Fraud is a deranged matchmaker that brings bankruptcy law and criminal law together by blurring the line between two of humanity’s oldest means of obtaining capital: borrowing and stealing. When fraudulent financial schemes collapse, the same wrongdoer and the same assets may be treated under two parallel legal regimes. This is true because, regardless of the face financial fraud takes, from massive securities fraud, to breathtaking Ponzi schemes, to individual one-on-one capers, society must determine whether fraud creates a private debt best left to private resolution, or a crime upon society, or both.

Of late, the verdict has been “both.” In the wake of the great recession, a substantial number of high profile parallel criminal prosecutions and individual and business bankruptcies arising from dramatically collapsing fraudulent schemes have hit the headlines, and the courts. Examples include the nationally infamous Madoff case (New York), Adelphia/Rigas securities fraud (Pennsylvania), Petters/Lancelot Ponzi schemes (Minnesota), fraud within the law firms operated by Marc Dreier (New York) and Scott Rothstein (Florida), the more locally shocking cases of Monroe Beachy (Ohio Amish Ponzi schemer), Lydia Cladek (Florida Ponzi schemer), Samantha Delay-Wison (Anchorage fraudster), Nick Cosmo/Agape (Long Island Ponzi schemer), and many others.

To criminal law, fraud is a crime—an act that harms society and calls for public vindication. To bankruptcy law, fraud is simply one in a humdrum and lengthy list of ways to create debt. Until fairly recently (the past half-dozen years, most notably), the intersection between criminal law and bankruptcy law in cases of fraud was relatively routine and non-controversial. Both heard injured parties cry “Don’t let them get away with it!”; and both happily obliged: criminal law by sentencing the fraudster to prison and likely to restitution; bankruptcy law by denying discharge to the debtor and/or the debt and excepting criminal prosecution from the “automatic stay.”

Nevertheless, despite the possibility of a restitution order, criminal law had no direct impact on the fraudster’s assets. Bankruptcy law gathered and distributed the assets to stakeholders under its own comprehensive scheme if the fraudster, or his business, filed bankruptcy.

**Critical Developments in Criminal Law**

What changed? Two significant developments brought criminal law into the realm of asset collection and distribution in new ways that put it on a collision course with bankruptcy law.

First, during the past several decades, criminal law has enthusiastically embraced the notion of victims’ rights. In this regard, restitution orders have become standard in many federal sentences, including in fraud cases. Restitution does not, however, give the government power to seize a defendant’s assets and restore or remit them to victims. This is where the second development, regarding forfeiture, comes into play.

Forfeiture allows the government to seize property that was involved in, facilitated, or is the proceeds of a wide array of crimes. In its earliest days, criminal forfeiture emphasized drug and money laundering crimes. In 2000, and again in 2006, Congress expanded criminal forfeiture to include a lengthy list of federal crimes, including a variety of frauds. Today, Congress expanded criminal forfeiture to include a lengthy list of federal crimes, including a variety of frauds. Today, the government routinely seizes property as a mandatory component of many federal sentences. When coupled with restitution,
remission, and restoration, forfeiture allows the government to take a defendant’s assets and use them to compensate victims.

The expansion of forfeiture, combined with the growth of the victims’ rights movement, has changed the practice of restorative justice from an arcane notion of discretionary compassion in favor of innocents, to a perceived entitlement that requires the government to fashion reasoned means of distributing literally billions of dollars of ill-gotten gains to fraud victims.

To understand how these changes altered the landscape, consider two simple examples of how forfeiture operates in the absence of fraud and bankruptcy: (1) a thief, and (2) a drug smuggler using a stolen boat.

Criminal forfeiture necessarily defines both the target property and any “victim” potentially entitled to compensation in reference only to the offense of conviction. The thief might be ordered to return the stolen goods, which property (or value) may be returned to the victim.

The smuggler’s boat and contraband (drugs) may be seized under civil forfeiture, an in rem doctrine with ancient maritime roots. Under criminal forfeiture, an in personam action against the convicted smuggler, the government might also seize proceeds of the sale of the illegal drugs.

What of the smuggler’s “victims”? If the smuggler had stolen the boat, the owner (if innocent) may petition for its return. It is unlikely that any claimant would be foolish enough to assert title to the illicit drugs. Unless the smuggler legitimately acquired other goods on credit, or employed honestly innocent sailors, it is difficult to identify other “victims” who might seek compensation. Moreover, neither the thief nor the smuggler is likely to file bankruptcy in an effort to discharge or restructure debts arising from the illegal activities. Thus, one might conclude that the gathering and distribution of assets through forfeiture is fairly straightforward.

This would be so until one considers fraud. Depending on the crimes charged (securities fraud, mail fraud, wire fraud, etc.), the forfeitable property identified as being involved in, facilitating, or constituting proceeds of the crime may include virtually all of the assets of the (possibly legitimate) business. The definition of victims, again in reference to the crimes of conviction, may include vast numbers of shareholders, investors, and others who claim have to be duped. The definition of victims might not, however, include many others who suffered harm from the business collapse, such as suppliers, utilities, trade creditors, employees, and lenders whose dealings with what they perceived to be a legitimate business unwittingly enabled the fraud to continue.

Fraud and Bankruptcy Law
How does bankruptcy law treat entities harmed by fraud? The answer lies in bankruptcy’s fundamental objectives. Commonly synthesized as the “twin pil- lars” of modern bankruptcy law, these are: (1) the debtor’s tenet of a “fresh start” for the “honest but unfortunate” debtor (the phrase typically employed with respect to individual debtors) or financial rehabilitation (of business debtors), and (2) creditors’ rights tenets of restorative and distributive justice, expressed in terms of collective enforcement, maximization of value, and equitable distribution.

Our concern here is the second pillar. The Bankruptcy Code fosters collective enforcement by attempting to bring all assets and all claimants into a single forum for equitable distribution. In this regard, bankruptcy law differs from forfeiture law, at least in theory, because forfeiture is limited to property tied to the particular crime(s) of conviction. Nevertheless, the enlarged definition of crimes for which forfeiture is authorized, combined with broad concepts such as substitute property, facilitating property, proceeds, and relation back (as outlined by Alice Dery in this issue), may result in broad forfeitures of virtually all of the assets that otherwise might be administered in a bankruptcy case. This is especially true in a Ponzi scheme where there arguably are few if any “clean” assets.

As with the debtor’s property, the Bankruptcy Code seeks to gather all of the debtor’s stakeholders in one forum. Claimants generally cannot opt out of the bankruptcy process, and typically will be bound by the discharge if they decline to participate.

In this regard, bankruptcy law again differs from forfeiture law because bankruptcy law is not limited to distributing property to “victims” whose injuries relate directly to the specific crime(s) of conviction. Rather, it proceeds under a broad construct that accounts for all of the fraudster’s stakeholders without regard to whether their claims or interests arise directly from the fraud.

Finally, after all of the assets and stakeholders have been brought together in the bankruptcy forum, the Bankruptcy Code mandates distribution according to a carefully constructed and detailed distribution scheme. In so doing, it creates an “abso-
An Underappreciated Tension

Here, the expansion of forfeiture powers brings into sharp focus an essential, and previously under-appreciated, tension between fundamental presumptions of criminal law, corporate law, securities law, and bankruptcy law. Bankruptcy law’s absolute priority rule rests on the well-established notion that equity is paid after debt. This principle presumes that investors who did their diligence assumed both the upside potential of equity ownership and the downside risk of insolvency when they chose to invest rather than lend. But did they accept the risk that the information they considered when investing was fraudulent, or that the entity in which they were investing was a sham Ponzi scheme? If not, how does one reconcile the competing distribution schemes of bankruptcy (which may favor injured creditors) and criminal law (which may favor defrauded investors)?

Integrating Criminal and Bankruptcy Law

In this issue of Business Law Today, leading experts in criminal and bankruptcy law lay the groundwork for answering these questions. Alice Dery, Deputy Chief of the Department of Justice’s Criminal Division, Asset Forfeiture and Money Laundering Section, Office of Policy and Training, provides an essential guide to the fundamentals of asset forfeiture and distribution. Henry Kevane, a partner in the San Francisco office of Pachulski Stang Ziehl & Jones, considers how asset forfeiture interacts with and upsets the expectations of bankruptcy law. Kathy Phelps, a partner in the Los Angeles firm Danning Gill Diamond and Kollitz, LLP, explores how third parties can assert rights with respect to assets the government has seized. She uses the complex issues that arose in the Rothstein case as a guide. Finally, the Honorable Steven Rhodes, bankruptcy judge in the Eastern District of Michigan, explains how cooperation agreements can reduce the tensions that arise between the government and the bankruptcy trustee. In so doing, he compares the cooperative approach achieved in the Dreier case, with the less than cooperative approach followed in the Rothstein case. Other cases in which the government and trustees were able to achieve cooperation on at least some aspects of the interplay between forfeiture and bankruptcy law include Madoff and Petters.

Although these experts bring different perspectives to the problem, their articles reveal a single theme, rooted in the value of communication and coordination. Coordination is possible because, although bankruptcy law and criminal law wield different tools, they hold firmly to the same fundamental principles regarding financial fraud: the honest but unfortunate debtor should not be shackled for life; the dishonest cheat should pay; the victims should be compensated.

It is not enough to agree upon these principles, however. The restorative and distributive rules of bankruptcy law and forfeiture law vest in highly developed statutes. Those statutes evolved from different sources, for different reasons, and are in many ways irreconcilable today. Consequently, it is incumbent upon those who practice and make policy in these areas to collaborate across disciplines to reconcile competing processes where possible, identify points of tension where necessary, and advocate for change where appropriate.

Moreover, although to date cooperative agreements have necessarily been ad hoc, given the rich variety of facts these cases present, the articles in this issue help us recognize emerging trends regarding when and how cooperation can be achieved.

The Business Law Section has been exploring these complex questions, and working to facilitate these objectives, since 2010 through its Working Group on White Collar Crime, Asset Forfeiture and Business Bankruptcy, an initiative of the Business Bankruptcy Committee and Committee on Bankruptcy Court Structure and Insolvency Process. Select materials from the Working Group’s November 2011 Symposium are forthcoming in The Golden Gate University Law Review, Volume 42, Issue 4 (2012). The Working Group welcomes the voices of members of the Business Law Section.

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Overview of Asset Forfeiture

By Alice W. Dery

Part I

Asset forfeiture has ancient roots. At its inception it was used by governments to fight piracy. More recently, it has emerged as a powerful tactical weapon in the fight against organized crime and drug trafficking organizations. It is also an indispensable tool in federal white collar crime prosecutions. According to most recent statistics, half of all federal forfeiture cases involve white collar crime. This development is crucial to understanding the importance of asset forfeiture in contemporary criminal prosecutions. White collar crime, in its modern incarnation, affects vast numbers of victims who suffer large monetary losses. Without the recovery of funds made possible through the use of asset forfeiture, victims would be left to their own devices in recovering their losses. During the past decade, the Department of Justice used asset forfeiture to recover nearly $3 billion in criminal fraud proceeds that were returned to victims through the Victim Asset Recovery Program (VARP). So, what is asset forfeiture? How does it work? And how did it become an integral component in the recovery of assets for victims?

What is Asset Forfeiture?
Asset forfeiture is commonly understood to be the divestiture without compensation of property used in a manner contrary to the laws of the sovereign. Simply stated, it is the taking of property derived from a crime, involved in a crime, or which makes a crime easier to commit or harder to detect. For example, let’s consider an individual—Mr. Slick—who uses his business to run a Ponzi scheme and then takes the fraud proceeds to support a lavish lifestyle through the purchase of expensive items like houses, cars, and boats. The government may pursue a forfeiture of the business because it was involved in a crime and made the crime easier to commit or harder to detect. Because the houses, cars, and boats were derived from the crime, a forfeiture of these assets may also be pursued.

A Brief History of Asset Forfeiture
Asset forfeiture’s early roots were grounded in admiralty law as a way for governments to prevent the owner of ships engaged in piracy and the smuggling of goods to continue their criminal activity. If a ship’s crew was arrested, the owner simply hired a new crew and continued the illegal activity. However, if the government forfeited the ship, this prevented the criminal activity from continuing.

Fast forward to the 1970s and the 1980s, when the criminal landscape changed, and asset forfeiture was deployed against criminal organizations, including drug trafficking organizations. Law enforcement began to target not only the individuals who controlled these organizations, but also the money that was their lifeblood.

Recognizing the effectiveness of forfeiture in the fight against drug trafficking and organized crime, Congress expanded the use of forfeiture for other criminal offenses, especially those involving fraud and other white collar crime, once again changing the landscape of forfeiture. This ancient tool is now an indispensable means of seizing and preserving assets for victims of white collar crime.

Why Use Asset Forfeiture?
There are many important and compelling reasons to use asset forfeiture to fight crime. In the example above, the fraudster, Mr. Slick, is committing the fraud for one primary reason: good old-fashioned greed. Simply prosecuting and convicting this individual for fraud does not address his primary motivation for committing the crime in the first place. By going after the money he generated from the fraud, forfeiture takes away the principal incentive for committing the crime in the first place. By going after the money he generated from the fraud, forfeiture takes away the principal incentive for the crime and punishes the criminal for his illicit conduct where it hurts most.

Asset forfeiture is also an effective way to remove the tools of the trade from the criminal. Just like the pirate who would continue to seek his prey on the open seas as long as he had a ship, the modern fraudster can use businesses and other assets to harm the public, unless they are taken away. The government’s forfeiture of the fraudster’s business takes away the essential tool which allows him to conduct his Ponzi scheme.

Finally, and perhaps most importantly, asset forfeiture can be used to protect and benefit those most harmed by criminal activity. It has been used to seize crack houses that pose a threat to public health
and safety, which are then turned over to non-profit organizations and used to redevelop neighborhoods blighted by drugs and crime. And as discussed above, forfeited property has been used to recover and return billions of dollars to individuals victimized by white collar fraud. In sum, asset forfeiture deters crime by removing the tools of crime from the criminals and their organizations, deprives wrongdoers of the proceeds of crime, recovers property that may be used to compensate, and otherwise benefit, victims.

**What Can Be Forfeited?**
Depending on the crime, the government can forfeit a wide variety of property and interests in property, including:

- **Proceeds**: the proceeds of the crime (which includes anything of value obtained as a result of the crime and property traceable to those assets);
- **Facilitating property**: the property used to make the crime easier to commit or harder to detect; and
- **Property involved in**: the property involved in a money laundering offense (which includes the money being laundered and the money and other property that is commingled with it).

Under federal forfeiture law, property is considered anything of value, both tangible and intangible, including rights, privileges, interests, claims, and securities. The key to being able to forfeit property is that it has to be connected to a crime, and federal law must authorize forfeiture for that crime. In other words, every forfeiture must be authorized by a specific statute. In the United States, there is no general forfeiture statute that covers all property and all crimes. However, forfeiture is available for over 200 different federal, state, and local crimes. Perhaps the best known forfeiture statutes allow the forfeiture of drug proceeds and any type of property used to commit the drug offense. In money laundering cases, forfeiture statutes allow the forfeiture of all property involved in the money laundering offense. In mail and wire fraud cases, forfeiture statutes allow the forfeiture of the proceeds of the crime. In Racketeer Influenced and Corrupt Organizations (RICO) cases, forfeiture statutes allow the forfeiture of any property acquired or maintained through the racketeering activity.

**Types of Forfeiture**

**Administrative Forfeiture**
The vast majority of federal forfeiture cases go uncontested. Uncontested forfeitures are commonly known as “administrative forfeitures” because they are processed by the law enforcement agency that seized the assets. Since no one has stepped forward to challenge the forfeiture, courts are not involved in the process. Administrative forfeitures can only be pursued if federal law authorizes the seizing law enforcement agency to proceed in this manner, and if the property being forfeited (excluding cash and other monetary instruments) is less than $500,000. Houses and other real property may not be forfeited administratively. Federal law imposes strict deadlines and stringent notification requirements upon law enforcement agencies that engage in administrative forfeitures.

For example, under the facts of our fraud scenario, the FBI—an agency with administrative forfeiture authority—may seize Mr. Slick’s personal assets, which are valued at less than $500,000. FBI obtains a judicial warrant based on probable cause that the cars and boats are subject to forfeiture. However, the FBI cannot pursue the house or business because real property may never be forfeited administratively.

Operating under strict deadlines and filing requirements, the FBI must begin its administrative forfeiture process by providing notice to Mr. Slick, and to anyone else with a potential interest in the property, in a newspaper of general circulation. If Mr. Slick declines to file a claim contesting the forfeiture within the prescribed time period, the agency completes the administrative procedures by entering a declaration of forfeiture. If Mr. Slick decides to file a claim, the government has two options: civil and criminal forfeiture.

**Criminal Forfeiture**
Criminal forfeiture is referred to in legal jargon as an in personam action, because it is pursued as part of a criminal case against one or more persons, and the forfeiture of assets is considered to be part of the punishment for the crime, along with any jail time a court might impose. Criminal forfeiture requires the government to obtain a criminal conviction as the basis for forfeiting property. Only the defendant’s interest can be forfeited in a criminal case because criminal forfeiture is part of the defendant’s sentence. In our hypothetical situation, if the government decided to pursue criminal forfeiture against Mr. Slick, the government would bring a case captioned *United States v. John Slick,* and the criminal indictment or other charging document would contain a forfeiture allegation identifying the property that the government seeks to forfeit. In addition, because a criminal forfeiture order is an in personam judgment against the defendant, the court can order the defendant to pay a money judgment or to forfeit substitute assets not implicated in the crime if the directly forfeitable assets are no longer available.

Continuing with our example, in the criminal case against Mr. Slick, the government may pursue a criminal forfeiture by including the business, bank accounts, houses, cars, and boats in the forfeiture allegations listed in the criminal indictment. If Mr. Slick pleads guilty before the case goes to trial, it is important that at least one of the offenses that he pleads guilty to supports the forfeiture. If Mr. Slick goes to trial, it is important that at least one of the offenses that he pleads guilty to supports the forfeiture. If Mr. Slick goes to trial, and the government obtains a guilty verdict, a second phase of the trial takes place. In this second, forfeiture phase of the criminal trial, the government bears the burden of proving the connection between the property and the defendant’s criminal conduct. This is sometimes referred to as a bifurcated trial, and the reason for this two-step process is simple. Whereas the government has to prove Mr. Slick’s guilt beyond a reasonable doubt, it
only has to prove the nexus between the property and the crime by a preponderance of evidence. If the government meets its burden, the court grants a preliminary order of forfeiture for the government as to Mr. Slick’s interest in the property.

However, the forfeiture is not complete until the court commences an ancillary hearing to address the interests of any third parties who may have an interest in the specific property forfeited. The ancillary hearing is essentially a quiet title action in which the court determines what portion of the property is forfeitable as to the defendant and what property is not forfeitable because of the interest of a third party petitioner. Once any third-party claims are resolved, the court will enter a final order of forfeiture, which transfers title of Mr. Slick’s property to the government.

Civil Forfeiture
The government may also proceed by way of civil forfeiture. Like criminal forfeiture, civil forfeiture is a judicial process, however, unlike criminal forfeiture, it does not require a criminal conviction. In legal jargon, civil forfeiture is sometimes referred to as an in rem action, because it is an action filed against the property itself, rather than a person (rem means property in Latin). Consequently, if the government were pursuing a civil forfeiture action against John Slick’s home located at 1234 Main Street, No Where, USA, the case would be captioned United States v. 1234 Main Street, No Where, USA.

Civil forfeiture is considered remedial rather than punitive in nature, because the goal of civil forfeiture is not punish someone, but to remedy harm caused to society by the criminal activity. Under well established principles of U.S. law, forfeited property is considered to be the property of the government at the time the crime was committed. Much like the forfeiture phase of a criminal trial, the purpose of the civil trial is to establish title to the property. Since the forfeiture action is against the property and not the defendant, it is limited to property that is traceable to the offense, that facilitated the offense, or that was involved in money laundering.

Returning to our fraud case involving Mr. Slick, the government, as the plaintiff, may file a civil complaint against his business and the assets acquired by Mr. Slick during the time period that he operated his Ponzi scheme. Mr. Slick, the claimant, must file claims to the property and answer the forfeiture complaint within a prescribed timeframe. As in any other civil case, the civil forfeiture case moves through discovery, motions practice, and ultimately trial by a judge unless a jury trial is requested. Finally, during the proceedings, third-party claims must be litigated before the court will enter a judgment for the government.

Part II — Disposition of Forfeited Assets
Forfeiture has become an indispensable tool for victims in the recovery and preservation of illicit gains arising from financial crimes such as fraud, embezzlement, and theft. Under the Civil Asset Forfeiture Reform Act (CAFRA) of 2000, the Department of Justice has the authority to return forfeited assets to victims of any offense that gave rise to forfeiture. Accordingly, forfeited assets may be returned to victims of all offenses for which a related civil or criminal forfeiture order is obtained. Using these powers, the department has already returned over $1 billion to victims in the first half of FY2012.

The nature of modern fraud schemes often poses legal challenges. Returning to our example, the government has successfully forfeited Mr. Slick’s assets, but its work is far from complete. As the criminal investigation and case proceeds, the government learns that Mr. Slick defrauded 2,000 victims in his Ponzi scheme. In addition, since the government brought a criminal case against Mr. Slick, his business, which also conducted some legitimate work, has fallen on hard times and he has filed for Chapter 11 bankruptcy. The victims, creditors, and non-creditors all want Mr. Slick’s assets so that they can recover their losses. The bankruptcy trustee wants to fulfill his fiduciary responsibility to marshal all the assets of Mr. Slick so that creditors and others can recoup as much of their loss amounts as possible. This raises a number of important questions. Is there a process for handling the return of forfeited assets to victims? How does the government handle the distribution of forfeited assets when there is also a bankruptcy proceeding? What is the interplay between asset forfeiture and bankruptcy? How can we successfully work together to meet our statutory and fiduciary obligations?

The Victim Asset Recovery Program
The vehicle through which the Department of Justice ensures that return of forfeited assets to victims is the Victim Asset Recovery Program (VARP). The purpose of VARP is to maximize the amount of forfeited money that can be returned to victims of crime. VARP is carried out by a dedicated team of experienced professionals, including attorneys, accountants, auditors, and claims analysts in the Asset Forfeiture and Money Laundering Section (AFMLS), which is a part of the Department’s Criminal Division. VARP has successfully used its specialized expertise to efficiently convert forfeited assets into victim recoveries in hundreds of cases. With its expertise and experience in handling these complex cases, VARP is uniquely equipped to maximize value for individual victims while ensuring fairness to all victims.

Types of Transfers to Victims
Under VARP there are two primary procedures that the government uses to return forfeited assets to victims: remission and restoration. Remission refers to the process by which the attorney general exercises discretion to use forfeited assets to provide a monetary payment to persons who have incurred a monetary loss from the offense underlying the forfeiture. Restoration is the process by which the attorney general exercises discretion to apply forfeited assets in satisfaction of restitution that a court has imposed against a criminal defendant. Restitution is an equitable remedy that courts often impose against defendants at sentencing in order

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to make crime victims whole and prevent criminal defendants from benefiting from the fruits of their crimes.

Although both of these transfers are discretionary, the attorney general has issued specific guidelines that require prosecutors to use asset forfeiture for the recovery of assets to victims of crime, as permitted by law, whenever possible.

Remission
The attorney general or the seizing agency may transfer forfeited property to a victim of a crime underlying the forfeiture through a process known as remission. Petitions for remissions, or requests by victims to receive a portion of forfeited assets, may be pursued with VARP if the assets have been forfeited through a criminal or civil judicial proceeding. Where assets have been subject to administrative forfeiture, the seizing agency is responsible for adjudicating remission petitions.

Remission is available to those who are “victims,” a term which under governing regulations means any person who has suffered a specific and identifiable pecuniary loss as a direct result of the crime underlying the forfeiture or a related offense. Persons include individuals, partnerships, corporations, joint business enterprises, estates, or other legal entities capable of owning property. However, a person cannot qualify as a victim if he/she:

- Knowingly contributed to or benefited from the offense underlying the forfeiture or was willfully blind to it; or
- Has recourse to other reasonably available assets or compensation; or
- Seeks recovery for torts or physical injuries associated with the offense that are not the bases for the forfeiture.

Following the seizure or forfeiture of the property, the Department of Justice in cooperation with the investigating agency, identifies all potential victims and notifies them of the opportunity to file a petition. Victims known by the government are notified by mail. In addition, the department notifies unknown victims through newspaper publications and an Internet website set up specifically for this purpose.

A successful petition requires documentary evidence demonstrating the specific monetary loss suffered by the victim and the date the loss occurred. Acceptable evidence of loss may include cancelled checks, receipts, and invoices. The department and the investigating agency may also use records seized during the investigation to assist in substantiating the victim’s loss. In calculating pecuniary loss, any money returned to the victim separate and apart from the request must be accounted for and deducted. Losses that cannot be compensated through the remission process include:

- Losses not supported by evidence;
- Losses indirectly resulting from the underlying offense or a related offense;
- Interest forgone; and
- Collateral expenses (i.e., attorneys’ fees and investigative expenses) incurred to recover lost property.

When the forfeited funds are insufficient to fully compensate all victims who file a petition, the funds are generally distributed on a pro rata basis in accordance with the amount of loss suffered by each victim. For example, if the forfeited funds cover one-half of the victims’ total losses, each victim receives 50 percent of his/her actual pecuniary loss.

The government can deduct administrative costs incident to the forfeiture, sale, or other disposition of the property from the amount available to the victims. The remaining balance is distributed to the victims. Victims have priority over all law enforcement requests for equitable sharing.

Finally, if a remission petition is denied, a petitioner may submit a request for reconsideration within 10 days of receipt of the denial notification letter. Reconsideration requests are reviewed by an official who did not decide the original petition.

Restoration
A request to apply forfeited funds to a restitution order through restoration must be initiated by the prosecutors responsible for the underlying case. Based on this request, VARP will transfer forfeited funds to a court for payment of restitution to the victim of a criminal offense. Forfeited funds may be applied to the restitution order if no other funds are available to fulfill the defendant’s restitution obligation. Victims may only receive funds through this process if they would be eligible for remission, i.e., if they are considered victims under the remission guidelines, suffered a specific monetary loss directly attributable to the crime and the losses are otherwise compensable.

Using this alternative process eliminates the need for each victim to file a petition for remission, and can lead to more efficient payment of funds to victims. This is particularly beneficial in large multiple-victim cases.

If the request for restoration is denied or never sought by the prosecutor, a person claiming losses as a victim may still request direct transfer through remission.

Which Process to Use—Restoration or Remission?
It is always the goal of the government to maximize the return of forfeited assets to the victims of the case in the most efficient and cost-effective manner possible. If the government is able to successfully work with the court to identify Mr. Slick’s 2,000 victims and their loss amounts in a restitution order, then proceeding with the restoration is preferable. If Mr. Slick is ordered to pay $40 million in restitution for the victims’ loss amounts and the government forfeits $20 million, then the transfer of the assets to the victims will be pro rata distribution.

On the other hand, if there is no restitution order or there are problems with the restitution order (e.g., not all the victims are identified), the government will pursue remission to return the forfeited assets to the victims. The government will send notice to the victims, will collect and analyze the victim petitions to verify the victim and the loss amounts, and will make a determination for each petition. As with remission, if the loss amounts for Mr. Slick’s Ponzi scheme total $40 million and the government forfeits $20 million, then
the transfer of the assets to the victims will be pro rata distribution.

Cooperation Agreements
Cooperation agreements between the bankruptcy trustee and the government regarding the allocation and distribution of assets have proven to be very successful. These agreements are important because they require the parties to discuss, identify, and allocate assets between the two proceedings; to determine which proceeding is most effective in acquiring and liquidating assets for distribution; and to coordinate the distribution of assets between the two proceedings so that no one receives a double recovery, or more than their fair share.

In assessing Mr. Slick’s assets, a cooperation agreement could effect the following allocation and distribution of assets:

• To the bankruptcy court: transferring the business and its assets to the bankruptcy trustee for liquidation and distribution to the creditors since Mr. Slick was conducting legitimate business along with his criminal activity. Generally, the government would have to expend significant resources and time to trace and prove the fraud proceeds going into the business.

• To the government: retaining the directly traceable assets of the fraud proceeds for distribution to the broader class of victims. These assets would include the Mr. Slick’s houses, cars, boats, and personal bank accounts.

It is important to note that each case is unique and fact specific when drafting a cooperation agreement. One size does not fit all and each agreement must be customized to address the particular assets, evidence to support the criminal offenses, and petitioners in each case.

Conclusion
Despite separate and distinct bodies of law and underlying principals, there are important similarities in the bankruptcy and forfeiture proceedings that make cooperation important when there is overlap. First and foremost, prosecutors and bankruptcy counsel both have an obligation to uphold their respective statutory obligations and to serve the claimants and petitioners in their respective proceedings. If unnecessary litigation results in costly fees, which ultimately diminishes the assets available for distributions, then all victims lose. It would be a tragedy to compound the injustice that occurred through the initial fraud with legal battles that pit victims against one another. Second, there are fundamental principles of fairness and equity that guide both bankruptcy and forfeiture proceedings. As a general rule, both processes seek to make a fair and equitable distribution among the respective claimants, and to prevent outcomes which result in some claimants receiving more than their fair share of a limited pie. This all goes to say that when we work in concert, everyone benefits.

Alice W. Dery is Deputy Chief of the Department of Justice’s Criminal Division, Asset Forfeiture and Money Laundering Section, Office of Policy and Training.

Key asset forfeiture statutes, rules, and regulations

Administrative Forfeiture
- 18 USC § 983

Civil Forfeiture
- 18 USC § 983

Criminal Forfeiture
- 21 USC § 853
- Fed. R. Crim. P. 32.2

Innocent Owner Defense
Civil Forfeiture
- 18 USC § 983(d)

Criminal Forfeiture
- 21 USC § 853(c), (n)

Remission or Mitigation of Civil and Criminal Forfeitures
- 28 CFR Part 9

Part III — Interplay between Forfeiture and Bankruptcy Proceedings
Bankruptcy and asset forfeiture are rooted in two distinct and separate areas of law with divergent goals. Bankruptcy law is designed to effect an orderly unwinding of affairs when a business is insolvent. The bankruptcy process is well suited to sift through competing claims of creditors, and works best in ensuring recovery where the victims of a crime are composed of competing classes of creditors. The bankruptcy process is poorly suited to dealing with crimes involving broader classes of victims. In contrast, forfeiture, and the associated means of returning assets to victims described above, seek to compensate all crime victims—not just various classes of creditors—on a pro rata basis.

Consequently, when these two distinct proceedings intersect, how can we work together to accomplish our respective goals?
What Just Happened? How Asset Forfeiture Affects Bankruptcy Distributions

By Henry C. Kevane

Not every bankruptcy case remains within the neat confines of the Bankruptcy Code. Just as the high-tech bubble revealed conflicts between bankruptcy and intellectual property law, and the current spate of municipal Chapter 9 cases reveals conflicts between federal and state law, the recent wave of bankruptcies of the fraudsters and Ponzi schemers has revealed conflicts between the federal asset forfeiture scheme and the distributive regime of the Bankruptcy Code. Crime victims may receive distributions from forfeited assets outside of the bankruptcy case and sometimes in conflict with the bedrock policies of ratable distribution and “absolute priority” under the Bankruptcy Code.

Moreover, creditors often encounter a bankruptcy estate that is diminished due to the “nullifying” effects of a government forfeiture proceeding on the property of a debtor. A successful forfeiture can both divest the bankruptcy estate of assets available for distribution to creditors and divest property held by third parties otherwise within the reach of the estate’s avoidance and turnover powers. Indeed, a debtor/criminal defendant may voluntarily turn over property or money to the government in settlement of a restitution action, fine, or penalty that is then used to compensate victims (often shareholders) ahead of or in lieu of creditors who would be senior under the bankruptcy distribution scheme. Additionally, victims often attempt to trace their investments into some form of trust that can then be carved out from the debtor’s property, further diminishing an estate.

The forfeiture and bankruptcy distribution schemes are each generally intended to maximize compensation to those harmed by a debtor’s conduct (whether that conduct was a crime, a tort, a contractual default, or a garden-variety business miscalculation). Yet, the divergent tools these schemes use to achieve this goal often result in fierce competition between their respective beneficiaries. A forfeiture proceeding does not typically inure to the benefit of general trade creditors and employees, while the bankruptcy paradigm typically subordinates the rights of investors and shareholders to those of creditors. Similarly, although a bankruptcy court has exclusive jurisdiction over all the property of the debtor, wherever located, the forfeiture remedies often result in the retroactive ouster of property into the hands of the government as of the date of the crime.

In those instances in which parallel criminal and bankruptcy proceedings are pending, should recoveries to injured parties vary (either in amount or eligibility) merely depending on whether a crime has been committed? Should the recoveries vary depending on what crimes are charged or, for that matter, proved? Should the government’s police powers, or its ability to levy fines and penalties or order restitution against a defendant/debtor, be used to generate a competing, satellite fund for distributions to select victims, or should those recoveries be commingled with the assets of the bankruptcy case for the benefit of all affected parties?

This article examines how the fundamentals of the compensatory regime under bankruptcy law are affected by federal asset forfeiture law. Although this article focuses on the bankruptcy system, similar competition for assets occurs in the context of receivership proceedings (either under state or federal law, such as those commenced by the SEC or the CFTC), or statutory liquidations under the Securities Investor Protection Act. (A SIPA liquidation largely follows Chapter 7 and many receiverships, in fact, are modeled on the administration of estates in bankruptcy.)

We will first examine the general principles under the Bankruptcy Code for marshaling and distributing assets. We then present an overview of the federal asset forfeiture rights and remedies, which nibble away at, and often deviate from, the comprehensive bankruptcy scheme. For the sake of simplicity, we have assumed that the crime at issue was perpetrated by or through an organized vehicle, such as a corporate or partnership entity. This is not to say that the issues discussed in this article are foreign to individual bankruptcy cases, but only that the scale and scope of the more celebrated cases are
typically conducted through some form of organized entity.

The Bankruptcy Estate
The bankruptcy system is premised on the instantaneous creation of an “estate” upon the commencement of a bankruptcy case. The estate, in turn, is managed and maximized by the trustee (or, in a Chapter 11 reorganization case in which a trustee is not appointed, by the debtor in possession) for eventual distribution to creditors and equity holders. The estate broadly comprises “all legal or equitable interests of the debtor in property, wherever located and by whomever held” as of the commencement of the case.

In addition, the estate includes (1) any interest in property that is recovered by the estate from a third party using avoidance, turnover, offset, and related powers under the Bankruptcy Code, (2) all postpetition proceeds of property of the estate, and (3) all property that the estate acquires after the commencement of the case.

The federal district court (and, by reference, the bankruptcy court) has exclusive jurisdiction of “all the property, wherever located, of the debtor as of the commencement of the case, and of property of the estate.” Virtually any party in interest has standing to appear and be heard with respect to matters affecting the disposition and distribution of property of the estate.

The formation of the estate, and the federal court’s exclusive in rem jurisdiction over the estate, serve the essential marshaling purpose of a bankruptcy case. The bankruptcy court provides a centralized forum for (1) disclosing the debtor’s financial affairs (through the schedules of assets and liabilities and other filings required of the debtor), (2) determining the validity and amount of all claims to share in the estate, (3) determining most actions against third parties to augment the estate through the trustee’s turnover and avoidance powers (with certain exceptions based on the jurisdictional limits of bankruptcy courts as non-Article III courts), and (4) distributing value among parties in interest according to the distributive rankings set forth in the Bankruptcy Code.

Although the Bankruptcy Code defines what property of the debtor becomes part of the estate, non-bankruptcy law defines the scope and extent of a debtor’s underlying interest in property. In other words, whether or not a debtor’s property passes to the estate depends, in the first instance, on whether the debtor held cognizable title to the property under state law. Importantly, the bankruptcy estate excludes property in which the debtor holds bare legal title, such as property the debtor holds in trust for the benefit of another party. The bankruptcy court cannot control or administer the beneficial interest in such property. Consequently, third parties (such as fraud victims) often employ state law trust theories to try to defeat a debtor’s interest in property and thereby thwart the estate’s ability to administer the property for the benefit of all creditors.

Distribution of Estate Assets
How is property distributed in the bankruptcy case? Generally speaking, in a Chapter 7 liquidation case under the Bankruptcy Code the trustee must “collect and reduce to money” the estate (although, with the court’s permission, the trustee may temporarily operate the debtor’s business in order to accomplish an orderly liquidation). The proceeds of the liquidation are distributed to creditors according to strict statutory ranking and any surplus is remitted to the debtor. The trustee then files a final account of the administration of the estate, the debtor is discharged (subject to certain exceptions), and the case is closed.

In a Chapter 11 business reorganization case, the business typically remains in operation during the case, although selected assets of the estate may be sold or, under certain circumstances, if relief from the automatic stay is appropriate, returned to creditors having an interest in the property. The ultimate goal of the Chapter 11 case, and the predicate for distributions to creditors, is the confirmation of a plan of reorganization (which may, quite permissibly, provide for the debtor’s eventual liquidation).

A Chapter 11 plan may propose myriad means for the disposition of the estate. For instance, the plan may provide for the retention of all or any part of the estate by the debtor (which, as a reorganized entity, could then carry on its business with its pre-bankruptcy property rights intact). Alternatively, the plan might provide for the distribution of parts of the estate to interested parties, or the merger of the debtor with another entity.

Once the liquidation is complete in a Chapter 7 case, or the plan is confirmed in a Chapter 11 case, the trustee can make distributions to creditors from property of the estate. In a Chapter 7 case, distributions follow a strict ranking—all senior claims must be paid in full before any distributions may be made to the next tier of creditors. Generally speaking, claims are ranked as follows: (1) secured claims, up to the value of the secured creditor’s interest in the collateral, (2) administrative expenses, namely those costs incurred by the estate following the commencement of the case, such as professional fees, (3) priority claims, such as employee wages earned within six months before the commencement of the case, (4) all other unsecured claims, and (5) equity security interests.

The Bankruptcy Code specifically provides that a claim for a “fine, penalty or forfeiture” is payable after all unsecured claims are paid in full (including late-filed claims), but before interest is paid to unsecured creditors and before any surplus in the estate is remitted to the debtor. Forfeiture claims, thus, are contemplated by the Bankruptcy Code to be ratably paid from the estate. 11 U.S.C. § 726(a)(4). This express recognition under the Bankruptcy Code’s classification scheme, however, is not viewed as an impediment to the government’s ability to seek the removal of forfeited property from the estate, as discussed below.

In a Chapter 11 case, the debtor has greater flexibility under a plan with respect to distributions to creditors than otherwise required by the Chapter 7 distribution regime. Subject to certain safeguards, as long as creditors accept, some classes may be paid more than other classes, and some creditors within a class may be paid less than others. For instance, a plan may
provide that, “for administrative convenience,” smaller creditors may be separately classified and treated. Distribution in Chapter 11 depends, however, on creditor acceptance of the plan. Absent creditor acceptance, the only path to confirmation is compliance with the “cramdown” provisions of the Bankruptcy Code—that is, the plan must be “fair and equitable” as to each rejecting class of creditors.

Under either Chapter 7 or Chapter 11, however, unsecured creditors (whether employees, vendors, lessors or otherwise) rank senior to equity security holders (e.g., shareholders of a corporation). Moreover, the claims of creditors asserting damages arising from the purchase or sale of a security (e.g., investors) are statutorily subordinated to the claims or interests represented by the underlying security. This provision prevents an equity security holder from couching its interest as a “claim” for damages, rather than accepting treatment of the security according to its terms, in an attempt to leapfrog ahead of its cohorts.

**Asset Forfeiture**

In the case of a debtor facing criminal fraud charges, the government’s forfeiture powers can interfere with both the scope of the estate that is otherwise subject to the jurisdiction of the Bankruptcy Court, and with the distributive priorities established under the Bankruptcy Code. Notably, the automatic stay in a bankruptcy case does not prevent the government from commencing or continuing the enforcement of its “police and regulatory power.” Because forfeiture is considered punishment for a crime, not remuneration to the government, it falls within this exception. Indeed, the Supreme Court has held that the Eighth Amendment to the U.S. Constitution, barring “excessive fines,” applies to forfeiture proceedings. *United States v. Bajakajian*, 524 U.S. 321 (1998).

In essence, under its forfeiture powers, the government can recover both the fruits of a crime and traceable proceeds of the crime. In addition, the government can target property used to commit, or otherwise involved in, a crime (such as a house used to manufacture drugs). A forfeiture order can be part of a criminal sentence (or a plea arrangement) against the individual fraudster or can be sought in a civil, *in rem* proceeding against the property itself, as in, for example, an action against a bank account styled as *United States v. All Funds and Interest Earned Thereon Located in Account No. 122860 at National Bank*.

**Relating Back**

If successful, under either the criminal or the civil path, title to the property is forfeited to the government. The government takes the position, supported by many cases, that forfeited property divests from the fraudster (or a third party, in the case of property involved in or derived from a crime), as of the date of the crime. In other words, the government’s title “relates back” to the date of the offense. Under this doctrine, because a bankruptcy estate is comprised only of property of the debtor *as of the commencement of the case*, a pre-bankruptcy crime will result in forfeited property never becoming part of the estate. Moreover, when directed against third parties in possession of forfeitable assets, the estate may lose the ability to recover the property through avoidance or turnover actions.

At first blush, the relation back doctrine seems to conflict with both the bankruptcy court’s exclusive jurisdiction over property of the debtor and of the estate and the provisions of the Bankruptcy Code that treat forfeiture as a “claim” against the estate. Under forfeiture rules, unless and until a judgment is entered, the property remains titled in the debtor. As a result, if the bankruptcy case is filed first, the bankruptcy court acquires exclusive jurisdiction over the property. Although the automatic stay, as discussed, would not prevent the continuation of a forfeiture proceeding, how would another court adjudicating that proceeding acquire jurisdiction over the subject property if the bankruptcy court’s jurisdiction was truly “exclusive?”

The answer is not entirely pellucid—after all, the bankruptcy court can divest an admiralty court of jurisdiction over a vessel that belongs to a debtor. Why then should another court be able to exercise jurisdiction over a *res* that is within the exclusive control of a bankruptcy court? Perhaps the response is that a court adjudicating a forfeiture action does not need to exercise possession of the property in order to enter judgment, but can “arrest” and seize the property following entry. Moreover, to the extent the relation back doctrine applies (there are some exceptions), the forfeited property is deemed never to have passed into the estate. According to the Bankruptcy Appellate Panel for the Ninth Circuit, “the conflict here arises because of the relation-back doctrine and the possibility that the Property, when all is said and done, may not be property of the estate. However, if that happens, it is because that is the appropriate result under the law.” *In re Chapman*, 264 B.R. 565, 573 (9th Cir. B.A.P. 2001).

**Differences in Distribution Schemes**

The forfeiture scheme may also be at odds with the distributive rules in bankruptcy. As noted above, in a bankruptcy case creditors are senior to shareholders and investors’ damage claims are subordinated to the rank of the underlying security. In Chapter 7, the property of the estate must flow in “absolute priority” to a senior class before any residue can trickle down to a junior class. In Chapter 11, although there is greater flexibility, if a class of unsecured creditors rejects a plan no junior class can receive any value unless and until the creditors are paid in full.

Under the forfeiture process, in contrast, the government considers the rights of innocent victims (as well as the contributions of law enforcement to the discovery and prosecution of the crime). Forfeited property in the hands of the government is often used to satisfy a fraudster’s obligations to his or her victims. General creditors of the fraudster are beneficiaries of forfeited property only if they qualify as victims under the crimes charged.

This result is not considered a violation of bankruptcy law because the distributive rankings under the Bankruptcy Code...
apply only to distributions of proceeds of the estate. Restitution to victims outside the auspices of a plan or the Bankruptcy Code do not implicate the strict rankings established under the code. Thus, in the recent Adelphia case, the bankruptcy court approved a settlement between the debtors and the SEC that contemplated a payment of $715 million into a victim restitution fund. The fund would then be distributed by the SEC directly to Adelphia’s shareholders, before satisfaction of creditors who would be senior under the bankruptcy scheme, and outside the auspices of the bankruptcy court.

According to the court, “here equity holders and defrauded noteholders would not be sharing in assets of the estate under a plan, or in a Chapter 7 liquidation. Rather, they would be sharing in a fund to be created and owned by the Government, sharing in assets the Government would be obtaining as a consequence of . . . [its] forfeiture power . . . .” In re Adelphia Communications Corp., 327 B.R. 143, 168–69 (Bankr. S.D.N.Y. 2005). On appeal, the district court affirmed noting that “if Adelphia had rejected the government’s proposal and the government succeeded in forfeiting its assets, the government’s interests in the assets would have been superior to those of the creditors in any case.

Conclusion

Many aspects of the interplay between the bankruptcy and asset forfeiture systems are unsettled. The federal government’s forfeiture powers can profoundly affect the course of a typical bankruptcy case. Yet, these powers serve compelling interests and may alleviate enormous hardship to innocent victims that might otherwise be diluted in a bankruptcy case. When bankruptcy and forfeiture clash, the ideal outcome is a process that coordinates the proceedings from the outset, with the early identification of shared goals, in pursuit of the same end game—the maximum restoration of property to persons harmed.
Bank accounts, real property, jewelry, yachts, cars, and other personal property are the low hanging fruit that defrauded investors and bankruptcy trustees hope to grab when a Ponzi scheme lands in bankruptcy. In the recent Ponzi case of Scott Rothstein and his law firm, Rothstein, Rosenfeldt & Adler, P.A., there were many such assets just within reach when Rothstein pleaded guilty to running a $1.2 billion Ponzi scheme.

Easy pickings for the trustee and creditors, right? Not if the government comes along and swallows the assets in one fell swoop in a forfeiture action. And not if third parties claim that those very same assets belong to them and not to the government, the trustee, or the defrauded investors.

The matter of third-party claims to forfeited assets has become an issue of great significance in the administration of assets in a fraudulent scheme, particularly where a parallel bankruptcy or receivership action is pending regarding the same fraud and the same assets. Conflicts arise when the government enforces the criminal and drug control laws containing provisions for asset forfeiture, while bankruptcy trustees and regulatory receivers seek to fulfill their mandate by marshaling and liquidating assets for the benefit of the creditors of the estate. When you add to that the individual defrauded investors who want to pursue direct claims to the assets, along with other unrelated third parties who claim an ownership interest in an asset that they believe to be superior to everyone else’s interests, a complicated mess of litigation ensues. This article will discuss these competing claims to forfeited assets and the range of potential outcomes.

Forfeited Assets in the Rothstein Case
The Scott Rothstein Ponzi case is a good example of how many different people can make claim to the very same assets, each with compelling arguments, and how, in the absence of cooperation and coordination between the government and parallel bankruptcy proceedings, significant litigation costs can deplete the value available for everyone. Scott Rothstein stipulated with the government to an order for forfeiture of Rothstein’s right, title, and interest in all property involved in the RICO and money-laundering activities and all property derived from the mail and wire fraud offenses. Once the government took the assets, everyone wanted a piece of them, and the fighting began. In other cases, such as the Bernard Madoff and Marc Dreier Ponzi cases, the government and trustee found ways to cooperate and coordinate on various contentious issues.

Rothstein may be an anomaly; however, it presents a cautionary tale.

Here is what happened in the Rothstein case.

- The government forfeited all of the assets of Rothstein and his law firm.
- The trustee of the Rothstein law firm made claim to all of the funds in the law firm bank accounts and all assets that had been purchased with those funds.
- Some of the defrauded investors asserted a constructive trust over the funds in the Rothstein law firm’s bank accounts.
- Non-investor clients of the Rothstein law firm asserted express and constructive trust claims over funds in some of the Rothstein law firm bank accounts on the theory that they had retained the firm to represent them in personal injury actions and the proceeds of the settlements of those claims were in client trust accounts held for their benefit.
- Rothstein’s wife claimed that Rothstein had given her gifts of jewelry based on their relationship, some of which was gifted before the criminal acts so she should be able to retain those gifts.
The creditors committee in the law firm’s bankruptcy case also tried to make claim to the forfeited property on behalf of all of the victims and creditors of the law firm.

Criminal or Civil Forfeiture Proceeding?
As a preliminary matter, whether the government has forfeited assets in a criminal or civil forfeiture proceeding may make all the difference for a third party asserting rights to forfeited assets.

A civil forfeiture proceeding is an in rem proceeding where the government is taking guilty property because the property was used in a crime, without regard to culpability of the owners of the property. Such a forfeiture does not depend on a criminal conviction or whether or not there has been an indictment.

A criminal forfeiture proceeding, on the other hand, is an in personam action against the criminal defendant, where the government takes property as punishment for a criminal act.

Because of these fundamental differences at the outset, the procedures for third parties to assert interests in forfeited property in criminal and civil forfeiture proceedings vary significantly. In a civil forfeiture proceeding, the government files a complaint for forfeiture and serves notice to victims pursuant to the remission regulations. The government must establish probable cause to the court, without a jury, that the forfeiture is appropriate. A third-party claimant must file a claim to the property and answer the government’s complaint. The case is then presented to a jury and the government’s burden of proof is a preponderance of the evidence. These procedures are set forth in 18 U.S.C. § 983(a).

In criminal forfeiture, the government must establish that the property sought to be forfeited was used in, or to facilitate, the crime. Alternatively, the government may establish property is forfeitable because it constitutes or is derived from any proceeds that the person obtained from the crime. A third party seeking to assert an interest in those assets may not contest the criminal forfeiture allegation in the forfeiture proceeding itself, as only the criminal defendant can do that. Nevertheless, after a preliminary order of forfeiture is entered in the proceeding as between the criminal defendant and the government, a third party can commence an ancillary proceeding to establish an interest in the forfeited property. These procedures are set forth in 21 U.S.C. § 853(n).

Third-party Standing
Before addressing the merits of what must be established to make a successful claim to forfeited assets in either a civil or criminal forfeiture proceeding, a third party must demonstrate that it has standing even to make a claim. To do so, a third party must establish an ownership or legal interest in the property. Being a run-of-the-mill general unsecured creditor or defrauded investor does not meet the test of standing in these types of proceedings; a more direct interest in the forfeited property must be established. “[T]he term ‘owner’ . . . does not include . . . a person with only a general unsecured interest in, or claim against, the property or estate of another[.]” 18 U.S.C. § 983(d)(6)(A).

Third-party Rights in Civil Forfeiture Proceedings
A third party asserting a superior interest in the forfeited property must demonstrate one of two things:

1. The property is not involved in or traceable to the specified unlawful activity; or
2. The “Innocent Owner Defense” applies.

These are factual matters that must be determined by the trier of fact. In a civil forfeiture proceeding, the innocence of the third party making the claim is of utmost importance, because the innocent owner defense is designed to protect the interests of the truly innocent owner. On a basic level, the third party must establish an ownership interest in the forfeited property and his or her innocence regarding the property’s forfeitability. The application of this defense, however, differs depending on when the innocent owner acquired an interest in the property.

If the third party’s property interest was in existence at the time the illegal conduct giving rise to the forfeiture took place, the third party is considered an innocent owner if he or she either did not know of the conduct giving rise to the forfeiture, or upon learning of that conduct, did all that reasonably could be expected under the circumstances to terminate the criminal use of the property. For example, the third party could have given timely notice of the criminal conduct to law enforcement or could have attempted to revoke permission for the use of its property or otherwise tried to prevent the illegal use of its property.

If the third party’s property interest was acquired after the conduct giving rise to the forfeiture had taken place, the third party is considered an innocent owner if he or she was a bona fide purchaser or seller for value and did not know, and was reasonably without cause to believe, that the property was subject to forfeiture.

In the context of the innocent owner defense, a lack of knowledge of the criminal conduct and the forfeitability of the property is key. The courts have held that turning a blind eye or willful blindness is equated with knowledge of the illegal activity.

Third-party Rights in Criminal Forfeiture Proceedings
In contrast to a civil forfeiture proceeding, a third party seeking to establish a superior interest to forfeited property in a criminal forfeiture proceeding need not be innocent. Here, the third party needs to establish superior ownership rights by demonstrating that he or she has a legal right or interest in the property superior to that of the criminal defendant’s interest. Alternatively, the third party can demonstrate that he or she is a bona fide purchaser for value.

Bona Fide Purchase for Value
One way that a third party can establish a superior interest in the forfeited property in a criminal forfeiture proceeding is by
demonstrating that he or she is a bona fide purchaser for value. The claimant must demonstrate that an actual purchase was made and that the property was obtained in an arm’s-length transaction. The claimant must be without cause to believe that the property is subject to forfeiture. General creditors and victims are not bona fide purchasers (they would not have standing in any event), nor are donees, judgment lien creditors, creditors receiving property as payment on a debt, or creditors exercising set-off rights.

Use of Constructive Trust

Issues relating to the establishment of a superior legal interest in the forfeited assets most often relate to the timing of the vesting of the third party’s interest in the property. The claimant must establish a legal interest in the forfeited property that was superior to the defendant’s interest at the time of the criminal offense. While it seems that this would be impossible as to proceeds of a crime (which do not exist until after the crime occurs), a third party may be able to present other theories to establish a superior interest.

The most frequently litigated theory asserted by third-party claimants is that of constructive trust. Some courts have found that property is not forfeitable where it was taken from a third party by fraud and the criminal defendant therefore only held it in constructive trust. Such property impressed with a trust is not subject to forfeiture. The Eleventh Circuit held in United States v. Shefton, 548 F.3d 1360, 1366 (11th Cir. 2008), that a constructive trust is a cognizable “legal interest” sufficient to assert an interest under the forfeiture statutes. Until Shefton, the government had been relying heavily on an early decision holding that “a constructive trust may not be used to defeat the government’s forfeiture claim.” United States v. BCCI Holdings (Luxembourg), S.A., 46 F.3d 1185, 1190–91 (D.C. Cir. 1995).

An interest in property may be demonstrated by establishing a constructive trust over property that one party holds in equity for another. Under state law, a constructive trust can generally be shown where property has been obtained by another through means by which it would be unconscionable for the holder of legal title to retain a beneficial interest. Although the law varies by state, generally, a claimant establishing a constructive trust must satisfy principles of equity and needs to demonstrate the following:

- The ability to trace an interest to the particular asset
- The lack of an adequate remedy at law
- A confidential relationship between the claimant and the defendant
- Fairness to others who are similarly situated
- Clean hands
- Unjust enrichment or fraud if no constructive trust is established

State laws may also vary on the timing of when a constructive trust is established, which may make all the difference on whether a constructive trust claim can prevail over the government’s forfeiture action. Some jurisdictions find that a constructive trust is created at the time the fraud occurs. Others state that a constructive trust is a remedy and established only at the time that it is judicially imposed.

If a constructive trust is imposed when the crime occurs, some courts find that such an interest cannot be pre-existing and superior because the constructive trust and the government’s claim would have arisen at the exact same moment when the crime occurred, so the government wins. The government’s interest arises pursuant to the relation back doctrine set forth in 21 U.S.C. § 853(c), where the government’s interest in the property is deemed to have vested at the moment the crime occurred.

Other courts, however, relying upon the same doctrines and theories, find that, even though the constructive trust and the government’s interests arise at the same time, the third-party constructive trust prevails, and the government’s claim is eliminated if the third party has met is burden under the criminal statutes.

If under state law the constructive trust must be judicially imposed rather than established as of the time of the crime, courts have held that a constructive trust can never give a third party the right to the forfeited property because the trust can never be pre-existing as the statute requires.

In other words, as a matter of state law, whether or not a constructive trust can be established in the first instance, when that trust is established, and what are the rights vis-à-vis the defendant’s and the government’s interests, are all issues that are up for grabs. Several courts have found, however, that the federal question of whether a third party can establish a superior interest in forfeited property through the use of a constructive trust should be answered in the affirmative, so long as the constructive trust has been timely established under state law.

In the case of a fraudulent scheme, the issue of constructive trust can mean the difference between full recovery versus no recovery. Some courts, however, have specifically disallowed the use of constructive trusts in Ponzi or Ponzi-like cases expressly because of the fraudulent nature of the scheme and the inequity that would result in allowing the one defrauded investor whose funds were still located in the account on the last day to be paid back in full while earlier investors receive nothing. For example, in United States v. Ramunno, 599 F.3d 1269, 1275 (11th Cir. 2010), the court explained:

If the funds are distributed equitably to all victims, then each victim . . . may recover some fraction of their lost investments. However, if Martin is granted a constructive trust and recovers his entire loss, the other victims would recover less than their pro-rata share of the seized assets.

Details of the Rothstein Battle Over Forfeited Assets

The outcome of the disputes arising in the Rothstein Ponzi case over the forfeited assets took into consideration many of these factors. The results were mixed, after numerous hard fought battles:

- The Rothstein law firm bankruptcy trustee was not allowed to keep most of the law firm bank accounts
because the court concluded that the funds in those accounts were traceable to the crime. The trustee was permitted to keep one client trust account because it was determined that Rothstein, the criminal defendant, had no interest in that account, the trustee did not have to prove a superior interest to the trust beneficiaries, and the trustee had legal title. United States v. Rothstein, 2010 U.S. Dist. LEXIS 109311 (S.D. Fla. Oct. 14, 2010).

- The trustee did not fare well in his attempts to assert a constructive trust over assets acquired with the funds in the law firm accounts. The court found that a constructive trust was inequitable under the circumstances where the funds should not go to the bankruptcy estate but should be returned directly to the law firm clients and investors. The court also noted that the equitable remedy of constructive trust should not be imposed where the victims had an adequate remedy at law through the restitution process. United States v. Rothstein, 2010 U.S. Dist. LEXIS 69180 (S.D. Fla. July 9, 2010).

- The trustee’s constructive claims over real property purchased with the law firm funds were also rejected, as was his claim that he was a bona fide purchaser for value under Section 544(a)(3) of the Bankruptcy Code. United States v. Rothstein, 2010 U.S. Dist. LEXIS 109311 (S.D. Fla. Oct. 14, 2010).

- The defrauded investors also asserted constructive trust claims against the funds in the law firm’s bank accounts. Given the court’s findings denying the trustee’s claims because the money should be returned directly to investors, one would have expected success here by the third parties. But the investor constructive claims were also denied. First, the court held that the investors were required to trace their funds to the forfeited property but were unable to do so. Second, it would be inequitable to the other victims to impose a constructive trust for the benefit of just a few victims. Third, the victims all had an adequate remedy at law, which was the remission process. United States v. Rothstein, 2010 U.S. Dist. LEXIS 74814 (S.D. Fla. July 26, 2010).

- The non-investor clients of the law firm were somewhat successful in their third-party claims. To the extent that the accounts were held directly for their benefit, the third-party claims prevailed. Nevertheless, the constructive trust did not extend to cover assets that had been purchased with those funds for many of the same reasons that the trustee’s and investor’s trust claims had failed. United States v. Rothstein, 2010 U.S. Dist. LEXIS 69794 (S.D. Fla. July 13, 2010).

- Rothstein’s wife asserted an ownership claim over certain jewelry she had received prior to the criminal conduct. The government objected on the grounds that she had not adequately described the jewelry, but the court overruled the objection, noting that the government itself had been sufficiently vague in describing the jewelry in its forfeiture order. United States v. Rothstein, 2010 U.S. Dist. LEXIS 74423 (S.D. Fla. July 22, 2010).

- The creditors’ committee of the Rothstein law firm bankruptcy case made claim to the forfeited property in an attempt to reach assets for the benefit of the law firm’s creditors and victims, but the court found that the committee did not have standing in the forfeiture proceeding and that it needed to seek recourse in the bankruptcy case. United States v. Rothstein, 2010 U.S. Dist. LEXIS 74814 (S.D. Fla. July 26, 2010).

Conclusion

If appropriate, third-party claims can catapult a party out of the category of general unsecured creditor, where it would share the pot with everyone else, and can lead to a full recovery of that creditor’s claim amount. In Ponzi cases and other fraudulent schemes, however, courts are wary of treating the last victim to place money into the scheme differently than earlier investors just because the last victim’s funds are still sitting in a bank account. Therefore, even if all the t’s are crossed and the i’s dotted, a victim or creditor may still not be successful in asserting a third-party claim to forfeited property. Nevertheless, one should not be discouraged from asserting those rights if property rightfully belonging to that party has been forfeited by the government. Importantly, however, all potential claimants—including trustees, receivers, investors, third-party owners, and the government—are encouraged to communicate and work together to divvy up the assets in the most cost-effective manner possible. The multiple pieces of Rothstein litigation certainly led to some winners, yet one cannot help but wonder whether the wins would have been greater and the losses smaller had the government and trustee been able to avoid such costly, lengthy, and bitter litigation.

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Coordination Agreements in Parallel Forfeiture and Bankruptcy Proceedings

By Hon. Steven W. Rhodes

When a Ponzi scheme collapses, the result is often two or three parallel proceedings—a forfeiture action filed by the Department of Justice, a civil securities enforcement action filed by the Securities and Exchange Commission, and a bankruptcy proceeding. Each has procedures for compensating the victims of the scheme, but the procedures are different and conflicting. Resolving those conflicts through litigation can result in significant expense and delay in compensating victims. Recognizing this, and in an effort to use the more advantageous aspects of each process, the DOJ and bankruptcy trustees often negotiate coordination agreements that divide and assign the responsibilities for recovering and distributing assets.

Competing Processes for Compensating Ponzi Victims

The DOJ initiates the asset forfeiture process, whether civil or criminal, as a part of its prosecution of the crimes that the Ponzi perpetrator has committed, which may include mail fraud, wire fraud, securities fraud, money laundering, and conspiracy, just to name a few. In the forfeiture process, the DOJ seizes the property that the perpetrator used in the commission of these crimes and the proceeds of these crimes, as provided in 18 U.S.C. § 981. The DOJ then uses the forfeited assets to compensate the victims of the perpetrator’s fraud through its remission and restoration process under 21 U.S.C. § 853(i)(1) (relating to the disposition of criminal forfeiture proceeds) and 18 U.S.C. § 981(e)(6) (relating to the disposition of civil forfeiture proceeds). Remission is the means by which forfeited property is distributed to crime victims. Restoration is the means by which forfeited property is used to satisfy a criminal restitution order for crime victims. This distribution process is done entirely within the DOJ and in the discretion of the attorney general.

At the same time, the Securities and Exchange Commission may also file a civil enforcement action under 15 U.S.C. § 78u(d). The district court may then immediately appoint a receiver over the perpetrator’s property for the benefit of the scheme’s victims.

Finally, the perpetrator may also face bankruptcy, which can happen in any of three ways. The perpetrator itself may file a voluntary bankruptcy petition. Or, through an involuntary bankruptcy proceeding under 11 U.S.C. § 303, the victims of the scheme may obtain bankruptcy relief and the appointment of a trustee. Or, the receiver appointed through the SEC civil enforcement action may file a petition for the perpetrator. In any event, under 11 U.S.C. § 541(a), all of the perpetrator’s property becomes property of the bankruptcy estate, excepting forfeited property under the “relation back” doctrine, discussed below.

Experience suggests that conflicts between receivership proceedings and forfeiture proceedings are rare, perhaps because receivers may be more inclined than bankruptcy trustees to defer to the government’s desire to liquidate and distribute forfeited assets. Whatever the reason, because conflicts between bankruptcy and forfeiture are much more common, this article is limited to those conflicts and their resolution through coordination or cooperation agreements.

It is important to note that the forfeiture proceedings and the bankruptcy proceedings are filed in two different courts, with two different judges presiding. The bankruptcy court hears all matters relating to the bankruptcy case, while the district court presides over the forfeiture proceedings. Each court applies a different set of rules to its respective processes.

Both forfeiture and bankruptcy have procedures for compensating victims by (1) marshaling the perpetrators’ assets, (2) liquidating those assets, (3) fixing victims’ claims to the proceeds of those assets, and (4) distributing those proceeds to victims. There are, however, significant differences in these four key aspects of these procedures. As a result of these differences, each system has advantages and disadvantages, proponents, and critics.
Those who favor the forfeiture process argue:

- Often the criminal investigation has proceeded for a substantial period of time before the bankruptcy process gets underway, and has uncovered and preserved substantial assets from which victims can be compensated.
- The forfeiture process is more expeditious than the bankruptcy process.
- The forfeiture process is less costly than the bankruptcy process.
- The applicable statutes establish a priority for the forfeiture process over the bankruptcy process that must be respected. This priority results from the “relation back” doctrine by which property is deemed forfeited to the government at the time of the commission of the crime and is therefore not property of a subsequently filed bankruptcy estate. 18 U.S.C. § 981(f); 21 U.S.C. § 853(c).

On the other hand, the proponents of the bankruptcy process argue:

- In bankruptcy, there is judicial review and oversight of the entire process, but in the forfeiture process, there is judicial review of only the asset marshaling process, which is accomplished by the identification of the forfeited property in the forfeiture order.
- In bankruptcy, commercial creditors who were left unpaid when the scheme collapsed are entitled to a pro rata distribution on the same priority as the direct victims of the perpetrator’s fraud, but in the forfeiture process, they receive no distribution because they are not considered “victims” under 28 C.F.R. § 9.6(a).
- In bankruptcy, the proceeds of avoidance actions such as preference claims under 11 U.S.C. § 547(b) and fraudulent transfer claims under 11 U.S.C. §§ 544 and 548 are available for distribution to creditors, but in the forfeiture process there are no such actions.

In the Ponzi case of United States v. Frykholm, 362 F.3d 413, 417 (7th Cir. 2004), the Seventh Circuit agreed with the proponents of the bankruptcy process for compensating victims:

[An involuntary bankruptcy petition] would have provided a superior way to marshal [the perpetrator’s] remaining assets and distribute them to her creditors. Although § 853(n)(1) allows the Attorney General to use forfeited assets for restitution, it does not create a comprehensive means of collecting and distributing assets. Bankruptcy would have made it pellucid that [one victim] cannot enjoy any priority over the other victims and cannot reap a profit while [the perpetrator’s] other creditors go begging. Moreover, bankruptcy would have enabled the trustee to recoup the sums distributed to the first generation of investors, who received $5 million or so against $2.5 million paid in. Those payments could have been reclaimed under the trustee’s avoiding powers and made available to all of the bilked investors.


**Coordination Agreements**

Fortunately for Ponzi victims, in many recent cases, the DOJ and bankruptcy trustees have been able to negotiate coordination agreements. These agreements recognize that coordination of the parallel proceedings, to whatever extent, better serves the victims and creditors of a Ponzi scheme than litigation or stalemate.

Nevertheless, the flexibility of negotiating coordination agreements on a case-by-case basis carries significant costs. First, because the bankruptcy trustee’s attorneys fees for negotiating the agreement are entitled to administrative priority in the bankruptcy case under 11 U.S.C. §§ 503(b)(2) and 507(a)(2), their payment will reduce the proceeds available to creditors. This administrative expense can be significant unless the parties reach an agreement promptly.

Second, the time that the trustee and the DOJ take to conclude an agreement delays the trustee’s work in marshaling and liquidating whatever assets the coordination agreement assigns to the trustee. Because of depreciation, this time delay can reduce the value of those assets. In any event, it certainly delays the ultimate distribution to creditors.

Regardless, it is clear that a coordination agreement between the DOJ and a Ponzi scheme bankruptcy case trustee is better for victims and other creditors than either litigating the issues or leaving the process of compensating them to one system or the other.

**Recently, parties successfully negotiated coordination agreements in these Ponzi cases:**


**The Scott Rothstein Ponzi Case**

The “poster case” that should motivate the DOJ and the trustee to negotiate a coordination agreement in every Ponzi case is the Scott Rothstein case. When Rothstein was convicted for his Ponzi scheme crimes, the court entered an order forfeiting all
property involved in his RICO and money laundering conspiracies and all property derived from his mail and wire fraud offenses. Also forfeited were the bank accounts of Rothstein’s law firm, Rothstein Rosenfeldt Adler, P.A., (RRA). The DOJ and the trustee of the RRA bankruptcy did not reach a coordination agreement. Unfortunately, as a result, the DOJ and the trustee litigated at some length and cost over who should liquidate what property, as this list of court opinions demonstrates:

- **United States v. Rothstein, 2010** U.S. Dist. LEXIS 143131 (S.D. Fla. June 11, 2010) (denying the RRA bankruptcy trustee’s motion to amend the forfeiture order, seeking the return of the funds in RRA’s bank accounts).
- **United States v. Rothstein, 2010** U.S. Dist. LEXIS 69180 (S.D. Fla. July 9, 2010) (granting in part and denying in part the government’s motion to dismiss the trustee’s claim, which challenged: (1) the trustee’s ownership claim to the RRA accounts; (2) the trustee’s constructive trust claim to certain miscellaneous property; and (3) the trustee’s claim to certain real property as a bona fide purchaser).

The Marc Dreier Ponzi Case
An excellent example of a thoughtful coordination agreement is one that the parties negotiated in the Marc Dreier Ponzi case. Dreier, a practicing attorney, ran a Ponzi scheme between 2004 and 2008, selling bogus promissory notes and depositing approximately $700 million in proceeds into a bank account of his law firm, Dreier LLP. The receiver appointed in the subsequent SEC enforcement action filed an involuntary bankruptcy case against Dreier LLP. The trustee appointed in that bankruptcy case then joined other creditors in filing an involuntary case against Dreier personally and a second bankruptcy trustee was appointed.

As part of Dreier’s criminal case, the court ordered the forfeiture of $746,690,000 in cash held in accounts controlled by Dreier, as well as the forfeiture of specific listed properties. In addition, as part of Dreier’s sentence, he was ordered to make restitution payments to his victims in the amount of $387,675,303. Thus, the stage was set for the negotiations over a coordination agreement among the government and the two bankruptcy trustees. These negotiations were “lengthy and sometimes acrimonious.”

When these parties did achieve a series of agreements, they submitted them to the judges assigned to the criminal and bankruptcy cases for approval.

Before reviewing the agreement, District Judge Jed Rakoff in **United States v. Dreier**, 682 F. Supp. 2d 417 (S.D.N.Y. 2010), astutely observed:

An under-appreciated evil of substantial frauds like those of Marc Dreier is how they pit their victims against one another. Where, as here, the funds remaining after the fraud is uncovered are insufficient to make whole Dreier’s numerous victims and creditors, these unfortunates are left to squabble over who should get what. In this case, moreover, resolution of these competing claims involves consideration of three bodies of law—criminal law, securities law, and bankruptcy law—that cannot always be reconciled without some friction.

Judge Rakoff then stated that he, as the judge presiding over the criminal case against Dreier, along with the judges presiding over the related SEC civil enforcement action and the related bankruptcy action, had concluded, “[T]hese inherent tensions are best addressed through coordination and cooperation by all concerned.” As a result, “the three judges convened a joint hearing to urge such a resolution by the affected parties.”

One of the agreements was a coordination agreement between the DOJ and the bankruptcy trustee for the Dreier’s law firm, Dreier, LLP. Other agreements involved settlements between Dreier’s personal bankruptcy trustee and GSO Capital Partners, which had invested in Dreier’s fictitious promissory notes and had been paid interest and fees. These agreements provided in substance:

- The government will not seek forfeiture of any recoveries generated through avoidance actions brought by the Dreier LLP trustee.
- The government will release to the Dreier LLP trustee 97 seized artworks that it was unable to trace to the proceeds of Dreier’s offenses.
- The Dreier LLP trustee promises not to contest forfeiture of the properties listed in the schedule to the Court’s Preliminary Order of Forfeiture.
- The Dreier LLP trustee will not challenge the forfeiture of $30,895,028 that GSO disgorged, representing payments that it received from Dreier.
- GSO will pay $9,250,000 to the Dreier LLP trustee and $250,000 to Dreier’s personal bankruptcy trustee in exchange for (1) a release of the trustees’ claims against GSO, and (2) the entry of a bar order enjoining creditors and other parties in interest from seeking to recover funds from GSO.
- The government released to Dreier’s personal bankruptcy trustee the personal property in three personal residences that Dreier owned.
- The government permitted Dreier’s personal bankruptcy trustee to sell the three residences, which had been forfeited, in exchange for which the trustee will retain 10 percent of the proceeds.

Certain investors objected, arguing that the property to be transferred to the trustee under the coordination agreement is indisputably forfeitable such that the agreement will reduce the pool of funds available to victims. But Judge Rakoff...
rejected this objection, concluding that litigation over the issues resolved in the agreements “would, at a minimum, have the effect of delaying and diminishing the victims’ recoveries.” The judge also noted that the agreement would incentivize the trustee to pursue her available avoidance actions, for the potential benefit of the creditors. “Thus, despite the foregoing objections, the Court finds that the Coordination Agreement is reasonable and in the best interests of the victims collectively.” 682 F. Supp. 2d at 420–21.

In the two Dreier bankruptcy cases, Bankruptcy Judge Stuart Bernstein also approved the agreements, with the exception of one aspect—the bar order enjoining creditors and other parties in interest from seeking to recover funds from GSO. After reviewing the applicable Second Circuit authority, he held that the court could enter an “bar order enjoining creditors and other parties in interest from seeking to recover funds from GSO, where their claims are based on the debtors’ misconduct, and there is no independent basis for an action against GSO other than its receipt of the transfers from LLP.” He concluded, however, that the proposed bar order was too broad. “While the Bar Order is limited to creditors and parties in interest in the LLP and Dreier cases, these parties may also have direct claims against GSO relating to the debtors or the Notes that are unrelated to their status as creditors or parties in interest.” Accordingly, the court held that it “must be modified.”

Additional Opportunities for Coordination

The coordination agreements entered to date have focused largely on dividing and assigning assets and claims for relief against third parties to recover additional funds for victims and other creditors. There are, however, a few other areas where communication and coordination between the government and bankruptcy trustees could lead to more streamlined administration and greater recovery in both proceedings.

First, the government may not have the identities of all of the victims and, therefore, may not be able to give notice to all victims to file claims to the forfeited property. The trustee, on the other hand, may have a more complete list of all of the creditors, including victims, which the government could use for notice purposes in the forfeiture proceeding. More complete noticing and access to the forfeited property could therefore be achieved if the parties shared their lists of victims early in the case.

Second, the timetables for distribution to victims in forfeiture proceedings and distribution to creditors in bankruptcy cases are likely to be different. If the bankruptcy trustee does not know about earlier remission or restitution payments to victims from the forfeiture proceeding, the trustee would not be able to account for those partial or full payments when proposing an additional distribution to the same victims in the bankruptcy case. Communication between those responsible for the distributions in the two proceedings would avoid double recovery by some victims. This would also potentially allow greater recoveries for general creditors in bankruptcy cases who are not otherwise considered to be “victims” in the forfeiture proceeding.

Third, while the government may agree to permit a trustee to administer some of the forfeited property, it may want the trustee to distribute the proceeds of that property only to victims and not to general creditors. Because any such agreement would directly impact the rights of general creditors who are not considered “victims,” it would need to be approved by the bankruptcy court, after creditors are given an opportunity to be heard. Therefore, the district and bankruptcy courts presiding over these cases should also coordinate and cooperate in carrying out their responsibilities as well.

Conclusion

The competition between forfeiture and bankruptcy in the process of compensating the victims of a Ponzi scheme is not in the better interest of Ponzi scheme victims. It delays and reduces their recoveries. The willingness of the DOJ and bankruptcy trustees to address this problem by negotiating coordination agreements is therefore a welcome development.

Hon. Steven W. Rhodes is a United States Bankruptcy Court Judge for the Eastern District of Michigan.
Inside Business Law
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Focus on Banking Law
• Leading enforcement attorneys from the federal banking agencies describe their views regarding enforcement actions they are issuing and lawsuits they are filing against banks and their institution-affiliated parties in these materials from the 2012 Spring Meeting. The materials also cover strategies used by prominent banking attorneys to defend their clients against these actions and lawsuits, regardless of the hand that they are dealt. “Dealing with Enforcement Actions and Insider Liability” (Audio)

• Learn about the Federal Stability Oversight Counsel (FSOC), Systematically Important Financial Institutions (SIFIs), and the expanded role of the Federal Reserve in these information materials. “Dodd-Frank’s New Guys in Town: FSOC, SIFIs and the Expanded Fed” (Audio)

• Social media has created a host of new issues for financial service providers. These materials explore these new issues, including the dangers of social media to financial service providers and best practices for using social media to promote and develop products. “Maps to the Social Media Minefield Part II: How Financial Service Providers Get a Winning Hand by Addressing Legal, Reputational and Regulatory Risks” (Audio)

• These helpful materials address the challenges for financial institutions facing anti-money laundering (AML) and economic sanctions compliance challenges. Topics include regulatory expectations for Bank Secrecy Act (BSA)/AML compliance, recent developments in Iranian economic sanctions, recent developments in BSA/AML compliance, and use of BSA-related data by law enforcement. “Phoenix Rising? Financial Institutions Continue to Face AML and Economic Sanctions Compliance Challenges Description” (Audio)

• The Consumer Financial Protection Bureau (CFPB), established by the Dodd-Frank Act, has been in operations for nearly one year. For a comprehensive overview of the CFPB’s first year and expectations for the coming year, read these materials. “The CFPB at One Year: Experiences and Exposures” (Audio)

For the Young Business Lawyer: Making Connections
Do you rely on electronic communications too much for connecting with colleagues and clients? Too often it seems that many of us rely more and more on communicating via electronic methods: e-mail, text, instant messaging, and now online social networks. Try these tips for getting out of the office to meet new people and make new connections. See “Getting Out of the Office to Make Personal Connections” on page 5 of the most recent The Business of Diversity newsletter.

Consumer Financial Services
• Having trouble keeping track of the many mortgage lending provisions in the Dodd-Frank Act? Then check out these materials which provide a helpful summary. “Fisher Memorial Program: Home Ownership: American Dream or American Nightmare?” (Audio)

• A National Mortgage Settlement was recently announced between 49 state attorneys general, the Department of Justice, and the country’s five largest loan servicers. As part of the settlement, these servicers must abide by specific new servicing standards. The author of this article highlights the new servicing standards and suggests it is likely that the negotiated settlement servicing standards will form the basis of national standards applicable to all servicers. “The Mortgage Settlement: A First Look at National Servicing Standards?”

Entertainment Law
Interested in a legal career in the entertainment industry? These materials from the 2012 Spring Meeting provide a helpful overview of what to expect as a lawyer in the entertainment industry. “Stars on the Strip: An Insider’s Guide to Legal Careers in the Entertainment Industry” (Audio)
Diverse Lawyers
How do we create a culture in which diverse lawyers are supported and can thrive? These materials from the Diversity Committee seek to answer this question. “Strength in Diversity: Empowering All Lawyers to Thrive in the Workplace” (Audio)
Delaware Insider: Sue First, Ask Questions Later: Can a Derivative Plaintiff Seek to Inspect Books and Records After Filing Its Derivative Claims?

By Bruce E. Jameson

Recently, the Delaware Supreme Court was presented with the question whether a stockholder who files a derivative action is necessarily precluded from pursuing its statutory inspection rights under 8 Del.C. § 220 where the purpose of the inspection is to investigate acts of corporate mismanagement that form the basis of the stockholder’s derivative claims. In Central Laborers Pension Fund v. News Corp., No. 682, 2011, 2012 WL 1925724 (Del. May 29, 2012), the Delaware Supreme Court affirmed the Court of Chancery’s dismissal of the section 220 action, but declined to address the interplay of that action to the prior filed derivative action. Although the Delaware Supreme Court has previously expressed reservations about the advisability of a stockholder filing derivative claims prior to utilizing the “tools at hand” afforded by section 220 to gather information, Delaware law continues to recognize that there may be limited circumstances where stockholder inspection rights remain valid notwithstanding the prior filing of derivative claims.

Derivative Suit Not a Bar to Inspection Rights

Last year, the Delaware Supreme Court considered that issue in King v. VeriFone Holdings, Inc., 12 A.3d 1140 (Del. 2011). The court reversed the Delaware Court of Chancery’s dismissal of a books and records action holding that the plaintiff’s prior-filed derivative action in California did not bar the plaintiffs’ inspection rights. The derivative action had been dismissed by the federal district court in California but the dismissal was without prejudice to plaintiff’s right to re-plead based on information the plaintiff might obtain if it chose to exercise its statutory inspection rights under section 220. In dismissing the section 220 suit, the Court of Chancery in King v. VeriFone Holdings, Inc., 994 A.2d 354, 356–57 (Del.Ch. 2010), reasoned that “stockholders who seek books and records to determine whether to bring a derivative suit should do so before filing the derivative suit,” and that once a stockholder files a derivative suit it “. . . has chosen its course and may not reverse course and burden the corporation (and its stockholders) with yet another lawsuit to obtain information it cannot get in discovery in the derivative suit.”

The Delaware Supreme Court reversed. It acknowledged the well settled principle that a “proper purpose” for a stockholder’s exercise of its inspection right is the investigation of corporate mismanagement noting that “Delaware courts have strongly encouraged stockholder-plaintiffs to utilize Section 220 before filing a derivative action, in order to satisfy the heightened demand futility pleading requirements of Court of Chancery Rule 23.1.” (Emphasis added).

While filing a derivative action before pursuit of inspection rights under section 220 may be “ill-advised,” the Delaware Supreme Court identified and discussed several prior Delaware opinions where it had not been “fatal.” In each of the cases cited by the Delaware Supreme Court, the plaintiffs’ original derivative complaints had been dismissed with leave to re-plead. Furthermore, in all instances the dismissing courts had affirmatively suggested that the plaintiffs make use of section 220 to develop facts prior to re-pleading. On the other hand, the Delaware Supreme Court identified two cases where the Delaware Court of Chancery had dismissed with prejudice section 220 actions because of the existence of earlier-filed derivative actions. In both cases, the plaintiff had been denied leave to re-plead its derivative claims. Because the plaintiff in King had been specifically granted leave to amend his derivative complaint by the federal district court in California, the Delaware Supreme Court held that King had stated a proper purpose under section 220 and his action seeking to inspect books and records could proceed. Notwithstanding its recognition that in certain circumstances an action to inspect corporate records may be pursued after the initiation of a derivative action, the Delaware Supreme Court cautioned that its holding “should not be read as an endorsement . . . of proceeding in that way.”

The Next Step Not Taken

In Central Laborers, the Delaware Supreme Court again faced the question
whether and when a stockholder plaintiff can pursue its section 220 inspection rights to investigate mismanagement after having first filed a derivative suit. Central Laborers Pension Fund commenced a derivative action against the directors of News Corporation (News Corp.) challenging the fairness of News Corp.’s acquisition of the Shine Group, an entity formed by Elisabeth Murdoch, the daughter of News Corp. CEO, Rupert Murdoch. On the same day that it filed the derivative suit, Central Laborers also filed an action to compel inspection of News Corp.’s books and records for the purpose of investigating potential breaches of fiduciary duty in connection with the acquisition of Shine Group. News Corp. moved to dismiss the section 220 action on various grounds including that the filing of the derivative action refuted any claim of a proper purpose for inspection under section 220.

The Court of Chancery dismissed the section 220 proceeding holding that “once the derivative action is filed, and until the judicial processing of the dismissal motion reached the point where a recasting of the allegations has been authorized, the stockholder may not, as a general matter, demonstrate a proper purpose for invoking Section 220.” Central Laborers Pension Fund v. News Corp., 2011 WL 6224538 at *2 (Del.Ch. Nov. 30, 2011). The Court of Chancery acknowledged that “there may be special circumstances that would warrant the pursuit of books and records action at the same time as the related derivative action” but found that such circumstances did not exist there. The court did not discuss the nature of when such special circumstances might exist other than to cite Khana v. Covad Commc’n Group, Inc., 2004 WL 187274, at *4 (Del.Ch. Jan. 23, 2004). In Khana, the Court of Chancery found a section 220 action could proceed despite the plaintiff’s prior filing of a derivative action because of plaintiff’s concern that the derivative claims could become time barred if further time passed. Concerns that the limitations period applicable to the derivative claims may expire during the pendency of a section 220 action may now be of limited validity because the Delaware Court of Chancery ruled in 2010 that filing of a section 220 action tolls the statute of limitations as to claims regarding the mismanagement that is being investigated. Sutherland v. Sutherland, 2009 WL 857468, at *5 (Del. Ch.).

Central Laborers appealed the Court of Chancery’s dismissal of its section 220 claims. The Delaware Supreme Court affirmed the Court of Chancery’s dismissal of the section 220 action on grounds not considered by the Court of Chancery, and ruled that Central Laborers had failed to comply with the procedural requirements of section 220 by not supplying proof of beneficial ownership with its original demand. Although Central Laborers submitted proof of beneficial ownership in response to defendant’s motion to dismiss, the Delaware Supreme Court considered that submission inadequate holding that “strict adherence to the section 220 procedural requirements” was required to protect “the right of the corporation to receive and consider a demand in proper form before litigation is initiated.” Because it found the form of the demand deficient, the Delaware Supreme Court did not review the Court of Chancery’s determination that the plaintiff’s filing of the derivative suit precluded the existence of a proper purpose necessary to support plaintiff’s inspection rights.

The Potential Impact of Chancery Rule 15(aaa)

Because of a procedural rule unique to the Delaware Court of Chancery, the circumstances when a stockholder may simultaneously prosecute a derivative action and section 220 action may vary based on the forum in which the derivative action is brought. In all the cases cited by the Delaware Supreme Court in King as examples of plaintiffs being permitted to prosecute their section 220 claims after having filed derivative actions, the dismissal of the plaintiff’s derivative complaint was subject to a right to amend. Such a scenario is unlikely today if the derivative action is filed in the Delaware Court of Chancery because of the adoption of Court of Chancery Rule 15(aaa) which became effective June 1, 2001. Rule 15(aaa) requires a plaintiff that desires to amend its complaint in response to a motion to dismiss to file an amended complaint or motion to amend before the time that its answering brief in response to the motion to dismiss is due. If the plaintiff fails to amend its complaint and the court grants the motion to dismiss, the dismissal is with prejudice unless the court, for good cause shown, finds that dismissal with prejudice would not be just under the circumstances. Unlike cases decided under Federal Rule of Civil Procedure 15, which states that the right to amend shall be freely given, the Court of Chancery Rules make it much less likely that a section 220 action can be prosecuted once a derivative suit is filed in Delaware.

The two cases cited by the King v. Verifone court as examples of instances where section 220 suits were permitted to go forward after derivative suits had been filed and dismissed in Delaware (In re: Wald Disney Co. Derivative Litig. and Ash v. McCall) both pre-date the adoption of Rule 15(aaa). The third case cited by the King court, Melzer v. CNET Networks, Inc., and King v. Verifone itself, both involve instances where the derivative suit had been filed in federal court. In Central Laborers, plaintiff filed its derivative suit in the Delaware Court of Chancery but there was no discussion by the Court of Chancery regarding the potential impact of Court of Chancery Rule 15(aaa). The Court of Chancery did note that the derivative action had not been dismissed and that no judicial action had occurred requiring further pleading. Had a motion to dismiss the derivative action been filed and ruled on by the Court of Chancery, any dismissal likely would have been with prejudice pursuant to Chancery Court Rule 15(aaa) unless the court found good cause to permit plaintiffs to re-plead. Whether the existence of Court of Chancery Rule 15(aaa) will result in different outcomes for plaintiffs who file derivative suits in the Delaware Court of Chancery compared to those who file derivative suits in the federal courts, and then subsequently seek to pursue statutory inspection rights, remains to be seen. Similarly, it remains an open question...
whether a stockholder may ever state a proper purpose for assertion of corporate inspection rights where the stockholder’s derivative suit has not yet been the subject of a motion to dismiss and no obligation or right to re-plead has yet arisen.

The Delaware Supreme Court in *King* strongly cautioned against filing derivative claims first and section 220 claims later. Nevertheless, the Delaware Supreme Court’s acknowledgement in *King* that the sequence of filing claims by a stockholder cannot by itself be fatal to a stockholder’s statutory inspection rights, and the suggestion by the Delaware Court of Chancery in *Central Laborers* that “special circumstances” may at times warrant the simultaneous prosecution of a books and records action and derivative action leaves open the door, if only just a crack, to the possibility that simultaneous assertion of those claims in the future may occur. Court of Chancery Rule 15 (aaa), however, limits the likelihood that such circumstances are likely to occur where the derivative claims are filed in the Delaware Court of Chancery.

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Fleischman has chaired the ABA Business Law Section Committee on Professional Responsibility and the Business Financing Committee, as well as the Securities, Commodities, and Exchanges Committee in the Administrative Law Section and the International Securities and Capital Markets Committee in the International Law Section.

Why did you specialize in securities work?
That wasn’t really a decision to make. I reported for work at the magnificent sum of $125 a week in the middle of the summer of 1959. It was the old New York law firm of Beekman & Bogue. The firm had hired me to be trained as a litigator, but in those intervening months between hiring and starting, the small issuer and medium-sized issuer IPO market had really taken root and started to fly. Since the firm had several clients which were then major broker-dealers and underwriters with inclinations for the IPO market, the firm’s focus shifted substantially into the IPO market during those months and during the months immediately following my reporting for duty. Very shortly, it became evident that the place the firm was going to be able to use me most and best and the area that I really enjoyed was securities, and that’s what happened. And it didn’t change. That IPO market went on, got hotter, and hotter, and hotter until Memorial Day 1962. But for those first three years it was a lively place to be.

How did your transition from private practice to working at the SEC come about?
I was at a lunch or a dinner sometime the winter of 1985 when Ken Bialkin, who was then, if not the Chairman of the Section, certainly on the ladder to become Chairman of the Section and still to this day is one of the real water carriers for elephants in that particular parade. Ken said to me, “Would you think about becoming an SEC Commissioner?” Because there was a vacancy. The lawyer sheets were full of speculation [about who would be appointed]. I said “Gee, I have never thought about it but, sure, let me just go home and check with my wife.” That second conversation in which basically my wife said it would mean over-turning our lives completely. And I said “Yes, you are right about that. But it ain’t going to happen, so why not try?”

And we did. We followed Ken’s advice right to the then Chairman of the SEC and explained in the letter why I thought I would be a good candidate for him to consider and it went on from there, through step after step after step until the end of the story, which was an annual meeting of the ABA including the Business Law Section in Washington that summer. I was extraordinarily bored one morning and I walked out and called back to New York to my secretary and she said, “I am glad you called. The White House wants you,” just about an hour from the time we were speaking.

So I did what you would do in that circumstance: I showered, changed my clothes, grabbed a cab and got over to the executive office building. And the assistant to the president for this kind of thing said, “The end of the long story, Ed, is we’ve picked you.”

What was it like to be an SEC Commissioner?
My time there was a little more than six years long, and I think at least at the time it was about double what an average length of stay was of an SEC Commissioner. My time there really split into three different pieces. The early years were truly exhilarating. First of all because of the job and the market conditions and what was going on all around us, but mostly because the then Chairman really cared about what his Commissioners thought. And shortly after he left, a year and a half later, the market break of ’87 happened and that phase was extraordinarily exciting because I was the one person at that level of the SEC who actually had substantial experience in futures market as well as the securities market, and it was the intersection of the futures and securities market to which the break was attributed by a lot of people. So I had the opportunity to make
a relatively exciting contribution and after that, a couple of things happened, including the fact that my wife was diagnosed with leukemia. This is now two years after the market break and the excitement died away and the last year and a half, two years were, let’s say, disappointing. The opinions I had then were, I thought, no less valuable, but they weren’t being solicited anymore and they weren’t being heard even when they were volunteered. So those were the three different phases of my Commissionership.

What has been the most fulfilling moment in your work so far?
I spent a great deal of time as an SEC Commissioner considering the relationship of the organized bar to the SEC and the SEC to the organized bar. I spoke on that subject to the Federal Regulation of Securities Committee on three or four occasions and to other bar groups as well. But I think the most fulfilling moment to me was at an annual meeting at Atlanta, in which I really said what I had to say about that subject, critical in both directions, speaking about the standards for the SEC and the standards for the bar and that relationship between them. I was greeted by my peers with a standing tribute. I remember that to this day, although it is now 30 years later.

What are three essentials that every business lawyer needs to know?
Subject matter knowledge—that has to be first. Second, the atmosphere and the boundaries imposed by the regulators—or a single word: compliance. The last and perhaps the most important, because the others will be useless otherwise, is the ability to communicate that knowledge and that compliance sensitivity to the client and persuade the client that the lawyer does have an understanding that makes him or her very much worthwhile listening to, even if the advice is not what the client wants to hear.

Why did you get involved in the ABA and in the Section?
It had become apparent to me that the opportunities for real learning were not only in the books and not only in the law reports, but equally so in the interaction with others who were practicing in the same field. And it seemed to me that those opportunities were particularly outstanding in the ABA Business Law Section. It took me a couple of years at that time to be accepted into membership on the Federal Regulation of Securities Committee. You didn’t just say “I want to join.” You had to be considered and approved.

The opportunity to participate in various panels on what I might call ethical issues. I’m old enough so that people are willing to let me pontificate and that’s what people do with ethics issues. At the recent meeting in Las Vegas, they had me on two panels and I much enjoyed them as a matter of fact. Some of it is very interesting and very provoking. Some of it is extraordinarily frustrating. It’s hard to get your hands around ethics; it’s much easier to get your hands around substantive issues.

What has been the highlight of your work as a Business Law Section Advisor?
The opportunity to participate in various panels on what I might call ethical issues. I’m old enough so that people are willing to let me pontificate and that’s what people do with ethics issues. At the recent meeting in Las Vegas, they had me on two panels and I much enjoyed them as a matter of fact. Some of it is very interesting and very provoking. Some of it is extraordinarily frustrating. It’s hard to get your hands around ethics; it’s much easier to get your hands around substantive issues.

Describe the work that’s being done by the Federal Regulations of Securities Committee.
Within the last few weeks, since the passage of what’s called the Jobs Act, the Chairman of the Committee has made it his business to focus the attention of Committee members all around the country on the regulatory developments under the Jobs Act. The Q&A being put out by the SEC, the client memos being put out by the firms of which individual members of the Federal Regulation of Securities Committee are themselves associates or partners, so that everybody can have at least access to what’s supposed to be a very major change in the approach to securities regulation. But that’s just an example. Because if you look at the other work being done by various sub committees, there’s much breadth in the work of the Committee.

Describe the relationship between the SEC and the ABA Business Law Section.
There is no formal relationship. It’s a relationship that’s fraught with both cooperation and difficulty. But it is a relationship of professional colleagues. That is to say, a relationship between persons within the SEC who had come to know lawyers at the private bar who are members of the Business Law Section and between members of the Business Law Section who have come to know persons who are Commissioners or who are on the staff of the SEC. So it’s not a formal relationship, but the senior members of the staff and occasionally even a Commissioner or the Chairperson of the SEC will come to the meetings of the Business Law Section or of the Federal Regulation of Securities Committee. The same thing is true with the derivatives area and they will participate, not in the sense of slugging it out, but in the sense of making views known to the people who are laboring in the vineyards.

How has your involvement in the ABA shaped your work as a lawyer?
Before I went to the SEC, my involvement in the ABA gave me a fair amount of insight into the issues facing the SEC over those years and into the way the SEC could be expected to react to those issues. Some of that I’m sure came from private practice, but most of it came from involvement in the ABA and in the ABA committees.

What is a commonality among most successful business lawyers you know?
Creativity, insight, expertise. If I think of the great business lawyers that I’ve known and in particular those who are practicing today, those three traits are the fundamentals.
How has the SEC evolved?
It’s become more bureaucratic; it’s become more regulatory; and it’s become—I think it’s fair to say—less open to opinions that originate outside the Commission and outside the city of Washington, D.C.

What challenges does the SEC face in the next decade?
I’m not sure that the future ones are a lot different from the challenges faced in past decades. The SEC is always challenged by a temptation to believe that it has all the answers; that is, if there’s a problem, there must be a regulatory solution. I’m a Reagan appointee to the Commission so I don’t believe either that it has all the answers or that there has to be a regulatory solution to every problem.

How is public sector work different from private practice?
The difference is in the identification of the client. The entire legal regulatory system, with all its many facets—our society as a whole—is your client when you’re in the public sector, as opposed to the interests of entities, organizations or individuals who are your clients when you’re in private sector. That makes a great deal of difference.

Who is your idol in the legal profession?
Holmes, Brandeis, and Cardozo—the great common law lawyers. Because that’s the foundation, the way of thinking that you have to learn. It’s worth going back to Holmes to understand how the law, even in a regulatory area, even in the administrative law area, how the law develops, how it evolves and what its goals and directions can be and should be.

What are your interests outside of the law?
Reading, the theater, small boat sailing.

Who has been your most influential teacher?
Outside the law it was a professor at Harvard who went on to teach at Columbia for many years. He was a professor of Russian history in the nineteenth and twentieth centuries and he supervised my thesis, which had to do with a particular event of Russian history in the nineteenth century. Within the law, it would have been a corporate senior partner at Beekman & Bogue named Bertrand Kohlmann, who died now 40 years ago. He was the most influential teacher I’ve ever had. He was a perfectionist, but very much a pragmatic practitioner of the law.

What is the best idea you ever had?
The realization in the mid ‘70s that this wonderful law firm in which I practiced simply couldn’t survive, despite the reputation and despite the abilities of its partners, without a substantial merger, which would involve geographic expansion. I pursued that particular idea for a number of years with people whom I had met through the Section. It finally came to fruition.

What is the most unique thing about you?
I’m an archivist, otherwise called a pack rat, with a huge personal library of regulatory materials, particularly SEC materials, that I have acquired over the years from lawyers who are older than I, from publishers in the field, from second-hand book stores, from all kinds of places. I would be delighted to make that library available to some law school that could use it, but in fact what I’m finding is that paper and print are out of fashion. I don’t know what I am going to do with my library. It will be a shame to burn it but it may happen.
ALI Elects New Council Members

At the Annual Meeting on May 21, the ALI membership elected six new members to the Council. These remarkable new members, who join 50 others on the Council, are:

Michele Kane, Associate General Counsel of the Walt Disney Company in Burbank, California. She leads the Technology Legal Group, which is responsible for technology and telecommunications law, information security, and IT outsourcing for the company and its subsidiaries worldwide. She also chairs the company’s e-commerce/commercial law practice group and is a member of its IT leadership board. Before joining the Walt Disney Company, Ms. Kane was in private practice in Los Angeles with Hufstedler, Kaus and Beardsley. She also served as Acting Director of the Illinois Department of Finance. A past Chair of theABA Section of Science and Technology, Ms. Kane is a graduate of the University of Chicago Law School and also holds a master’s degree in public administration from the Maxwell School at Syracuse University.

Carolyn Kuhl, Presiding Judge of the Complex Litigation Division of the Superior Court of California for the County of Los Angeles. Judge Kuhl worked in the U.S. Department of Justice from 1981 to 1986, where she served as Deputy Solicitor General, Deputy Assistant Attorney General in the Civil Division, and as a Special Assistant to Attorney General William French Smith. She also was in private practice with the Los Angeles firm of Munger, Tolles & Olson. Judge Kuhl received her bachelor’s degree in chemistry from Princeton University and graduated from Duke Law School. She was an editor of the Duke Law Journal and clerked for then-future Supreme Court Justice Anthony Kennedy when he was on the Ninth Circuit.

Carol Lee, General Counsel of Taconic Capital Advisors, an SEC-registered investment advisor based in New York City that manages eight private investment funds with total assets under management of approximately $8 billion. Previously she was Vice President and General Counsel of the International Finance Corporation, which is the private sector investment arm of the World Bank Group. Ms. Lee also was in private practice at Wilmer, Cutler and Pickering, in Washington, D.C. Ms. Lee has a B.A. from Yale College, a B.A. from Oxford University in philosophy, politics, and economics; and a J.D. from Yale Law School, where she was article and book review editor of the Yale Law Journal. She clerked for Judge J. Skelly Wright of the District of Columbia Circuit and for Justice Stevens of the U.S. Supreme Court.

Daniel Rodriguez, Dean and Harold Washington Professor at Northwestern School of Law and a professor at Berkeley. His areas of teaching and academic specialty are administrative law, local government law, property, state constitutional law, statutory interpretation, and law and positive political theory. Dean Rodriguez was a law clerk to Judge Alex Kozinski of the Ninth Circuit. He is a graduate of California State University and Harvard Law School, where he was the Supreme Court Editor of the Harvard Law Review.

Robert Sitkoff, John L. Gray Professor of Law at Harvard Law School. He is an expert in trusts and estates and is the youngest chaired professor with tenure in the history of Harvard Law School. Professor Sitkoff taught previously at New York University School of Law and at Northwestern University School of Law and has received a number of teaching awards. His primary research focus is economic and empirical analysis of the law of trusts and estates and trust law reforms. His work has been published widely and he works with the Uniform Law Commission. Professor Sitkoff served as a law clerk to then Chief Judge Richard Posner of the Seventh Circuit. A graduate of the University of Chicago Law School, he was awarded the Olin Prize as the outstanding graduate of his class in law and economics.

Steven Weise, partner in the corporate department of Proskauer Rose in Los Angeles. He practices in all areas of commercial law and has experience in financing,
especially those secured by personal property. His experience covers e-commerce, contract law (including “plain English” drafting), legal opinions, and consumer law compliance matters. Mr. Weise lectures widely and has written many articles on commercial law topics. He brings to the Council a wide range of valuable experience with the Uniform Commercial Code and has been an ALI designee on the Permanent Editorial Board for the UCC since the mid-1990s. Mr. Weise served on the ALI-ABA Board of Directors and will help ALI with the transition to ALI CLE. He is a graduate of Yale University and Berkeley.

We thank this outstanding group of people for agreeing to serve on the Council. A full list of Council members is available on the ALI website.

Sincerely,
Diane P. Wood,
Judge, U.S. Court of Appeals, Seventh Circuit
ALI Nominating Committee Chair

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Business Law Today

The Business Lawyer Earns “Most-Cited” Titles

In the June 2012 issue of the Michigan Law Review article “The Most-Cited Law Review Articles of All Time,” two articles from The Business Lawyer made the list! An article authored by John C. Coffee, Jr., “Understanding Enron: It’s About the Gatekeepers, Stupid,” was listed as one of the “Most-Cited Law Review Articles of Recent Years.” Also, “Takeover Bids in the Target’s Boardroom” written by Martin Lipton was recognized as one of the “Most-Cited Law Review Articles in Selected Subjects.”