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Crime and Forfeiture: The Innocent Third Party

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ABSTRACT

Forfeiture has survived through time in American law, and since 1984, the use of forfeiture statutes to divest felons of their spoils has increased substantially. This report reviews the case law which raises the issue concerning many relative to whether some civil forfeiture proceedings constitute punishment which may violate the Eighth Amendment's excessive fines clause.

Crime and Forfeiture: The Innocent Third Party

Summary

Forfeiture has survived through time in American law, and since 1984, the use of forfeiture statutes to divest felons of their spoils has increased substantially. The fact that property has been used illegally does not automatically give the government the right to take and confiscate it. The criminal behavior must violate a federal statute that specifically authorizes the forfeiture or condemns the property involved in the offense.

As a result of the increased volume of forfeiture activity, numerous third parties have been drawn into forfeiture litigation. Coupled with the complexities of forfeiture litigation and the inconsistencies in the judicial decisions, it has been difficult for the innocent-third-party to justify his/her rights in seized property.

The judicial analyses of innocent owner defenses in 21 U.S.C. § 881(a)(6) and (7) reveal disparate interpretations. There are two views (disjunctive and conjunctive) as to the correct interpretation of the statute, and differences exist even within these two views. One school of thought contends that the term “or” must be read in a disjunctive way, holding that the innocent owner test requires a claimant to demonstrate either a lack of knowledge *or* a lack of consent, but not a lack of both knowledge *and* consent (*United States v. Parcel of Real Property Known as 6109 Grubb Road*). On the other hand, there are some courts which have followed the conjunctive school of thought and have held that, in order to maintain the innocent owner defense, a claimant must establish both lack of knowledge and lack of consent (*United States v. One Parcel of Land, Known as Lot 111-B, Tax Map Key 4-4-03-71(4), Waipouli, Kapaa, Island and County of Kauai, State of Hawaii*). Within the conjunctive view, some courts extend the defense further by stating that in order to meet the lack-of-consent test of the innocent-owner defense, the claimant must prove that he “had done all that reasonably could be expected to prevent the proscribed use of his property” (*Calero-Toledo v. Pearson Yacht Leasing Co.*).

In the cases of *Alexander v. United States* and *Austin v. United States*, the Supreme Court found that in some instances, civil proceedings do constitute punishment and may violate the Eighth Amendment’s excessive fines clause. However, the owner’s innocence is only one of the factors that the lower courts have included in their various *post-Austin/Alexander* tests for determining whether a forfeiture constitutes an excessive fine.

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Crime and Forfeiture: The Innocent Third Party

Introduction

This report reviews forfeiture with emphasis on the innocent third party. It focuses on the judicial analyses of 21 U.S.C. § 881(a)(6) and (7), (forfeited drug trafficking proceeds and of property used to facilitate trafficking) by the federal courts, and it provides a general background regarding the origins of forfeiture, types of forfeiture actions, and rights of the innocent third party. Due to the complexity of forfeiture litigation and inconsistency in court decisions, the difficulty involved in defending the rights of innocent owners of seized property is highlighted.

General Background

With the increased activity involving forfeiture actions in recent years, many third parties have been drawn into forfeiture litigation. According to Black's Law Dictionary, "forfeiture is a comprehensive term which means a divestiture of specific property without compensation; it imposes a loss by the taking away of some

preexisting valid right without compensation.”¹ It may also be defined as “the divestiture without compensation of property used in a manner contrary to the laws of the sovereign.”²

At common law, the value of an “inanimate object that had been the direct or indirect cause or agent of a person’s death” was forfeited to the Crown as a deodand.³ The origins of the deodands⁴ are traceable to Biblical⁵ and pre-Christian practices, which eventually reflected the view that the instrument of death was the accused and the English Crown became the earthly representative of the divine power to whom compensation was due.⁶

In the United States, the common law does not concede to the government the power of forfeiture; property is protected by the Bill of Rights.⁷ However, since 1984, the use of forfeiture laws to divest felons of their spoils and means of acquiring them has increased substantially.⁸ Regarding federal criminal investigations, there are

¹ Black’s Law Dictionary 650 (6th ed. 1990).

² *United States v. Eight (8) Rhodesian Stone Statues*, 449 F. Supp. 193, 195 n.1 (C.D. Cal. 1978).

³ Finkelstein, *The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty*, 46 *Temp. L. Q.* 169, 180 (1973).

⁴ Deodand derives from the Latin *Deo dandum*, “given to God”, *supra* note 3, at 180 n. 35. It was any personal chattel which was the immediate cause of the death of any reasonable creature and which was forfeited to the crown. Black’s Law Dictionary 392 (5th ed. 1979).

⁵ *See* Exodus 21:28 which states: “If an ox gore a man or woman, that they die: then the ox shall be surely stoned, and his flesh shall not be eaten; but the owner of the ox shall be quit (free or clear of further obligation).” In this example, the ox rather than the owner is considered guilty but the innocent owner is punished because he no longer has use of his ox.

⁶ *Supra* note 3, at 183.

⁷ The Fourth Amendment prohibits “unreasonable searches and seizures” and requires the establishment of “probable cause” before a warrant is issued. The property must be described with particularity in the warrant before it is seized. The Fifth Amendment guarantees that no one can be deprived of “property without due process of law.” Consequently, any forfeiture of property must be authorized by a specific statute, with due process protection guaranteed.

⁸ Since the enactment of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976 (1984), and the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986), which contained forceful forfeiture legislation, the use of forfeiture has proliferated as a remedy where crimes for profit are involved.

two general categories of property which are subject to forfeiture; one is “proceeds”⁹ and the other is “facilitating property.”¹⁰

The fact that property has been used illegally does not automatically give the government the right to take and confiscate it. The criminal behavior must violate a federal statute that specifically authorizes the forfeiture or condemns the property involved in the offense.¹¹ Such forfeiture provisions apply to property used in the commission of a crime under the particular statutes, as well as property acquired from the proceeds of the crime.¹² There are numerous federal statutes under which forfeiture is authorized.¹³ The most commonly used include statutes for: controlled

⁹ 21 U.S.C. § 881(a)(6) (1994). The subsection provides: “All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance ..., all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.” See also 21 U.S.C. § 853(a)(1) (criminal forfeiture of proceeds of controlled substance violations); 18 U.S.C. § 981(a)(1) (civil forfeiture of proceeds from money laundering violations); 18 U.S.C. § 982(a)(1) (criminal forfeiture of proceeds from money laundering violations); 18 U.S.C. § 1963(a)(3) (criminal forfeiture of proceeds from Racketeer Influenced and Corrupt Organization [RICO] violations).

¹⁰ 21 U.S.C. § 881(a)(7) (1994). The subsection provides: “All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part ..., or to facilitate the commission of, a violation of this subchapter [is] punishable by more than one year’s imprisonment, except ... no property shall be forfeited ... to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.” See also 21 U.S.C. § 853(a)(2) (criminal forfeiture of facilitating property in controlled substance violations); 18 U.S.C. § 981(a)(1) (civil forfeiture of facilitating property involved in money laundering violations); 18 U.S.C. § 1963(a)(3) (criminal forfeiture of facilitating property from RICO violations).

¹¹ “The power to condemn or declare a forfeiture must be found in the statute, and such statutes must be pursued with reasonable strictness.” *United States v. Charles D. Kaier Co.*, 61 F.2d 160, 162 (3d Cir. 1932). See also *United States v. Modicut*, 483 F.Supp. 70, 71 (M.D. La. 1979); *Jensen v. Klecker*, 599 F.2d 243, 245 (8th Cir. 1979); *Sell v. Parratt*, 548 F.2d 753, 758 (8th Cir. 1977).

¹² See, e.g., 18 U.S.C. §§ 981, 982 (1994) (criminal and civil forfeiture in money laundering cases), 21 U.S.C. §§ 853, 881 (1994) (criminal and civil forfeiture in controlled substances cases).

¹³ There are at least 155 federal forfeiture statutes spread throughout the United States Code which encompass criminal and civil provisions. See Doyle, Crime and Forfeiture, CRS Rept. No. 93-826A (Sept. 13, 1993) at 44-9.

substance violations,¹⁴ racketeer influenced and corrupt organizations (RICO offenses),¹⁵ federal gambling offenses,¹⁶ and savings and loan offenses.¹⁷

Often, the determinative issue in forfeiture is whether the seized property was or was not connected to an illegal activity. A claimant is neither a plaintiff nor defendant, but an intervenor who seeks to defend his right to the property against the government's claim. The guilt or innocence of the claimant is largely irrelevant in the absence of a statutory exception.¹⁸ However, paragraphs (6) and (7) of 21 U.S.C. § 881(a) prohibit the forfeiture of a claimant's interest in property if he/she did not know of or consent to the illegal act. Claimants face a threshold requirement of showing that they have an ownership interest in the property. Possession, title and financial stake are relevant factors in determining a claimant's standing to assert an innocent owner defense.¹⁹

¹⁴ 21 U.S.C. §§ 853, 881 (1994).

¹⁵ 18 U.S.C. §§ 1962, 1963 (1994).

¹⁶ 18 U.S.C. § 1955 (1994).

¹⁷ 18 U.S.C. §§ 981, 982, 1956, 1957 (1994).

¹⁸ *United States v. One Parcel Property Located at 427 and 429 Hall Street, Montgomery, Montgomery County, Alabama, With all Appurtenances and Improvements Thereon*, 74 F.3d 1165, 1169 (11th Cir. 1996); *see also supra* text accompanying notes 9 and 10.

¹⁹ *United States v. One 1986 Chevrolet Monte Carlo*, 817 F. Supp. 729, 732-33 (N.D. Ill. 1993) (case where government asserted claimant had given away all ownership interest).

Types of Forfeiture Actions

Criminal Judicial Forfeiture

The government's interest in forfeitable property is established by one of three types of forfeiture actions: criminal, civil, or administrative. Although the innocent owner defenses of § 881(a)(6) and (7) apply only in the case of civil or administrative forfeitures (administrative forfeitures are uncontested civil forfeitures), a property owner's innocence may be a factor in criminal forfeitures as well.

“[A] criminal forfeiture is an *in personam* judgment against a person convicted of a crime” and determines the government's title in property only against the named defendant(s).²⁰ Under criminal forfeiture, the property cannot be sold following the conviction until all other potential third parties have been given notice pursuant to 21 U.S.C. §853(n).²¹ Those with an interest in the property may file claims as third parties. The RICO criminal forfeiture provision, 18 U.S.C. § 1963(l) (1994), for instance, permits a person to file a petition asserting an interest in the forfeited property following a conviction and notice by the government of the forfeiture. At the post-conviction hearing on the petition, the third party has the burden of demonstrating that: (1) he/she has a legal right or interest in the forfeited property; and (2) either (a) his/her interest “was superior to...[the] interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property”,²² or (b) he/she acquired an interest in the property after the crime was committed and is a bona fide purchaser for value who “was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture....”²³

In order to qualify as a “bona fide purchaser for value” under the provision of the criminal forfeiture statute dealing with a third party's interest, the party must acquire its interest through a conscious, arm's length transaction.²⁴ Notwithstanding, third-party claimants may not intervene in the criminal trial, but must wait until after trial to defend their claims to the property.²⁵ In these ancillary and subordinate proceedings, claimants have to carry the burden of proof by a preponderance of the

²⁰ *United States v. Lester*, 85 F.3d 1409, 1413 (9th Cir. 1996).

²¹ 21 U.S.C. 853(n)(1), (7); *United States v. Real Property in Waterboro*, 64 F.3d 752, 755 (1st Cir. 1995).

²² 21 U.S.C. §853(n)(6)(A); *United States v. Alcaraz-Garcia*, 79 F.3d 769, 774 (9th Cir. 1996) 21 U.S.C. 853(n)(6)(B); *United States v. Alcaraz-Garcia*, 79 F.3d 769, 774 (9th Cir. 1991).

²³ 21 U.S.C. §853(n)(6)(B); *United States v. Lavin*, 942 F.2d 177, 179 (3d Cir. 1991).

²⁴ *United States v. Lavin*, 942 F.2d at 180-81 (a tortious transaction such as embezzlement, inadvertent with respect to the victim, does not render the victim a bona fide purchaser for value of his own stolen property; the victim may have an interest in the property superior to the defendant under subsection 853(n)(6)(A), but the victim is not a good faith purchaser for value under subsection 853 (n)(6)(3)).

²⁵ 21 U.S.C. §§ 853(k) and (n) (1988).

evidence.²⁶ Unlike civil forfeitures, the forfeiture of the property in criminal actions depends upon the conviction of the defendant.²⁷

Prior to the passage of the Comprehensive Forfeiture Act of 1984, “all third parties, whether asserting a legal or equitable basis for relief from an order of criminal forfeiture, [were required to] pursue the remedy of petitioning the Attorney General for remission or mitigation of forfeiture.”²⁸ The resolution of such petitions was left entirely to the discretion of the Attorney General and was not subject to judicial review.²⁹ However, Congress and the Department of Justice were not comfortable with this practice and they agreed to create a limited exception which is as follows: “[I]f a third party can demonstrate that his interest in the forfeited property is exclusive of or superior to the interest of the defendant, the third party’s claim renders that portion of the order of forfeiture reaching his interest invalid. The [Senate Judiciary] Committee strongly agrees with the Department of Justice that such third parties are entitled to judicial resolution of their claims.”³⁰ As a result, Congress provided two categories of third parties, standing to petition the courts to determine the validity of their claims to forfeited assets. A third party standing to petition the courts exists: “first, where the petitioner had a legal interest in the property that, at the time of the commission of the acts giving rise to the forfeiture, was vested in him rather than the defendant or was superior to the interest of the defendant; or second, where the petitioner acquired his legal interest after the acts giving rise to the forfeiture but did so in the context of a bona fide purchase for value and had no reason to believe that the property was subject to forfeiture.”³¹ However, for the majority of third parties who assert an equitable, rather than a legal basis for relief, petitioning the Attorney General for remission and mitigation remains the exclusive remedy.³²

²⁶ *United States v. Tanner*, 61 F.3d 231, 234 (4th Cir. 1995) (“... most ... circuits that have considered this issue have concluded that forfeitures under § 853 are punishment, and thus provable under the preponderance standard.”); *United States v. Bieri*, 21 F.3d 819, 822 (8th Cir. 1994) (“The presumption of section 853 is a clear indication that Congress intended criminal forfeiture under section 853(a)(1) [property acquired with drug proceeds] to be proven by a preponderance of the evidence”); *United States v. Banco Cafetero Panama*, 797 F.2d 1155, 1160 (2d Cir. 1986) (claimant has the “ultimate burden of proving that the factual predicates for forfeiture have not been met.”).

²⁷ *See United States v. Saccoccia*, 58 F.3d 754, 783 (1st Cir. 1995); *United States v. Conley*, 826 F. Supp. 1533, 1535 (W.D.Pa. 1993); *United States v. \$39,000 in Canadian Currency*, 801 F.2d 1210, 1218 (10th Cir. 1986).

²⁸ S. Rep. No. 225, 98th Cong. 1st Sess., reprinted in 1984 U.S. Code Cong. & Admin. News 3182, at 3390.

²⁹ *Id.*

³⁰ *Id.*, at 3391.

³¹ *Id.*, at 3392.

³² *Id.*, at 3391.

Administrative Forfeiture

Administrative forfeiture proceedings are civil, *in rem* proceedings which are begun by officers of the Department of Justice or the seizing agency against property valued at \$500,000 or less, prohibited merchandise, of any value, a monetary instrument³³ or cash in any amount or a vessel (including vehicle) used for conveyance or storage, regardless of value.³⁴

Every federal agency has its own set of implementing rules and regulations.³⁵ While these regulations are different and vary from agency to agency, the most significant difference appears to be in the agency procedures. However, one rule appears to be consistent. Once the agency decides to proceed with administrative forfeiture, it should act within a reasonable period of time.³⁶ An unreasonable delay by the seizing agency may contribute to a finding that it "... has hampered the claimant in presenting a defense on the merits, through ... the loss of witnesses or other important evidence."³⁷ As the length of the delay increases, however, so will the burden on the government to show that its failure to act was justified and reasonable.³⁸

³³ "'Monetary instrument' means (A) United States coins and currency; (B) ... coins and currency of a foreign country, travelers' checks, bearer negotiable instruments, bearer investment securities, bearer securities, stock on which title is passed on delivery, and similar material; and (C) ... checks, drafts, notes, money orders, and other similar instruments which are drawn on or by a foreign financial institution and are not in bearer form." 31 U.S.C. § 5312(a)(3) (1994)

³⁴ 19 U.S.C. §§ 1607, 1609, 1619; 21 C.F.R. §§ 1316.75-77 (1995).

³⁵ For example, some of the regulations are: 19 CFR §§ 171.0-171.55 (1995) (Fines, Penalties, and Forfeitures) (Customs Duties); 21 CFR §§ 1316.71-1316.99 (1995) (Seizure, Forfeiture, and Disposition of Property) (Food and Drugs); 21 CFR § 1316.77-.81 (1995) (DEA and FBI); 28 CFR § 9.1 (1995) (Standards for Review); 28 CFR § 9.4 (1995) (Procedures for Filing and Handling Petitions) (DEA, FBI, INS); 28 CFR §§ 8.1-8.10 (1995) (FBI).

³⁶ *United States v. Fifty-Two Thousand and Eight Hundred Dollars in U.S. Currency and Interest*, 33 F.3d 1337 (11th Cir. 1994) (Due process was not violated by the 3 1/2 month delay between the seizure of property and the initiation of forfeiture proceedings in consideration of the factors of the length of the delay, the reason for the delay, the claimant's assertion of his rights, and prejudice to the claimant); *United States v. Approximately Two Thousand Five Hundred Thirty-eight Point Eighty-five Shares of Stock Certificates of the Ponce Leones Baseball Club, Inc.*, 988 F.2d 1281 (1st Cir. 1993) (The date which triggers the time period in which a claimant must file a claim is triggered by whether the notice was by personal service or publication); *United States v. \$23, 407.69 In U.S. Currency*, 715 F.2d 162, 165 (5th Cir. 1985) (forfeiture was denied because a 13-month delay from the time of seizure until the complaint for forfeiture was filed was considered inordinate and unjustified); *O'Reilly v. United States*, 486 F.2d 208 (8th Cir. 1973) (A three-month delay between the commission of the felony and governmental seizure does not cancel the forfeiture.)

³⁷ *United States v. \$23, 407.69 In U.S. Currency*, 715 F.2d at 165.

³⁸ *See United States v. Eight Thousand Eight Hundred and Fifty Dollars in United*
(continued...)

Notice of the seizure of property and the intent “to forfeit and sell must be published for at least three successive weeks in a newspaper of general circulation in the judicial district in which the [proceeding] is brought.”³⁹

However, at least two federal courts have recognized that notice by publication is not a substitute for personal notice and does not afford due process “with respect to persons such as registered owners of seized vehicles whose identities and addresses are known or easily ascertainable and whose legally protected interests are directly affected by the [forfeiture].”⁴⁰

Civil Forfeiture

Civil forfeitures are *in rem* proceedings,⁴¹ which are brought against the “offending” property,⁴² rather than the individual.⁴³ Since the property itself is the offender, its illegal use is the most important consideration.⁴⁴ Consequently, civil forfeitures do not depend upon the conviction of the malfactor, and “the innocence

³⁸(...continued)

States Currency, 461 U.S. 555, 565 (1983) (“Closely related to the length of the delay is the reason the Government assigns to justify the delay”).

³⁹ 19 U.S.C. § 1607 (1994); *see, e.g.*, 21 C.F.R. § 1316.75 (1995).

⁴⁰ *Vance v. United States*, 676 F.2d 183, 186 (5th Cir. 1982); *Wiren v. Eide*, 542 F.2d 757, 762 (9th Cir. 1976); *United States v. \$184,505.01 in U.S. Currency McGlory*, 72 F.3d 1160, 1163-64 (3d Cir. 1995) (“...[F]or due process purposes, publication alone is not sufficient when the government can reasonably ascertain the names and addresses of interested parties [W]hen government knows of party’s actual whereabouts, due process requires sending notice to that address”); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 308, 313-15 (1950) (“The notice must be of such nature as reasonably to convey the required information....It would be idle to pretend that publication alone...is a reliable means of acquainting interested parties of the fact that their rights are before the courts.”)

⁴¹ *United States v. One Parcel Property Located At 427 And 429 Hall Street, Montgomery, Montgomery County, Alabama, With All Appurtenances And Improvements Thereon*, 74 F.3d 1165, 1169 (11th Cir. 1996); *Campbell v. Eastland*, 307 F.2d 478 (5th Cir. 1962).

⁴² Examples include: 18 U.S.C. §981 (savings and loan offenses); 18 U.S.C. §492 (counterfeiting paraphernalia); 19 U.S.C. §1305 (immoral articles); 19 U.S.C. §1497 (undeclared imports); 21 U.S.C. §881 (drug-related proceeds, real property and conveyances); 22 U.S.C. §401 (illegally imported war materials); 33 U.S.C. §§384,385 (vessels used for piracy).

⁴³ *United States v. In Re One Jeep Wrangler Automobile V.I.N. # 2BCCL8132HBS12835*, 972 F.2d 472, 476 (2d Cir. 1992); *United States v. \$152,160 in U.S. Currency*, 680 F. Supp. 354 (D. Col. 1988); *United States v. One Mercedes Benz 380 SEL*, 604 F. Supp. 1307 (S.D.N.Y. 1984), *aff’d*, 762 F.2d 991 (2d Cir. 1985).

⁴⁴ *United States v. Real Property 874 Gartel Drives Walnut Cal.*, 79.F.3d 918, 922-23 (9th Cir. 1996); *United States v. One Parcel Of Real Estate Located At Rural Route 9., La Harpe, Illinois*, 900 F. Supp. 1032, 1037 (C.D.Ill. 1995); *United States v. One 1980 Red Ferrari*, 875 F.2d 186 (8th Cir. 1989); *United States v. \$38,600 in U.S. Currency*, 784 F.2d 694 (5th Cir. 1986); *United States v. \$64,000 in U.S. Currency*, 722 F.2d 239 (5th Cir. 1984).

of the owner of the property subject to forfeiture has almost uniformly been rejected as a defense.”⁴⁵ “[F]orfeiture statutes are civil for the purpose of the double jeopardy clause ... and the broader range of constitutional protections applied to criminal trials.”⁴⁶

Notwithstanding, federal forfeiture procedures in all respects must incorporate the due process safeguards and require for example “[the] government to afford notice and meaningful opportunity to be heard before seizing real property subject to civil forfeiture.”⁴⁷

That having been said, the procedure followed in most civil forfeitures can be fairly unforgiving. To establish its rights to forfeiture, the Government bears the initial burden of demonstrating that there is probable cause to believe that the properties in question were used, or intended to be used to facilitate violations of the federal controlled substances statute.⁴⁸ A probable cause determination is made by examining whether the Government has relied upon information “adequate and sufficiently reliable to warrant the belief by a reasonable person that’ the property was used to further the trafficking of illegal narcotics.”⁴⁹ The Government must demonstrate that the properties facilitated illegal drug trafficking to establish the requisite nexus between the subject premises and the underlying crimes.⁵⁰

⁴⁵ *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 681, 683 (1973); see *Bennis v. Michigan*, 116 S.Ct. 994 (1996) (The unsuspecting wife of a man who was caught using the family car to engage in sex with a prostitute, lost her bid to recoup her ownership stake in the vehicle after the Supreme Court found that the state of Michigan had the right to seize the car because it had been used in a crime.)

⁴⁶ *United States v. Ursery*, 116 S.Ct. 2135 (1996). *United States v. Seifuddin*, 820 F.2d 1074, 1077 (9th Cir. 1987).

⁴⁷ *United States v. James Daniel Good Real Property*, 114 S.Ct. 492, 495 (1993).

⁴⁸ *United States v. Premises Known As RR # 1, Box 224, Dalton, Scott Township And North Abington Township, Lackawanna County, Pa.*, 14 F.3d 864, 869 (3d Cir. 1994); *United States v. Eleven Vehicles*, 836 F. Supp. 1147, 1152 (E.D.Pa. 1993); *United States v. RD 1, Thompsontown, Delaware Township*, 952 F.2d 53, 56 (3d Cir. 1991); *United States v. Parcel of Real Property Known as 6109 Grubb Road*, 886 F.2d 618, 621 (3d Cir. 1989).

⁴⁹ *United States v. Parcel of Real Property Known as 6109 Grubb Road*, 886 F.2d at 621 (quoting *United States v. One 56-Foot Motor Yacht Named Tahuna*, 702 F.2d 1276, 1282 (9th Cir. 1983)). Many circuits have held that the government is permitted to present hearsay evidence when proving probable cause in a forfeiture action. See *United States v. One 1973 Rolls Royce, V.I.N. SRH-16266*, 43 F.3d 794, 805 (3d Cir. 1994); *United States v. Daccarett*, 6 F.3d 37, 56 (2d Cir. 1993); *United States v. One 1982 Chevrolet Corvette*, 976 F.2d 392, 392 (8th Cir. 1992); *United States v. One Parcel Of Real Estate At 1012 Germantown Road*, 963 F.2d 1496, 1501 (11th Cir. 1992).

⁵⁰ *United States v. RDI, Thompson, Delaware Township*, 952 F. 2d at 56-57. There is some disparity among the cases regarding the level of proof beyond “mere suspicion” to which probable cause must exist. The cases hold that the government must demonstrate that there is either a “[mere] nexus” or a “substantial connection” between the seized property and the illegal drug activity. See *United States v. Real Property Known and Numbered as 429 South Main Street*, 52 F.3d 1416, 1418 (6th Cir. 1995) (government need prove only a “nexus”

(continued...)

Once the Government demonstrates the existence of probable cause, the ultimate burden shifts to the claimants to prove by a preponderance of the evidence either that the properties were not used to facilitate the trafficking of illegal narcotics, or that the illegal use was without the claimant's knowledge or consent.⁵¹

Legislative History

The language which established the civil forfeiture innocent owner defenses in §881(a)(6) and (7)⁵² has been confusing for the courts to interpret and the legislative history does not provide a solution to this issue. The forfeiture provision of the Comprehensive Drug Abuse Prevention and Control Act of 1970⁵³ establishes that property used to commit or to facilitate a violation of the Act, including proceeds traceable to narcotics trafficking, is subject to forfeiture. The forfeitable property includes vehicles,⁵⁴ books and records,⁵⁵ personal property,⁵⁶ and real property.⁵⁷ The legislation, which was designed to control in a comprehensive manner the growing problems of drug abuse in the United States, allows the government to remove the profits and thus the incentive for drug trafficking.⁵⁸ Congress enacted the innocent owner exception "... in order to protect the individual who obtains ownership of

⁵⁰(...continued)

between the seized property and the illegal drug activity); *United States v. Chandler*, 36 F.3d 358, 362 (4th Cir. 1994) (requiring demonstration of a nexus); *United States v. Daccarett*, 6 F.3d 37, 55-56 (2d Cir. 1993) (nexus); *United States v. Certain Real Property Commonly Known As 6250 Ledge Road*, 943 F.2d 721, 725 (7th Cir. 1991) (nexus); *United States v. Certain Real Property Located At 16510 Ashton*, 47 F.3d 1465, 1469 (6th Cir. 1995) (substantial connection); *United States v. Bizzell*, 19 F.3d 1524, 1527 n. 6 (4th Cir. 1994) (substantial connection).

⁵¹ *United States v. RDI, Thompson, DeLanson Township*, 952 F.2d at 56; *United States v. Parcel of Real Property known as 6109 Grabb Road*, 886 F.2d at 623. See also *United States v. Ursery*, 116 S.Ct 2135, 247-48 (1996); *United States v. One Parcel Of Real Property With Buildings, Appurtenances, And Improvements, Known As Plat 20, Lot 17, Great Harbor Neck, New Shoreham, Rhode Island*, 960 F.2d 200, 204 (1st Cir. 1992); *United States v. Certain Real Property, Commonly Known As 6250 Ledge Road*, 943 F.2d 721, 725 (7th Cir. 1991); *United States v. On Leong Chinese Merchants Association Building*, 918 F.2d 1289, 1293 (7th Cir. 1990).

⁵² Pub. L. No. 95-633, 92 Stat. 3768, 3777, § 301(1) added subsec. (A)(6) (enacted Nov. 10, 1978); Pub. L. No. 98-473, 98 Stat. 1837, 2050, § 306(a) added subsec. (A)(7) (enacted Oct. 12, 1984).

⁵³ 21 U.S.C. § 881 (1994).

⁵⁴ 21 U.S.C. § 881(a)(4) (1994).

⁵⁵ 21 U.S.C. § 881(a)(5) (1994).

⁵⁶ 21 U.S.C. § 881(a)(6) (1994).

⁵⁷ 21 U.S.C. § 881(a)(7) (1994).

⁵⁸ H.Rept. 91-1444, 91st Cong., 1st Sess. 1, reprinted in 1970 U.S. Code Cong. & Admin. News 4566, 4567.

proceeds with no knowledge of the illegal transaction.”⁵⁹ Congress intended “... to make it clear that a bona fide party who has no knowledge or consent to the property he owns having been derived from an illegal transaction, that party would be able to establish that fact under this amendment and forfeiture would not occur.”⁶⁰ The Senate Report does not make any specific comments as to whether the phrase “knowledge or consent” should be read disjunctively or conjunctively.

Neither does the legislative history concerning the innocent owner defense in section 881(a)(6) provide any information for determining whether “or” actually means “and” in section 881(a)(7).⁶¹ In its most definitive statement concerning the innocent owner defense, the legislative history provides that “... the property would not be subject to forfeiture unless the owner of such property knew or consented to the fact” that the property was being used or intended for use in conjunction with a drug-related activity.⁶²

Innocent Third Party Defense

Congress’s decision to add 881(a)(4), (6), and (7) to the forfeiture picture caused a dramatic expansion of government’s forfeiture power. Previously, forfeiture had been limited to the illegal drugs and the instruments by which they were

⁵⁹ 124 Cong. Rec. 23056 (1978) (statement of Sen. Culver).

⁶⁰ *Id.*, at 23057 (statement of Sen. Nunn).

⁶¹ The legislative history of section 881(a)(6) is significant inasmuch as Congress referred to section 881(a)(6) in describing the innocent owner defense in section 881(a)(7), and because section 881(a)(6) contains the same innocent owner language. *United States v. Parcel of Real Property known as 6109 Grubb Road, Millcreek Township Erie County, Pennsylvania*, 886 F.2d 618, 625 (3rd Cir. 1989) (“This is the only explanation given for the insertion of the language in § 881(a)(7) providing a defense from forfeiture of real property used for illegal purposes without the owner’s knowledge or consent.”) The civil forfeiture statute at 21 U.S.C. § 881(a) was described in the Senate Report as follows: “The first amendment would add to the list of property subject to civil forfeiture set out in section 881(a) real property which is used or intended to be used in a felony violation of the Drug Abuse Prevention and Control Act. This provision would also include an ‘innocent owner’ exception like that now included in those provisions [§ 881(a)(6)] permitting the civil forfeiture of certain vehicles and moneys or securities.” 1984 U.S. Code Cong. & Admin. News 3182, 3398.

⁶² The full text of the legislative history provides: “Finally it should be pointed out that no property would be forfeited under the Senate amendment to the extent of the interest of any innocent owner of such property. The term ‘owner’ should be broadly interpreted to include any person with a recognizable legal or equitable interest in the property seized. Specifically the property would not be subject to forfeiture unless the owner of such property knew or consented to the fact that: (1) the property was furnished or intended to be furnished in exchange for a controlled substance in violation of law, (2) the property was proceeds traceable to such an illegal exchange, or (3) the property was used or intended to be used to facilitate any violation of Federal illicit drug laws.” Joint Explanatory Statement of Titles II and III to the Psychotropic Substances Act of 1978, 124 Cong. Rec. 34664, 34672 (1978), reprinted in 1978 U.S. Code Cong. & Admin. News 9518, 9522-23.

manufactured and distributed. However, § 881(a)(4), (6), and (7) gave the government the power to seize property that otherwise appeared to be legitimate. This development gave rise to the possibility that owners who had innocently leased or loaned property to others could lose that property in a forfeiture proceeding. For example, a homeowner might forfeit a home if a relative was caught trafficking in drugs within the house, or a parent who had loaned a relative the family car might lose it if the relative were caught transporting drugs in it.

In order to correct this problem, Congress crafted an “innocent owner” defense to forfeiture under §881(a)(4), (6), and (7). The “innocent owner” defenses under (a)(6) and (7) are the same: no owner’s interest in property may be forfeited “by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.”⁶³ Congress later added the innocent owner defense of subsection 881(a)(4), which is somewhat different: no owner’s interest in a “conveyance” shall be forfeited “by reason of any act or omission established by that owner to have been committed or omitted without the knowledge, consent, or willful blindness of the owner.”⁶⁴

Other than the innocent-owner defenses, claimants in forfeiture proceedings have very few defenses, and the available defenses are very difficult to prove. Under many forfeiture statutes, lack of knowledge concerning the crime is no defense for the innocent owner.⁶⁵ Where an innocent owner defense is provided, a claimant in either a civil or a criminal forfeiture must establish that he is an owner, lienholder, or bona fide purchaser for value, within the meaning of the statute.⁶⁶ While the establishment of these claims may not always ensure success, nonetheless, they are required for the establishment of the innocent-owner defense and a prerequisite to being able to assert a claim. Having established standing, in order to succeed, the claimant must demonstrate that he/she lacked the *knowledge, consent* and was not *willfully blind*.

Judicial interpretations of each of these statutory defenses have not been consistent. There are two general viewpoints as to the correct interpretation and differences exist even within these two views. The disjunctive view holds that “knowledge or consent,” should be read literally. If a claimant establishes that he/she

⁶³ 21 U.S.C. §§ 881(a)(6) and (a)(7) (1994).

⁶⁴ 21 U.S.C. § 881(a)(4)(C) (1994).

⁶⁵ See, e.g., *Bennis v. Michigan*, 116 S.Ct. 994 (1996) (“the innocence of the owner of property subject to forfeiture has almost uniformly been rejected as a defense”; the issue was not whether the state could require the car to be forfeited [the wife conceded that it could], but whether, if it did, the state had to compensate an innocent owner for her interest in the property).

⁶⁶ 21 U.S.C. § 881(a)(6) (1988) (drug violations); 18 U.S.C. § 981(a)(2) (1994) (money laundering); 21 U.S.C. § 881(a)(4)(C) (1988) (drug violation); 31 U.S.C. § 5317 (1994) (forfeiture of monetary instruments crossing an international border without the filing of a Currency and Monetary Instrument Report).

lacked actual knowledge or that even with such knowledge, he/she did not consent to the use, the claimant prevails.⁶⁷

The conjunctive view on the other hand, requires that claimants prove that they lacked both knowledge and consent. An example of this view can be found in *United States v. One Parcel Known As Lott 111-B, Tax Map Key 4-4-03-71(4), Waipouli, Kapaa, State of Hawaii*,⁶⁸ where the court held that “if the claimant either knew or consented to the illegal activities, the ‘innocent owner’ defense is unavailable.”

In the first case which raised the question concerning the disjunctive interpretation of the innocent owner “knowledge or consent” defense, the court concluded that in accord with the “canons” of statutory construction, terms separated by the word “or” must be read disjunctively and concluded that a claimant could be an innocent owner by showing either that he lacked knowledge of, or had not consented to the illegal drug use of his property.⁶⁹

Within the conjunctive view, the Supreme Court has extended the defense further by stating that in order to meet the lack-of-consent test of the innocent-owner defense, the claimant must prove that he/she “had done all that reasonably could be expected to prevent the proscribed use of his property.”⁷⁰ Selected cases providing examples of innocent owner claims which were found to be either credible or insufficient to meet the “all that could be reasonably expected” test are as follows: (1) homeowners were not innocent where they allowed their children to reside, knowing that they had criminal convictions for narcotics violations, and they were aware that they possessed narcotics in the residence; (2) innocent owner defense required the claimant to establish that he did everything that could be reasonably expected to prevent the illicit use of the property; the claimant testified that he had tried constantly to stop the drug traffic by calling the police, chasing away dealers, placing “no loitering” signs in the front windows, installing cameras and mirrors, removing telephones on the side of the building, paving the dirt parking lot so drugs could not be buried, erecting tall fences, installing a burglar alarm and keeping watchdogs; case remanded so district court could properly instruct the jury on the definition of consent

⁶⁷ See *United States v. Parcel of Real Property Known As 6109 Grubb Road*, 886 F.2d 618, 626 (3d Cir. 1989), *reh’g denied*, 890 F.2d 659 (1989); *United States v. One Parcel of Real Estate at 1012 Germantown Road, Palm Beach County, Florida*, 963 F.2d 1496, 1503 (11th Cir. 1992) (a claimant may avoid forfeiture by proving either ignorance of the illegal activity occurring on her premises or a lack of consent to that activity); *United States v. Certain Real Property And Premises Known As 418 57th Street, Brooklyn, New York*, 737 F. Supp. 749, 751 (E.D.N.Y. 1990); *United States v. Sixty (60) Acres, More Or Less With Improvements, Located In Etowah County, Alabama*, 727 F. Supp. 1414, 1418-19 (N.D.Ala. 1990), (vacated on other grounds), 736 F. Supp. 1579 (1990).

⁶⁸ 902 F.2d 1443, 1445 (9th Cir. (1990).

⁶⁹ *United States v. Certain Real Property and Premises Known as 17102 Liberty Avenue*, 710 F. Supp. 46, 50 (E.D.N.Y. 1989).

⁷⁰ *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 690 (1974). See also *United States v. All Right, Title and Interest in Real Property and Appurtenances*, 77 F.3d 648, 657 (2d Cir. 1996).

and the reasonable efforts necessary to avoid a § 881(a)(7) forfeiture;⁷¹ (3) the forfeiture of real property was affirmed where the claimants failed to establish that the drug trafficking on their premises was beyond their control, and they appeared to conduct their activities without regard to what might follow;⁷² (4) the owner of real property who knew nothing about the illegal use of his property was an innocent owner and his property was not subject to forfeiture; he lived in and was employed in different cities than where the property was located; additionally, he did not purchase or place on his property the mobile home from which the drug activity was conducted;⁷³ (5) the wife's generalized fear of her husband whom she knew to be involved in drugs did not allow her to escape the consequences of her consent to those activities so as to make her an innocent owner to defeat the government's forfeiture of property which she was the sole owner;⁷⁴ (6) a 66-year-old homeowner established an innocent owner defense to forfeiture where there was no evidence that she was aware of her grandson's drug dealing, and there was evidence that she had acted reasonably to prevent her home from being used for drug transactions; the homeowner worked long hours and had no prior experience with the world of drug trafficking;⁷⁵ and (7) where corporate employee engaged in criminal activity outside the scope of his employment, the activity is not imputable to the corporation, so as to deny the corporation an "innocent owner" defense in the forfeiture action.⁷⁶

The Supreme Court interpreted the innocent owner defense established in §881(a)(7) in *United States v. A Parcel of Land, Buildings, Appurtenances and Improvements Known as 92 Buena Vista Avenue, Rumson, New Jersey*.⁷⁷ Recognizing that the circuits have disagreed as to whether the phrase "without the knowledge or consent of the owner" should be read disjunctively, to afford the defense if the transferee either was without knowledge or did not consent, or conjunctively, to afford the defense only when the transferee was without knowledge and did not consent, the Court provided some guidance. A plurality of the Court stated that one who acquires forfeitable property after an illegal act has occurred but before forfeiture may assert the innocent owner defense because title does not vest in the government until the date of forfeiture and forfeiture takes effect immediately

⁷¹ *United States v. One Parcel of Real Estate at 1012 Germantown Road, Palm Beach County, Florida*, 963 F.2d 1496 (11th Cir. 1992).

⁷² *United States v. All Right, Title and Interest in Real Property and Appurtenances Thereto Known as 785 St. Nicholas Ave.*, 983 F.2d 396 (2d Cir. 1993).

⁷³ *United States v. That Certain Real Property Located at 632-636 Ninth Avenue, Calera, Alabama*, 798 F. Supp. 1540 (N.D.Ala. 1992).

⁷⁴ *United States v. Sixty Acres in Etowah County*, 930 F.2d 857 (11th Cir. 1991)

⁷⁵ *United States v. Premises Known as 417 East Grand Avenue, Garland County, Hot Springs Arkansas*, 777 F. Supp. 1455 (W.D. Ark. 1991).

⁷⁶ *United States v. Route 2, Box 472, 136 Acres More or Less, Land Lying and Being in Land Lot 221 of the 18th District, 1st Section, Towns County, Georgia With Mailing Address Route 2, Box 472, Hiawassee, Georgia*, 60 F.3d 1523, 1528 (11th Cir. 1995).

⁷⁷ 507 U.S. 111 (1993).

upon commission of the illegal act.⁷⁸ “[T]he right to the property then vests in the United States, although their title is not perfected until judicial condemnation [which] when obtained relates back to that time, and avoids all intermediate sales and alienations, even to purchasers in good faith.”⁷⁹

Although the plurality in *92 Buena Vista Avenue* suggested that equitable principles (and not the statutory language) might prevent a post-illegal-act transferee with knowledge of the illegal act at the time of the transfer from having the benefit of the innocent owner defense, the Supreme Court did not decide the issue but stated that “respondent has assumed the burden of convincing the trier that she had no knowledge of the alleged source of Brenna’s gift [the property]”⁸⁰

Forfeiture and the Eighth Amendment

An owner’s innocence or his or her relative culpability has been identified by several of the lower federal courts as a factor to be considered in the determination of whether a particular forfeiture constitutes an excessive fine in violation of the Eighth Amendment.

In *Alexander v. United States*⁸¹ and *Austin v. United States*⁸² the Supreme Court dealt with the issue of proportionality in civil as well as criminal forfeiture proceedings. The Court instructed that civil and criminal forfeitures should be made proportional to the condemned conduct and directed the Courts of Appeal to devise a workable solution to correct the problem caused by forfeiture penalties which exceed the harm caused by the unlawful conduct. The central issue which was before the Court in both cases was whether the government through forfeiture violated the Constitution if the value of the property to be forfeited substantially outweighs the severity of the offense. The Court found that, in some instances, civil proceedings do constitute punishment and may, for example, violate the Eighth Amendment’s excessive fines clause. In *Alexander*, the defendant was convicted of violating federal obscenity laws and the Racketeer Influenced and Corrupt Organizations Act (RICO). In addition to imposing a prison term and fine, he was forced to forfeit his business

⁷⁸ *Id.*, at 126-27.

⁷⁹ *Id.* See also *United States v. One Parcel of Real Estate Located at 6640 SW 48th St, Miami, Dade County*, 41 F.3d 1448, 1453 (11th Cir. 1995) (“we believe the best approach is to hold that the “lack of consent” defense of Section 881(a)(7) is not available to post-illegal act transferees; under this approach, if a post-illegal act transferee knows of illegal activity which would subject property to forfeiture at the time he takes his interest, he cannot assert the innocent owner defense to forfeiture”); *contra United States v. One 1973 Rolls Royce*, 43 F.3d 794, 818-20 (3d Cir. 1994) (held that a post-illegal act transferee who did not consent to illegal activity would be safe from forfeiture under 21 U.S.C. § 881(a)(4)(C)’s innocent owner defense even though he knew of the illegal activity at the time he acquired his interest).

⁸⁰ *92 Buena Vista Avenue*, 507 U.S. at 130.

⁸¹ 509 U.S. 544 (1993) (criminal).

⁸² 509 U.S. 602 (1993) (civil).

and almost \$9 million acquired through racketeering activity.⁸³ The Supreme Court held that the Eighth Amendment's Excessive Fines Clause⁸⁴ applied to the criminal forfeiture and remanded the case back to the Court of Appeals to decide if the forfeiture was excessive.⁸⁵ In *Austin*, the defendant sold two grams of cocaine to an undercover officer and as a result, he lost his body shop and mobile home in a civil forfeiture proceeding.⁸⁶ The Supreme Court held that civil forfeiture under § 881(a)(4) and (7) is a monetary punishment and is subject to the limitations of the Eighth Amendment's Excessive Fines Clause.⁸⁷

Finally, it should be noted that the owner's innocence is only one of the factors that the lower courts have included in their various *post-Austin/Alexander* tests for determining whether a forfeiture constitutes an excessive fine.⁸⁸

Overview

The law of forfeiture dates back to the Old Testament. The ox that gored and killed someone was guilty and the owner was freed of further obligation. In this example, the ox, not the owner, is deemed guilty, but the owner is also punished because he is without the use of his ox. The forfeiture doctrine continued into the common law where the Crown became the sovereign to be appeased. Thus, if an object had been the direct or indirect cause of the death of a King's subject, the object became the Crown's in order to redress the loss of human life and provide revenue.

The distinction between civil and criminal forfeiture was based upon whether the penalty was against the person or against the thing. Forfeiture against the person is considered *in personam* and requires a conviction before the property can be taken from the defendant. These forfeitures are regarded as criminal in nature because they are penal; they primarily seek to punish. Forfeiture against the thing is considered *in rem* and the forfeiture is based upon the unlawful use of the *res* (property), regardless of its owner's culpability. These forfeitures are regarded as civil and their purpose is remedial. Both criminal and civil forfeitures are available to the federal government and are used with increasing frequency in the war on drugs.

⁸³ Alexander, *id.* at 548.

⁸⁴ "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. Const. Amend. VIII.

⁸⁵ 509 U.S. at 559.

⁸⁶ *Id.*, at 602.

⁸⁷ *Id.*, at 621-22.

⁸⁸ See e. g., *United States v. Milbrand*, 58 F.3d 841, 847-48 (2d Cir. 1995) ("the role and degree of culpability of the owner of the property"); *United States v. Chandler*, 36 F.3d 358, 357 (4th Cir. 1994) ("the role and culpability of the owner"); *United States v. El Dorado County*, 59 F.3d 974, 984-85 (9th Cir. 1995) ("whether the owner was negligent or reckless in allowing the illegal use of his property whether the owner was directly involved in the illegal activity, and to what extent"); *United States v. Bajakajian*, 84 F.3d 334, 336 (9th Cir. 1996) ("culpability of the owner").

Similar to civil forfeiture, administrative forfeiture is an *in rem* action against the *res* (property). It allows the agency to implement forfeiture of the property without judicial involvement. Instead of statutes, agency regulations govern administrative forfeitures.

The judicial analyses of 21 U.S.C. § 881(a)(6) and (7) by the federal courts reveal the disparate interpretations of the innocent owner defense. The legislative history seems to indicate that the defenses under (6) and (7) are the same; however, the structure of the language in § 881(a)(4)(C) is identical to that in § 881(a)(7), and therefore, the same canons of construction in one would be applicable to the other. There are two views (disjunctive and conjunctive) as to the correct interpretation of the statute, and differences exist even within these two views. One school of thought contends that the term “or” must be read in a disjunctive way, holding that the innocent owner test requires a claimant to demonstrate either a lack of knowledge *or* a lack of consent, but not a lack of both knowledge and consent (*United States v. Parcel of Real Property Known as 6109 Grubb Road*). On the other hand, there are some courts which have followed the conjunctive school of thought and have held that, in order to maintain the innocent owner defense, a claimant must establish both lack of knowledge and lack of consent (*United States v. One Parcel of Land, Known as Lot 111-B, Tax Map Key 4-4-03-71(4), Waipouli, Kappa, Island and County of Kauai, State of Hawaii*). Within the conjunctive view, the Supreme Court extended the defense further by stating that in order to meet the lack-of-consent test of the innocent owner defense, the claimant must prove that he “had done all that reasonably could be expected to prevent the proscribed use of his property” (*Calero-Toledo v. Pearson Yacht Leasing Co.*).

In the *Buena Vista* case, the Supreme Court interpreted the innocent owner defense found in 21 U.S.C. § 881(a)(6). This case resolved a split among the circuits as to when title to forfeited property vests in the government. The Court did not address the pending issue regarding whether the post-illegal act transferees could invoke the innocent owner defense. However, the issue was addressed *in dictum* by stating that equitable doctrines may foreclose the assertion of the innocent owner defense by a post-illegal act transferee “with guilty knowledge of the tainted character of a property.”

In the *One 1973 Rolls Royce* case, the third circuit held that a post-illegal act transferee who did not consent to illegal activity would be safe from forfeiture under 21 U.S.C. § 881(a)(4)(C)’s innocent owner defense even though he knew of the illegal activity at the time he acquired his interest. The defense would be available to any owner who can prove either a lack of knowledge, lack of consent, or lack of willful blindness.

However, in *One Parcel of Real Estate Located at 6640 SW 48th St. Miami, Dade County*, the eleventh circuit held that the “lack of consent” decree of § 881(a)(7) is not available to post-illegal act transferees. Under this approach, if a post-illegal act transferee knows of illegal activity which would subject property to forfeiture at the time he takes his interest, he cannot assert the innocent owner defense to forfeiture.

The legislative history regarding the innocent owner defense does not provide any information for determining whether “or” actually means “and” in sections 881(a)(6) and (7).

In the cases of *Alexander v. United States* and *Austin v. United States*, the Supreme Court found that in some instances, civil proceedings do constitute punishment and may violate the Eighth Amendment’s excessive fines clause. However, the owner’s innocence is only one of the factors that the lower courts have included in their various *post-Austin/Alexander* tests for whether a forfeiture constitutes an excessive fine.

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