

Asset Recovery

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What we will cover . . .

Everything from forfeiture basics to money laundering to individual rights to how forfeiture interacts with complex related civil proceedings.

What we will cover . . .

Block One:

- Differing Legal Systems
- Basic Forfeiture Concepts

Block Three:

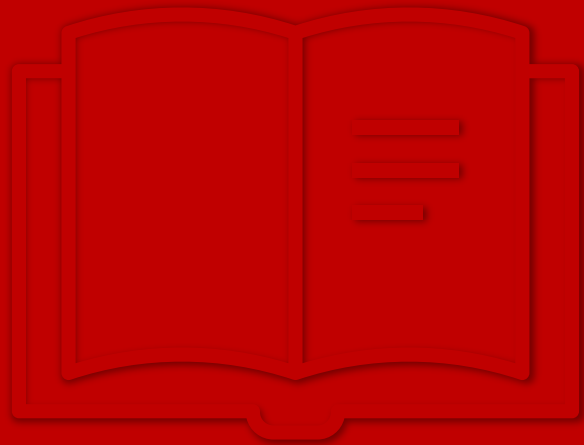
- Due Process and Third Party Litigation
- Excessive Fines
- Managing and Disposing of Assets
- Exercise

Block Two:

- Best Practices for Finding Assets
- Related Concepts
- Tracing
- Exercise

Block Four

- Pitfalls and Criticisms
- Exercise
- Related Proceedings
- Recap



Different Legal Systems

Common Law Legal System

The laws governing a case are based on both legal precedent created by judges and statutory laws created by legislatures.

Usually an adversarial system, where the judge acts as an impartial referee between opposing parties to a case.

A jury may determine the facts; a judge will decide the law to be applied.

There is an active role for prosecutors and defense attorneys.

Victims have a role as witnesses and may have rights to receive information and participate in a limited manner – however, victims are not a party in criminal cases.

The U.S. and the U.K. are examples of countries that maintain common law systems.

Civil Law Legal System

Most of the law is statutory law created by legislatures and not by judges following precedent.

Usually an inquisitorial system, where an investigating judge is actively involved in investigating the facts of a case.

Juries are rarely used; a judge or panel of judges will decide the facts and the law to be applied.

Prosecutors and defense attorneys may play a more limited role.

Victims may be parties and have rights regarding involvement, which may include filing the initial charges.

In many civil law systems, victims may bring civil claims, e.g., for monetary damages, in the context of a criminal prosecution.

Many European countries, including France and Germany, and a number of North, Central, and South American countries, like Mexico and Brazil, operate under civil law systems.

Your Jurisdiction

Common Law or Civil Law?



Basic Forfeiture Concepts

Different Types of Forfeiture

Civil Forfeiture (does not require conviction)

vs.

Criminal Forfeiture (requires conviction)

Your Jurisdiction

Civil or Criminal Forfeiture?

What we will cover.

- Who?
- What?
- Where?
- Why?
- When?
- How?

What?-Forfeiture Defined

Forfeiture is:

- The involuntary transfer of ownership of an asset
- To the government
- Without compensation
- Because the asset was
 - Derived from a crime (proceeds), or
 - Used in connection with a crime (instrumentalities)

Forfeiture Defined

Forfeiture is taking stuff from bad guys.

Who?-People Involved in Forfeiture

- Law enforcement
 - Federal/National
 - Local
 - Forensic auditors and accountants
- Prosecutors and their staff
- Courts, judges, and arms of court (probation)
- Defendants, defense counsel, and property owners
- Regulators, reporting banks, victims, bankruptcy parties, and civil litigants?

Who in the US System



When?-Early and Often

- What happens as soon as you approach a target and/or the target becomes aware of the investigation?

When?-Early and Often

- What happens as soon as you approach a target and/or the target becomes aware of the investigation?
 - Assets DISAPPEAR.

When?-Early and Often

- This is why we pursue assets EARLY and OFTEN.
- EARLY:
 - Find assets before investigation becomes overt.
 - Preferably, seize before we charge anyone and at same time as we search places or approach targets.
- OFTEN:
 - Always search for assets.
 - You will either find assets or more crime, or both.

Where?-It depends

- Assets could be anywhere:
 - In-country?
 - Offshore?
 - In nominee names?
- Proceedings might be held:
 - Where the crime was committed and/or
 - Where the assets are located.

Why?-Punishment and Deterrence

- Punish the criminal
- Deter illegal activity
- Remove the tools of the trade
- Disrupt the organization
- Protect the community
- Compensate victims

Why?-Punishment and Deterrence

- Criminal and civil forfeiture **remove the proceeds and instrumentalities of crime.**
- For every seizure, ask yourself **what purpose is accomplished by seizure?**
 - We never approach forfeiture as a money-making tool.
 - Law enforcement is principal objective.

Why?-Common results

- Pay victims
- Render a drug dealer unable to use his proceeds to buy more drugs
- Take a gun out of the hands of a criminal
- Clean up a neighborhood

How?-Forfeiture Processes

- Let's talk:
 - Universal concepts
 - Types of Proceedings

Universal Concepts

Key Forfeiture Concepts

NEXUS: Early and often, identify and pursue properties that have nexus (connection) to crime;

TIMELINESS: Initiate some type of proceeding in a reasonable time; and

DUE PROCESS: Provide opportunity to challenge forfeiture.

How do we know if something is subject to forfeiture?-in the US . . .

- There is not one overarching forfeiture statute.
- Instead, there are statutes throughout Federal Code that authorize criminal and/or civil forfeiture.
- For example, there is a statute that authorizes forfeiture for a drug offense, there is a separate statute that authorizes forfeiture for a fraud offense, there is a separate statute that authorizes forfeiture for a child exploitation offense, etc.

What is Subject to Forfeiture in US?

- Examples:
 - **Proceeds** of most crimes;
 - **Facilitating Property** (drug cases, child porn cases, etc.);
 - Property **involved** in money laundering;
 - **Guns** involved in any federal crime.



Disposing of Assets: Hierarchy in United States

FIRST, contraband and guns are destroyed. Computer items often also destroyed.

SECOND, victims are paid via net proceeds of sale of valuable forfeited assets.

THIRD, equitable sharing and official use requests decided.

Seizing Assets for Forfeiture

- Most forfeitures, other than real estate forfeitures, begin with the seizure of assets.
- Seizure could be pursuant to warrant exception;
- Seizure could be pursuant to process issued by a judge:
 - federal **seizure warrant**; or
 - **search warrant**.

Seizure vs. Forfeiture

- Seizure is about *possession*.

IN CONTRAST . . .

- Forfeiture is about *ownership*.

Pre-seizure questions that we ask ourselves in the United States

Is there probable cause that there is a **federal crime** and is **forfeiture authorized** for that crime?

Is there probable cause that there is a **nexus** between the property and the crime?

If you are not pursuing a federal seizure warrant, does a **warrant exception** apply?

You can seize but ***should*** you seize?

Real Estate

- Could be pursued via:
 - Lien;
 - Lis Pendens (notice of pending action);
 - Seizure;
 - Writ of Entry.

Burden of Proof for Forfeiture- Preponderance (in the US)

Generally speaking, in *any type* of forfeiture proceeding,

- An asset is only forfeited if its nexus to crime is proven by a preponderance of the evidence;
 - BUT
- A third party can claim an asset by proving by a preponderance that he had an interest that predated the crime (innocence also required in civil cases) or was a bona fide purchaser for value without knowledge of crime.

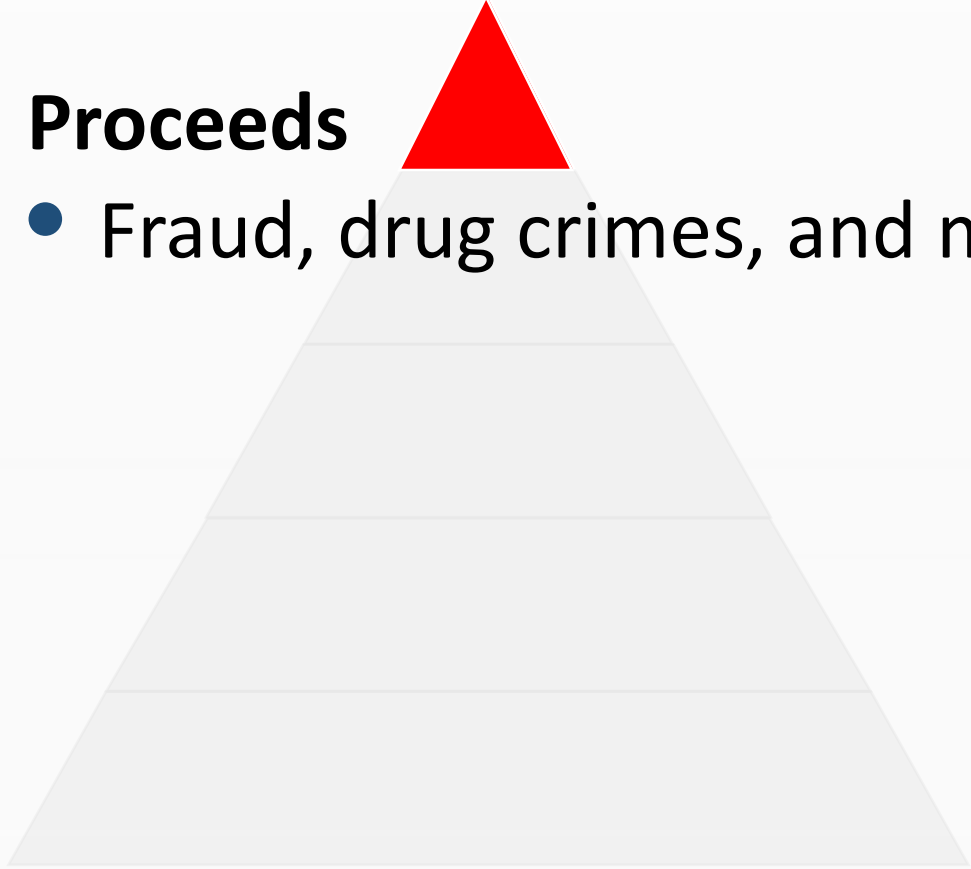
Theories of Forfeiture



Proceeds Forfeiture

Proceeds

- Fraud, drug crimes, and many other crimes.



Facilitating Property

Facilitation

- “Facilitating property” is property that makes an offense either:
 - Easier to commit, or
 - Harder to detect
- We can often forfeit facilitating property for only a limited class of drug and general crimes.

“Involved In” Money Laundering Forfeiture

Property “Involved in” Money Laundering

- Property “involved in” a money laundering transaction can include the clean money that the launderer commingled with criminal proceeds either:
 - *as a part of the money laundering transaction, or*
 - *to facilitate* the money laundering transaction by concealing the nature, source, location, ownership, or control of the SUA proceeds.

Proceeds Test-But For Analysis

“But for” analysis

Facilitating Property: Substantial Connection Test

Does the asset make the crime easier to commit or harder to detect

Involved In Property: Substantial Connection Test

Proceeds of the crime plus any clean property involved in a money laundering transaction.

Example: Typical Drug Money Mule Case: Circumstantial Evidence-Totality of the Circumstances

Higher amounts of cash (\$5,000 or greater)

Location, denomination, and manner in which cash is stored

Presence of drugs in proximity to cash (most money couriers don't carry drugs AND cash at same time)

Contemporaneous Arrest

Admissions, inconsistent statements, evasive answers to law enforcement

Canine alert performed before or shortly after seizure

History of drug charges and convictions

Lack of legitimate income, employment information

Example: Typical Fraud Money Mule Case

Why is the individual receiving money from so many sources?

What was the individual told about the source of the money/receipts?

Is the individual being paid?

Has the individual been communicating online with someone?
Have they ever met? Romance fraud?

Did the individual set up a business to receive money?

What was the individual told to do with the money?

Any crypto?

Any transactions without any apparent legitimate purpose?

Common Charlotte, North Carolina Cases

- Airport interdiction
- Investment Fraud
- Embezzlement
- BEC/Romance/Money Mule
- Drugs
- Guns and Robbery
- Child Exploitation
- Human trafficking

Questions so far?

Types of Proceedings

In rem Jurisdiction vs. *In Personam* Jurisdiction

In personam=the person

- *United States of America vs. John Doe*

In rem=the property

- *United States of America vs. One 2020 Lamborghini Huracan*

Hon. Clarence Thomas (*Leonard v. Texas*)

The Court has justified its unique constitutional treatment of civil forfeiture largely by

statutory forfeitures of **offending objects**

in violation of the customs and revenue laws. This practice took hold in the United States, where the First Congress passed laws subjecting ships and cargos involved

permitted the government to **proceed *in rem***
under the fiction that the thing itself...was
guilty of the crime

Leonard v. Texas, 137 S. Ct. 847, 848–49 (2017) (internal citations and quotations omitted)

In rem Jurisdiction vs. In Personam Jurisdiction

Does your country exercise in personam jurisdiction, in rem jurisdiction, both, or neither?

Are there any other types of jurisdiction?

Types of Forfeiture Proceedings

Administrative Forfeiture-*In Rem*

- Agency process that often pre-dates criminal charges and is not reliant upon criminal conviction.

Criminal Forfeiture-*In Personam*

- Forfeiture is part of indicted criminal case and is conviction-based.

Civil Judicial Forfeiture-*In Rem*

- Civil judicial case may be related to, but is independent of, an indictment.
- Conviction not required. Accordingly, courts often closely scrutinize civil forfeiture cases.
- Case (in the USA, at least) initiated by filing civil complaint against property.

Administrative Forfeiture

(in rem)

Administrative Process

- *In rem* (against the property) Agency Proceeding
- **Agency provides notice** to target and potential owners.
- **Claimant requests (1) adjudication by agency and/or (2) judicial adjudication.**
 - If claimant requests judicial adjudication, **Prosecutor:**
 - (1) includes assets in indictment and/or files a separate civil judicial forfeiture complaint;
 - (2) declines to proceed against assets/assets returned; or
 - (3) negotiates settlement in admin forfeiture.
 - If no claims filed, agency issues **Proclamation of Forfeiture.**

Administrative Process

- Claim (requests court decision)

VS.

- Petition (requests agency decision)

Administrative Process

- **Limits:** Typically, there are limits placed on the value of what an agency can forfeit without any court approval.
- **For example:** In the US, real estate cannot be administratively forfeited.

Administrative Process

- What agencies in your countries process administrative forfeitures?
- What are the limits on the agencies' powers and on what they can administratively forfeit?

Civil Forfeiture

(in rem)

Civil Judicial Process

Seizure of personal assets or lis pendes on real property.

Admin forfeiture commenced.

Administrative Claim filed. Claim requests judicial action.

Civil Judicial Process

Complaint alleges a crime for which forfeiture is authorized and a connection between the subject property and the crime.

Claim and Answer are filed by target and/or third parties asserting interest in property. Claim often under oath.

Discovery on Complaint and Claims.

Default Judgment if no one files claim or **Summary Judgment Hearings and/or Trial, and Judgment** if someone files a claim.

Civil Judicial Process-Complaint

Pleading/allegation standard: Our pleading standard is, essentially, that we have to give information about the bases for forfeiture. We have to give enough info so that someone can respond.

An agent has to **verify** the facts in the complaint.

Civil Judicial Process-Claim

A claimant's pleading standard is to (1) essentially, state his interest and (2) answer every sentence in the complaint (admit, deny, no knowledge).

A claimant has to **verify** the facts in the claim.

Civil Judicial Process-Discovery

Both sides can:

- Request documents
- Subpoena
- Take depositions under oath
- Request admissions
- Send written questions to each other

Civil Judicial Process-Resolution

Case is resolved via:

- Settlement;
- Order of the court (if there are no genuine issues of material fact or no right to jury); or
- Jury.

Civil Judicial Process-Sample Complaint

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
STATESVILLE DIVISION

CASE NO. 5:17cv81

United States of America

v.

COMPLAINT FOR
FORFEITURE *IN REM*

Approximately \$961,308.93 in funds seized
from JP Morgan Chase Account XXX5580,
such account held in the name of Royce Hub
Trading, Inc.;

Approximately \$38,910.23 in funds seized
from Bank of America Account XXX7847,
such account held in the name of UAV
Research and Development, LLC;

Approximately \$3,517.94 in funds seized from
Bank of America Account XXX5136, such
account held in the name of Earth Lab, Inc.;

Approximately \$81,413.13 in funds seized
from Woori Bank Account XXX1720, such
account held in the name of Neo Tech &
Design, Inc.;

Approximately \$445,502.76 in funds seized
from Bank of America Account XXX8497,
such account held in the name of Mornay
Logan DBA Holding Properties;

Approximately \$11,789.34 in funds seized
from Bank of America Account XXX8484,
such account held in the name of Mornay
Logan DBA Holding Properties.

NOW COMES the United States of America, Plaintiff herein, by and through Jill Westmoreland Rose, United States Attorney for the Western District of North Carolina, in a civil cause of forfeiture, and respectfully states the following:

INTRODUCTION

1. This is a civil action *in rem* pursuant to 18 U.S.C. § 981(a)(1)(A) and (C). Procedures for this action are mandated by Rule G of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions and, to the extent applicable, 18 U.S.C. §§ 981, 983, and 984, and the Federal Rules of Civil Procedure.

2. This action seeks the forfeiture of all right, title, and interest in the above-captioned property because the property constitutes or is derived from proceeds of wire fraud in violation of 18 U.S.C. § 1343, and property involved in monetary transactions and money laundering conspiracy in violation of 18 U.S.C. §§ 1957 and 1956(h). As set forth more fully below, the conspirators identified herein, through fraud and false pretenses, obtained the property from a public institution and then engaged in numerous transactions with the property before law enforcement discovered the fraud and was able to locate and seize the property.

3. This Court has jurisdiction over this action commenced by the United States under 28 U.S.C. § 1345 and over this action for forfeiture under 28 U.S.C. § 1355(a). The Court has *in rem* jurisdiction over the defendant property under 28 U.S.C. § 1355(b).

4. This Court has venue pursuant to 28 U.S.C. §§ 1355 and 1395. Venue is proper because the acts or omissions giving rise to the forfeiture occurred in this district, the claim accrued in this district, and the defendant property was found in this district.

5. The defendant is all present and future interest in the following property (hereafter collectively, "the Funds"):

- a. Approximately \$961,308.93 in funds seized from JP Morgan Chase Account XXX5580, such account held in the name of Royce Hub Trading, Inc. ("the Royce Hub Account");
- b. Approximately \$38,910.23 in funds seized from Bank of America Account XXX7847, such account held in the name of UAV Research and Development, LLC ("the UAV Account");
- c. Approximately \$3,517.94 in funds seized from Bank of America Account XXX5136, such account held in the name of Earth Lab, Inc. ("the Earth Lab Account");
- d. Approximately \$81,413.13 in funds seized from Woori Bank Account XXX1720, such account held in the name of Neo Tech & Design, Inc. ("the Neo Tech Account");
- e. Approximately \$445,502.76 in funds seized from Bank of America Account XXX8497, such account held in the name of Mornay Logan DBA Holding Properties ("Mornay/Holding Account 8497");
- f. Approximately \$11,789.34 in funds seized from Bank of America Account XXX8484, such account held in the name of Mornay Logan DBA Holding Properties ("Mornay/Holding Account 8484").

6. The Funds were seized in the Western District of North Carolina pursuant to federal Seizure Warrants (WDNC Cases 3:16MJ467 and 3:17MJ4) for forfeiture, all such Warrants

executed in and around December 2016 through January 2017. The Properties are currently being held by the United States Marshals Service in Charlotte, North Carolina, in the Western District of North Carolina.

7. Pursuant to Supplemental Rule G(2)(f), facts in support of a reasonable belief that the Government will be able to meet its burden of proof at trial are as follows and have been verified by the attached Verification of Federal Bureau of Investigation Special Agent James R. Meade.

SUMMARY OF THE SCHEME

8. From at least November 2016 through January 2017, while in the Western District of North Carolina and elsewhere, an individual, fraudulently doing business as Royce Hub Trading, Inc., and others did commit wire fraud and illegal monetary transactions, in violation of 18 U.S.C. §§ 1343, 1956(h), and 1957, to defraud a publicly-funded university (identified herein as "Victim University") out of approximately \$2,000,000.

VICTIM UNIVERSITY

9. Victim University, located in Boone, North Carolina, within the Western District of North Carolina, is part of the University of North Carolina system. Victim University receives funds from the North Carolina State Treasurer for, among other purposes, capital improvements.

RODGERS BUILDERS

10. Rodgers Builders (identified herein as "Rodgers" or "Rodgers Builders") is a large national builder headquartered in Charlotte, North Carolina. Rodgers Builders was incorporated in North Carolina and offers a wide array of construction services. Rodgers Builders has worked on previous construction projects for Victim University and other North Carolina university projects. In 2016, Rodgers Builders was awarded a contract to construct Victim University's new health science college facility.

11. On October 14, 2016, Rodgers Builders submitted an initial Automated Clearing House ("ACH") enrollment form to Victim University's Controller's Office. The ACH form was subsequently processed. The ACH network facilitates the movement of money and information from one bank account to another through Direct Deposit and Direct Payment via ACH transactions. ACH credit and debit transactions process quickly and generally settle within one to two business days.

THE SCHEME

12. On December 2, 2016, a Victim University Controller's Office employee received an e-mail from an unidentified individual purporting to be Doug McDowell, Finance Technician II at Rodgers Builders. The e-mail was sent from the following account: accounts@rogersbuildersinc.com. The e-mail included an attached direct deposit form and instructions to change Rodgers Builders' previously submitted banking information to a new account at JPMorgan Chase Bank ("JPMorgan").

13. Unbeknownst to the Victim University employee at that time, the suffix for the legitimate e-mail address for Rodgers was "rogersbuilders.com" and not "rogersbuildersinc.com." Additionally, although Doug McDowell was the Controller for Rodgers, he did not generate the e-mail or the attachments and he did not approve any changes to Rodgers' banking information.

14. On December 5, 2016, a Victim University employee processed the fictitious Rodgers vendor electronic payment form which caused future Victim University construction payments to be sent via ACH to a bank account used to receive fraud proceeds and not controlled by Rodgers.

15. On December 8, 2016, Victim University Capital Improvements submitted a payment application for \$1,959,925.02, which was then entered into the Victim University accounts payable system. An ACH file was then transmitted to Bank of America (Victim University's bank) on December 9, 2016, and the North Carolina State Treasurer transferred funds to Victim University's ACH clearing account. On December 12, 2016, a Victim University Controller's Office employee received another e-mail from an unidentified individual posing as Doug McDowell who confirmed that the Victim University's payment had been received and that "you might receive a verification call from the bank as this is the first time receiving [sic] a payment from you to this account." The receiving bank, JPMorgan, did not subsequently contact Victim University.

16. On December 20, 2016, Rodgers contacted Victim University about not receiving the expected construction payment. A Victim University Controller's Office employee then

Civil Judicial Process-Sample Claim

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9 Attorneys for Claimant ROBERT SHUMAKE

10 UNITED STATES DISTRICT COURT
11 WESTERN DISTRICT OF NORTH CAROLINA
12 CHARLOTTE DIVISION

13 UNITED STATES OF AMERICA,

14 Plaintiff,

15 CIVIL NO. 3:18 CV 646

16 v.

17 VERIFIED CLAIM
18 OF ROBERT SHUMAKE
19 OPPOSING FORFEITURE

20 \$252,140.00 IN U.S. CURRENCY,


21 Defendant.

22 ROBERT SHUMAKE,

23 Claimant.

24 The undersigned hereby claims an ownership and possessory interest in, and the right to
25 exercise dominion and control over, all of the defendant property.

26 Dated: 31 December 2018

27 
ROBERT SHUMAKE
Claimant

1 VERIFICATION

2 The undersigned declares under penalty of perjury that he is the Claimant in the above-
3 entitled matter, that he has read the foregoing Claim, that he knows the contents thereof, and that
4 the same is true of his own knowledge.

5 Dated: 31 December 2018

6 
7 ROBERT SHUMAKE
8 Claimant

9 CERTIFICATION OF COUNSEL

10 The undersigned hereby certifies that he has the signed original of this document which is
11 available for inspection during normal business hours by the Court or a party to this action.

12 Dated: 31 December 2018

13 S/David M. Michael
14 DAVID M. MICHAEL

15 Attorney for Claimant ROBERT SHUMAKE

16 CERTIFICATE OF ELECTRONIC SERVICE

17 The undersigned hereby certifies that, on 9 January 2018, he caused to be
18 electronically filed the foregoing with the clerk of the court by using the CM/ECF system, which
19 will send a notice of electronic filing to all ECF-registered counsel by operation of the Court's
20 electronic filing system. Parties may access this filing through the Court's system.

21 S/David M. Michael
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10 UNITED STATES DISTRICT COURT
11 WESTERN DISTRICT OF NORTH CAROLINA
12 CHARLOTTE DIVISION

13 UNITED STATES OF AMERICA,

14 Plaintiff,

CIVIL NO. 3:18 CV 646

15 v.

ANSWER OF ROBERT SHUMAKE
TO COMPLAINT FOR
FORFEITURE IN REM

16 \$252,140.00 IN U.S. CURRENCY,

17 Defendant.

DEMAND FOR TRIAL BY JURY

18 ROBERT SHUMAKE,

19 Claimant.

20 Claimant ROBERT SHUMAKE hereby answers the allegations in the government's
21 Complaint For Forfeiture *In Rem* as follows:

22 1. In response to the allegations contained in paragraph 1 of the Complaint,
23 Claimant admits that this is a civil action in rem against the Defendant Currency seized from
24 Claimant Darren Lennard Coleman at the Charlotte-Douglas International Airport.

25 2. In response to the allegations contained in paragraph 2 of the Complaint,
26 Claimant denies that the Currency constitutes money furnished or intended to be furnished
27

1 by any person in exchange for a controlled substance or listed chemical in violation of 21 U.S.C.
2 §§ 841 and/or 846 and denies that the Currency is subject to forfeiture pursuant to 21 U.S.C.
3 § 881(a)(6). Claimant further denies that that the Currency constitutes property involved in a
4 transaction or attempted transaction in violation of 18 U.S.C. § 1960, or any property traceable to
5 such property making it subject to forfeiture pursuant to 18 U.S.C. § 1981(a)(1)(A).

6
7 3. In response to the allegations contained in paragraph 3 of the Complaint, and
8 subject to the denials by Claimant as set out in paragraph 1 and paragraph 2, Claimant denies that
9 any procedures for this action are necessarily "mandated". In response to the remaining
10 allegations contained in paragraph 3 of the Complaint, Claimant lacks sufficient information to
11 form a belief as to the truth of the allegations contained therein, and, on those grounds, denies
12 each and every allegation contained therein.

13
14 4. In response to the allegations contained in paragraph 4 of the Complaint,
15 Claimant admits the allegation contained therein.

16
17 5. In response to the allegations contained in paragraph 5 of the Complaint,
18 Claimant admits the allegation contained therein.

19
20 6. In response to the allegations contained in paragraph 6 of the Complaint,
21 Claimant admits that the Currency was seized within the Western District of North Carolina. In
22 response to the remaining allegations contained in paragraph 6 of the Complaint, Claimant lacks
23 sufficient information to form a belief as to the truth of the allegations contained therein, and, on
24 those grounds, denies each and every allegation contained therein.

25
26 7. In response to the allegations contained in paragraph 7 of the Complaint,
27 Claimant lacks sufficient information to form a belief as to the truth of the allegations contained
therein, and, on those grounds, denies each and every allegation contained therein.

Criminal Forfeiture

Criminal Process

Seizure based on PC of nexus;

Charging Doc that lists seized items;

Conviction beyond reasonable doubt on count that supports forfeiture;

Trial (Bench or Jury) by preponderance on forfeiture NEXUS;

Preliminary Order against Defendant;

Ancillary Proceeding/Final Order on third party interests;

Sentencing.

Criminal Process

- Note the differing burdens of proof that we use in the USA.

Beyond a reasonable doubt
to convict someone

VS

Preponderance to forfeit
something.

- Note the bifurcated nature of the proceedings.

Criminal Process-US Samples-Indictment

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF NORTH CAROLINA CHARLOTTE DIVISION		FILED CHARLOTTE, NC APR 18 2017 US DISTRICT COURT WESTERN DISTRICT OF NC
UNITED STATES OF AMERICA)	DOCKET NO. 3:17-cr-00114-RJC
)	
)	BILL OF INDICTMENT
v.)	Violations:
)	
)	15 U.S.C. §§ 78j and 78ff
)	18 U.S.C. § 1001(a)(3)
(1) ROBERT M. BOSTON)	18 U.S.C. § 1343
(2) ROBERT S. LABARGE)	18 U.S.C. § 1344(2)
)	18 U.S.C. § 1349
)	18 U.S.C. § 1956(h)

THE GRAND JURY CHARGES:

Introductory Allegations

At times material to this Indictment:

1. From in or about July 2012 through in or about August 2015, Defendants ROBERT M. BOSTON and ROBERT S. LABARGE defrauded franchisees, investors, and lenders of their company, ZLOOP. In addition to deceiving their victims through false and misleading franchise and securities offering documents, Defendants created fake documents to perpetuate their fraud. Through their fraud, Defendants obtained millions of dollars, much of which they spent on expensive personal real estate, a private plane, and the racing career of ROBERT M. BOSTON's son.
2. ZLOOP, Inc. ("ZLOOP" or the "Company") was a Delaware corporation with its headquarters and principal place of business in Hickory, North Carolina. ZLOOP was an electronic waste recycling company. Originally founded as a limited liability company in 2012, ZLOOP converted to a corporation in or about 2014.
3. DEFENDANT ROBERT M. BOSTON was one of the two principal founders of ZLOOP. He served as ZLOOP's Chief Executive Officer and as a director of ZLOOP.
4. DEFENDANT ROBERT S. LABARGE was one of the two principal founders of ZLOOP. He served as ZLOOP's Chief Marketing Officer and as a director of ZLOOP.
5. Victim 1 was an individual residing in Louisiana.
6. Patriot Bank was a federally insured financial institution based in Texas.

Case: 3:17-cr-00114-RJC-DSC *SEALED* Document 3 Filed 04/18/2017 Page 1 of 11

statement intended to be filed by Victim 1. The statement was false because, as LABARGE then and there knew, the email that he actually sent bore the subject line "UCC1," and did not indicate that its attachment was a draft statement to be filed by Victim 1.

All in violation of Title 18, United States Code Section 1001.

COUNT SIX
18 U.S.C. § 1956(h)
(Money Laundering Conspiracy)

46. The Grand Jury incorporates paragraphs 1 through 30 of this Bill of Indictment and further alleges that:

47. From at least in or about 2012 through in or about 2015, in Mecklenburg and Catawba Counties, within the Western District of North Carolina, and elsewhere, the defendants,

(1) ROBERT M. BOSTON
(2) ROBERT S. LABARGE

did knowingly and willfully combine, conspire, confederate and agree with each other and others both known and unknown to the Grand Jury, to commit the offenses of money laundering, in violation of Title 18, United States Code Section 1957.

48. It was a part and an object of the conspiracy that BOSTON, LABARGE, and others known and unknown to the Grand Jury, would and did knowingly engage and attempt to engage in monetary transactions in criminally derived property of a value greater than \$10,000, such property having been derived from specified unlawful activity—to wit, wire fraud and bank fraud—in violation of Title 18, United States Code Section 1957.

All in violation of Title 18, United States Code Section 1956(h).

NOTICE OF FORFEITURE AND FINDING OF PROBABLE CAUSE

Notice is hereby given of 18 U.S.C. § 982 and 28 U.S.C. § 2461(c). Under Section 2461(c), criminal forfeiture is applicable to any offenses for which forfeiture is authorized by any other statute, including but not limited to 18 U.S.C. § 981 and all specified unlawful activities listed or referenced in 18 U.S.C. § 1956(c)(7), which are incorporated as to proceeds by Section 981(a)(1)(C). The following property is subject to forfeiture in accordance with Section 982 and/or 2461(c):

- a. All property which constitutes or is derived from proceeds of the violations set forth in this bill of indictment;
- b. All property involved in such violations or traceable to property involved in such violations; and

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BILL OF

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- c. If, as set forth in 21 U.S.C. § 853(p), any property described in (a) or (b) cannot be located upon the exercise of due diligence, has been transferred or sold to, or deposited with, a third party, has been placed beyond the jurisdiction of the court, has been substantially diminished in value, or has been commingled with other property which cannot be divided without difficulty, all other property of the defendant/s to the extent of the value of the property described in (a) and (b).

The Grand Jury finds probable cause to believe that the following property is subject to forfeiture on one or more of the grounds stated above:

- a. A forfeiture money judgment in the amount of at least \$25,000,000, such amount constituting the proceeds of the violations set forth in this bill of indictment;
- b. The real property at 6698 Dam Cove Road, Conover, North Carolina, more particularly described in a deed to grantee "Lake Hickory Holdings, LLC," recorded on or about July 7, 2015 at Deed Book 03297, Pages 1458-1459, and further identified as Parcel 374502793020 at Catawba County Register of Deeds;
- c. The real property at 964 18th Avenue Circle NW, Hickory, North Carolina, more particularly described in a deed to grantee LaBarge-Diamond Family Trust, LLC, recorded on or about December 19, 2012 at Deed Book 03163, Pages 0367-0368, and further identified as Parcel 3704-17-12-7475 at Catawba County Register of Deeds;
- d. The real property at 8102 Evanston Falls Road, Huntersville, North Carolina, more particularly described in a deed to grantee "8102 Evanston Falls Road, LLC," recorded on or about April 1, 2016, at Deed Book 30708, Pages 157-158, and further identified as Parcel 00537851 at Mecklenburg County Register of Deeds;
- e. Any and all interest in Lake Hickory Holdings, LLC; LaBarge-Diamond Family Trust, LLC; and 8102 Evanston Falls Road, LLC.

A TRUE BILL:

[Redacted Signature]

/FOREPERSON

JILL WESTMORELAND ROSE
UNITED STATES ATTORNEY


TAYLOR J. PHILLIPS
ASSISTANT UNITED STATES ATTORNEY

Criminal Process-US Samples-Verdict

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
STATESVILLE DIVISION

CRIMINAL NO. 5:15-cr15-RLV-DCK

UNITED STATES OF AMERICA)

v.)

(1) STEVEN W. CHASE)

JURY INSTRUCTIONS

UNITED STATES' PROPOSED FORFEITURE INSTRUCTION NO. 1

(Jury's duty regarding forfeiture)

Ladies and Gentlemen of the Jury, in view of your verdicts on Count One that Defendant is guilty of a child exploitation enterprise; on Count Two that Defendant is guilty of engaging in a conspiracy to make, print, and publish visual depictions involving the use of minors engaged in sexually explicit conduct; and on Count Three that Defendant made, printed, and published, and caused to be made printed, and published, visual depictions involving the use of minors engaged in sexually explicit conduct, in violation of 18 U.S.C. §§ 2252A and 2251, you have one more task to perform before I discharge you.² What you must now decide is whether Defendant must forfeit certain property that the Government claims is subject to forfeiture to the United States because of its connection to this crime, namely:³

- The real property at 3570 15th Avenue SW, Naples, Florida;
- One ASUS Laptop, Serial Number ELN0CV0907390L2, seized during the investigation; and
- One Cruzer 128GB Thumbdrive, seized during the investigation.

² Fed.R.Crim.P. 32.2(b)(1) ("As soon as practical after a verdict or finding of guilty . . . on any count in an indictment . . . regarding which criminal forfeiture is sought, the court must determine what property is subject to forfeiture under the applicable statute."); *see also* Rule 32.2(b)(5)(A), providing for a jury determination upon a party's request.

³ *United States v. Sandini*, 816 F.2d 869, 873-74 (3d Cir. 1987) (issues of culpability and forfeitability should be determined in the same trial, but the jury should not consider the special forfeiture verdict until after it has convicted the defendant)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
STATESVILLE DIVISION
Case No. 5:15-CR-00015-RLV-DCK-1

FILED In Court
Statesville, NC
SEP 16 2016
US District Court
Western District of NC

UNITED STATES OF AMERICA)

v.)

STEVEN W. CHASE)

SPECIAL VERDICT FORM
FORFEITURE

We, the jury, unanimously find by a preponderance of the evidence as follows:

COUNT ONE FORFEITURE

1. Was the real property at 3570 15th Avenue SW, Naples, Florida used or intended to be used to commit or to promote the commission of the Count One offense in violation of 18 U.S.C. § 2252A(g)?
☒ Yes ☐ No
2. Was the ASUS Laptop, Serial Number ELN0CV0907390L2, and identified as Government's exhibit number 66, used or intended to be used to commit or to promote the commission of the Count One offense in violation of 18 U.S.C. § 2252A(g)?
☒ Yes ☐ No
3. Was the Cruzer 128GB Thumbdrive, and identified as Government's exhibit number 68, used or intended to be used to commit or to promote the commission of the Count One offense in violation of 18 U.S.C. § 2252A(g)?
☒ Yes ☐ No

Criminal Process-US Samples-Preliminary Order

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
3:17CR114-RJC-DSC

UNITED STATES OF AMERICA)

v.)

(1) ROBERT M. BOSTON)

**MONEY JUDGMENT AND
PRELIMINARY ORDER OF
FORFEITURE**

THIS MATTER is before the Court on the government's Motion for Money Judgment and Preliminary Order of Forfeiture, pursuant to Fed. R. Crim. P. 32.2(b) and 18 U.S.C. §§ 981(a)(1)(C) and 982(a)(1), (Doc. No. 98); the defendant's response in opposition, (Doc. No. 90); and the government's reply, (Doc. No. 91). For the reasons below, the Court will grant the motion.

In September 2017, a Grand Jury returned a Superseding Bill of Indictment charging the defendant and Robert LaBarge with wire fraud conspiracy, in violation of 18 U.S.C. § 1349 (Count One); substantive wire fraud, in violation of 18 U.S.C. § 1343 (Count Two); securities fraud, in violation of 15 U.S.C. §§ 78j and 78ff (Count Three); and conspiracy commit money laundering, in violation of 18 U.S.C. § 1956(h) (Count Four), (Doc. No. 34). The Indictment also contained a probable cause finding for forfeiture of a money judgment in the amount of at least \$25,000,000 and, among other items, the certain real properties. (*Id.* at 7-8).

LaBarge pled guilty and stipulated that they obtained millions of dollars from investors in ZLOOP, an electronic waste recycling company, some of which

1

Case 3:17-cr-00114-RJC-DSC Document 106 Filed 08/07/18 Page 1 of 8

was used to purchase of real estate for him and the defendant. (Doc. No. 42; Factual Basis at 2-3). The defendant was found guilty on all counts by a jury, (Doc. No. 71; Verdict), but waived jury determination of forfeiture.

The defendant's conviction for violating the conspiracy and fraud statutes at issue in this case renders any property which constitutes or is derived from proceeds traceable to such violation subject to forfeiture to the United States. 18 U.S.C. § 981(a)(1)(A), (C); 28 U.S.C. § 2461(c). Courts use a nexus test to determine whether assets constitute or are derived from proceeds. *United States v. Farkas*, 474 F. App'x 349, 359 (4th Cir. 2012) (citing *Libretti v. United States*, 516 U.S. 29 (1995) and *United States v. Cherry*, 330 F.3d 658, 669-70 (4th Cir. 2003)). Courts use the "but for" test to determine whether there is a nexus between a crime and properties that the government contends are proceeds. *Id.* at 359-60. "Pursuant to this test, [assets] are considered proceeds and therefore deemed forfeitable if a person would not have [the assets] but for the criminal offense." *Id.* (collecting cases from the Seventh Circuit, D.C. Circuit, Second Circuit, Eastern District of Virginia, and Western District of New York) (internal quotation marks omitted). "Strict tracing from a particular criminal act to a particular asset is not required if the totality of the circumstances establish that the asset constitutes or is derived from proceeds." *United States v. Guess*, 2015 WL 1208882, at *2 (W.D.N.C. March 17, 2015) (citing cases from the Sixth Circuit, the District of Maryland, and the Eastern District of Virginia).

2

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Further, any person convicted of violating the money laundering laws shall forfeit any property, real or personal, involved in such offense, or any property traceable to such property. 18 U.S.C. § 982(a)(1)(A). Property "involved in" money laundering includes both the criminally derived proceeds and the legitimately obtained property commingled with the criminally derived proceeds in a money laundering transaction. *United States v. Kivanc*, 714 F.3d 782, 794 (4th Cir. 2013).

Fed. R. Crim. P. 32.2 and 21 U.S.C. § 853 support imposition of a forfeiture money judgment when directly forfeitable assets have been rendered unavailable. *United States v. Chamberlain*, 868 F.3d 290, 296 (4th Cir. 2017). The substitute property provisions apply if, as a result of any act or omission of defendant, the otherwise forfeitable property cannot be located upon the exercise of due diligence; has been transferred or sold to, or deposited with, a third party; has been placed beyond the jurisdiction of the court; has been substantially diminished in value; or has been commingled with other property which cannot be divided without difficulty. 21 U.S.C. § 853(p)(1)-(2). Rule 32.2 provides in pertinent part as follows: "[i]f the government seeks a personal money judgment, the court must determine the amount of money that the defendant will be ordered to pay." Fed. R. Crim. P. 32.2(b)(1)(A); *see also United States v. Buller*, 578 F. App'x 178, 182 (4th Cir. 2014) (district court must find nexus between forfeiture calculation and crime).

The government's burden of proof on forfeiture is preponderance of the evidence. *United States v. Cherry*, 330 F.3d 658, 669 (4th Cir. 2003). The Court's

3

Case 3:17-cr-00114-RJC-DSC Document 106 Filed 08/07/18 Page 3 of 8

Criminal Process-US Samples-Preliminary Order

"determination may be based on evidence already in the record, including [...] any additional evidence or information submitted by the parties and accepted by the court as relevant and reliable." Fed. R. Crim. P. 32.2(b)(1)(B); see also *Farhas*, 474 F. App'x at 360 (4th Cir. 2013) (court may rely on trial record to determine forfeiture). The government may satisfy the preponderance burden by both direct and circumstantial evidence. *United States v. St. Pierre*, 484 F.3d 75, 86 (1st Cir. 2007).

In this case, the government has limited its request to a money judgment to \$1,696,397.42, that is, the amount of fraud proceeds and property involved in money laundering conspiracy transferred from ZLOOP to the defendant and/or an entity that he controlled, rather than the alleged \$33 million in fraud proceeds that ZLOOP obtained while under the defendant's direction.¹ The defendant objects by arguing that amount of forfeiture does not relate to assets "currently" in his possession and that a money judgment is "problematic" because he is destitute. (Doc. No. 90: Memorandum at 2). The United States Court of Appeals for the Fourth Circuit has rejected that position stating:

The fact that a defendant is indigent or otherwise lacks adequate assets to satisfy a judgment does not operate to frustrate entry of a forfeiture order. Forfeiture is calculated on the basis of the total proceeds of a crime, not the percentage of those proceeds remaining in the defendant's possession at the time of the sentencing hearing.

¹ Accordingly, the government's position is in keeping with the Fourth Circuit's recent decision in *United States v. Chittenden*, --- F.3d --- (4th Cir. 2018), limiting forfeiture of proceeds to those personally obtained by a defendant.

United States v. Blackman, 746 F.3d 137, 143-44 (4th Cir. 2014) (recognizing this rule as "embraced by a unanimous and growing consensus among the circuits" (internal quotation marks and citations omitted)).² Additionally, the dissipation of the criminal proceeds makes a money judgment "especially appropriate." *Id.* at 145. Based on the preponderance of the evidence in the trial record and attached to the government's motion,³ the Court finds that it is appropriate to enter a \$1,696,397.42 money judgment for the fraud proceeds and properties involved in the defendant's offenses, including money laundering conspiracy, that are attributable to the defendant and that are no longer available, pursuant to 18 U.S.C. §§ 981(a)(1)(C) and 982(a)(1), the substitute property provisions of 21 U.S.C. § 853(p), and Rule 32.2(b)(1)(A).

Additionally, the defendant argues on one hand that he has no interest in the real properties and related limited liability companies detailed in the government's motion, and on the other hand objects to their forfeiture on the basis of a lack of nexus to the crimes of conviction. (Doc. No. 90: Memorandum at 6). He asserts that the Fourth Circuit has not yet ruled on the legality of the forfeiture of

² The defendant's argument based on statutory interpretation that entry of a money judgment is prohibited, (Doc. No. 90: Memorandum at 2-5), has likewise been rejected by the Fourth Circuit, *Blackman*, 746 F.3d at 145 ("It is well settled that nothing in the applicable forfeiture statutes suggests that money judgments are forbidden." (internal quotation marks and citations omitted)).

³ The defendant has not contested the exhibits attached to the government's motion, (Doc. No. 90: Memorandum), which the Court accepts as relevant and reliable, pursuant to Fed. R. Crim. P. 32.2(b)(1)(B).

comingled funds, (Id.), yet, that court has stated:

Under Section 981(a)(1)(A), any real or personal property "involved in" a money laundering transaction in violation of Section 1957 is subject to civil forfeiture. 18 U.S.C. §981(a)(1)(A). Consequently, when legitimate funds are comingled with property involved in money laundering or purchased with criminally derived proceeds, the entire property, including legitimate funds, is subject to forfeiture.

Kivanc, 714 F.3d at 794.

The trial record and FA Zigmont's Affidavit and supporting documents, (Doc. No. 89-1), establish in detail the flow of money from ZLOOP investors into the Lake Hickory Property, Lake Hickory Holdings LLC, the Evanston Falls Property, and the Evanston Falls LLC, more particularly described below. Thus, the Court finds by a preponderance of the evidence that they are assets constituted or are derived from proceeds of and property involved in the offenses of which the jury found the defendant guilty, including money laundering conspiracy, making them subject to forfeiture.

WHEREFORE, based on the aforementioned record whereby the government has established, by a preponderance of the evidence, both satisfaction of the substitute property provision and a nexus between the money judgment and counts of conviction, and a nexus between the real properties and LLCs and the counts of conviction, the government's Motion for Money Judgment and Preliminary Order of Forfeiture, pursuant to Fed. R. Crim. P. 32.2(b) and 18 U.S.C. §§ 981(a)(1)(A)(C) and 982(a)(1). (Doc. No. 98), is **GRANTED**, the following property is ordered forfeited pursuant to Fed. R. Crim. P. 32.2(b), and the government is authorized to take and

Criminal Process-US Samples-Preliminary Order

maintain custody of the property for forfeiture:

- A forfeiture money judgment in the amount of \$1,696,397.42, such amount constituting the proceeds of the counts of conviction and property involved in the money laundering conspiracy by the defendant; this amount shall be reduced by the net proceeds of liquidation of any finally forfeited assets;
- The real property at 6698 Dam Cove Road, Conover, North Carolina, more particularly described in a deed at Catawba County Book 03297, Pages, 1458-1459, and identified as Parcel 374502793020 ("the Lake Hickory Property");
- The real property at 8102 Evanston Falls Road, Huntersville, North Carolina, more particularly described in a deed at Mecklenburg County Book 30708, Pages 157-158, and identified as Parcel 00537851 ("the Evanston Falls Property");
- Any and all interest in Lake Hickory Holdings, LLC ("the Lake Hickory LLC"); and
- Any and all interest in 8102 Evanston Falls Road, LLC ("the Evanston Falls LLC")

Pursuant to 21 U.S.C. § 853(n)(1), the government shall publish notice of this order to the extent that the order pertains to the specific real properties and LLCs; notice of its intent to dispose of the property in such manner as the Attorney General may direct; and notice that any person, other than the defendant, having or claiming a legal interest in any of the above-listed forfeited Funds must file a petition with the Court within thirty days of the final publication of notice or of receipt of actual notice, whichever is earlier. This notice shall state that the petition shall be for a hearing to adjudicate the validity of the petitioner's alleged interest in the property, shall be signed by the petitioner under penalty of perjury, and shall set forth the nature and extent of the petitioner's right, title or interest in the forfeited property and any

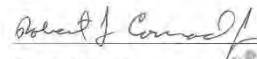
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additional facts supporting the petitioner's claim and the relief sought. The United States may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in property that is the subject of this Order, as a substitute for published notice as to those persons so notified.

Upon adjudication of all third-party interests, this Court will enter a Final Order of Forfeiture as to the real properties and LLCs.

Signed: August 7, 2018


Robert J. Conrad, Jr.
United States District Judge

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Exercise

- Break into groups
- Design a forfeiture scheme for your fictional country:
 - What types of crime will you address?
 - What types of property will be subject to forfeiture?
 - How will you seize?
 - Who will have the burden of proof?
 - What forfeiture processes will be available?



Best Practices for Finding Assets

Coordination

- What will probably happen if you arrest someone or search their property without seizing assets?
- What will probably happen if you seize something without simultaneously searching properties and arresting targets?

Make a Plan

- Is this a covert case or an overt case?
- Is the crime historical or ongoing?
- If you seize assets, will you undermine a criminal investigation? Will evidence or people disappear?
- If you do not seize assets, will they disappear?
- Can you coordinate a search or arrest with a seizure of assets?
- Are there any unique assets to consider?

Work in Two Directions to Identify Owners and Trace

- Search for assets starting from the moment of the crime and tracing **forwards**,

BUT ALSO

- Search for assets and entities related to your targets, and try to trace **backwards** from the assets to the crime.

Know Sources of Information

Know Sources of Information

- Public records
- Bank reporting documents/FIU documents
- Regulatory documents
- Covert subpoenas
 - For example, for bank records
- Surveillance
- Interviews
- International requests for assistance.

Know Sources of Information

- Public records
 - Records on companies related to criminal target or his address
 - Real estate records
 - Vehicle records
 - Records of apparent legitimate employment
 - Tax records (are they public?)
 - Records on acquaintances/relatives
 - Records of travel into and out of country

Conduct Surveillance

- Identify how many times a car is used in a drug crime.
 - The more the better for purposes of forfeiture.
- If legal in your country, put up pole cams.
 - How often is a house used in drug crime?
 - Who goes in and out?
 - Who knows what is going on?
 - Who is stopped leaving the house?
 - Any controlled buys?

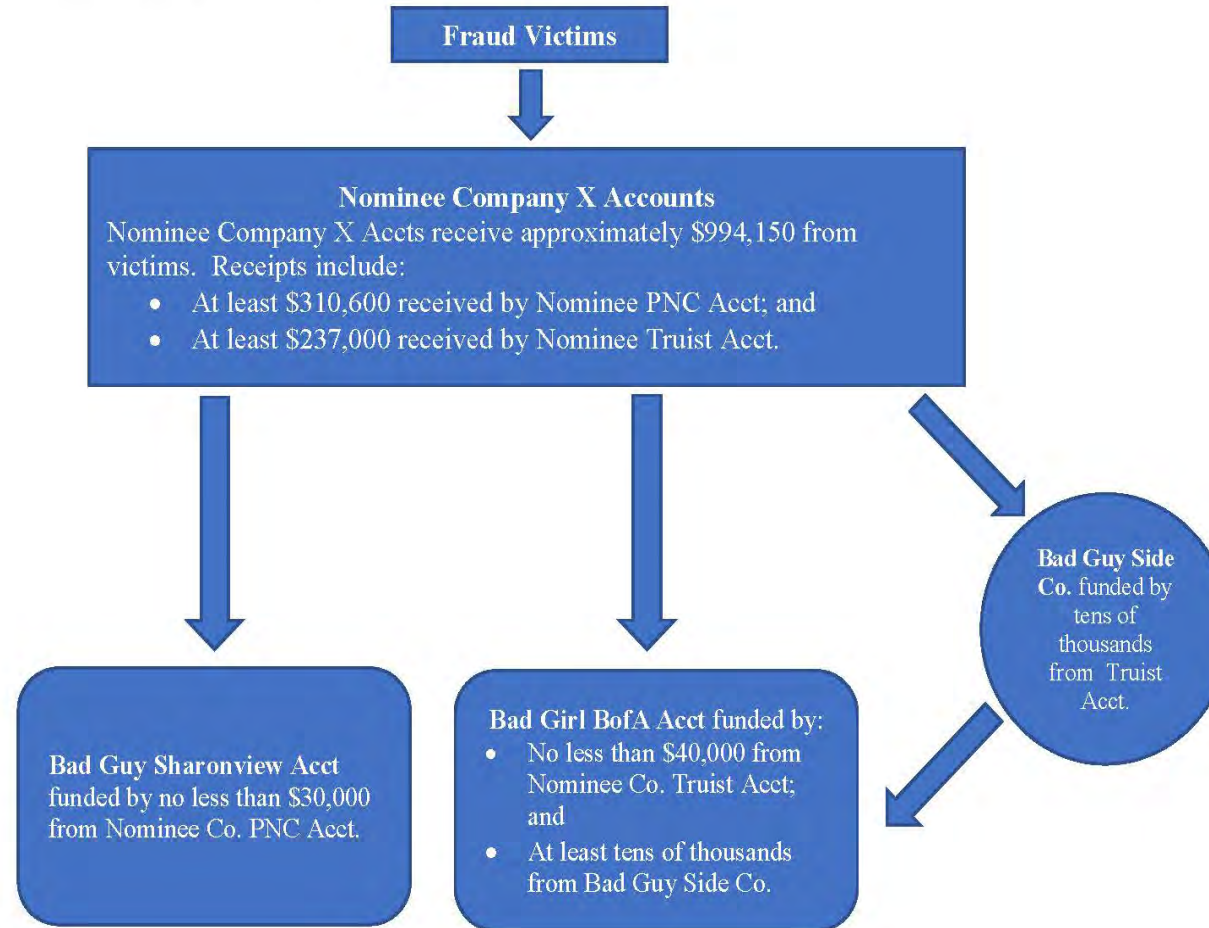
Prepare for Common Problems

- Lack of equity in properties
- Unclear Ownership
 - Nominee owners?
 - Relatives?
- Complex, difficult to explain transactions
 - Mix of clean and dirty money?
 - Multiple transactions?

Common Problems-Solutions

- Lack of Equity in Properties
 - Know all interests and equities before you pursue a property
- Unclear Ownership
 - Investigate!
 - Pierce the Veil
- Complex Transactions
 - Forensic auditors are your friends
 - Images and Graphs are better than Words

The flow of money from victims to Nominee Company X to and through the Target Accounts was generally as follows:





Related Concepts

Racketeering

- What is it?
 - Basically, organized crime or an ongoing criminal enterprise.
- How does it relate to forfeiture?
 - Many modern forfeiture laws were created to combat organized crime. Racketeering laws and forfeiture laws are close relatives.
 - Forfeiture is often the only effective way to combat a criminal organization.

Racketeering Businesses

- If a legitimate business is used to launder proceeds of a crime or promote racketeering, all of the property belonging to that business may be subject to forfeiture



Money Laundering

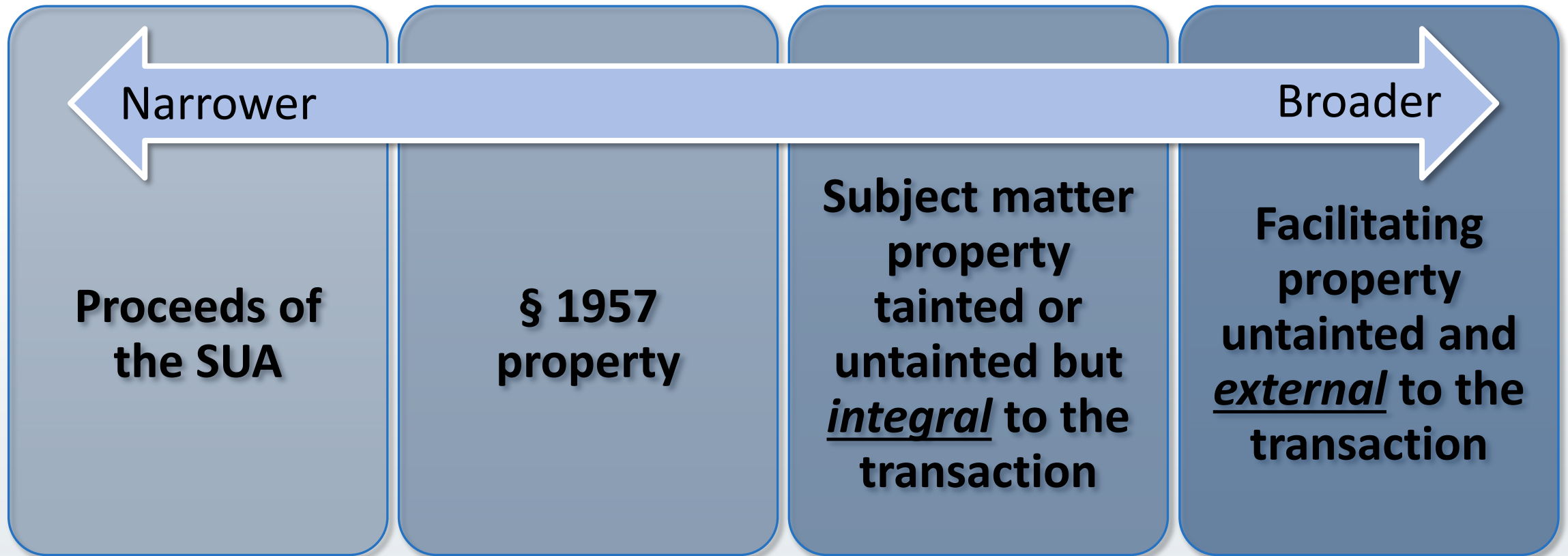
- What is it?
 - Money laundering laws generally forbid transactions designed to conceal or promote certain serious crimes.
- How do money laundering laws relate to forfeiture?
 - Many modern money laundering laws developed at the same time as modern forfeiture laws.
 - And, if you find assets, you often find money laundering, and vice/versa.

Money Laundering Basics

By following the money, investigating money laundering, and using money laundering charges, prosecutors may:

- Tell the whole story of what happened to money involved in the crime and introduce evidence at trial of same;
- Refute defenses at trial;
- Obtain additional and more appropriate penalties for sophisticated criminal conduct; and
- Find a broader pool of criminal proceeds to use for victim compensation.

“Involved In” Money Laundering Forfeiture in the US



Bank Secrecy/AML/FIU Laws

- What is it?
 - In many countries, there are laws that basically require financial institutions, casinos, and other businesses to report suspicious action to government financial intelligence units.
- How do these laws relate to forfeiture?
 - Leads from reporting can often lead to investigations and forfeiture.

Restitution Laws

- What is restitution?
 - A means to pay crime victims
- How do these laws relate to forfeiture?
 - In the United States, restitution and forfeiture are collected via two different parallel statutory schemes.
 - Forfeiture is often the only means to covertly seize assets.

What is Restitution?



Restitution is:

An order for the benefit of VICTIMS based on their quantifiable losses



Imposed upon a criminal defendant but focused on victims



at sentencing

Forfeiture and Restitution Defined and Distinguished

Forfeiture is the process whereby law enforcement:

- Seizes assets (proceeds/property that facilitates crime);
- Uses administrative and judicial processes to gain title;
- Provides due process opportunity for third parties to claim title to assets; and
- Liquidates finally forfeited assets.

Restitution is the process whereby law enforcement:

- Obtains a restitution order recognizing the quantifiable full amount of loss of each victim of a crime; and
- Find and take D's property or rights to property to pay victims (no tracing! All property or rights to property).

Forfeiture = Gain to Defendant

- Forfeiture is the process whereby law enforcement:
- Seizes assets connected or traceable to crime (**proceeds/facilitating property**);
 - Uses administrative and judicial procedures to provide due process for interested parties to claim title to assets;
 - Obtains preliminary and final orders or declarations to forfeit assets to US;
 - Liquidates finally forfeited assets; and
 - **Restores net proceeds to victims!**

Restitution = Loss to Victims

- Restitution is the process whereby law enforcement:
 - Obtains a restitution order recognizing the quantifiable full amount of **loss** of each victim of a crime; and
 - Uses debt collection procedures to find and take any property or rights to property of the defendant to pay the Clerk of Court, which pays victims.
 - No tracing to proceeds required!

Restitution Basics

Elements

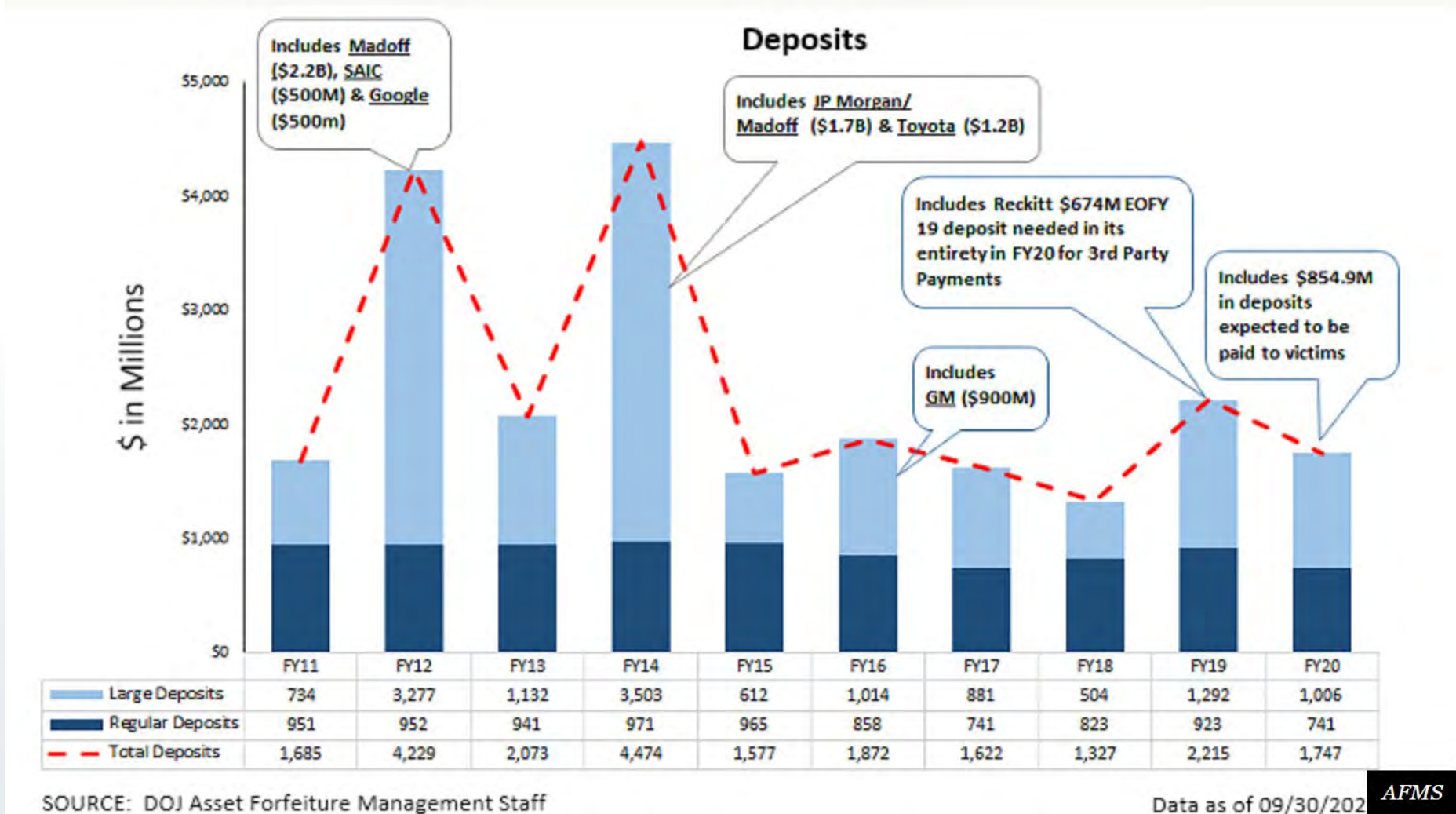
- Offense
- Causation
 - Proximate causation
 - Harm is reasonably foreseeable
- Identifiable victims
 - Person “directly and proximately” harmed
- Recoverable loss

Better Together

- **Restitution** compensates victims of crime for losses incurred to make them whole.
- Post-conviction from plea or verdict to sentencing until paid in full.
- All property is subject to recovery to pay restitution – no requirement of tracing.
- In some countries, forfeited property can be used to pay restitution.

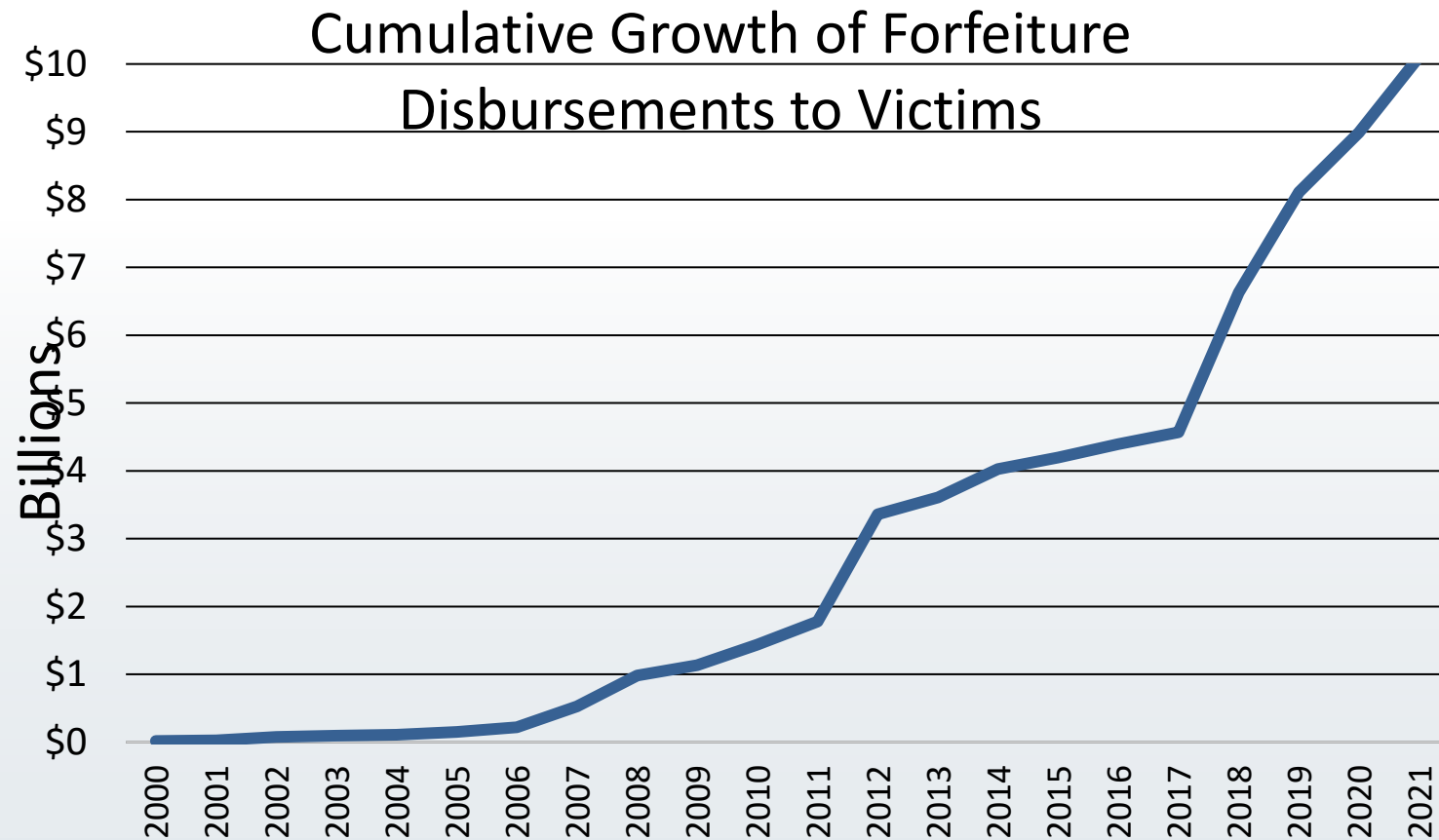
Scope of the USDOJ Asset Forfeiture Program

Total deposits into the Assets Forfeiture Fund have exceeded **\$1 billion** in each of the past 10 years.

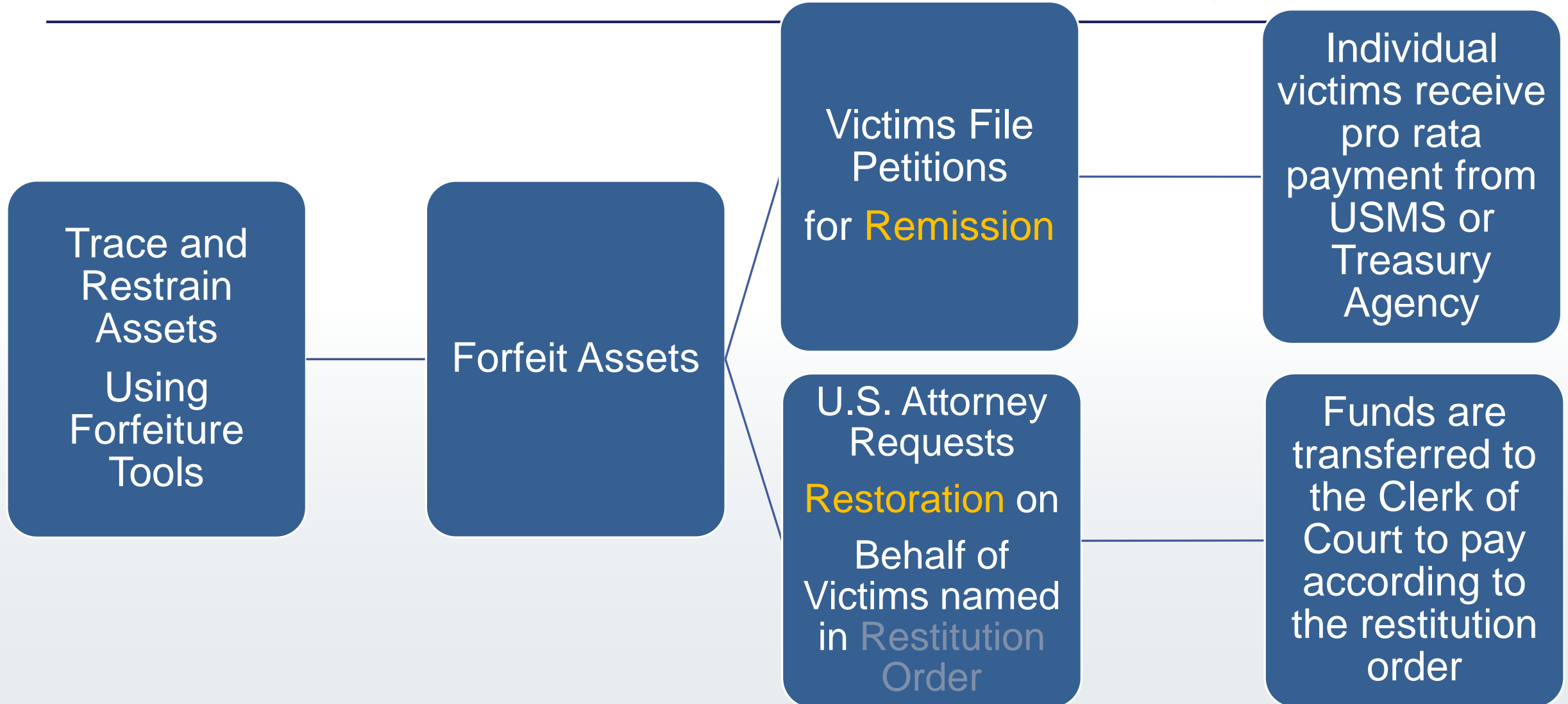


Victim Compensation Statistics

Total victim compensation from forfeited assets since fiscal year 2000 exceeded **\$11 billion**.



How Does This Process Work in the US?





Tracing

Tracing-why do we care?

- Tracing is:
 - How we find proceeds and prove forfeitability;
 - How we prove money laundering; and
 - How we find other wrongdoers.

Proceeds – Do We *Always* Have to Trace?

Not necessarily.

Sometimes, we can prove that funds or property constitute or are traceable to proceeds *circumstantially*.

Sometimes, target:

- (1) had no legitimate source of funds, and
- (2) was committing criminal conduct that generated proceeds when target acquired the funds or asset.



Proceeds – The Problem of Commingling

Where a suspected criminal:

- Earned both criminal proceeds and presumably “clean” monies;
- Commingled those funds in:
 - A bank account or
 - A crypto wallet; and
- Then made expenditures from that account or wallet, the question is, *was any given expenditure made with proceeds, clean funds, or both?*



Proceeds – Using Tracing Principles as to Commingled Account

To determine which funds flowed from a commingled account, we generally may use tracing principles.

But *which* tracing principles we use turns on:

- Why are we tracing?
 - To prove money laundering?
 - To forfeit assets?
 - Both?



Accounting Methods



Proceeds Out
Last / Lowest
Intermediate
Balance Rule



Proceeds Out
First / “Drugs
In, First Out”
Rule



Pro Rata
Approach

Proceeds-Out-Last / LIBR Approach

Also known as “Drugs-in, Last-out” Rule

And as “Lowest Intermediate Balance Rule” (LIBR)

Rule assumes legitimate funds are withdrawn first—and criminal proceeds are withdrawn last.

When the account contains insufficient legitimate funds to cover a specific withdrawal, then criminal proceeds are used to cover the withdrawal.

Use this rule to show funds remain in a bank account containing commingled funds and a fluctuating balance.

Example 1: Tracing Using LIBR

Defendant is running a fraud scheme but also has a legitimate business.

Defendant deposits proceeds from both into a single account.

Defendant then buys an asset from the account.

Did that purchase involve crime proceeds under a LIBR tracing method?



Example 1: Tracing Using LIBR - Transactions

Day 1: Defendant deposits \$100,000 in fraud proceeds into account with \$0 balance.

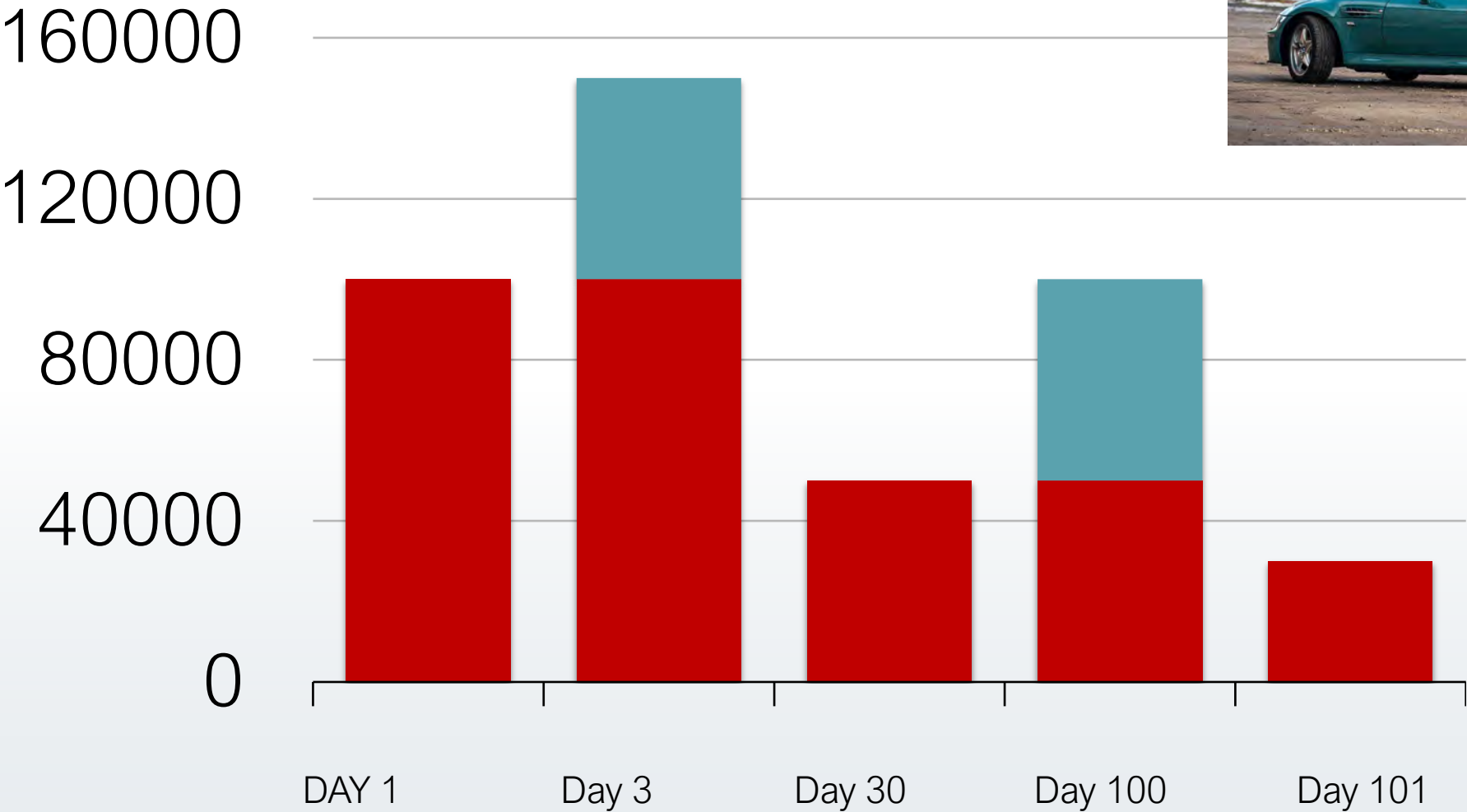
Day 3: Defendant deposits \$50,000 in clean money.

Day 30: Defendant withdraws \$100,000

Day 100: Defendant deposits \$50,000 in clean money

Day 101: Defendant buys pristine 1998 BMW Z3M for \$70,000.

Example 1: Tracing Using LIBR - Transactions



RED = DIRTY BLUE = CLEAN

Proceeds-Out-First Approach

Also known as “Drugs-in, First-out” Rule

Traceable proceeds may be considered to be *any one withdrawal* (or withdrawals), *or any asset purchased with such withdrawal*, to the extent of the amount of criminal proceeds then on deposit in the account.

Thus, the traceable proceeds transferred from an account are *not necessarily the first transfer or transfers out, chronologically*.

Rather, *G chooses* which transfers are funded by proceeds.

Assets bought with proceeds become proceeds.

Pro Rata or Averaging Rule

Any withdrawal is considered proportionate to the ratio of tainted funds to untainted funds in the account at the time the withdrawal is made.

Example:

- Account A has \$100K in tainted funds and \$100K in clean funds.
- Target withdraws \$100K.
- Withdrawal contains \$50K of tainted, and \$50K of clean, funds.

But sometimes we instead use *average ratio* of proceeds to total deposits to determine portion of account—and asset bought from account—consisting of proceeds.

Use where proceeds flow into account—and expenditures are made from account—over time.

Scenario

On January 1, 2021, Dan deposits \$40,000 in wire fraud proceeds into an account in his name. The balance of the account prior to the deposit was \$60,000 derived from Dan's legitimate income. Total balance is now \$100,000.

Dan conducts 3 transactions:

1. On January 2, 2021, he gives a \$15,000 check to his niece, Isabella, for her college tuition;
2. On January 3, 2021, he makes \$35,000 down payment on 2021 Maserati; and
3. On January 4, 2021, he purchases diamond ring for \$26,000.

Which of these transactions involves a transaction in crime proceeds under our money laundering and forfeiture tracing theories?

Proceeds Out Last/LIBR

Date	Source	Action	Balance	Clean Balance	Fraud Balance	Proceeds
1/1/2021	Beginning Deposit		\$100,000	\$60,000	\$40,000	
1/2/2021	Check to Niece	-\$15,000	\$85,000	\$45,000	\$40,000	
1/3/2021	Down payment on 2021 Maserati	-\$35,000	\$50,000	\$10,000	\$40,000	
1/4/2021	Purchase of Diamond Ring	-\$26,000	\$24,000	\$0	\$24,000	\$16,000

Proceeds Out Last/LIBR

Date	Source	Action	Balance	Clean Balance	Fraud Balance	Proceeds
1/1/2021	Beginning Deposit	-	\$100,000	\$60,000	\$40,000	
1/2/2021	Check to Niece	-\$15,000	\$85,000	\$45,000	\$40,000	
1/3/2021	Down payment on 2021 Maserati	-\$35,000	\$50,000	\$10,000	\$40,000	
1/4/2021	Purchase of Diamond Ring	-\$26,000	\$24,000	\$0	\$24,000	\$16,000

Proceeds Out Last /LIBR/Aggregate

Date	Source	Action	Balance	Clean Balance	Fraud Balance	Proceeds
1/1/2021	Beginning Deposit	-	\$100,000	\$60,000	\$40,000	
1/2/2021	Check to Niece	-\$15,000	\$85,000	\$45,000	\$40,000	
1/3/2021	Down payment on 2021 Maserati	-\$35,000	\$50,000	\$10,000	\$40,000	
1/4/2021	Purchase of Diamond Ring	-\$26,000	\$24,000	\$0	\$24,000	\$16,000

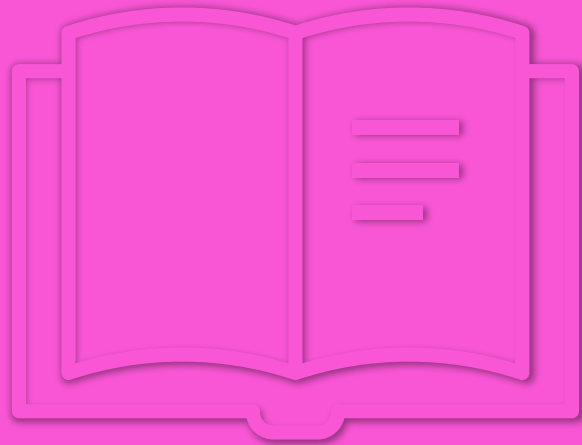
Also, because the \$76,000 in aggregate withdrawals exceed the \$60,000 in clean funds, we can say that *any one* of these transactions included crime proceeds. There are also some crime proceeds left in the account after the transactions.

Pro Rata

Date	Source	Action	Balance	Clean Balance	Fraud Balance	Proceeds
1/1/2021	Beginning Deposit	-	\$100,000	\$60,000	\$40,000	
1/2/2021	Check to Niece	-\$15,000	\$85,000	\$51,000	\$34,000	\$6,000
1/3/2021	Down payment on 2021 Maserati	-\$35,000	\$50,000	\$30,000	\$20,000	\$14,000
1/4/2021	Purchase of Diamond Ring	-\$26,000	\$24,000	\$14,400	\$9,600	\$10,400

Proceeds Out First

Date	Source	Action	Balance	Clean Balance	Fraud Balance	Proceeds
1/1/2021	Beginning Deposit	-	\$100,000	\$60,000	\$40,000	
1/2/2021	Check to Niece Jamie	-\$15,000	\$85,000	\$60,000	\$25,000	\$15,000
1/3/2021	Down payment on 2021 Maserati	-\$35,000	\$50,000	\$50,000	\$0	\$25,000
1/4/2021	Purchase of Diamond Ring	-\$26,000	\$24,000	\$24,000	\$0	\$0

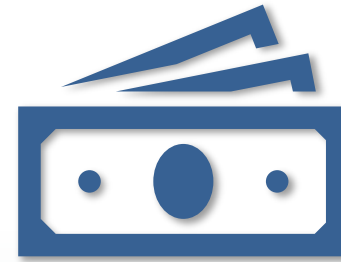


Exercises

Forfeiture Theories

\$50K
Proceeds

\$50K
Clean



Q: What portion
of the RV is
forfeitable?



A: It depends on
your theory of
forfeiture!

Knowledge Check - Only Proceeds in Transaction

Q: What portion of the RV is forfeitable?

\$100K
Proceeds



Answer in the chat pod.

Knowledge Check - Only Proceeds in Transaction

Q: What portion of the RV is forfeitable?

\$100K
Proceeds



A: \$100K
forfeitable
as proceeds and
involved in



Answer in the chat pod.

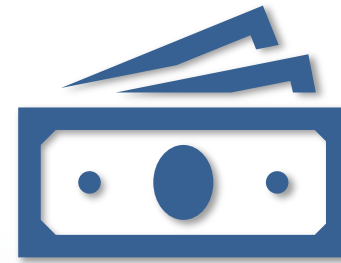
Knowledge Check - Proceeds Plus Clean Property

Q: What portion of the RV is forfeitable on a proceeds theory?

\$50K
Proceeds



\$50K
Clean



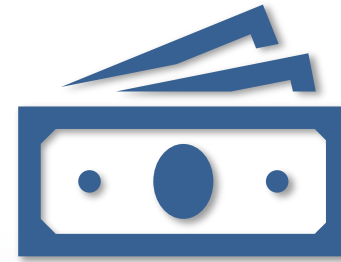
Knowledge Check - Proceeds Plus Clean Property

Q: What portion of the RV is forfeitable on a proceeds theory?

\$50K
Proceeds



\$50K
Clean



A: 50K or 50% of equity forfeitable (as proceeds)

Knowledge Check - Proceeds Plus Clean Property

Q: What portion of the RV is forfeitable on an “involved in” theory?

\$50K
Proceeds



\$50K
Clean



Answer in the chat pod.

Knowledge Check - Proceeds Plus Clean Property

Q: What portion of the RV is forfeitable on an “involved in” theory?

\$50K
Proceeds



\$50K
Clean



A: 100%
forfeitable (as
“involved in”
money
laundering)

Knowledge Check - Facilitating

Q: What portion of the RV is forfeitable on a facilitating theory?



What questions do you want answered?

What questions do you want answered?

- Can we trace?
- How much is the vehicle used?
- Who owns the RV? Is owner culpable?
- What is the value of the RV? Are there liens?
- Where is the RV? What process do I need from a judge?
- How would seizure affect other aspects of the investigation?
- Where will we store the RV? What will it cost to store?

What types of process apply to the RV?

What types of process apply to the RV?

- Seizure warrant or restraining order?
- Civil process?
- Criminal process?
- Agency process?

Knowledge Check Facts

- Fraudster Fred made \$1,000,000 in criminal proceeds through his fraud scheme.
- Money Launderer Mike owns a car dealership that sells cars to the general public. Fraudster Fred brings his criminal proceeds to ML Mike. ML Mike sells Fred cars and creates fictitious liens on the cars.
- ML Mike deposits Fraudster Fred's car payments in the car dealership's business account, buys more cars, and later continues to engage in more transactions with Fred and legitimate customers.

Knowledge Check Facts

Fraudster Fred made \$1,000,000 in criminal proceeds through his fraud scheme.

Money Launderer Mike owns a car dealership that sells cars to the general public. Fraudster Fred brings his criminal proceeds to ML Mike. ML Mike sells Fred cars and creates fictitious liens on the cars.

ML Mike deposits Fraudster Fred's car payments in the car dealership's business account, buys more cars, and later continues to engage in more transactions with Fred and legitimate customers.

What is subject to forfeiture and under what theory?

Knowledge Check

Fraudster Fred made \$1,000,000 in criminal proceeds through his fraud scheme.

Money Launderer Mike owns a car dealership that sells cars to the general public. Fraudster Fred brings his criminal proceeds to ML Mike. ML Mike knows Fred is a fraudster. ML Mike sells Fred cars and creates fictitious liens on the cars.

ML Mike deposits Fraudster Fred's car payments in the car dealership's business account.

Is the car dealership business forfeitable?

Knowledge Check

Fraudster Fred made \$1,000,000 in criminal proceeds through his fraud scheme.

Money Launderer Mike owns a car dealership that sells cars to the general public. Fraudster Fred brings his criminal proceeds to ML Mike. ML Mike knows Fred is a fraudster. ML Mike sells Fred cars valued over \$10,000 and creates fictitious liens on the cars.

ML Mike deposits Fraudster Fred's car payments in the car dealership's business account.

Is the car dealership's operating account forfeitable?

Knowledge Check

Fraudster Fred made \$1,000,000 in criminal proceeds through his fraud scheme.

Money Launderer Mike owns a car dealership that sells cars to the general public. Fraudster Fred brings his criminal proceeds to ML Mike. ML Mike knows Fred is a fraudster. ML Mike sells Fred cars valued over \$10,000 and creates fictitious liens on the cars.

ML Mike deposits Fraudster Fred's car payments in the car dealership's business account.

Is the car dealership's operating account forfeitable?

Knowledge Check

Fraudster Fred made \$1,000,000 in criminal proceeds through his fraud scheme.

Money Launderer Mike owns a car dealership that sells cars to the general public. Fraudster Fred brings his criminal proceeds to ML Mike. ML Mike knows Fred is a fraudster. ML Mike sells Fred cars valued over \$10,000 and creates fictitious liens on the cars.

Are the cars Mike sold to Fred forfeitable?

Knowledge Check

Agents surveil Fraudster Fred and discovery that, on Tuesday, he drove his \$100,000 Maserati to the dealership.

Is Fred's Maserati forfeitable?

Knowledge Check

Agents surveil Fraudster Fred and discovery that, on Tuesday, he drove his \$100,000 Maserati to the dealership. Agents conduct additional surveillance and note four other occasions on which Fred drove in his Maserati to the dealership. These occasions coincide with large cash transactions, seemingly related to Fred, in the dealership operating account.

Is Fred's Maserati forfeitable?



Due Process and Third Party Litigation

Overarching Questions

- Due Process:
- What rights to individual citizens (even alleged wrongdoers) have in your country?
- How does your country protect those rights?
- What is your role in protecting those rights?

In the US . . .

- Citizens have substantive rights—the right to vote, the right to free speech, the right to freedom of religion, etc.

BUT THEY ALSO HAVE

- Rights to certain processes.

Due Process in the US

- In the US, due process in forfeiture proceedings is protected by providing:
- Notice; and
- Opportunity to contest at agency level and court level.

Notice

- Must be reasonably calculated
- Must be clear.
- Should probably be via publication to the world and direct mailing.
- Should probably be more inclusive than legally required.

Notice

- What is the action and where is it pending?
- What does the Government allege?
- What law applies to the claimant?
- What does the claimant have to do now?
- To whom does the claimant need to send correspondence and seek redress?
- What is the next step?

Notice

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

DOCKET NO.

UNITED STATES OF AMERICA

v.

DEFENDANT

)
)
)
)
)

NOTICE

NOTICE IS HEREBY GIVEN that above captioned defendant has been convicted of one or more criminal offenses in the United States District Court for the Western District of North Carolina. As a result of that conviction, the Court has entered the enclosed Consent Order forfeiting specific property to the United States. The United States intends to dispose of the property as provided by law. The property to be forfeited is:

One Ruger, model P345, 45 caliber pistol, serial number 12345.

The United States has determined, for purposes of Federal Rule of Criminal Procedure 32.2(b)(6)(A) and 21 U.S.C. § 853(n), that you reasonably appear to be a potential claimant to the property.

Any person claiming a legal right, title, or interest in any of the property must file a petition with the United States District Court for the Western District of North Carolina, 401 West Trade Street, Charlotte, North Carolina 28202, within thirty (30) days of the receipt of this notice to protect any interest the person may have in the property.

The petition must be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property. The petition should state the time and circumstances of the petitioner's acquisition of the right, title or interest in each property and any additional facts supporting the petition and the relief sought.

A copy of the petition must also be served on:

JOHNNY JUSTICE
Assistant United States Attorney
227 West Trade Street, Suite 1650
Charlotte, NC 28202.

In addition to or in lieu of filing a petition for adjudication by a federal court, any person may also assert an interest in property by submitting a Petition for Remission or Mitigation of forfeiture for adjudication by a federal agency (and not the court) as set forth in 28 C.F.R. Part 9.

IF YOU FAIL TO ASSERT YOUR RIGHT, TITLE, OR INTEREST IN THIS PROPERTY WITHIN THIRTY (30) DAYS OF THE RECEIPT OF THIS NOTICE, YOUR RIGHT, TITLE, AND INTEREST IN THE PROPERTY MAY BE LOST AND THE PROPERTY FINALLY FORFEITED TO THE UNITED STATES OF AMERICA.

Rights of Defendants and Third Parties

- Defendants have a right to contest the forfeitability of property in Court, with or without jury.
- Third parties typically have a right to assert interests in property.
 - Preexisting owners;
 - Bona fide purchasers for value reasonably without knowledge of use of the property in crime or its forfeitability.



Exercise

- Breakout: Design protections:
 - How can someone contest forfeiture?
 - What burden does he have?
 - What notice are you required to give?
 - How do you give the notice?
 - Draft a simple notice
 - Any other rights?



Avoiding Excessive Fines

Overarching Principle

- Always ask ourselves, just because we CAN take a particular action or impose a particular punishment, SHOULD we do so?

Substantial Connection

- Where the government seeks to forfeit under a “facilitating property” or “involved in” theory of forfeiture, the government often must establish that there was a substantial connection between the property and the offense.
- To be “substantial” that connection must be more than incidental or fortuitous.

Gross Disproportionality Test

- Is the forfeiture *grossly disproportional* to the gravity of the offense?—compare forfeiture with gravity of underlying offense.



Asset Management

Beware Underwater Assets

- Law enforcement should not seize assets without equity unless doing so serves a compelling law enforcement interest.
- Law enforcement should not hold tangible assets longer than necessary as doing so diminishes the funds ultimately available to victims.
 - Consider interlocutory sale
 - Cash in lieu options



Costs

- Law enforcement should always take costs into account before seizing assets:
 - How much will storage cost?
 - Will the asset depreciate?
 - How will I secure the asset?
 - What if I do not prevail in my forfeiture action?
 - How long will the asset take to sell?
 - Will there be realtor fees, liens to pay, taxes, etc?
 - Equities (innocent grandmother lives in house, etc.).

Contracting Regulations

Ask yourself:

- Does my country maintain contracting regulations that will render me unable to control the sale process?
- Will there be contractor expenses that could be avoided?

Alternatives to Government Sale

Cooperative defendants often can sell property more easily and efficiently than a government entity can sell property, BUT

- Be sure to secure property upfront;
- Be sure to control and monitor sale;
- When possible, enlist a trusted defense attorney to hold property in escrow when Government cannot hold it.



Pitfalls and Criticisms of Forfeiture

The Press

Background

1980s/1990s—War on Drugs—Miami Vice

- Dismantle criminal organizations.
- Take profit out of crime.

2000s—High profile victim cases—Madoff, Stanford

Approx. Great Recession to-date

- Federal/state/local budgets stretched.
- Growing anti-government sentiment in politics.
- Growing anger with law enforcement—Ferguson and Baltimore.
- Washington Post, New Yorker, and other US national and local news outlets start criticizing forfeiture and structuring prosecutions.
- Focus of criticism—**roadside stops** and structuring.

Common Criticisms in the Press in the US

Taking assets without proving a crime.

Failing to investigate innocent owner issues.

Putting the burden on petitioners to prove innocence before law enforcement has even proven nexus.

Depriving innocent citizens of due process.

Policing for profit!

“The troubling return of an asset seizure program”

April 1, 2016 Charlotte Observer editorial.

Highlights

- “Justice Department announced this week that it is resuming a program that allows police to seize and keep assets of those suspected in crimes”
- “Forfeiture happens, however, even when a person hasn’t been arrested or convicted”
- “N.C. laws are strong, but federal program allows police to ignore them”

USA-Federal Legislature

“Deterring Undue Enforcement by Protecting Rights Of Citizens from Excessive Searches and Seizures Act” (introduced 2016; reintroduced 2020)

Proposed significant civil forfeiture changes.

Shorter time periods to initiate action.

Initial hearing to challenge seizure.

Clear and convincing burden of proof.

Burden on Govt. to affirmatively disprove innocent ownership.

No ability for Government and claimant to negotiate a settlement whereby claimant waives attorney fees. Even if parties settle, Government has to pay fees if over 50% settlement.

State Legislatures

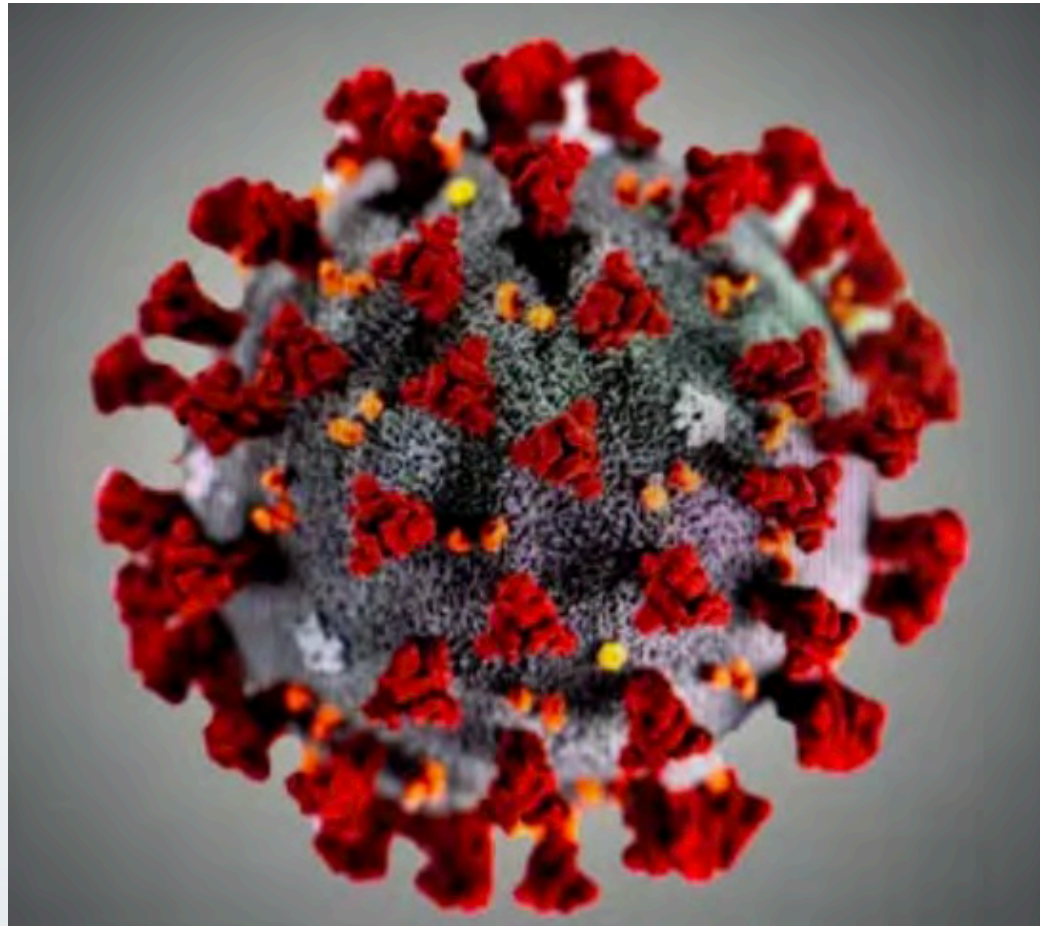
Some states have passed . . .

Legislation banning state civil forfeitures;

Legislation regulating the ability of state law enforcement to turn over money to feds for adoption;

Legislation regulating sharing in such a way that state agencies could not longer comply with DOJ Equitable Sharing Program requirements.

Then, this happened . . .



And, this happened . . .



Exercise

- Breakout: Sell your forfeiture system to the public.
 - What criticisms will you face from the governing bodies, citizens, press, etc?
 - What processes will you put in place to avoid those criticisms?
 - How will you provide process to third parties and defendants?
 - Money and assets sometimes make people—even law enforcement—act in strange ways. What safeguards will you have in place for asset management, sharing, and avoiding abuses of forfeiture process against citizens?

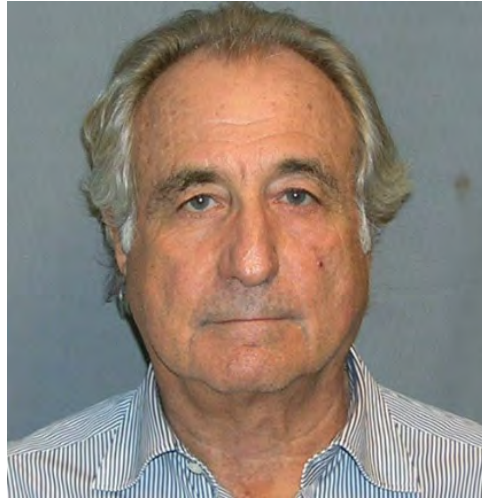


**Regulators and
Litigants in Related
Proceedings:
partners, foes, or
both?**

Objectives

- Discuss when the intersection of bankruptcy, regulatory actions, civil litigation, and forfeitures arise
- Identify reasons we should work with, and not against, others
- Examine the motivations of others who are handling parallel actions to our forfeiture action
- Identify challenges and best practices

Cases Straight from the Headlines



US v. Madoff (SDNY)

Bernard Madoff conducted a massive Ponzi scheme

65,000 petitioners

A special master was appointed to handle victim claims

All of Madoff's assets were auctioned (including his slippers)

DOJ expects to return over \$4 billion in forfeited funds to victims

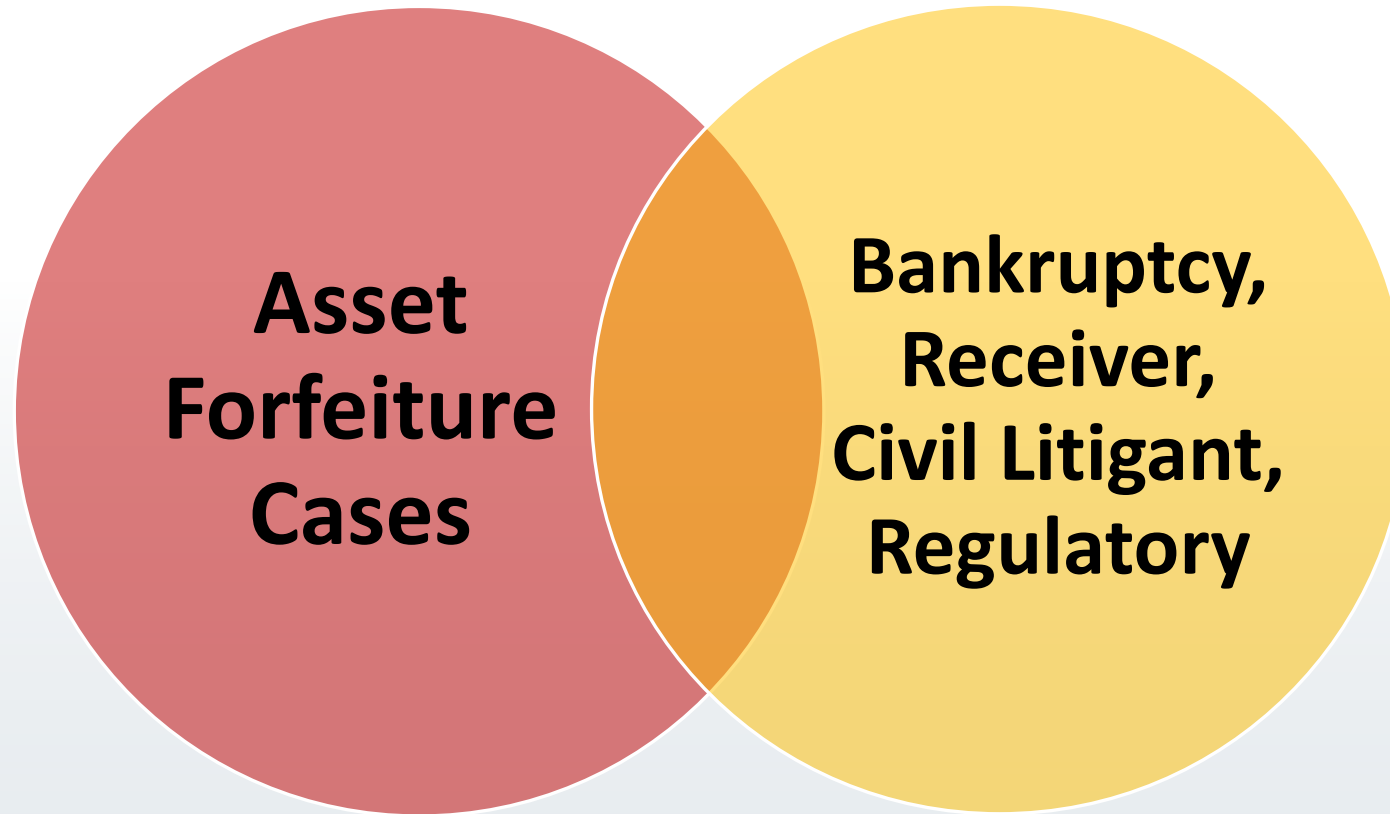


Enron

- Principals of Enron defrauded shareholders by using off-balance-sheet transactions with certain Special Purpose Entities
- Enron's stock price dropped to less than \$1 and Enron filed for bankruptcy in 2001
- DOJ coordinated with the SEC fund administrator to transfer over \$100 million from criminal and civil forfeitures to the Enron Victim Trust
- Over 128,000 victims received payments

Why should we work together?

Laws often intersect— whether we like it or not



Fast Force Multiplier

Different

- Tools for collecting assets
- Tools for handling claims to assets
- Burdens
- Resources
- Timelines
- Role in the court system
- Clients



This is what
happens
when things
go wrong



Bloomberg News

Rothstein Funds in Firm Account Not Subject to Forfeiture (1)

By David Beasley

June 12, 2013 [f Share](#) [t Tweet](#) [in](#) [g+](#) [p](#) [e](#)

Related



For Virtual-Currency Cops, Liberty Reserve Was the Easy Part

Funds held in bank accounts of convicted Ponzi schemer Scott Rothstein's bankrupt law firm can't be forfeited to the government, a federal appeals court said.

The money in the law firm accounts, mixed with receipts from clients at the time Rothstein was charged, isn't subject to forfeiture, the Atlanta-based U.S. Court of Appeals said today, reversing the lower court and handing a victory to the trustee of the law firm's Chapter 11 proceeding.

- Government files forfeiture complaint.
- Trustee files suit claiming same assets.
- Everybody loses.

This is what
happens when
things go right



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Noeleen G. Walder
New York Law Journal | March 27, 2009

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Related Items

- Receiver's Report Offers Details of Dreier's Once-Lavish Lifestyle

Bidders Thursday sat on black and chrome sleigh-arm chairs and perched on the steps of a white spiral staircase at now-defunct Dreier LLP, while others convened in the reception area of the 14th



Government and regulators work together to sell items to highest bidder and pay victims.

Our story begins

The phone rings: Prosecutor/Agent tells you about . . .

A complex white collar case often involving one or more of the following:

- Mail fraud, wire fraud, or securities fraud;
- Money laundering;
- Lots of victims;
- Different categories of victims and loss amounts;
- Net winners—victims who gained money as a result of the scheme;
- Lots of different assets—some involving legitimate, ongoing businesses;
- Civil lawsuits;
- Regulators;
- Claimant/Defendant files for bankruptcy;
- Urgency—ongoing scheme, race to the courthouse, dissipation of assets, etc.

Typical Purpose of a Regulatory Action

EXAMPLE: In US, the Security and Exchange Commission's mission is to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation.

Authorities: SEC/Receiver in US

Statutory Authority: Civil Actions Seeking Injunctive and Other Relief (See, e.g., Section 20(b) of the Securities Act of 1933 and Section 21(d)(1) of the Securities Exchange Act of 1934).

Equitable Remedy: Appointment of a Receiver is a well-established equitable remedy available to the SEC in civil enforcement proceedings for injunctive relief. See, e.g., *SEC v. First Financial Group of Texas*, 645 F.2d 429, 438 (5th Cir. 1981); see also Section 22(a) of the Securities Act of 1933 and Section 27 of the Securities Exchange Act of 1934.

Receiver in SEC action: Acting under order of the appointing court, the Receiver's goal is to maximize the receivership estate's value for harmed investors and other estate claimants.

Tools to Achieve Goals: SEC

- TROs, injunctions, asset freezes, accountings, repatriation of assets, document preservation, expedited discovery, disgorgement, penalties, and Fair Funds.
- Receiver in SEC action:
 - A Receiver wields sweeping powers under the Court's equity jurisdiction
 - may recover assets
 - bring contempt actions against those refusing to relinquish receivership assets
 - set aside fraudulent transfers and recover false profits
 - file suit to recover assets
 - avoid or set aside bankruptcy proceedings
 - retain other professionals, such as accountants, investigators, and attorneys, to achieve the Receiver's mandate.

Goals of Bankruptcy and Trustee

- Bankruptcy law has two key goals:
 - Provide honest but unfortunate debtors with a fresh start
 - Facilitate orderly payment of debts to creditors
- Trustee: Statutory duties and powers to maximize recovery for creditors

Tools to Achieve Goals: Bankruptcy

- Preference claims and avoidance actions
- Flexibility to handle complex assets and process accounts receivable, handle payroll and employment benefits, transfer project, reject leases, etc.
- Clawbacks

Common Pitfalls

Pursuing the same assets or the same types of assets via different processes and without discussing strategy;

Formulating different victim loss numbers among proceedings and without a factual or legal justification for the difference;

Failing to address the payment of fees or set aside certain assets for fees;

Failing to determine ahead of time how any payments will be credited against outstanding restitution.

Timing: questions to consider

At what stage is each proceeding?

Who is better poised to seize and control the assets?

What government entities are involved in the case?

Have receivers already been appointed in federal, state, or foreign proceedings?

What information can be shared and what CANNOT be shared?

Timing: Best Practices

Consider the amount of work, resources, and effort already expended by the Government, bankruptcy trustee, other receivers, and regulatory agencies when determining allocation and distribution of assets.

Ensure that the goals for distribution by the Government and the trustee/receiver are timely, cost-effective, non-duplicative, and equitable.

Take advantage of the tools provided for seizing and collecting assets under all statutory schemes.

Timing: Best Practices

Consider having the trustee/receiver distribute the assets if significant delays arise (several years) in the conviction/exhaustion of appeals by the defendant that necessarily delay any criminal forfeiture

A cooperation agreement between the Government and the trustee can address –

- the victims of the criminal offense
- secured creditors
- unsecured creditors
- victims who have filed claims in the bankruptcy
- costs and payments to a trustee/receiver

Assets: questions to consider

What assets are directly traceable to the criminal activity?

What criminal assets are commingled with legitimate assets?

Is the asset a complex asset?

What assets are located in a foreign jurisdiction?

Are there substitute assets?

Assets: best practices

Allocate resources between the forfeiture case and other proceeding by retaining the directly traceable assets for the forfeiture and directing the comingled assets to the other proceeding.

Consider directing the complex business assets to the receiver/trustee, who is in a better position to unwind these assets.

Consider the transfer of substitute assets to the receiver/trustee when negotiating a cooperation agreement involving the allocation of assets and resources.

Assets: best practices

Consider which case and approach is most COST EFFECTIVE.

Set aside ego and focus on victims.

Victims: questions to consider

Are all the victims in the criminal case in the same class of creditors?

Are the victims of the criminal case also the secured creditors in the bankruptcy proceedings?

Are the victims located in a foreign jurisdiction?

Are the victims identified in a restitution order?

Is the victim an individual or a business?

Is the victim part of a class of victims represented by counsel?

Is the fraud such that certain victims in the bankruptcy will reap unfair benefits?

Victims: best practices

Direct the seized and/or forfeited assets to the bankruptcy estate when the victims are also the secured creditors in the bankruptcy proceeding

Retain forfeited assets for the victims who are not secured creditors

Share documentation, when possible, in order to more accurately ascertain the victims

Tools: questions to consider

Overarching Question: Who is in best position to quickly preserve and liquidate assets?

Seizure/Restraint:

- Are there assets that can be recovered from claw-back litigation?
- Are there avoidance actions, tort claims, or assigned claims that could be pursued?

What is the most effective way to recover losses for victims?

Tools: questions to consider

Liquidation/Costs:

- Is the asset easily liquidated?
- Who is better equipped to administer and/or sell the asset?
- Will the liquidation of the asset require costly litigation?
- Does the debtor have exemptions available to him in the bankruptcy that reduces the trustee's recovery for victims?
- Will the creditors in the bankruptcy be paid in full?

Distribution: questions to consider

Overarching Question: What is the most effective way to return losses to the victims?

Formulating a Victim/Loss List: Will the lists in the criminal and civil cases be the same? Can you use the trustee/receiver's list?

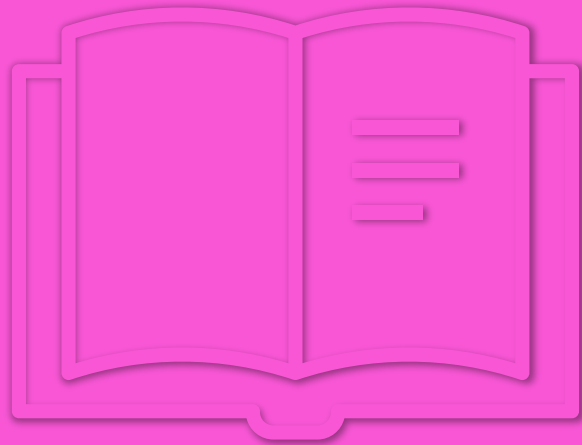
How will payments of in-kind items or payments of mixed debts and victim losses be credited against outstanding restitution order?

Best Practices For Minimizing Conflicts

Open Communication

Coordination Agreements When
Appropriate

Sharing Information and Distribution
Systems



Recap

We talked about . . .

- What is subject to forfeiture and how.
- Related concepts.
- Best practices and tracing practices to find connections between crime and assets.
- Protecting everyone's rights.
- Asset liquidation.
- Related complex proceedings.

Questions?

