and thus third party could not place a judgment lien on defendant's property because he no longer had any interest in it. (590) A grand jury indicted Egan and a co-defendant on bank fraud charges that included a forfeiture allegation seeking criminal proceeds obtained from Egan's fraud. Egan pled guilty and consented to forfeiture of \$70 million in U.S. currency. Petitioner ADP obtained a stipulation of judgment against Egan for \$1,072,733.98 in a separate action. After the government was unable to locate sufficient criminal proceeds to satisfy the initial forfeiture order, it moved for forfeiture of substitute assets – Egan's 123,923.24 shares of stock – which the court granted and entered a Second Preliminary Order of Forfeiture as to Substitute Property. ADP filed a petition, which the government moved to dismiss, and ADP cross-moved for summary judgment. The court held that based on the parties' agreed upon timetable, the government had the superior interest in the shares. ADP readily acknowledged that its January 27, 2014 judgment did not convey it an interest in the shares. Instead, it argued its interest in the shares vested on April 21, 2014 when it delivered the property execution to the sheriff, giving it a superior interest because the government's interest did not vest until entry of a final order of forfeiture, and the April 11 preliminary forfeiture order was insufficient to vest the government with any rights superior to third parties. The said ADP was simply wrong. Although ADP framed this as state law property rights trumping federal forfeiture law, the court said it lost either way. The government had already stepped into Egan's shoes by the time ADP had delivered the property execution. The preliminary forfeiture order divested Egan of his interest in the shares and transferred that interest to the government (subject, of course, to whatever third-party interests may have already vested) on April 11, 2014. At that time, no one other than Egan had a vested interest in the shares. Because the transfer of Egan's interest occurred, at the latest, ten days before ADP's delivery of the property execution, it was effective as against ADP. Since the government stepped into Egan's shoes at the moment of preliminary forfeiture, which ADP acknowledged, ADP could no longer place a lien on the shares because Egan no longer had any interest in the shares. Thus, ADP's purported interest in the shares was a nullity. Since the preliminary forfeiture order served to divest Egan of his interest in the shares and transferred it to the government, there was no merit to ADP's argument that the government should have to go through the additional trouble of obtaining its own judgment lien. The government obtained an interest in the shares because, under federal law, Egan forfeited his interest in them to the government. Although there is no explicit relation-back provision for substitute assets in 21 U.S.C. §853, and courts have reached different conclusions about whether relation back applies to substitute assets, courts have also indicated in dicta that the government's interest vests at some point before the entry of the final, as opposed to the

preliminary, order of forfeiture. In this case, the court said it need not define a precise moment of vesting because it concluded that entry of the preliminary order of forfeiture was the latest that the government's interest arose. ADP also lost on the bona fide purchaser exception because it had no arguable interest in the shares (as opposed to a general interest in payment) until it executed the lien with the sheriff, at which time it had knowledge of the government's alleged interest. Thus, the government's motion to dismiss the petition was granted and ADP's cross-motion for summary judgment was denied. *U.S. v. Egan*, 2015 WL 4772688 (S.D.N.Y. August 13, 2015).

Probable Cause, Generally; Judgments (including default judgments)

New Jersey district court denies default judgment because government failed to show probable cause for forfeiture based on false statements made to investigators, prior arrests for suspected drug-related activity, lack of an identified legitimate source for the seized cash, and a dog's detection of a controlled substance on the currency. (440, 450)

A forfeiture complaint alleged the DEA seized the defendant currency from Sanchez's carry-on luggage at Newark Liberty International Airport. Sanchez consented to questioning and a search of his carry on luggage found bundles of the currency intermingled with clothing. Sanchez stated that the luggage contained \$20,000, but when shown the bundles, said it was actually \$25,000.

Sanchez told the agents that he was traveling to Los Angeles to meet a friend and "hang out and go to the clubs," but he was unable to provide his friend's address, or a hotel reservation. He provided phone numbers he claimed could be used to reach his friend, but when the agents called, they reached either an automated answering machine or individuals whom Sanchez did not name and who denied knowing Sanchez. Sanchez told the agents he worked as a manager at a restaurant in the Bronx, but could not provide the restaurant's address. When Task Force officers visited the restaurant, both the manager and owner denied that Sanchez worked there, and neither recognized a photo of him. Although Sanchez stated he had not been arrested in 10 years, he had multiple previous arrests for suspected possession, manufacturing and distribution of controlled substances, the most recent in 2013 (although the complaint did not mention any convictions). A dog signaled that it detected a controlled substance on the currency.

Although he filed an administrative claim, neither Sanchez nor anyone else filed a claim in the judicial civil forfeiture proceeding nor did anyone answer the verified complaint, and thus the government moved for default judgment. The court noted that the alleged facts included a series of false statements that Sanchez made to investigators about his activities, Sanchez's prior arrests for suspected drug-related activity, the lack of an identified legitimate source for the \$24,700 in cash, and a dog's detection of a controlled substance on the currency. Under Third Circuit precedent, however, the court said these

allegations were insufficient to establish the probable cause required under 21 U.S.C. §881(a)(6). First, a dog's indication of the presence of drugs is not probative without evidence of the dog's training and reliability. Nor is the currency's placement in rubber bands persuasive on its own as to a purported nexus with narcotics activity. There is even less suggestion of a drug nexus in Sanchez's previous arrests, the most recent of which was more than a year before the seizure. No testimony or other evidence connecting the currency to drugs was present here. At best, the facts alleged suggested involvement in some unspecified furtive activity; they did not indicate, more specifically, that the claimant had engaged, or was about to engage, in a drug sale with this currency. *U.S. v. \$24,700 in U.S. Currency*, 2015 WL 4647978 (D. New Jersey August 5, 2015).

Pretrial Seizure or Restraint of Property

Second Circuit holds that defendant did not waive hearing for judicial determination of probable cause for restraint of assets based on alleged Fourth and Fifth Amendment violations. (510)

Cosme was charged with defrauding an international school in Korea of approximately \$5.5 million, for representing that he would invest the school's money but instead using the money to enrich himself. On the day of Cosme's arrest, the government seized several of his assets, including a Cadillac that was parked in plain view in his driveway, and a Lamborghini and a Ferrari in his garage that were discovered during a protective sweep. During an inventory search of the cars, officers found and seized a bag containing \$634,894 in currency. That same day, the government delivered letters to Scottrade and Sterling National Bank requesting that they freeze Cosme's accounts, believed to contain proceeds of unlawful activity. In letters to the financial institutions, the government stated it was "in the process of obtaining a seizure warrant" from the court for the accounts but that "exigent circumstances required that the funds be frozen immediately to prevent it from being dissipated. The government moved ex parte and the court issued an order permitting the government to maintain custody of the seized assets through the conclusion of the pending criminal case. Cosme's attorney asked to be relieved because of the conflict between his position as a court-appointed lawyer and Cosme's potential Monsanto hearing, the purpose of which would be to obtain the release of seized funds to hire a replacement lawyer. By stipulations, the government agreed to release \$634,894 if Cosme would not raise a Sixth Amendment right to counsel claim and seek a Monsanto hearing with respect to any restrained property, and another \$407,000 held in an escrow account to hire new counsel. Cosme nevertheless thereafter requested a Monsanto hearing based on other grounds, which the court denied. On appeal, the government argued Cosme waived his right to appeal the restraints on his property by failing to object and by entering into the two stipulations. The

court held that since neither stipulation referenced Cosme's Fourth or Fifth Amendment rights, they did not effect a waiver of a hearing. Moreover, the forfeiture statute does not create a new exception to the fourth amendment's warrant requirement, and the exigent circumstances exception only permits a seizure to continue for as long as reasonably necessary to secure a warrant, and thus did not immunize the lengthy, warrantless seizure here. The court thus concluded that the continued seizure of Cosme's accounts violated the Fourth Amendment. Nevertheless, Cosme was not entitled to the relief he requested, i.e., the immediate return of his restrained assets, but was entitled to a judicial determination of probable cause. If the district court determined probable cause did not exist, then he would be able to seek a vacatur of the restraining order and the return of his restrained assets. *U.S. v. Cosme*, 2015 WL 4716437 (2nd Cir. August 10, 2015).

Standing of Claimant, Generally

Ninth Circuit holds that expected loss of tax revenue can constitute a sufficient injury for purposes of Article III standing but that Administrative Procedures Act did not provide a basis for City of Oakland to bring collateral action to enjoin civil forfeiture proceeding against medical marijuana clinic. (320) The City of Oakland contested the Government's filing of a civil in rem forfeiture action against Harborside Health Clinic, a medical marijuana dispensary acting in accordance with local and state laws but in violation of the Controlled Substances Act. Because Oakland lacked a property interest in Harborside, it was unable to participate in the forfeiture action. Instead, the city initiated a collateral attack against the government under the Administrative Procedure Act. The district court dismissed the complaint for lack of subject matter jurisdiction. On appeal, the government asserted that Oakland lacked standing under Article III. Oakland cited direct injury from an expected loss of tax revenue, an expected rise in crime and diversion of police resources due to the increase in black market sales of cannabis that will follow if the forfeiture action succeeded, and harm to its proprietary interest in providing patients safe and affordable access to medicinal quality cannabis in accordance with California law." The court found the expected loss of tax revenue constitutionally sufficient, and thus declined to address the other two alleged injuries. Oakland projected it would receive more than \$1.4 million in tax revenues from the city's four permitted dispensaries in 2012, "enough to pay for a dozen badly needed additional police officers or firefighters." A substantial portion of this sum would be attributable to Harborside, as it was reputed to be the largest dispensary in the country. The court said an expected loss of tax revenue can constitute a sufficient injury for purposes of Article III standing. The government also argued the APA provided no basis for Oakland to bring a collateral action to enjoin the forfeiture proceeding. The court agreed. Because the Government's decision to file the forfeiture action was committed to agency discretion, and because Oakland's suit is impliedly forbidden by the existence of the forfeiture statute,

judicial review was precluded. The government made an informed judgment to initiate a civil forfeiture proceeding against Harborside, relying on the exercise of the equivalent of prosecutorial discretion, and thus was immune from judicial review under the APA. The fact that Oakland is unable to participate in the forfeiture action, because it does not possess an interest in the Harborside property, is irrelevant. Congress created a framework permitting only certain parties to bring claims, and allowing collateral attacks would disrupt that framework by giving third parties a greater ability to initiate challenges. *City of Oakland v. Lynch*, 2015 WL 4939623 (9th Cir. August 20, 2015).

Attorneys' Fees, Reimbursement by Government

Ninth Circuit holds that Anti-Assignment Act voids claimants' assignment of CAFRA attorney fee awards, however government must contend with attorney's lien arising under California law before it can enforce income tax liens. (870) In a civil forfeiture proceeding, the representation agreement between the claimants and their attorney provided that "[a]ny fees the Court orders the government to pay for the work that I perform belongs to me and not to the clients." After the district court granted summary judgment, the claimants moved for an award of attorney's fees pursuant to the Civil Asset Forfeiture Reform Act.. The district court found that the claimants were the prevailing parties and entered a substantial award of attorney's fees against the government. Thereafter, the government filed tax liens against five of the seven claimants. The district court denied the attorney's motion to intervene in the forfeiture action to protect his interest in the award. The district court later entered a second fee award, but declined to award the fees directly to the attorney because he was not a party to the forfeiture action. The attorney also filed a wrongful levy action against the government, which moved to dismiss, arguing that the attorney should instead have intervened in the forfeiture action. Then attorney then filed a second motion to intervene in that action, which the district court granted, and eventually ordered that the attorney's fees be paid directly to counsel. The government appealed the order. While that appeal was pending, the Ninth Circuit decided *United States v. \$186,416.00*, 642 F.3d 753 (9th Cir.2011), which held that attorney fees awarded under CAFRA are payable to the claimant, not to the claimant's attorney. The parties agreed to remand the case for further proceedings in light of \$186,416.00. To protect his contractual interest in the attorney's fees, the attorney also filed a lien against the properties seized by the government. In litigation regarding priority of interests in the seized properties, the district court held that the government admitted that the attorney lien had priority over the tax liens. However, with regard to the award of attorney's fees, the government maintained that the fees belonged to the claimants, and therefore its tax liens would take priority over any interest that counsel had in the attorney's fees awards. The government also

invoked the Anti-Assignment Act, 31 U.S.C. §3727, to argue that the assignment of the awards from the Claimants to the attorney was ineffective as against the United States. The district court nevertheless held that the attorney's fees awards could be paid directly to counsel, and that the government had, effectively, waived its statutory right to set off the claimants' tax liabilities with the fee awards. The government was therefore left with only its tax liens, which it had previously admitted were inferior in priority to counsel's interest. The district court relied on 26 U.S.C. §6323(b)(8) to hold that an attorney's lien had "superpriority" over a tax lien. The government's primary contention on appeal was that the Anti-Assignment Act barred the claimants from assigning the attorney's fees awards to their counsel. The Act prohibits the "assignment of any part of a claim against the United States Government or of an interest in that claim; or the authorization to receive payment for any part of the claim," unless certain conditions are met. The government conceded it was all but impossible for any assignment to comply with the strictures of the Act, however in modern practice, the obsolete language of the Act means the government has the power to pick and choose which assignments it will accept and which it will not. The court held that although this situation may diverge sharply from what Congress intended when it enacted the Act, it refused to rewrite the statute or decline to enforce it simply because circumstances have changed since it was passed. Here, because the appellants did not contend that the representation agreement satisfied the Act's requirements, the sole question was whether the Act applied to a CAFRA award of attorney's fees. The court held that an award of statutory attorney's fees represents a right to be paid the United States's money, and thus is a anti-assignable "claim" against the government. The right of a claimant to be made whole under CAFRA cannot be taken to mean that the government is forbidden to offset preexisting debts before it pays out a sum of money to a claimant. The government has a right to be made whole as well, and the Act allows the government to balance its obligation to make a CAFRA claimant whole against that claimant's debts to the United States. Because CAFRA attorney fees awards are payable to the client, not to the attorney, the Act ensures that the government preserves its defenses even when an attorney is the beneficiary of the fee award. Thus, because an award of attorney's fees under CAFRA is "a claim against the United States" and the fees are payable directly to the claimants, the Act applied to the assignment in this case. The plain language of the Act compelled the conclusion that the purported assignment of attorney fees awards was void., and the award of attorney's fees must be paid to the Claimants, not counsel. However, there was nothing in the Act to prevent the attorney from obtaining an interest in the fee awards through another mechanism. Since the attorney was not asserting a right akin to a contingency fee in the awards, which could be voided by operation of the Act, his lien against the awards arose from the representation agreement by operation of California law. The United States has no need to worry about fraud or any of the other evils associated with the assignment

of claims against it once the proceeds of the claim have been reduced to the possession of the purported assignor. By the time the CAFRA awards have been paid to the claimants, the government has had every opportunity to assert any defenses that it had against the claimants. The government maintains the statutory right to offset an award of attorney's fees against a claimant's tax liabilities, but in this case simply waived its right to do so. It may rely on its tax liens against the claimants, and is free to enforce them, but must contend with the attorney's lien. The court thus vacated the district court's order awarding attorney's fees directly to counsel and remanded for further proceedings, including determining the priority of liens in the awards. *U.S. v. Kim*, 2015 WL 4758354 (9th Cir. August 13, 2015).

This Issue

320, 440, 450, 510, 530, 590, 870

Table of Cases

City of Oakland v. Lynch, 2015 WL 4939623 (9th Cir. August 20, 2015)

U.S. v. \$24,700 in U.S. Currency, 2015 WL 4647978 (D. New Jersey August 5, 2015)

U.S. v. Christensen, 2015 WL 501059 (9th Circuit August 25, 2015)

U.S. v. Cosme, 2015 WL 4716437 (2nd Cir. August 10, 2015)

U.S. v. Egan, 2015 WL 4772688 (S.D.N.Y. August 13, 2015)

U.S. v. Kim, 2015 WL 4758354 (9th Cir. August 13, 2015)

United States v. \$186,416.00, 642 F.3d 753 (9th Cir.2011)