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The ABA Business Law Section's Online Resource

Overview of Asset Forfeiture

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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 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 re-develop 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, 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

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 news-

paper 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.

Key asset forfeiture statutes, rules, and regulations

Administrative Forfeiture

- 18 USC § 983

Civil Forfeiture

- 18 USC § 983
- Fed. R. Civ. P., Supp. Rule G

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?

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.

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