

# Considerations for Defending Against Federal Civil Asset Forfeiture Action

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The federal asset forfeiture program is a significant component of the Department of Justice's strategy for disrupting alleged criminal activity, and increasingly is being used in corporate fraud and other financial crime cases. See, e.g., Dep't of Justice, *Asset Forfeiture Program, FY 2021 Performance Budget Report to Congress*, at p. 10.

Asset forfeiture, however, is not confined to criminal proceedings. Under the federal forfeiture statutes, the Department of Justice is authorized to seek civil forfeiture of property connected to a range of unlawful activities.

A civil forfeiture proceeding poses an immediate and permanent threat to the property rights of everyone with an interest in the subject property, regardless of culpability or even awareness of any alleged criminal activities, as well as unique procedural challenges and complexities.

Federal civil forfeiture practice raises far too many issues and complexities to be comprehensively addressed in this article. Instead, we'll focus on the critical issues that property owners and their counsel ought to be aware of at the outset of an action.

## A Brief Background of Forfeiture

The Department of Justice maintains that criminal and civil forfeiture not only "serve the same purposes," but that they also "have similar procedural safeguards." Civil Asset Forfeiture: Purposes, Protections, and Prosecutors Money Laundering and Asset Recovery Section, Criminal Division,



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U.S. Department of Justice, Dep't of Just. Manual Comment. 9-119.000A.

While criminal and civil forfeiture are founded on the same purpose of disrupting unlawful activity, they are governed by very different substantive and procedural mechanisms—and the effectiveness of civil forfeiture procedural safeguards are hardly commensurate with the protections in the criminal context.

Criminal forfeiture represents a post-conviction punishment, and therefore is imposed only after the defendant has been convicted beyond a reasonable doubt. And criminal forfeiture is limited to the convicted defendant's interest in the subject property. See 21 U.S.C. §§853, 982.

In contrast, a civil forfeiture action is not directed at alleged criminals, nor even the owners of the property at issue. Instead, a civil forfeiture proceeding is an action *in rem* against *property* which allegedly is connected to or derived from some specified unlawful activity.

The proceeding is not limited to the interests of the persons who committed, participated in, or even knew about the unlawful acts. See 18 U.S.C. §981.

The premise of a civil forfeiture action is that any and all ownership interests in the named property were vitiated at the time of the unlawful activity, whether or not the property owners themselves were culpable. (“All right, title, and interest in property described in subsection (a) of this section shall vest in the United States upon commission of the act giving rise to forfeiture under this section.”); see also *United States v. PetroSaudi Oil Servs. (Venezuela) Ltd.*, 70 F.4th 1199, 1210 (9th Cir. 2023) (“in civil forfeiture actions, a court exercises in rem jurisdiction and must ‘adjudicate the rights of the government to the property as against the whole world’”) (citation omitted).

The government need not convict anyone, nor prove that the property owners were even aware of unlawful activities, to prevail in a forfeiture action. In general, if the government establishes that the property at issue was involved in unlawful activity, the property owners will lose their interests unless they prove the affirmative defense of innocent ownership.

In effect, the typical presumption of the American legal tradition—that the government must prove culpability to deprive ownership rights—is turned on its head, as the property owner is required to prove innocent ownership simply to retain their property interests. Moreover, federal civil forfeiture claims are subject to unique procedural rules, which have significant implications and present serious pitfalls.

### **The Risks and Complexities of Civil Forfeiture Actions**

A civil forfeiture action poses an array of risks that must be carefully navigated. A thorough understanding of the substantive and procedural issues arising from a civil forfeiture action is critical.

And because property is subject to forfeiture only if it is traceable or substantially connected to alleged unlawful activity, it often is important to dissect related financial transactions.

Finally, counsel should look for strategic opportunities, not only to defeat a civil forfeiture action on the merits, but to minimize impairment of property rights during the pendency of the action.

**The Scope of Civil Forfeiture May Be Broader Than the Alleged Damages or Unjust Enrichment Arising From the Unlawful Activity.** The scope of a forfeiture claim may be significantly broader than the alleged damages or unjust enrichment attributable to unlawful activity. For example, Section 981(a)(1)(A) authorizes forfeiture of property *involved* in money laundering activities.

Under the federal money laundering statutes, a monetary transaction involving “criminally derived property” may constitute money laundering—e.g., depositing funds attributable to investment fraud into a bank account may constitute money laundering.

In that case, under Section 981(a)(1)(D), the government may pursue civil forfeiture of all funds in the account at or after the time of the deposit, not merely the proceeds of alleged fraud. See *United States v. Huber*, 404 F.3d 1047 (8th Cir. 2005); *United States v. McGauley*, 279 F.3d 62 (1st Cir. 2002).

**The Filing of a Civil Forfeiture Complaint Generally Leads to Pre-Judgment Restraint of the Named Property.** Under 28 U.S.C. §1395, a court may exercise *in rem* jurisdiction over any property that is “brought” before the court. By itself, the service of an *in rem* complaint is insufficient to bring the property before the court.

Instead, the government must perfect *in rem* jurisdiction through judicial process that puts the named property under the constructive control of the court. *United States v. One Oil Painting Entitled Femme en Blanc by Pablo Picasso*, 362 F. Supp. 2d 1175, 1181-83 (C.D. Cal. 2005) (citing *Dluhos v. Abandoned Vessel, Known as New York*, 162 F.3d 63, 69 (2d Cir. 1998)).

If the property has not already been seized by the government, there are two mechanisms for perfecting constructive control over the named property: (1) a judicial warrant based on a finding of probable cause; and (2) a judicial restraining order. See 18 U.S.C. §§981(b)(2), 983(j), 985(d)(1), 985(f)(1); see also Fed. R. Civ. P. Suppl. G(3)(b).

If the government fails to properly obtain judicial process over the named property, the court is deprived of *in rem* jurisdiction. See *United States*

v. 51 Pieces of Real Property Roswell, NM, 17 F.3d 1306, 1312 (10th Cir. 1994); *United States v. Approx. 2,538.85 Shares of Stock Certificates*, 988 F.2d 1281, 1288-89 (1st Cir. 1993).

The federal civil forfeiture laws and Supplementary Rules of Procedure incorporate the constitutional safeguards that protect against the Government's impairment of an individual's property rights absent due process. See, e.g., *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 48-49 (1993) (The Due Process Clause of the Fifth Amendment guarantees that "[n]o person shall ... be deprived of life, liberty, or property, without due process of law," including in the civil forfeiture context").

In practice, however, the standard required of the government to restrain the named property prior to trial is not steep. A court may enter an order restraining the named property "upon the filing of a civil forfeiture complaint alleging that the property with respect to which the order is sought is subject to civil forfeiture." 18 U.S.C. §983(j).

There nonetheless may be opportunities for challenging a pre-judgment restraint of property, which may mitigate the impairment of property rights and reduce losses, or even preclude the action from proceeding. See *United States v. All Funds Distributed To, or o/b/o Weiss*, 345 F.3d 49, 55 (2d Cir. 2003) ("if the defendant personal property cannot be seized, at least constructively, the forfeiture proceeding cannot move forward, because the court will not have jurisdiction").

For example, in *United States v. Morgan JV Units*, 20-cv-00334-EAW (W.D.N.Y. April 9, 2021), the civil forfeiture complaint named and sought forfeiture of joint venture units. The government, however, instructed the joint venture to withhold not only the joint venture units, but also distributions payable on the named units.

Even before filing verified claims of ownership, the claimants filed a motion for an order compelling the release of the withheld distributions. The claimants argued that distributions were distinct from the underlying joint venture units, and the government had not obtained a restraining order against the distributions.

Moreover, because the distributions were not named in the complaint, they were not subject to forfeiture, and therefore could not be restrained. Following briefing and oral argument, the government voluntarily agreed to the release of withheld distributions, which then exceeded \$1 million.

**The Failure To Timely File a Verified Claim of Ownership Will Deprive a Claimant Standing To Challenge Forfeiture.** Because a civil forfeiture action is premised on *in rem* jurisdiction against the named property, a claimant effectively must intervene in the action by filing a verified claim of ownership interests in the named property.

As a threshold matter, the claimant must demonstrate standing under Article III of the Constitution, and under the statutory framework "established by compliance with [Supplemental Rules for Admiralty and Maritime Claims and Asset Forfeiture Actions] Rule G." *United States v. Real Property & Premises Located at 2840 S. Ocean Boulevard*, No. 14-CV-2693 (RJD)(RR), 2017 1533538, at \*4 (E.D.N.Y. April 21, 2017); see also *United States v. Vazquez-Alvarez*, 760 F.3d 193, 197 n.3 (2d Cir. 2014); *United States v. Cambio Exacto, S.A.*, 166 F.3d 522, 526 n.3 (2d Cir. 1999) (same).

After filing a verified claim and establishing standing, the claimant then must answer or move against the forfeiture complaint as provided in Supp. Rule G and Rule 12 of the Federal Rules of Civil Procedure.

It is critically important to timely file a verified claim of ownership interest and preserve standing to challenge the forfeiture claim. Under Supplemental Rule G(5), a verified claim of ownership must: (1) identify the specific property claimed; (2) identify the claimant and state the claimant's interest in the property; (3) be signed by the claimant under penalty of perjury; and (4) be served on a designated government attorney.

The failure to timely file a proper verified claim of ownership within the time periods dictated in Rule G(5) deprives a claimant of standing and terminates any claim to the named property. Bear in mind that the named defendant in a civil forfeiture action is property, and therefore the standards

and effectiveness of notice are less precise than service requirements on a person.

If the claimant received direct notice of the forfeiture claim, the claimant must file the claim of ownership within the time stated in the notice, generally at least 35 days from the date of notice.

If the government did not send individual direct notice, then the claim of ownership must be filed within 30 to 60 days, depending on whether the government published notice and if the property was already in the government's possession, custody or control when the complaint was filed. See Suppl. Rule G(5).

Although the standards of service and time periods for filing a claim of ownership are not uniformly precise, the consequence for missing a deadline is severe. If a claimant fails to file a claim of ownership that conforms to the requirements of Rule G(5), or is not timely filed, the verified claim is disregarded, and the claimant lacks standing to challenge forfeiture.

For example, in *United States v. \$8,040.00*, 21 CV 6323 (W.D.N.Y. Feb. 3, 2022), the police executed a search warrant on Cristal Starling's house in October 2020, because they suspected her boyfriend, who sometimes stayed with her, was a drug dealer. Starling operated a food cart and had been saving to buy a food truck. She had saved about \$8,000, which she kept in a drawer.

During the search, the police seized her savings, as well as additional cash in a pocket of her jeans, on suspicion that the cash represented proceeds from her boyfriend's drug sales. The police did not find any drugs in her apartment, nor in their search of her boyfriend's apartment that same night.

Her boyfriend nonetheless was indicted on drug trafficking charges, and the Department of Justice later filed a forfeiture action against Starling's cash. Starling filed administrative claims for the return of the seized cash, but was told it would be held as evidence until the criminal action was resolved.

In November 2021, her boyfriend was acquitted of all charges, and Starling promptly filed a verified claim of ownership of the seized money in the civil forfeiture action.

The court, however, granted the government's motion for a default judgment. Starling's verified claim of ownership was deemed untimely—which, under civil forfeiture rules, deprived her of standing to claim ownership of cash seized from her apartment and her pants pocket.

Her savings were forfeited to the government.

**A Claimant May Challenge a Civil Forfeiture Complaint on a Motion To Dismiss.** A civil forfeiture complaint may be challenged on a motion to dismiss pursuant to Rule 12 of the Federal Rules of Civil Procedure. A civil forfeiture complaint must "state *sufficiently detailed facts* to support a reasonable belief that the government will be able to meet its burden of proof at trial." Supplemental Rule G(2)(f) (emphasis added).

A number of courts and commentators have explained that civil forfeiture actions are subject to heightened pleading standards. See *United States v. Daccarett*, 6 F.3d 37, 47 (2d Cir.1993) (pleading standards "are more stringent than the general pleading requirement"); 12 C. Alan Wright, A. Miller, and R. Marcus, Fed. Prac. & Proc. Civ. §3242 (2d ed.) ("this requirement for added specifics is thought appropriate because of the drastic nature of those remedies").

What that means in practice, however, is not altogether clear.

Despite the heightened pleading standards, motions to dismiss rarely succeed. A number of courts have held that forfeiture actions, even those that allege unlawful activity based on fraud, are not subject to the heightened pleading requirements for fraud claims under Rule 8. "The Court finds that the Rule 8 pleading standards, as interpreted in *Twombly* and *Iqbal*, are inconsistent with the text and purpose of Supplemental Rule G." *United States v. 15607 E. Girard Place, Aurora, Colorado*, No. 1:20-CV-00304-RM-KLM, 2021 WL 4264065, at \*5 (D. Colo. Sept. 20, 2021).

The heightened pleading requirements are also somewhat mitigated by Section 983(a)(3)(D), which states that a complaint may not be dismissed "on the ground that the Government did not have

adequate evidence at the time the complaint was filed to establish the forfeitability of the property.” 18 U.S.C. §983(a)(3)(D).

While civil complaints generally are not subject to dismissal based on a failure of evidence, Section 983(A)(3)(D) has been construed as mitigating the government’s burden of pleading each element with specificity. “The issue is one of pleading, not proof.” *United States v. \$32,507.00*, No. 14 Civ. 5118 (CM) (Sept. 26, 2014 S.D.N.Y.) citing \$22,173.00, 716 F. Supp. 2d at 248-49.

Nevertheless, a motion to dismiss may present a realistic opportunity to terminate or at least pare down a civil forfeiture action and mitigate impairment of property rights. It may be a worthwhile endeavor, even when the pleading defect in the complaint may be curable.

Even if the complaint is dismissed without prejudice, the restraint on property terminates since the property is no longer subject to forfeiture, and the government might reconsider pursuing forfeiture of some or all of the property named in the original complaint, and the dismissal may provide an opening to negotiated resolution.

There are two general avenues for attacking a civil forfeiture complaint: (1) the complaint fails to plead the necessary elements of civil forfeiture under Section 981; and (2) the complaint fails to plead the necessary elements of the specific allegedly unlawful activity, as defined in the related criminal statute

For example, in *United States v. 7405 Morgan Road*, 19-cv-01157-EAW (W.D.N.Y.), the claimants challenged complaint for failing to adequately plead the elements of forfeiture under Section 981, as well as failing to plead the elements of the alleged specified unlawful activities. *Id.*, Docket No. 195. The complaint sought forfeiture based on alleged bank loan fraud and money laundering.

The claimants first argued that the complaint acknowledged that the loans at issue had been repaid or satisfied—which foreclosed forfeiture under Section 981. Under Section 981(a)(2)(C), in “cases involving fraud in the process of obtaining a loan or extension of credit, *the court shall allow the claimant a deduction from the forfeiture to the*

*extent that the loan was repaid, or the debt was satisfied, without any financial loss to the victim”* (emphasis added).

Since each of the allegedly fraudulent loans was fully repaid or satisfied without loss to the victim, the amount subject to forfeiture was reduced to zero. In addition, the claimants analyzed each allegedly fraudulent loan, and argued that in each case, the complaint failed to plead the necessary detailed elements of fraud under the bank fraud criminal statute, 18 U.S.C. §1344.

The *7405 Morgan Road* claimants also challenged the claims based on money laundering. The claimants argued that the complaint failed to plead the necessary elements of money laundering. The civil forfeiture complaint alleged that a real estate management firm fraudulently obtained bank mortgage loans, and then used the loan proceeds to acquire interests in residential apartment buildings. The use of the loan proceeds to acquire interests in the buildings was alleged to constitute unlawful money laundering.

Under 18 U.S.C. §1957, a claim of money laundering must allege that a person “knowingly engages or attempts to engage in a money transaction in criminally derived property.”

The *7405 Morgan Road* claimants argued that the complaint alleged that specific persons associated with the real estate management firm misrepresented information in the mortgage loan applications, and it also alleged how the subsequent loan proceeds were disbursed by the borrower—but it failed to allege *who* actually managed and disbursed the loan proceeds, or that those persons *knew* that the loan proceeds constituted criminally derived property. (While the motion to dismiss in *United States v. 7405 Morgan Road* was before the court, the government agreed to voluntarily resolve that and all related civil and criminal forfeiture actions, a result that was very favorable to the claimants and related parties.)

**The Government May Seek a Stay, During Which Time the Property Remains Seized or Restrained.** Unlike a typical civil litigation, in which the plaintiff favors expeditious resolution of its claim, in a civil forfeiture action, the government may not

be incited to press its claim, and in fact may prefer delay.

Because the named property is seized or restrained, the government has little reason for concern that the property may not be available to satisfy a forfeiture judgment. And if the government is pursuing a related criminal investigation or prosecution, it may seek to delay a civil forfeiture action to avoid discovery that might adversely affect its criminal investigation or prosecution.

The government is presumptively entitled to a stay of a civil forfeiture proceeding pending the resolution of a related criminal investigation or prosecution, even if the claimants are not involved in the criminal investigation or prosecution. Under Section 981(g)(1), the “court shall stay the civil forfeiture proceeding if the court determines that civil discovery will adversely affect the ability of the Government to conduct a related criminal investigation or the prosecution of a related criminal case.”

The government’s representation that discovery will interfere with a criminal investigation or prosecution generally is sufficient for entry of a stay. *United States v. \$278,780.80 in Funds*, No. 11 CIV. 00555 KBF, 2012 WL 4747209, at \*1 (S.D.N.Y. Oct. 4, 2012) (ordering a stay even though “no indictment had issued; [and] the criminal matter was only at the investigatory stage”); *United States v. All Funds on Deposit in any Accounts Maintained at Merrill Lynch, Pierce, Fenner & Smith*, No. CIV. A. CV 90-2510, 1991 WL 87323, at \*1 (E.D.N.Y. May 20, 1991) (“The basis for this stay was that continued discovery would jeopardize ongoing criminal investigations.”). (The statute’s language is the product of an amendment by the Civil Asset Forfeiture Reform Act of 2000 (CAFRA) that “broadened the stay relief significantly” and did away with any requirement that the Government show good cause. *United States v. All Funds Deposited in Account No. 200008524845*, 162 F. Supp. 2d 1325, 1330 (D. Wyo. 2001).

The statute requires no particularized showing of prejudice or harm; all the court need determine

is whether civil discovery will likely interfere with the criminal investigation. See *U.S. v. Real Property Located at 6415 N. Harrison Ave., Fresno Cty.*, 2012 WL 4364076, at \*3 (E.D. Cal. Sept. 21, 2012.)

**A Property Owner May Be Forced To Prove Actual Innocence To Avoid Forfeiture.** In typical civil litigations, a defendant cannot be deprived of property interests unless the plaintiff, whether the government or a private party, proves the defendant’s liability—e.g., that the defendant breached a contract, was negligent or acted unlawfully.

But that standard is turned on its head in a civil forfeiture action in which the property itself is the named defendant.

In a civil forfeiture action, the government need only adduce evidence that *someone* engaged in unlawful activity that involved the named property. If it does so, persons with an interest in the property bear the burden of proving the affirmative defense of actual innocence. 18 U.S.C. §983(d) (“The claimant shall have the burden of proving that the claimant is an innocent owner by a preponderance of the evidence”).

### Conclusion

The Department of Justice has reiterated its strategy of pursuing alleged corporate fraud and complex financial crime through the federal civil forfeiture program.

A forfeiture action poses substantial risks to anyone with an interest in the subject property, and sometimes interests in related property not even named in the forfeiture complaint.

Because of the unique and complex substantive and procedural rules that govern forfeiture proceedings, the defense of a claimant’s property rights must be grounded in expertise in asset forfeiture practice, a carefully conceived litigation strategy and agility to react opportunistically as issues arise in the course of an action.

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