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ASSET FORFEITURE

13.2 Personal Property

APPENDIX E

E. Legal Background Regarding Forfeiture of Personal Property

Forfeitures in General

A civil forfeiture is intended to confiscate property used in violation of the law or acquired in violation of the law. It can be pursued against property owned by someone other than the person who used it to violate the law. In contrast, a criminal forfeiture is imposed on a wrongdoer as part of his/her punishment following his /her conviction.

The procedures involved in the two types of forfeiture are very different. However, the result of either a civil or criminal forfeiture is the transfer of rights, title, and interests in the property to the United States.

- The purpose of civil forfeiture is to confiscate property used in violation of the law and to remove the profits of illegal conduct from the wrongdoer. The threat of forfeiture encourages property owners to take care in managing their property and ensures that they will not permit that property to be used for illegal purposes. Civil forfeiture can be pursued directly against property even if there are no criminal charges brought against an individual or even after an individual has been convicted.
- The purpose of criminal law is to punish a wrongdoer, and the criminal forfeiture is imposed as part of that punishment following his/her conviction.

Civil Forfeiture Procedure

Because a civil forfeiture action is an in rem action brought against the property allegedly involved in criminal conduct, the first step in a civil forfeiture action is to gain jurisdiction over the property subject to forfeiture. Most civil forfeiture statutes incorporate by reference the procedures set forth in the United States Customs forfeiture statutes.¹⁸ The Customs statutes provide that property subject to forfeiture may be seized pursuant to a lawful warrant.¹⁹ Once seized, the property remains in the custody of the United States until the forfeiture action is concluded.²⁰

Under certain circumstances, civil forfeiture may occur without a judicial proceeding. Property may be subject to *forfeiture* in an administrative proceeding conducted by a Federal investigative agency. The authority to institute an *administrative forfeiture* proceeding by the investigative agency depends upon the value of the property, or

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upon the fact it was intended to be used to facilitate drug trafficking. This proceeding is referred to as an *administrative forfeiture*.

Administrative Forfeiture

The Administrative forfeiture process. *Administrative forfeiture* proceedings were established as a means to keep uncontested forfeiture actions out of the courts. Therefore, it is a form of default *forfeiture*. Also, it provides an alternative administrative remedy for property owners who were not involved in drug trafficking, even though their property may have been used to facilitate such trafficking.

Currently, the United States may commence *administrative forfeiture* proceedings against property valued at \$500,000 or less, except real property of any value must be judicially forfeited. Additionally, money **in any amount** is subject to *administrative forfeiture*, as is any conveyance (vehicle, vessel, or aircraft) that was used to import, export, transport, or store illicit drugs. ²¹

An *administrative forfeiture* proceeding begins with *publication of notice*. ²² The United States is required to publish *notice* of the *seizure* and of intent to forfeit. ²³ An unreasonable delay between the time property is seized and the time notice is provided to interested parties may be considered a denial of due process. ²⁴ Further, there is a statutory provision covering vehicles, vessels, and aircraft, 21 U.S.C. § 888, which the courts have interpreted as requiring that *notice* must be provided "at the earliest practicable opportunity after determining ownership."²⁵

The United States sends *notice* by mail ²⁶ to all persons who may have an interest in the property. Also, it must publish *notice* of the *seizure* in a newspaper of general *circulation* in the judicial district in which the *seizure* was made. ²⁷ Following the *publication* of the *notice*, anyone who has an interest in the seized property can elect to demand a judicial proceeding in Federal Court, or to seek administrative relief from the seizing Federal investigative agency.

Administrative relief from forfeiture. United States law provides for administrative relief from forfeitures "where the violations are incurred 'without willful negligence' or the intent to commit the offense."²⁸ A person seeking remission or mitigation must petition the Department of Justice for administrative relief. ²⁹ The administrative relief can take the form of *remission* or *mitigation*. The relief granted is discretionary, and is not subject to judicial review, but is considered a matter of executive grace. ³⁰E2d 1540, 1543 (11th Cir. 1990). See *United States v. One 1987 Jeep Wrangler Auto*, 972 F.2d 472,479 (2nd Cir. 1992) (a claimant's election to proceed by *petition for remission or mitigation* binds that claimant to the administrative remedy); *Sarit*, 987 E2d at 17 (*the forfeiture statute precludes judicial review*); *Scarabin*, 919 E2d at 339 (*the administrative denial of a petition for remission or mitigation is not subject to judicial review on the merits*); *Willis*, 787 E2d at 1094 (*"the remission proceeding is a matter of grace. . . ."*).

Individuals who assert they have an interest in the seized property may file a *claim* to contest the forfeiture in Federal district court and a petition for remission.³¹ Most individuals, however, file **either** a *claim* or a *petition*. Under the regulations governing petitions for *remission* or *mitigation* ³², the seizing agency has the responsibility to rule on petitions in administrative forfeitures ³³ (when both a *claim* and a *petition* are filed), while the Criminal Division of the Department of Justice rules on petitions in Judicial forfeitures ³⁴ (When both a *claim* and a *petition* are filed).

To remit the forfeiture is to return the property to the petitioner without any penalty. Generally, *remission* will be granted to a party whose property was used without his/her knowledge or negligence.³⁵ This includes financial institutions with a *security* interest in the property (*lien* or *mortgage*) and other innocent persons.

Mitigation simply means partial relief, usually conditioned upon the payment of a money penalty. *Mitigation* may be granted when the *remission* standards have not been met, but there are extenuating circumstances that justify some relief from the forfeiture.³⁶

Often, when *mitigation* of the forfeiture is granted, the property will be returned upon the payment of monetary penalty. *Mitigation* or *remission* may be granted if it is demonstrated that the *forfeiture* "was incurred without the willful negligence or without any intention on the part of the petitioner to violate the law."³⁷

Judicial Forfeiture

The judicial proceeding is normally initiated by the United States Attorney's Office in the Federal court for the judicial district in which the property was seized.³⁸ The judicial forfeiture action

begins when the United States files a pleading called a "verified complaint."³⁹ Generally, the complaint must contain: 1) a verification on oath by the Assistant United States Attorney prosecuting the *forfeiture* action attesting to the truth of the contents of the complaint; 2) a description of the property to be subject to *forfeiture*; 3) a statement that the property seized or to be seized is within the *jurisdiction* of the court; and 4) a statement of the facts of the offense justifying forfeiture. The statements in the complaint must be sufficiently detailed that anyone who wishes to contest the forfeiture will be able to file an answer responding to the complaint. Once the complaint is filed, the court issues a *warrant of arrest in rem* which gives the court *jurisdiction* to act on the *forfeiture*.⁴⁰ The property is placed in the custody of the United States Marshal

for that judicial district, who provides *notice* of the *forfeiture* action to all persons having an interest in the property.⁴¹ Any person who contests a judicial forfeiture is called a "claimant." Claimants are entitled to file an answer to the forfeiture complaint, to "discover"⁴² the United States' evidence and to demand a jury trial.⁴³

The burden of proof is on the United States to produce enough evidence to persuade the judge that *probable cause* exists to believe the seized property is forfeitable. *Probable cause* is "reasonable grounds for belief of [the] guilt [of the seized property] supported by less than *prima facie* proof but more than mere suspicion."⁴⁴ Once the United States demonstrates *probable cause*, the burden shifts to the claimant to show, by a preponderance of the evidence, that the property should not be forfeited.⁴⁵ Therefore, once the United States establishes probable cause for-forfeiture, as determined by the judge, the claimant to the property must produce some evidence in defense of the forfeiture of the property. If he/she does not, the judge must direct a verdict in favor of the United States.

Criminal Forfeiture

In contrast with civil forfeiture, a criminal forfeiture proceeding is part of the criminal prosecution. Because a criminal forfeiture action is in personam (against the person)

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it may not occur unless there is a conviction of the person charged with the underlying criminal activities. The Department of Justice has indicated that forfeiture counts should be included as part of the criminal case whenever practical instead of pursuing assets in a separate civil case.⁴⁶

Ancillary Hearings To Dispose of Third-Party Interests

The special verdict only forfeits the interest of the defendant. In order for the United States to have complete title to the property, it is necessary to resolve the interests that any third party may have in the property. This is done through *ancillary proceedings* following the criminal trial. These *ancillary proceedings* are similar to civil forfeiture proceedings, except they deal only with the ownership rights that third parties may assert to the forfeited property. After *notice* is published, any party asserting an interest in the property must *petition* the court for a hearing to adjudicate the validity of his/her interest in the property. The judge then conducts a hearing which is basically civil in nature. The petitioner must establish by a preponderance of the evidence that he/she is the legitimate owner of the property. Such ownership interest may include *liens* and mortgages on the forfeited property. After the hearing, the judge will issue a *final order of forfeiture* which will resolve and dispose of the interests of any third party.⁴⁷ This can include rejecting the third party's interest, or providing satisfaction of that interest.

Pretrial Seizure of Property Subject to Criminal Forfeiture

Under some circumstances, the United States may seek a restraining order or injunction to preserve the availability of the property upon the filing of the *indictment* or *information*.⁴⁸

Under other circumstances, before the *indictment* or *information* is filed, and after giving *notice* to the apparent property owner and announcing the opportunity for a hearing, the United States may

request such a *restraining order* or *injunction*. Under this alternative, the court will issue the order or injunction if it determines that there is a "substantial probability" that the property will be subject to forfeiture and that "failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture."⁴⁹ Such orders are effective for only 90 days unless extended by the court for good cause shown.

A third alternative provides that a pre-indictment temporary *restraining order* may be issued without *notice* and opportunity for a hearing if the United States demonstrates that there is "probable cause to believe the property would, in the event of conviction, be subject to forfeiture and that provision of notice will jeopardize the availability of the property for forfeiture."⁵⁰ This type of *restraining order* is valid for only 10 days unless good cause for an extension is demonstrated.

In addition to these pretrial options, the statutes covering drug *forfeitures*⁵¹ and money laundering⁵² provide that the United States may request the issuance of a *seizure warrant*, if the court determines that there is probable cause to believe the property will be forfeited, and if a *restraining order* may not be sufficient to assure the property's availability forfeiture.

Substitute Assets

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Under some forfeiture statutes, upon conviction and a special *verdict of forfeiture*, when the property subject to forfeiture cannot be located, has been transferred to a third party, has been placed beyond the *jurisdiction* of the court, or has diminished in value or commingled with other property as a result of any act or omission of the defendant, the court has authority to "order the forfeiture of any other property of the defendant up to the value of any property" subject to forfeiture. ⁵³

Appendix C - Forfeiture Statutes

Appendix D - Policy Authorization Review Decisions

Appendix E - Legal Background

Appendix F - Referenced Policies

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