

ASSET FORFEITURE—THE BEST COMES TO THOSE WHO DON'T WAIT

By: Paul Flannery

Federal and State asset forfeiture laws can result in extremely harsh consequences for unsuspecting clients unfortunate enough to have their property used in connection with criminal activity. Although this article does not permit a detailed discussion of the intricacies of asset forfeiture, the single most important factor in navigating the complex web of both federal and state asset forfeiture laws is timing—a blown deadline in an asset forfeiture proceeding can have catastrophic results with respect to a property owner's interest in his/her property. As such, it is extraordinarily important for owners who receive notice of property seizure, or owners who, even without notice, believe their property has been seized for forfeiture, to contact counsel immediately.

What is asset forfeiture? Asset forfeiture is the process by which the government confiscates property that has been used in connection with, or represents the proceeds of, illegal conduct. Property that may be forfeited generally falls into four categories: contraband, instrumentalities, proceeds, and facilitating property. Contraband is property that is *per se* illegal to possess, such as drugs or child pornography. An instrumentality is property that directly contributes to a crime, such as actual laundered currency. Proceeds are property traceable directly **or indirectly** to illegal activity, including interest, dividends, etc. To seize and/or forfeit property as proceeds, the government must show a “nexus” between the property to be seized and specified criminal activity. Finally, facilitating property is property that has been used **or intended to be used** in criminal activity. Facilitation is arguably the broadest weapon a prosecutor has in forfeiting property. Although the law requires the government to show a “substantial connection” between the property and criminal activity in order for such property to be forfeited as facilitating property, many people would be dismayed by the low level of “connection” courts have upheld to be “substantial.”

Generally, the first step in the forfeiture process is a seizure of assets. This can occur in several ways, including warrants or restraining orders. In order to secure a warrant to seize property, the government must convince a judge or magistrate that probable cause, or in other words, a reasonable probability exists to believe that such property is subject to forfeiture. With few exceptions, such as seizure of real-estate, a property owner is generally not entitled to any hearing or notice prior to assets being seized for forfeiture.

Once assets are seized, the government must decide what to do with them. Generally, there are three avenues which may be pursued for forfeiture: administrative, civil, and criminal. Administrative forfeiture is conducted by the seizing agency, such as the FBI or DEA, and is designed to swiftly forfeit uncontested property. Administrative forfeiture can be dangerous for property owners who do not react quickly to an administrative forfeiture notice. For instance, a property owner only has 35 days from the date a notice of administrative forfeiture **is mailed** to contest it by filing a claim, and the clock does not stop running until the claim is actually **received** by the seizing agency.

Another reason timing is so important in administrative forfeiture is that a property owner's filing of a notice of claim starts the clock running with respect to the so-called "hardship provision," whereby an owner who satisfies certain conditions can petition a court for immediate release of property if the seizing agency does not return it within 15 days of a claim. Finally, by contesting an administrative forfeiture an owner also forces the government to decide, within 90 days, whether to file a complaint against the property, thereby initiating a civil forfeiture, or to include an allegation against the property in a criminal indictment, thereby initiating a criminal forfeiture. The 90 day deadline may be extended for good cause shown. Many forfeiture actions start as administrative and are then consolidated into civil or criminal actions once a claimant files a notice of claim.

Ultimately, in either a criminal or civil action, the government must prove by a preponderance of evidence (ie. "more likely than not") that the property is subject to forfeiture. This standard is higher than the showing of probable cause necessary to seize the property. The government must prove a sufficient nexus between the property and the underlying criminal activity, which may depend on the "theory" of forfeiture which the government has decided to pursue *i.e.*, the property as contraband, instrumentality, proceeds, and/or facilitating.

There are methods by which a property owner can secure the return of property illegally seized, and there are defenses to forfeiture for innocent owners, which can provide entities, such as corporations, with some protection from the criminal actions of agents or officers. As mentioned above, pursuant to the "hardship provision", a property owner in an administrative forfeiture may file a petition for immediate release of property if such owner can demonstrate sufficient hardship and certain other factors. Unfortunately, this provision will often not be successful in securing the release of currency. In addition, an owner may also be able to make certain constitutional arguments in situations in which the government continues to seek and is granted extensions of time to either file a complaint against the property in a civil action or include a forfeiture allegation against the property in a criminal indictment.

In addition, depending on the stage of the proceeding, a property owner aggrieved by a perceived illegal seizure can file a motion for return of property, challenging the government to demonstrate probable cause for forfeiture. Similar to the filing of a notice of claim, this motion often results in the government moving a forfeiture action from an administrative forfeiture to a civil or criminal action in which the property owner can then attack the merits by filing a motion to suppress. The sooner a client reacts to the government's first notice of forfeiture, the sooner he/she has the potential to receive a merit-based hearing. Again, timing is important. In asset forfeiture the best comes to those who **don't** wait.

If you are facing an asset forfeiture situation, or if you have any other litigation needs, please contact Paul M. Flannery at 410-547-2417 or pflannery@rosenbergmartin.com, or any attorney in our litigation group:

Benjamin Rosenberg	brosenberg@rosenbergmartin.com
Gerard P. Martin	gmartin@rosenbergmartin.com
Gerard J. Gaeng	ggaeng@rosenbergmartin.com
Douglas J. Furlong	dfurlong@rosenbergmartin.com
Kevin J. Pascale	kpascale@rosenbergmartin.com
Steven F. Wrobel	swrobel@rosenbergmartin.com
Caroline D. Ciruolo	cciraolol@rosenbergmartin.com
Andrew H. Baida	abaida@rosenbergmartin.com
David M. Wyand	dwyand@rosenbergmartin.com
T. Christine Pham	cpham@rosenbergmartin.com
James E. Crossan	jcrossan@rosenbergmartin.com
Melody Tagliaferri Cronin	mcronin@rosenbergmartin.com