



FPD Asset Forfeiture Training 2014

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Forfeiture Overview



- Traditionally, forfeiture was not an important issue for appointed counsel because clients had no assets worthy of forfeiture
- Now, clients with no current assets are facing large money judgments
- Some clients lose their small amount of assets and others once worth millions of dollars have their assets seized
- These clients cannot afford to retain counsel
- This situation leaves appointed counsel the task of reclaiming or protecting those assets
- This presentation will provide the basics of how to defend forfeiture actions

Key Forfeiture Statistic

Over \$2 billion net forfeited by US in 2012-2013.

Source – Justice.Gov 2014

Property Subject to Forfeiture

- Property used to facilitate or assist in a crime
- Property which is a proceed or profit or result of a crime
- Substitute assets are clean but are pursued by the Government when it cannot collect facilitation or proceeds property. Money judgments implicate substitute assets.

Forfeiture Representation by CJA Counsel

FPD counsel can become involved in forfeiture representation in several ways. When appointed to represent an indigent defendant, the indictment may contain a forfeiture notice. Some of the new client's property may be seized and awaiting forfeiture proceedings. The new client's property may be subject to civil asset forfeiture. The new client's family may own some of the property subject to forfeiture and want to know how to protect their interests. An eventual plea agreement may contain forfeiture provisions. There are numerous ways forfeiture can come up in appointed criminal cases.

Representation by FPD Permitted

The FPD is permitted to represent indigent defendants in criminal cases in forfeiture matters pursuant to the CJA and the provisions of Volume 7 Defender Services in the Guide to Judiciary Policy. Section 210.20.40 provides for representation of indigent defendants in related civil forfeiture proceedings. Sections 210.20.30(c)(5) and (6) addressing ancillary matters pursuant to the CJA identifies preservation of a claim to property subject to civil forfeiture and seeking the return of seized property as an ancillary matter which FPD counsel might appropriately address. When in doubt, FPD counsel should seek guidance from a supervisor or the presiding judge before handling a particular forfeiture issue for an indigent client.

Federal Asset Forfeiture Starts With the Seizure of Funds, Personal Property, or Real Estate



With a Warrant

United States District Court SOUTHERN DISTRICT OF INDIANA

In the Matter of the Search of
(Name, address or brief description of person, property or premises to be searched)

██████████
Bloomington, Indiana 47408

is a wooden residential structure divided into apartments with two apartments on the first level marked # 1 and # 2 with both accessible from the porch and # 2 is located in the southeast portion of the structure

SEARCH WARRANT (UNDER SEAL)

CASE NUMBER: IP 06-037 M-01

To: Special Agent Dorian Deligorges, Federal Bureau of Investigation, and any Authorized Officer of the United States

Affidavit(s) having been made before me by Dorian Deligorges, Federal Bureau of Investigation, who has reason to believe that on the property or premises known as (name, description, address location)

██████████ Bloomington, Indiana 47408, is a wooden residential structure divided into apartments with two apartments on the first level marked # 1 and # 2 with both accessible from the porch and # 2 is located in the southeast portion of the structure

in the Southern District of Indiana there is now concealed a certain person or property, namely (describe the person or property to be searched)

See Attachment A, and any other property that constitutes evidence of the commission of a criminal offense, contraband, the fruits of crime or things otherwise criminally possessed or property designed or intended for use or which is or has been used as the means of committing a criminal offense, specifically, the conspiracy to commit, or the commission of knowingly presenting a false and fictitious claim upon or against the United States, or any department or agency thereof in violation of Title 18, United States Code, Sections 2, 371, 1036, 1343, 2318 and Title 49, United States Code, Sections 46314 and 46316 (incorporating 49 CFR 1540.103 & 195).

I am satisfied that the affidavit(s) and any recorded testimony establish probable cause to believe that the person or property so described is now concealed on the person or premises above-described and establish grounds for the issuance of this warrant.

YOU ARE HEREBY COMMANDED to search on or before November 6, 2006 (not to exceed 10 days) the person or place named above for the person or property specified, serving this warrant and making the search (in the daytime—6:00 A.M. to 10:00 P.M.) (at any time in the day or night as I find reasonable cause has been established) and if the person or property be found there to seize same, leaving copy of this warrant and receipt for the person or property taken, and prepare a written inventory of the person or property seized and promptly return this warrant to Kennard P. Foster, U.S. Magistrate Judge or any other United States Magistrate Judge as required by law.

October 28, 2006 at 2:09 pm
Date and Time Issued

KENNARD P. FOSTER, U.S. Magistrate Judge
Name and Title of Judicial Officer

at

Bloomington / Indianapolis, Indiana
City and State

Signature of Judicial Officer

Or Without a Warrant



Like Roadside Cameras, Forfeiture Can Be Pursued To Make Money Not To Reduce Crime



What Government can say no to this
pile?

Officers Typically Provide a Receipt When Funds or Property Are Seized



Adobe Acrobat
Document

Sample receipt

Whether the Feds Seized the Property Originally or Not, a Notice of Forfeiture Must Follow the Seizure to Legalize Any Eventual Forfeiture



Adobe Acrobat
Document

Notice of Forfeiture



Adobe Acrobat
Document

CAFRA Seizure Notice

Types of Notice

- Personal notice is common but not required by due process
- Notice by publication can meet due process requirements
- Notice may consist of administrative notice, complaint or a forfeiture notice in an indictment
- Administrative notice requires filing an administrative claim to preserve the client's rights in the seized property

To Hope to Get Anything Back a Claim Must Be Received By The Seizing Agency by the Deadline Provided in the Seizure Notice

- The administrative claim must be signed by the owner of the seized property
- Prior to preparing the claim for the owner, counsel should consult with experienced forfeiture counsel if the owner's counsel has not prepared a claim previously
- Risks which can arise in filing claims include assuring that the claimant properly requires the seizing agency to forward the claim to the U.S. Attorney, avoiding Fifth Amendment issues raised by filing a claim, and getting the claim delivered and processed by the seizing agency on time

Upon Receipt of the Claim the Seizing Agency Must Forward the Claim to the U.S. Attorney for Action Within 90 Days of Receipt of the Claim

While the Government is processing the owner's administrative claim, counsel should require the owner to provide documentary evidence supporting the owner's lawful ownership and use of the seized funds or property, for example, ask for tax returns to help verify the source of the seized funds.



The U.S. Attorney Has Three Options In Response To A Timely Administrative Claim

- Return the seized funds or property to the owner
- File a judicial civil asset forfeiture case against the seized funds or property and provide notice to the owner to file a judicial claim for the seized funds or property
- Indict the owner of the funds or property with charges allowing asset forfeiture and identify the seized funds or property as subject to forfeiture

Rarely Does the U.S. Attorney
Immediately Return Funds Without
Any Contact By Counsel for the
Owner



The Most Common Action U.S. Attorneys Take Upon Receipt of an Administrative Claim

- Filing a federal judicial civil forfeiture action against the seized property previously claimed by the owner is the typical response of the U.S. Attorney
- After filing the civil asset forfeiture complaint with the Clerk of the Court, the owner and counsel will be served with the Complaint
- Upon receipt of the complaint, counsel will have to consult with the client owner and if appropriate enter an appearance, file a judicial claim, and file an answer
- The civil procedure rules govern the action, including discovery and the right to a jury trial
- Legal fees and expenses can be substantial for federal civil litigation if representation for the indigent client is not provided by appointed counsel



Having Filed an Administrative Claim, Owners May be Indicted and Subject to Federal Criminal Forfeiture Proceedings

- If the owner of property is the target of an investigation, the owner may be indicted following the filing of an administrative claim
- Owners can also be indicted without any administrative claim having been filed
- The property can be seized as part of the arrest process
- The U.S. Attorney can meet the 90 day requirement by timely initiating federal criminal asset forfeiture proceedings against an indicted defendant
- The forfeiture notice is included in the indictment.
- Per Crim. Proc. Rule 32.2, criminal asset forfeiture proceedings delay resolution of property claims by a defendant until trial or as part of a plea and claims by parties other than a named defendant until at least after trial, and typically after sentencing
- Criminal asset forfeiture proceedings are by far the least claimant friendly of the possible outcomes of filing an administrative claim





Criminal Forfeiture

18 U.S.C. §§982, 981
(through 28 U.S.C. §2461(c))

§982

- §981(a)(1) – applies to money laundering & transmitting
- Reaches any property “involved in” offense
- §982(a)(2) - applies to crimes designated in statute
- And to conspiracy to commit designated crimes
- Reaches “any property constituting, or derived from, proceeds the person obtained directly or indirectly, as the result of” the offense

§981

- Applies to crimes not designated in §982 as long as civil forfeiture is authorized for those offenses
- Reaches “any property...which constitutes or is derived from....” the offense
- Different standards for different offenses

§981 – Alternate Rules

- “Proceeds traceable to a violation of [specified statutes, e.g. bank fraud] or any “specified unlawful activity” (§981(a)(2)(C))
- “Property... which represents or is traceable to the gross receipts obtained from” [specified offenses, e.g. wire fraud affecting financial institution] (§981(a)(2)(D))
- “Property...which represents or is traceable to gross proceeds from” [specified offenses, e.g. sale of stolen vehicles](§981(a)(2)(F))

§981(a)2)

Alternate “Proceeds”

- For illegal goods, services, unlawful activities, telemarketing & health care fraud: property obtained as a result of the offense, not limited to net gain or profit (§981(a)(2)(A))
- For lawful goods or services sold or provided in an illegal manner: amount of money acquired through illegal transactions less direct costs incurred in providing the goods or services (§981(a)(2)(B))
- For fraud in obtaining loan or credit, forfeiture is reduced to extent loan was repaid or debt satisfied without financial loss to victim (§981(a)(2)(C))

Procedure – Crim. Proc. Rule 32.2

- After verdict/plea – court must determine property subject to forfeiture – whether government has proven “nexus” between property and offense
- Forfeiture may reach specific items of property or result in a money judgment
- If the forfeiture is contested, the district court must grant a hearing on the request of either party

Procedure Continued...

- Court then enters “preliminary order of forfeiture”
- “Ancillary proceedings” commence after entry of preliminary order of forfeiture – third parties claiming interest in forfeited property (not applicable to money judgments)
- Court then enters final order of forfeiture

Related Issues

- “Relation Back” Doctrine – title to forfeited property vests in the US upon commission of the offense (18 U.S.C. 981(f))
- “Substitute Assets” – if forfeited property cannot be located, US may move to seize other property in place of missing property (21 U.S.C. §853(p); 18 U.S.C. §1963(m))
- NOTE: Only Fourth Circuit permits pre-trial restraint of substitute assets, *In Re Billman*, 915 F. 2d 916 (1990)

Related Issues Continued...

- Criminal forfeiture judgment is *in personam*, not *in rem*
- Court may award forfeiture and restitution for the same loss because forfeiture is punitive and restitution is compensatory to victim although this logic permits a double recovery to be avoided

Summary of Federal Forfeiture Proceedings



- In many ways the proceedings and issues are more akin to tax and bankruptcy proceedings than criminal cases
- Seemingly minor issues such as how administrative claims are mailed or phrased can hamper or destroy a client's ability to recover seized assets
- Clients sometimes paradoxically care as much about who gets their seized property than their potential jail sentences
- Consulting with experienced counsel can help avoid the more obvious pitfalls routinely arising in asset forfeiture practice