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131423

ASSET
FORFEITURE

Protection of Third-Party Rights

12th in a series

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ASSET FORFEITURE

Protection of Third-Party Rights

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131423

U.S. Department of Justice
National Institute of Justice

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Prepared under cooperative agreement No. 87-DD-CX-K090(S-1) by the Police Executive Research Forum.

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Dear Colleague:

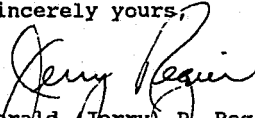
Illicit drug traffic continues to flourish in every part of the country. The cash received by the traffickers is often converted to assets that can be used by drug dealers in ways that suit their individual tastes. Since 1981, federal authorities have increased their attack on these assets through both criminal and civil forfeiture proceedings with remarkable success. The recent passage and use of state asset forfeiture laws offers an excellent means for state and local jurisdictions to emulate the federal success.

The Bureau of Justice Assistance (BJA), in the Office of Justice Programs, has funded a nationally focused technical assistance and training program to help state and local jurisdictions facilitate broader use of such laws. BJA selected the Police Executive Research Forum to develop and administer this program because of its history of involvement in practical, problem-oriented research to improve police operations and the Forum's central role in developing training materials for use by police agencies and chief executives.

As part of this project, the Forum has contracted with experts in the area of asset forfeiture and financial investigations to prepare a series of short manuals dealing with different concerns in the area of asset forfeiture. We hope these manuals help meet the rapidly unfolding needs of the law enforcement community as more and more agencies apply their own forfeiture laws and strive to learn from the successes and problems of their peers.

I welcome hearing your comments about this program. We have this project so that most requests for information or assistance can be handled through the Forum staff in Washington, D.C., by calling 202/466-7820.

Sincerely yours,


Gerald (Jerry) P. Regier
Acting Director

Acknowledgments

We want to thank Cary Copeland, Director, and Katherine Deoudes, Assistant Director for Operations, Executive Office for Asset Forfeiture, Office of the Deputy Attorney General, U. S. Department of Justice, for their review of this publication. An earlier draft benefited considerably from the comments and suggestions of Donald Semesky, IRS-OCDEF Co-ordinator for the Mid-Atlantic Region, as well as staff in the Office of Asset Forfeiture, Criminal Division, Department of Justice.

Police Executive Research Forum

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Protection of Third-Party Rights

Introduction

In recent years, asset forfeiture has become a mainstay in the battle against narcotics trafficking, and has afforded law enforcement agencies with an expedient way to separate criminals from assets that were used or acquired illegally.¹ In 1970, Congress enacted civil and criminal forfeiture legislation.² Together with subsequent amendments, this legislation has been used to compel the forfeiture of millions of dollars in cash, real estate, vehicles, vessels, airplanes, and even businesses.³

Within this context, however, a difficult question has developed concerning the rights of people who are not involved in narcotics trafficking, but whose property may be subject to forfeiture because it was either used in or derived from a drug transaction. People who fit into this category are owners, lienholders, unsecured creditors, bona fide purchasers, business partners, corporate shareholders, joint tenants, and others. Despite the innocence of such persons, forfeiture laws often cause them to forfeit their property.⁴

This report explains the basis for such forfeitures and examines the extent to which constitutional, statutory, and administrative principles have tempered the harshness of this doctrine. The first portion of the report reviews federal legislation providing for forfeiture of narcotics-related assets. The second portion considers the constitutionality of such legislation, while the last (third) portion examines pertinent forfeiture procedures and defenses.

The Nature of Federal Legislation

Federal narcotics laws authorize two types of forfeitures: civil and criminal. Civil forfeiture proceedings are brought directly against the property sought to be forfeited. The underlying

legal theory, which has ancient historical roots, is that property involved in illicit conduct is itself guilty of wrongdoing. Thus the action is brought directly against the property rather than against its owner.⁵ Moreover, because of a rule known as "the relation-back doctrine," forfeiture is considered to have occurred at the time the illegal act was committed, thereby cutting off subsequent transfers to third parties. Ensuing civil proceedings merely perfect the state's interest in the property.⁶ In such an action, the government needs to establish only probable cause linking the property to narcotics trafficking. Once this has been done, any claimant to the property must disprove the allegations by a preponderance of the evidence.⁷ Alternatively, the claimant must sustain this burden in connection with any of the exemptions that have been established to protect third-party interests. These exemptions vary depending upon which section of forfeiture law the government uses.⁸

Criminal forfeiture proceedings, on the other hand, are directed against a defendant in a criminal prosecution rather than against the property.⁹ This forfeiture action is part of the criminal trial. Because innocent third parties are not involved in this trial, they may not assert their claims to the defendant's forfeited interest until the trial is completed.¹⁰ At that point, as with their civil counterparts, these claimants operate under the relation-back doctrine and carry the burden of proof as to any third-party exemption.

Actual applications demonstrate the impact of such forfeiture laws on third-party interests. The U.S. Supreme Court's 1974 decision in *Calero-Toledo v. Pearson Yacht Leasing Company*¹¹ provides an illustration, and it also is significant because it endorsed the constitutionality of such legislation.

The *Pearson* case is most applicable to conveyances seized before Nov. 18, 1988, when Public Law 100-690 amended 21 U.S.C. 881(a)(4) to include an innocent-owner exception. This relatively new amendment will be discussed in detail later in the text.

Constitutionality: The *Pearson* Doctrine

Pearson involved the constitutionality of forfeiture legislation enacted in Puerto Rico. Because this law was modeled on federal legislation,¹² the court's decision had a broad effect. At issue was the forfeiture of a yacht that had been rented to two Puerto Rican residents by the Pearson Yacht Leasing Company (Pearson Yacht). After a marijuana cigarette was found on the vessel, the yacht was seized without prior notice to either the renters or Pearson Yacht. Forfeiture took place under laws providing that any conveyance used to transport or facilitate the transportation of controlled substances is subject to forfeiture.¹³ Pearson Yacht was innocent of trafficking in controlled substances, and the company did not even learn of the forfeiture until it attempted to recover the yacht after the lessee defaulted on the rental contract.¹⁴

Two constitutional issues were raised by this forfeiture: (1) the propriety of seizure without prior notice or hearing and (2) the constitutionality of taking an innocent party's property without just compensation. Both issues were decided adversely to the innocent third party. Seizure without notice or hearing was justified by the government's interest "in preventing continued illicit use of the property . . ." and by the risk that advance notice would make it easy to conceal the vessel or remove it from the jurisdiction.¹⁵ These circumstances were found to present "an 'extraordinary' situation in which postponement of notice and hearing until after seizure did not deny due process."¹⁶

Forfeiture of the vessel—without any compensation—was justified on both historical and policy grounds reflecting the unique nature of civil forfeiture. Such forfeitures were a well-established aspect of English law, which were recognized in America "long before the adoption of the Constitution . . ."¹⁷ Since civil forfeitures operated *in rem*—directly against the offending property—the possible innocence of its owner was never a pertinent consideration. In other words, conceptually "[t]he vessel was 'treated as the offender,' without regard to the owner's conduct . . ."¹⁸ There was long line of prece-

dent for this viewpoint,¹⁹ and the U.S. Supreme Court showed no inclination to abandon it.

Surprisingly Justice Brennan's majority opinion made little effort to justify this result from a policy standpoint. For example, he could have stressed quite properly that an innocent-owner defense might be too vulnerable to collusion or otherwise create a major loophole for narcotics traffickers seeking to avoid forfeiture. Rather than use their own property to conduct illegal transactions, drug dealers could then escape forfeiture by using conveyances belonging to third parties.²⁰ Justice Brennan, however, did not explicitly address this concern. Instead, he offered the following statement:

Forfeiture of conveyances that have been used—and may be used again—in violation of the narcotics laws fosters the purposes served by the underlying criminal statutes, both by preventing further illicit use of the conveyance and by imposing an economic penalty, thereby rendering illegal behavior unprofitable. . . . To the extent . . . that such forfeiture provisions are applied to lessors, bailors, or secured creditors who are innocent of any wrongdoing, confiscation may have the desirable effect of inducing them to exercise greater care in transferring possession of their property.²¹

Justice Brennan concluded that, under certain circumstances, constitutional protections might be triggered by this procedure:

[I]t would be difficult to reject the constitutional claim of an owner whose property subjected to forfeiture had been taken from him without his privity or consent. . . . Similarly, the same might be said of an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property. . . .²²

This language did not help the leasing company. Justice Brennan observed that the lessees voluntarily had been entrusted with the vessel and that "no allegation has been made or proof offered that the company did all that it reasonably could to avoid having its property put to an unlawful use."²³ Consequently Pearson Yacht's only remedy was to sue the lessee whose actions had caused the forfeiture or to rely

upon the possibility of an administrative remission procedure.

Thus *Pearson* established the principle that due process does not require pre-seizure forfeiture hearings and that innocence is not a constitutionally mandated defense in the civil context. The court's willingness to tolerate harsh results to third-party interests may apply to criminal forfeiture cases as well. Since *Pearson*, however, many courts have focused on whether the decision has created a limited defense for third-party claimants who take all reasonable precautions to prevent illegal use of their property. This issue and related concerns are treated best by examining pertinent forfeiture procedures and defenses applicable to third-party interests.

Procedures and Defenses

Pearson's impact has varied depending upon the procedural context within which forfeiture has been sought. Generally the issue has been confined to civil forfeiture proceedings. Even within that context, its effect depends upon which liability theory the government uses.

The four parts of this section each emphasize a different procedural setting: the first part examines federal civil forfeiture, the second analyzes federal criminal forfeiture, the third discusses state forfeiture laws, and the fourth covers remission procedures.

Federal Civil Forfeiture

Civil forfeiture in narcotics cases is authorized by 21 U.S.C. §881.²⁴ In part, this law authorizes forfeiture:

subsection (a)(4)—All conveyances . . . used, or . . . intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of [a controlled substance] . . . ;

subsection (a)(6)—All moneys, . . . or other things of value furnished or intended to be furnished . . . in exchange for a controlled substance . . . [and] all proceeds traceable to such an exchange . . . ; and

subsection (a)(7)—All real property . . . which is used, or intended to be used . . . to commit, or to facilitate the commission of a [designated] violation of this title

Since these provisions are governed by different statutory exemptions, the *Pearson* defense varies in each instance. Each provision deserves separate consideration.

§881(a)(4).

The previous discussion regarding the *Pearson* defense applies to conveyances seized before Nov. 18, 1988, when Public Law 100-690 amended §881(a)(4) to include an innocent-owner exception. The new exception is codified as 21 U.S.C.

881(a)(4)(C) and reads:

(C) no conveyance shall be forfeited under this paragraph to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge, consent, or willful blindness of the owner.

The new provision is almost identical to the wording of the innocent-owner exception included in the State Uniform Controlled Substances Act (1970) and similar wording in §881(a)(6) and 881(a)(7) with *one notable difference*: The last phrase in the new provision adds "willful blindness" to the exception. Hence, under the new exception an innocent owner must establish lack of "knowledge or consent" *and* a lack of "willful blindness" in the offense resulting in seizure in order to protect a conveyance from forfeiture.

Public Law 100-690, §6069, also added a new provision for violations of §881(a)(4), (a)(6), and (a)(7) involving the possession of personal-use quantities of a controlled substance. The new provision is codified as a note after 21 U.S.C. 881 and reads, in part:

(a) In General. Not later than 90 days after the date of enactment of this Act [Nov. 18, 1988], the Attorney General and the Secretary of the Treasury shall consult, and after providing a 30-day public comment period, shall prescribe regulations for expedited administrative procedures for seizures under section 511(a)(4), (6), and (7) of the Controlled Substances Act (21 U.S.C. 881(a)(4), (6), and (7)); section 596 of the Tariff Act of 1930 (19

U.S.C. 1595a(a)); and section 2 of the Act of Aug. 9, 1939, (53 Stat. 1291; 49 U.S.C. App. 782) for violations involving the possession of personal use quantities of a controlled substance.

(b) Specifications. The regulations prescribed pursuant to subsection (a) shall—

(1) minimize the adverse impact caused by prolonged detention, and

(2) provide for a final administrative determination of the case within 21 days of seizure, or provide a procedure by which the defendant can obtain release of the property pending a final determination of the case. Such regulations shall provide that the appropriate agency official rendering a final determination shall immediately return the property if the following conditions are established:

(A) the owner or interested party did not know of or consent to the violation;

(B) the owner establishes a valid, good faith interest in the seized property as owner or otherwise; and

(C)(1) the owner establishes that the owner at no time had any knowledge or reason to believe that the property in which the owner claims an interest was being or would be used in a violation of the law; and

(2) if the owner at any time had, or should have had, knowledge or reason to believe that the property in which the owner claims an interest was being or would be used in a violation of the law, that the owner did what reasonably could be expected to prevent the violation.

An owner shall not have the seized property returned under this subsection if the owner had not acted in a normal and customary manner to ascertain how the property would be used.

(e) Personal Use Quantities of a Controlled Substance. For the purposes of this section, personal use quantities of a controlled substance shall not include sweepings or other evidence of non-personal use amounts.

On Sept. 11, 1989, the Department of Justice (DEA/FBI) (54 F.Reg. 37605) and the Department of the Treasury (Customs) (54 F.Reg. 37600) published final regulations related to expedited petition procedures for all forfeitures involving personal-use quantities of controlled substances; expedited procedures in judicial conveyance forfeitures; and substitute bonds. These new regulations, which directly and sub-

stantially impact innocent owners of seized property, became effective Oct. 11, 1989. These regulations cover 14 pages of the *Federal Register* and, with a few minor exceptions delineated below, contain similar procedures.

Following is a summary of regulations under §6079, which deal with expediting *administrative* forfeiture procedures under 21 U.S.C. §881(a)(4), (a)(6), and (a)(7) and 19 U.S.C. 1595a(a) for violations involving the possession of personal-use quantities of a controlled substance:

Special-Notice Provisions. *Customs and DEA/FBI*—31 CFR 171.55 of the Customs regulations and 21 CFR 1316.99 of the DEA/FBI regulations contain a special-notice provision applicable to violations involving the possession of personal-use quantities of drugs. The new provision requires that at the time of *seizure* a written notice of seizure must be provided to the possessor of the property regarding applicable statutes and regulations, including the procedures for the filing of a petition for expedited procedures and for the posting of a substitute res bond. The new regulations also require that the standard notice to owners as required by 19 U.S.C. 1607 and applicable regulations "shall be made at the earliest practicable opportunity after determining ownership. . . ."

Time to File. *Customs*—A petition for expedited procedures must be filed in a timely manner under 31 CFR 171.52(d), which states, ". . . the petition must be received by Customs within 20 days from the date the notice of seizure was mailed. . . ."

DEA/FBI—A petition for expedited release must be filed in a timely manner under 21 CFR 1316.92(e), which states, "the petition must be received by the appropriate seizing agency within 20 days from the date of the first publication of the notice of seizure." (This 20-day period is the same as the period for filing a claim and bond under 19 U.S.C. 16.)

Place and Manner to File. *Customs*—Petition must be sworn to by the petitioner and signed by the petitioner or his attorney. The envelope and the petition must be marked clearly, "PETITION FOR EXPEDITED PROCEDURES"; it must be addressed

to the U.S. Customs Service; and filed in triplicate with the Customs district director in the district of seizure. (31 CFR 172.52(d)).

DEA/FBI—Petition must be executed and sworn to by the owner. Both the envelope and the request must be marked clearly, "PETITION FOR EXPEDITED RELEASE"; it must be addressed to the Director of the FBI or to the Administrator of the DEA, depending on which agency seized the property; and filed in triplicate with the Special Agent in Charge of the DEA or the FBI field office in the judicial district of seizure. (21 CFR 1316.92(e)).

Contents of Petition. *Customs and DEA/FBI*—31 CFR 171.52(e) of the Customs regulations, and 21 CFR 1316.92(f) of the DEA/FBI regulations, read as follows except that §1316.92(f) does not include the word "violation" in paragraph (1):

(e) Contents of petition. The petition shall include the following:

(1) A complete description of the property, including identification numbers, if any, and the date and place of the violation and seizure;

(2) A description of the petitioner's interest in the property, supported by the documentation, bills of sale, contracts, mortgages, or other satisfactory documentary evidence; and

(3) A statement of the facts and circumstances relied upon by the petitioner to justify expedited return of the seized property, supported by satisfactory evidence.

Elements to be Established in Petition. *Customs and DEA/FBI*—31 CFR 171.52(c) of the Customs regulations, and 21 CFR 1316.92(c) of the DEA/FBI regulations, read as follows except that the DEA/FBI regulations use the word "owner" instead of "petitioner" and the word "release" instead of "procedures":

(c) Elements to be established in petition.

(1) The petition for expedited procedures shall establish that:

(i) The petitioner has a valid, good faith interest in the seized property as owner or otherwise;

(ii) The petitioner reasonably attempted to ascertain the use of the property in a normal and customary manner; and

(iii) The petitioner did not know or consent to the illegal use of the property or, in the event that the petitioner knew or

should have known of the illegal use, the petitioner did what reasonably could be expected to prevent the violation.

(2) In addition, the petitioner may submit evidence to establish that he has statutory rights or defenses such that he would prevail in a judicial proceeding on the issue of forfeiture.

Definition of Normal and Customary Manner. *Customs and DEA/FBI—31 CFR 171.51(b)(4) of the Customs regulations, and 21 CFR 1316.91(h) of the DEA/FBI regulations, read as follows except that the DEA/FBI regulations use the word "owner" instead of "petitioner":*

(4) Normal and customary manner. "Normal and customary manner" means that inquiry suggested by particular facts and circumstances which would customarily be undertaken by a reasonably prudent individual in a like or similar situation. Actual knowledge of such facts and circumstances is unnecessary, and implied, imputed, or constructive knowledge is sufficient. An established norm, standard, or custom is persuasive but not conclusive or controlling in determining whether a petitioner acted in a normal and customary manner to ascertain how property would be used by another legally in possession of the property.

Time for Release of Property or Ruling on Expedited Petition. *Customs and DEA/FBI—31 CFR 171.53 (Customs) and 21 CFR 1316.93 (DEA/FBI) provide that if the property is not released within 21 days of seizure, a ruling on an expedited petition should be made within 20 days of the receipt of the petition either by (1) granting relief and releasing the property, or (2) by denying relief and proceeding with the administrative forfeiture.*

Definition of Personal-Use Quantities. *Customs and DEA/FBI—31 CFR 171.51(b)(6) of the Customs regulations and 21 CFR 1316.91(j) of the DEA/FBI regulations define the term "personal-use quantities" as: "Personal use quantities means possession of controlled substances in circumstances where there is no intent to distribute, or to facilitate the manufacturing, compounding, processing, delivering, importing or exporting of any controlled substance." The definitions further state that quantities of controlled substances (or mixtures of substances) that do not exceed the following quantities are presumed for personal use when no indication of drug traf-*

ficking or distribution exist: *one gram* of heroin, coca leaves, cocaine, ecgonine or methamphetamine; *1/10 of a gram* of cocaine base ("crack") or PCP; *one ounce* of marijuana; or *500 micrograms* of LSD.

Sweepings and Other Evidence of Nonpersonal-Use

Amounts. *Customs and DEA/FBI—31 CFR 171.51(b)(6)(ii)* of the Customs regulations and *21 CFR 1316.91(j)* of the DEA/FBI regulations state that quantities are not considered to be for personal use if sweepings are present or if there is other evidence of possession for other-than-personal use. In summary, both the Customs and DEA/FBI regulations give examples of other evidence to include: evidence such as drug scales, drug distribution paraphernalia, drug records, method of packaging, cutting agents, and other equipment; information from reliable sources indicating possession with intent to distribute; previous drug arrest and/or conviction that indicates intent to distribute; large amounts of cash or government buy-money indicating that the controlled substance is a sample of a larger transaction; or statements of violators or conspirators indicating possession with intent to distribute.

Substitute Res in an Administrative Forfeiture (Personal-Use Quantities Only). *Customs and DEA/FBI—31-CFR 171.54* of the Customs regulations and *21 CFR 1316.94* of the DEA/FBI regulations provide a new procedure where an owner may obtain the release of property seized for administrative forfeiture (for an offense involving personal-use quantities) by posting a bond equal to the appraised value of the property. The bond must be cash (Customs only), certified check, travelers check, money order, or irrevocable letter of credit. These new regulations are unique because the statutory provision upon which they are based (*21 U.S.C. 881-1(d)*) is contained in a section that does not apply to personal-use quantities, and that applies only to conveyances. Not only do the new regulations expand the concept of substitute res to administrative forfeitures involving personal-use quantities, but they also apply to property, not only conveyances.

Because most federal proceedings have involved efforts to forfeit cars, vessels, or airplanes that were used to facilitate

narcotics trafficking, the *Pearson* defense has been raised most often under this provision. Although §881(a)(4) exempts from forfeiture conveyances that either were used as common carriers or were unlawfully obtained without the owner's consent, these exemptions do not apply to the typical third-party claimant. Thus, resort usually has been made to the *Pearson* defense, or will in the future be made to the innocent-owner exception now included in §881(a)(4)(C).

At the outset, a threshold question is the potential scope of this defense. Who has standing to assert it? For example, is it available to a bona fide purchaser who paid full value for a conveyance and neither knew nor had reason to know of its prior illegal use? Similarly is the defense available to a lienholder who was reasonably without knowledge of any impropriety? It would seem that such third-party claimants should be given superior protection to owners because they generally lack any opportunity to prevent illegal use of the conveyance. Unfortunately this issue has not been carefully addressed yet. Because most such claimants tend to rely on an administrative remission process for relief,²⁵ the question rarely has been raised. The few decisions that considered the point did so obliquely and failed to generate consensus.²⁶

As a practical matter, most *Pearson* claims under §881(a)(4) before the November 1988 revision were raised by people and institutions with direct ownership interest in the conveyance subject to forfeiture. Their success in the courts has been mixed. A treatise on forfeiture law states that the judiciary has not decided yet whether *Pearson* establishes a constitutionally mandated defense when a claimant has taken all reasonable measures to avoid illegal use of his property.²⁷ Most courts have recognized a potential constitutional defense, but have found *Pearson* inapplicable under the factual circumstances presented.²⁸ Usually the third-party claimant simply was unable to establish his innocence. This burden is difficult to meet because the claimant must prove a negative—the absence of guilty knowledge—by a preponderance of the evidence.²⁹

Of greater import, the courts have identified factors for assessing the reasonableness of the claimant's precautionary

measures. The most important factor appears to be whether the conveyance was obtained from the owner by commercial means or through a personal relationship of some kind. Typically courts have imposed more stringent standards on commercial third parties than on family members or friends who innocently allowed their property to be borrowed by narcotics traffickers. This distinction reflects the belief that commercial third parties—usually rental companies—can be expected to protect themselves by following careful business practices and investigating suspicious borrowers. A recent decision summarized prevailing law for commercial third parties as follows:

In determining the standards for failure to do "all that reasonably could be expected to prevent the proscribed use of his property," courts have given weight to such factors as failure to determine where the claimant's property was to be taken, . . . failure to require a written contract when renting, . . . failure to obtain a clear understanding as to when property would be returned, . . . failure to require money from a renter prior to turning over possession of property, . . . and failure to carry insurance on the property. . . . Additionally, . . . it is significant if the subject property is being used in the South Florida area, since this is an "area of the country that is well known for drug related activities."³⁰

By contrast, courts generally have not been as demanding of third parties in noncommercial settings. For example, in *United States v. 1985 Chevrolet Camaro*, the trial court declined to order forfeiture of a car that had been loaned to a close family friend. Absent any reason to suspect the borrower's conduct, the court concluded that the claimant "did all he reasonably could . . . to prevent the proscribed use of his property."³¹ Furthermore, the court specifically distinguished commercial third parties who are held to a higher standard of care.³²

The higher standard for commercial claimants is somewhat ironic. As such claimants often have no reason to anticipate illegal use of their property, they usually have no motivation to investigate persons using their property; the costs of such an investigation could be prohibitive.³³ By comparison, friends and family members who lend out their conveyances are in a better position to suspect criminality and to make

reasonable inquiry. Perhaps for this reason, noncommercial claimants have fared only slightly better than their commercial counterparts. Courts have been extremely reluctant to find that noncommercial third parties have taken all reasonable precautions to avoid unlawful use of their property.³⁴ Judges occasionally have stretched to suggest preventive measures that claimants might have taken to preclude unlawful use of their conveyances. For example, in *United States v. One 1977 36 Foot Cigarette Ocean Racer*, the court erroneously suggested that the *Pearson* defense requires claimants to establish that all reasonable measures were taken to prevent the theft of a conveyance subsequently used to transact narcotics.³⁵ In another case, an out-of-town owner—who had left his Mercedes in the care of an acquaintance—lost his *Pearson* defense on the grounds that garaging the car would have been a more reasonable means of preventing its illegal use.³⁶

Though the familial or personal entrustment cases may occasion harsh results, they reflect both judicial skepticism to third-party claims of innocence and the need to avoid creating a large loophole in the forfeiture process. A review of the cases reveals that many of the claimants were not as innocent as they maintained.³⁷ Often they were actually strawmen holding title on behalf of a drug dealer.³⁸ As a result, courts aggressively have pierced the veil of fictitious ownership that conceals the real criminal interests at stake.³⁹ This experience motivates judges to apply the *Pearson* defense narrowly. To do otherwise would permit drug dealers to avoid the impact of forfeiture merely by using conveyances belonging to third parties.

Thus, the *Pearson* defense rarely has succeeded under §881(a)(4). Its application under §(a)(6) and (a)(7) has been even more problematic.

§881 (a)(6).

This provision was added to federal law in 1978 to bring the proceeds of narcotics trafficking within the reach of civil forfeiture. By authorizing the forfeiture of narcotics proceeds, Congress sought to expand the impact of this law enforce-

ment remedy.⁴⁰ Civil forfeiture no longer was limited to property used to facilitate narcotics transactions. Now, for example, money, real estate, or personal property constituting narcotics proceeds—whether direct or indirect—was subject to forfeiture.⁴¹ Simply put, Congress expanded the reach of civil forfeiture to help law enforcement take the profit out of narcotics trafficking.

Because of this expansion, much more property obviously was subject to forfeiture. Congress, however, sought to temper the potential severity of this measure by providing an explicit innocent-owner defense to forfeitures brought under this section.⁴² The law provides that “no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.”⁴³

Three important issues have been raised by courts interpreting this language: (1) Does this language expand upon the *Pearson* defense, or does *Pearson* instead serve to limit it? (2) Who qualifies as an “owner” entitled to raise this defense? (3) Is the defense limited by a 1984 amendment to §881 providing that “[a]ll right, title, and interest in property . . . [subject to forfeiture] shall vest in the United States upon commission of the act giving rise to forfeiture. . . .”⁴⁴

Although the new defense appears to expand the *Pearson* exemption, the government occasionally had argued that *Pearson* should be denied to negligent claimants who should have known that persons using their property were doing so for illegal purposes.⁴⁵ §881(a)(6), however, imposes no “reason to know” standard. The statutory defense is available to anyone who lacks *actual* knowledge of the underlying criminal transaction.⁴⁶ Moreover, §881(a)(6) seems to liberalize the defense by not imposing any requirement that the claimant had “done all that reasonably could be expected to prevent the proscribed use of his property.”⁴⁷ The 1984 amendment makes life considerably easier for third-party claimants.⁴⁸

Despite the relatively clear language of §881(a)(6), there has been some suggestion that this provision is limited by the *Pearson* doctrine. Specifically the argument is that *Pearson’s* re-

quirements must be satisfied by the claimant *in addition* to the statutory defense.⁴⁹ Although appealing to law enforcement agents, this notion is illogical. *Pearson* acknowledged elements of an innocent-person defense required by due process. Legislators, however, clearly have authority to liberalize this defense. Congress was aware of *Pearson* and could have chosen to codify its requirements. Its choice of language in section 881(a)(6) obviously rejected this option.⁵⁰

Since §881(a)(6) provides more liberal protections than *Pearson*, a critical consideration must be who qualifies as an owner under this provision. Clearly ownership includes whomever held legal title when the property first became a narcotics proceed, but do lienholders, unsecured creditors, and subsequent purchasers likewise qualify? The legislative history to §881(a)(6) provides a relatively clear answer to this question. It states that "[t]he term 'owner' should be broadly interpreted to include any person with a recognizable legal or equitable interest in the property seized."⁵¹ With this directive, lienholders and subsequent purchasers have been permitted to rely on §881(a)(6).⁵² Unsecured creditors, on the other hand, have been held to lack the requisite legal or equitable interest.⁵³

Of course, merely qualifying as an owner does not ensure a claimant's success. Under the §881(a)(6) defense, the owner must not have had knowledge of the property's illegal status at the time that his interest was acquired. A further complication concerns the relation-back doctrine, codified in a 1984 amendment to §881, which may cut off the rights of lienholders and subsequent purchasers.⁵⁴ One commentator has observed that this amendment is inconsistent with the defense recognized in §881(a)(6). After examining the legislative history, he concludes: "[T]he report of the Senate Judiciary Committee does not indicate any awareness of the inconsistency . . . or any intent to limit the scope of the innocent-owner defense. In these circumstances, the relation-back doctrine should not be applied to cut off the rights of the innocent owner."⁵⁵ This interpretation makes sense. Thus far no decision has directly addressed the issue.

A recent federal case resolved the claimed innocent-owner

status of attorney mortgages and lienholder claims on real property forfeited under §881(a)(6). In the case of *U.S. v. Real Property on Lake Forrest Circle*, 870 F.2d 586 (11th Cir. 1989) the Appeals Court *reversed* the decision of the District Court, which had allowed the attorneys' and lienholders' claims. The Appeals Court concluded that "the attorneys fail to meet the preconditions for innocent-owner status under section 881" and that the "attorneys have no rights in the defendant property under the Sixth Amendment." The Appeals Court concluded that in addition to the relation-back theory "a single ordering of priorities in the defendant property establishes the superior right of the United States," since the lienholder "did not acquire rights in the defendant property until after it had notice that the property was the proceeds of illegal narcotics transactions."

Another recent federal case under §881(a)(6), *U.S. v. Property Known as 6 Patricia Dr. Etc.*, 705 F.Supp. 710 (D.R.I. 1989) allowed a drug dealer's parents (record owners of the property) to contest the sufficiency of the forfeiture complaint, and held that the complaint "is inadequate to meet Rule E(2) particularity requirement as to the whole property." The District Court in this case relied directly on the First Circuit Test in *U.S. v. Pole No. 3172 Hopkinton*, 852 F.2d 636 (1st Cir. 1988), which adopted verbatim the Eleventh Circuit standard that "a section 881(a) forfeiture complaint must allege sufficient facts to provide a reasonable belief that the property is subject to forfeiture."⁵⁶ Rather than protecting the parents as possible "innocent owners" under §881(a)(6), the court chose to allow the violator's parents to contest the validity of the basis of the forfeiture itself.

Ultimately it is apparent that §881(a)(6) significantly expands the protections afforded innocent third parties. Comparable results are effected by §881(a)(7).

§881(a)(7).

This provision was enacted in 1984 to make real property used to facilitate narcotics trafficking subject to forfeiture. Because this amendment contained an innocent-owner defense

virtually identical to §881(a)(6), it raises the same issues discussed above.⁵⁷

A number of recent federal cases have raised the issue of the protection of innocent owners under §881(a)(7). Three of these recent cases deal with the issue of how property held as "tenants by the entirety" is affected by a §(a)(7) forfeiture. In two of these cases, *U.S. v. One Single Family Residence*, 699 F.Supp. 1531 (S.D.Fla. 1988) and *U.S. v. Marks*, 703 F.Supp. 623 (E.D.Mich. 1988), the U.S. District Court held that an innocent spouse should be protected by the entireties principle, which states that neither husband nor wife acting alone can alienate any interest in the property.

The third entireties case, *U.S. v. 6109 Grubb Rd., Millcreek Tp., Erie County*, 708 F.Supp. 698 (W.D.Pa. 1989), highlights that the "tenants by the entirety" concept as applied to the innocent-owner exception in §881(a)(7) does not protect a spouse who is not really innocent.

The court found that even though no cocaine offenses had occurred in the presence of the wife, the husband had stored large quantities of cocaine at the residence and distributed cocaine from the residence for more than four years. The court concluded that the wife "either knew of her husband's involvement in the sale of cocaine, or else deliberately blinded herself to it." The court further held that the minor children present in the case lacked standing to be entitled to protection as innocent owners under the §881(a)(7) exception. The court noted that, "If some further exemption is to be carved out of section 881 for the benefit of minor children, it must be done by Congress." For a contrary result, where the court protected the interests of children under a separation agreement in a §881(a)(7) forfeiture, see *U.S. v. Santoro*, 866 F.2d 1538 (4th Cir. 1989).

A technical pleading issue has arisen in the federal case authority as to when a summary judgment for the government is appropriate as applied to the innocent-owner exception in §881(a)(7). Basically the cases hold that if a drug violator is the party claiming innocence, then summary judgment for the government is proper; however, if third parties are involved, then summary judgment generally is not appropriate

and the matter must go to trial. In the case of *U.S. v. Property Known as 303 W. 116th St., N.Y.*, 710 F.Supp. 502 (S.D.N.Y. 1989), the court granted summary judgment and held that the property owner was collaterally estopped from asserting his innocence or lack of knowledge of drug violations on his property in March 1988 because of his own conviction for sale of narcotics while on the property in April 1987.

Conversely in *U.S. v. Lots 12, 13, 14, and 15, Keeton Heights*, 869 F.2d 942 (6th Cir. 1989) a wife sought to rely on the innocent-owner exception in §881(a)(7) for jointly held property while the government sought a summary judgment of forfeiture. The Court of Appeals held that ". . . the government has not suggested the absence of a genuine factual issue as to the wife's innocence. We conclude that summary judgment may not be entered against the wife under these circumstances." The court noted that at the trial, the wife will have the burden of proof to establish that her husband acted without her knowledge or consent. Similarly in *U.S. v. Property & Premises Known as 171-02 Liberty Ave., Queens, N.Y.*, 710 F. Supp. 46 (E.D.N.Y. 1989) the court held that the government was not entitled to summary judgment of forfeiture even though a property owner acknowledged that he was aware of drug trafficking on his property because he also alleged that he did not consent to such trafficking. Since material fact issues existed as to such lack of consent, the matter had to be set for a trial.

Federal Criminal Forfeiture

In 1970, Congress provided for criminal forfeiture in the newly enacted Racketeer Influence & Corrupt Organizations (RICO) and Continuing Criminal Enterprise (CCE) statutes. This legislation was designed to apply the forfeiture sanction directly against the offender rather than merely against his property.⁵⁸ For example, forfeiture of narcotics proceeds could be consolidated in one criminal proceeding, thereby avoiding the necessity of bringing separate civil actions wherever property subject to forfeiture happens to be located.⁵⁹ Although criminal forfeiture could be very effective, the original legisla-

tion did not provide guidelines for protecting third-party interests. Instead, the laws merely stated that "[t]he United States shall dispose of all such property as soon as commercially feasible, making due provision for the rights of innocent persons."⁶⁰ As a result, "confusion reigned."⁶¹

To remedy this situation (as well as other problems), extensive reform was enacted in 1984. Both RICO and CCE were amended to provide explicitly for third-party interests by creating a new ancillary-hearing procedure. An excellent summary of the new procedure was contained in an accompanying Senate report:

Under the new ancillary hearing procedure, the government, following the entry of an order of forfeiture, is to publish notice of the order of forfeiture and its intent to dispose of the property. Direct written notice to interested third parties may serve as a substitute for published notice. Within thirty days after publication of notice or the receipt of direct notice, any third party asserting a legal interest in the property . . . may petition the court . . . for a hearing to adjudicate the validity of his alleged interest. The hearing is to be held before the court alone.

If possible, the hearing is to be held within thirty days of the filing of the petition, and the court may hold a consolidated hearing to resolve all or several petitions arising out of a single case. At the hearing, both the petitioner and the United States may present evidence. . . . In addition . . . , the court may consider relevant portions of the record of the criminal case. This will allow the court to quickly dispense with claims that have already been considered at trial, as for example, where the jury has already determined that the third party held the property only as a nominee of the defendant or that a transfer to the third party was a sham transaction.

[The amendment] . . . provides that a third party will prevail if his claim falls into one of two categories: first, where the petitioner had a legal interest in the property that, at the time of the commission of the acts giving rise to the forfeiture, was vested in him rather than the defendant or was superior to the interest of the defendant; or second, where the petitioner acquired his legal interest after the acts giving rise to the forfeiture but did so in the context of a *bona fide* purchase for value and had no reason to believe that the property was subject to forfeiture. Since the United States will have already proven its forfeiture allegations in the criminal case beyond a reasonable doubt, the burden of proof at the hearing will be on the third party . . . to a preponderance of the evidence. . . .

A third party who fails to obtain relief under the new ancillary hearing provision or who does not file a petition for a hearing may seek equitable relief from the Attorney General by filing a petition for remission or mitigation of forfeiture. The Attorney General's decision on such petition shall not be subject to judicial review. . . .⁶²

Thus far, very few pertinent cases have been litigated under the 1984 amendments.⁶³ Their effect best may be understood by contrasting criminal forfeiture with civil forfeiture standards and procedures. Initially it is apparent that third-party claimants may experience greater delays in criminal forfeiture than in civil proceedings. This delay stems from the denial of any opportunity to litigate the forfeiture pending resolution of the criminal trial. In effect, this means that third-party claims may not be litigated until several years after seizure of the property. Comparable delays are not experienced in civil proceedings because a forfeiture hearing usually occurs shortly after seizure; there is no need to await completion of the criminal trial. At least one court has ruled that this feature of the new criminal forfeiture law is unconstitutional.⁶⁴ The issue awaits further resolution.⁶⁵

A second issue raised by the amendments is the extent to which judges may decide forfeiture cases based on evidence presented at the criminal trial. Courts should not be required to relitigate issues that have been resolved in another context; however, since the third-party claimant was not a party to the criminal case, it is not proper to allow evidence presented in that proceeding to have conclusive effect at the forfeiture hearing.⁶⁶

Third, it is apparent that the defenses afforded third-party claimants are somewhat narrower in criminal proceedings than in civil forfeiture proceedings. A successful defense to criminal forfeiture requires the claimant to establish either (1) a legal right to the property superior to the criminal defendant's interest at the time of the act giving rise to forfeiture or (2) his status as a "bona fide purchaser for value . . . reasonably without cause to believe the property was subject to forfeiture . . ." ⁶⁷ Thus, only claimants with legal—as opposed to equitable—interest in the property may contest the forfei-

ture.⁶⁸ In contrast to civil forfeiture, subsequent transferees must have been reasonably without knowledge of any illegality; mere ignorance will not necessarily suffice.⁶⁹

Absence of reasonable knowledge—as a requirement for bona fide purchaser status—has raised special problems for attorneys representing narcotics dealers. Since an attorney virtually always has reason to know that fees paid by an alleged narcotics dealer are proceeds of crime, the lawyer will not be able to qualify as a bona fide purchaser under the statute. As a result, attorney fees may be subject to forfeiture.⁷⁰

On June 22, 1989, the U.S. Supreme Court decided *U.S. v. Monsanto*, No. 88-454 and *Caplin & Drysdale v. U.S.*, No. 87-1729.⁷¹ In these two cases, the Supreme Court ruled on two important issues: (1) whether the federal drug forfeiture statute includes an exemption for assets that a defendant wishes to use to pay an attorney who conducted his defense in the criminal case where forfeiture was sought; and (2) if no such exemption exists under the forfeiture statute (21 U.S.C. 853), whether that statute, so interpreted, is consistent with the Fifth and Sixth Amendments. The court ruled that no exemption for attorney's fees exists under 21 U.S.C. 853 and that the statute, so interpreted, is constitutional. The court noted in *Monsanto* that the fact that the forfeiture statute contains no express provisions on attorney fees ". . . does not demonstrate ambiguity in the statute: It demonstrates breadth."

In *Caplin*, the court held that an individual's Sixth Amendment right to counsel does not go beyond "the individual's right to spend his own money to obtain the advice and assistance of . . . counsel," and because of the relation-back theory in §853(c), the ownership of the assets subject to forfeiture vested in the United States upon the commission of the act giving rise to the forfeiture. In *Caplin*, the court summarized its holding well by stating: "It is our view that there is a strong governmental interest in obtaining full recovery of all forfeitable assets, an interest that overrides any Sixth Amendment interest in permitting criminals to use assets and adjudged forfeitable to pay for their defense." The *Caplin* and *Monsanto* decisions were required in large part to resolve a substantial conflict between the federal courts on the issue of

forfeiture of attorney fees. Although both of these cases involved criminal forfeitures under 21 U.S.C. 853, the holding of the Supreme Court also should apply to civil forfeitures, including 21 U.S.C. 881.

State Forfeiture Laws

Because of the federal government's successful use of forfeiture against narcotics traffickers, many states have enacted their own forfeiture statutes. In general, most state legislation provides a broad defense for innocent third parties. This result has occurred because most state laws are based on the Uniform Controlled Substances Act.⁷² The act provides that "no conveyance is subject to forfeiture . . . by reason of any act or omission established by the owner thereof to have been committed or omitted without his knowledge or consent."⁷³ Secured parties are likewise protected absent their knowledge or consent to the illegality.⁷⁴ While this aspect of the act is concerned with conveyances that have been used to *facilitate* narcotics trafficking, some state laws have enacted similar innocent-owner defenses for any property constituting *proceeds* of such criminality.⁷⁵

Although state laws make some attempt to treat innocent-owner issues directly, they are inadequate in several important respects. First, third-party rights generally are addressed only in a civil forfeiture context; state criminal forfeiture provisions, however, often do not provide explicit protections.⁷⁶ Second, many state laws contain critical ambiguities concerning the rights of lienholders and bona fide purchasers for value.⁷⁷ Third, some states have failed to incorporate innocent-owner defenses into laws authorizing forfeiture of narcotics proceeds.⁷⁸ Thus, further reform is needed.⁷⁹

Remission Procedures

Although statutory law often fails to recognize third-party claims to forfeited property, administrative-remission procedures provide an opportunity to seek relief.⁸⁰ Generally these procedures require claimants to petition a designated agency

and request either remission or mitigation of forfeiture. Standards for relief vary considerably, and decisions are not subject to judicial review;⁸¹ however, the availability of this process considerably alleviates the apparent harshness of the *Pearson* doctrine.

§881-1. Expedited procedures for seized conveyances

Petition for expedited decision: determination

(a)(1) The owner of a conveyance may petition the Attorney General for an expedited decision with respect to the conveyance, if the conveyance is seized for a drug-related offense and the owner has filed the requisite claim and cost bond in the manner provided in section 1608 of Title 19. The Attorney General shall make a determination on a petition under this section expeditiously, including a determination of any rights or defenses available to the petitioner. If the Attorney General does not grant or deny a petition under this section within 20 days after the date on which the petition is filed, the conveyance shall be returned to the owner pending further forfeiture proceedings.

(2) With respect to a petition under this section, the Attorney General may—

- (A) deny the petition and retain possession of the conveyance;
- (B) grant the petition, move to dismiss the forfeiture action, if filed, and promptly release the conveyance to the owner; or
- (C) advise the petitioner that there is not adequate information available to determine the petition and promptly release the conveyance to the owner.

(3) Release of a conveyance under subsection (a)(1) or (a)(2)(C) of this section does not affect any forfeiture action with respect to the conveyance.

(4) The Attorney General shall prescribe regulations to carry out this section.

Written notice of procedures

(b) At the time of seizure, the officer making the seizure shall furnish to any person in possession of the conveyance a written notice specifying the procedures under this section. At the earliest practicable opportunity after determining ownership of the seized conveyance, the head of the department or agency that seizes the conveyance shall furnish a written notice to the owner and other interested parties (including lienholders) of the legal and factual basis of the seizure.

Complaint for forfeiture

(c) Not later than 60 days after a claim and cost bond have been filed under section 1608 of Title 19 regarding a conveyance seized for a drug-related offense, the Attorney General shall file a

complaint for forfeiture in the appropriate district court, except that the court may extend the period for filing for good cause shown or on agreement of the parties. If the Attorney General does not file a complaint as specified in the preceding sentence, the court shall order the return of the conveyance to the owner and the forfeiture may not take place.

Bond for release of conveyance

(d) Any owner of a conveyance seized for a drug-related offense may obtain release of the conveyance by providing security in the form of a bond to the Attorney General in an amount equal to the value of the conveyance unless the Attorney General determines the conveyance should be retained (1) as contraband, (2) as evidence of a violation of law, or (3) because, by reason of design or other characteristic, the conveyance is particularly suited for use in illegal activities

(Pub. L. 91-513, Title II, 511A, as added Pub. L. 100-690, Title VI, 6080(a), Nov. 18, 1988, 102 Stat. 4326.)

Time to File. Under 21 CFR 1316.95, a petition for expedited release must be filed in a timely manner, which is defined as being "received by the appropriate United States Attorney within 20 days from the date of the first publication of the notice of the action and arrest of the property or within 30 days after filing of the claim, whichever occurs later."

Place and Manner to File. Under 21 CFR 1316.95(c) a petition for expedited release must be executed and sworn to by the owner, and both the envelope and the request must be clearly marked "PETITION FOR EXPEDITED RELEASE." The petition must be filed in triplicate and addressed to and filed with the United States Attorney prosecuting the conveyance for forfeiture with a copy to the seizing agency.

Contents of Petition. 21 CFR 1316.95(d) states that the petition for expedited release must include the following:

(1) A complete description of the conveyance, including the identification number, and the date and place of seizure;

(2) The petitioner's interest in the conveyance, supported by bills of sale, contracts, mortgages, or other satisfactory documentary evidence; and

(3) The facts and circumstances, to be established by satisfactory proof, relied upon by the petitioner to justify expedited release of the seized conveyance.

Elements to be Established in Petition. 21 CFR 1316.95(b) states that the petition for expedited release needs to establish that:

(1) The owner has a valid, good faith interest in the seized conveyance as owner or otherwise;

(2) The owner has statutory rights or defenses that would show to a substantial probability that the owner would prevail on the issue of forfeiture;

(3) The owner reasonably attempted to ascertain the use of the conveyance in a normal and customary manner; and

(4) The owner did not know or consent to the illegal use of the conveyance; or in the event that the owner knew or should have known of the illegal use, the owner did what reasonably could be expected to prevent the violation.

Time for Release of Property or Ruling on Expedited Petition. 21 CFR 1316.96(a) provides that the U.S. Attorney must rule on the petition for expedited release of a conveyance within *20 days of receipt*. 21 CFR 1316.96(b) then provides that if the U.S. Attorney does *not* rule on the petition within 20 days of receipt, the conveyance is returned to the owner pending further forfeiture proceedings (except where it is evidence of a violation of law). If the petition is granted, the U.S. Attorney, where necessary (where a complaint has been filed), moves to terminate the judicial proceedings and directs the return of the conveyance unless it is evidence (21 CFR 1316.96(c)). If the petition is denied within 20 days of filing, the government can retain possession of the conveyance until the forfeiture is finalized, unless the owner provides a substitute res bond (21 CFR 1316.96(d)).

60-Day Time Limit for Filing Complaint. 21 CFR 1316.97(a) provides that the U.S. Attorney file a complaint for forfeiture of a conveyance within 60 days of the filing of the claim and cost bond. 21 CFR 1316(b) provides that the failure of the U.S. Attorney to file the complaint within the 60-day period (unless the court extends the period following a showing of good cause, or unless the U.S. Attorney and the owner agree to such an extension) will result in the court ordering the return of the conveyance and the return of any bond.

The Department of Justice regulations, which were published on Sept. 11, 1989, and which became effective on Oct. 11, 1989 (both of which previously were cited and discussed), also included regulations for expedited procedures for seized conveyances under 21 U.S.C. 881-1 quoted immediately above.

The Justice Department regulations on this matter are contained in 21 CFR 1316.95 through 1316.98, and all have the words "judicial forfeiture" in their headings. Unfortunately many of the procedures involved, particularly the filing of the claim and bond (which terminates the administrative forfeiture and *requests* the judicial forfeiture be instituted) *predate* the judicial forfeiture that is instituted by filing the forfeiture complaint. A summary of the Justice regulations follow, which apply to seized conveyances in judicial forfeitures *and* seized conveyances after an owner has filed the requisite claim and cost bond under 19 U.S.C. 1608.

Special-Notice Provisions. 21 CFR 1316.99 requires that conveyances seized pursuant to §1316.95 (judicial forfeitures) are subject to special-notice provisions where the possessor of the property (conveyance) must be provided written notice at the *time of seizure* regarding applicable statutes and regulations including the procedures for filing a petition for expedited release and for the posting of a substitute res bond. As a practical matter, the only conveyance that *could* be subject to this provision at the time of seizure is one with a value of *more than \$100,000*, and which has not been used to haul controlled substances; all other conveyances are subject to administrative forfeiture. Because this notice requirement could be interpreted to apply to conveyances that become subject to judicial forfeiture by the filing of a claim and bond, DEA and the FBI are furnishing special notices to the possessors of all conveyances. The procedures in these special notices apply only after claim and bond are filed.

Substitute Res Bond—31 CFR 1316.98 provides that if a conveyance is forfeited in a judicial proceeding for a drug-related offense, the owner may obtain the release of the conveyance by filing a substitute res bond with the seizing agency. Con-

fusion and delay can result in some cases because the U.S. Marshal, and not the seizing agency, has custody of the conveyance. Probably 31 CFR 1316.98 should be amended so that a res bond is filed with the U.S. Attorney involved, the entity with jurisdiction over the res, in most cases. The bond must be in the amount of the appraised value of the conveyance and be in the form of a travelers check, money order, cashier's check, or irrevocable letter of credit. The substitute res bond procedure is not applicable to conveyances held as evidence or those with characteristics that particularly suit them for use in illegal activities (traps, etc.).

Conclusion

Third-party interests are a neglected issue in forfeiture law. The most significant constitutional development in this area was the Supreme Court's 1974 decision in *Pearson*, which, while failing to recognize an innocent-owner defense, conferred implicit constitutional protections on anyone who had done all that reasonably could be expected to prevent the proscribed use of his property. Subsequent forfeitures were governed by this standard, and ensuing federal legislation, particularly expedited-release procedures in 1988, conferred third-party claimants with further protections. When this fails to protect third-party interests, administrative remission may be available to protect claimants who truly are innocent. State forfeiture laws also address third-party rights.

Appendix

Introduction

This Appendix contains a discussion of third-party rights issues under the laws of 20 states. These laws were selected based upon the past and projected needs of the asset forfeiture training programs conducted by The Bureau of Justice Assistance. Because these state laws are based largely on the Uniform Controlled Substances Act,⁸² an outline of the forfeiture provisions of this model legislation follows. Pertinent parts of §505 of the Act state:

The following are subject to forfeiture:

- (1) all controlled substances that have been manufactured, distributed, dispensed, or acquired in violation of the Act;
- (2) all raw materials, products, and equipment used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance;
- (3) all property used, or intended for use, as a container for property described in paragraph (1) or (2);
- (4) all conveyances, including aircraft, vehicles, or vessels, used, or intended for use, to transport or facilitate the transportation, for the purpose of sale or receipt of property described in paragraph (1) or (2), but:
 - (i) no conveyance used by any person as a common carrier in the transaction of business as a common carrier is subject to forfeiture unless the owner or other person in charge of the conveyance is a consenting party or violates this Act;
 - (ii) no conveyance is subject to forfeiture by the owner if the act or omission was committed without his knowledge or consent;
 - (iii) a conveyance is not subject to forfeiture for a violation of Section 401(c),⁸³ and,
 - (iv) forfeiture of a conveyance encumbered by a bona fide security interest is subject to the interest of the secured party if he neither had knowledge of nor consented to the act or omission.
- (5) all books, records, and research products and materials, including formulas, microfilm, tapes, and data that are used, or intended for use, in violation of this Act.⁸⁴

§505 of the Uniform Controlled Substances Act permits the forfeiture of controlled substances; items used to manufacture, contain, or distribute controlled substances; related re-

search materials; and conveyances used to transport controlled substances; or items used in their manufacture or distribution. Many states also have adopted forfeiture provisions relating to proceeds.

The Uniform Controlled Substances Act provides for the protection of third-party rights. The conveyances of common carriers, innocent owners, and lienholders are not forfeitable if the unlawful act was committed or omitted without the interest holder's knowledge or consent. Misdemeanor possession of a controlled substance also does not subject a conveyance to forfeiture. State laws vary considerably in the extent to which they protect third-party rights. To the extent that these protections deviate from the model act, the differences will be highlighted in the discussion of each state's laws.

In addition to the forfeiture provisions of the Uniform Controlled Substances Act, many states provide for forfeiture under racketeering or organized crime statutes. Under the racketeering statute, the state may require a defendant convicted of racketeering to forfeit property acquired through or from racketeering activity.

The racketeering statutes protect third-party interests in one of two ways. The first, modeled after the original provisions of federal RICO,⁸⁵ requires states effecting forfeiture and disposing of proceeds to make due provision for the rights of innocent persons.⁸⁶ The second alternative, based on amended federal RICO,⁸⁷ allows third parties to petition the court after the defendant's conviction and assert an interest in the forfeitable property.⁸⁸ Under this second type of protection, the third party may avoid losing an interest in the property if his interest was greater than the defendant's or if he can show that he was a bona fide purchaser for value.⁸⁹

Some states also may provide for forfeiture under other schemes. Such additional provisions and the protections they provide third parties are discussed by individual states throughout this Appendix.

Arizona

The Arizona Controlled Substances Act⁹⁰ differs from the Uniform Controlled Substances Act⁹¹ in that it contains no forfei-

ture provisions. Such provisions are included in the state Criminal Code, which permits forfeiture of substantially the same items as are forfeitable under the Uniform Controlled Substances Act.⁹² Drug paraphernalia,⁹³ imitation controlled substances,⁹⁴ and derivative proceeds⁹⁵ also are forfeitable. Forfeiture of conveyances, however, is limited to vehicles.⁹⁶

Arizona provides several exemptions to vehicular forfeiture. Common carriers⁹⁷ are exempt, as are innocent owners⁹⁸ if the vehicle was unlawfully in the possession of another. An innocent person acquiring an interest in property prior to the event giving rise to forfeiture is protected, unless the person whose act led to forfeiture had authority to convey the property or was married to the interest holder, who did not hold the item as separate property.⁹⁹ A bona fide purchaser who acquired his interest after the conduct which gave rise to forfeiture is protected.¹⁰⁰ Several state court decisions have addressed these issues.¹⁰¹

The Arizona statute dealing with organized crime and fraud¹⁰² provides another means for forfeiting property. Once the court finds that a person has violated the statute, it may require him to forfeit "[a]ll proceeds traceable to [racketeering activity] and all monies, negotiable instruments, securities, property, and other things of value used or intended to be used in any manner or part to facilitate commission of the offense."¹⁰³

The statute protects third-party rights by provisions similar to the original provisions of federal RICO.¹⁰⁴ These protections state that in issuing remedial orders the state must make "due provision for the rights of all innocent persons."¹⁰⁵ A racketeering lien filed pursuant to the racketeering statute is superior to all other liens except "[a] valid lien perfected prior to the filing of the racketeering lien,"¹⁰⁶ a real property "interest acquired and recorded prior to filing of the racketeering lien,"¹⁰⁷ and an interest acquired in personal property prior to the filing of the lien.¹⁰⁸ A third-party interest recorded after the state's lien is perfected still may have priority over the state's lien if the state fails to give notice of execution to a party possessing the property.¹⁰⁹

California

The forfeiture provisions of the California Uniform Controlled Substances Act¹¹⁰ are based on the federal Uniform Controlled Substances Act.¹¹¹ The California statute specifies that the forfeiture of containers does not include "real property or a boat, airplane, or any vehicle."¹¹² In addition to the usual forfeitable items, "all moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, or securities used or intended to be used to facilitate a . . . violation" are subject to forfeiture.¹¹³

The exemptions to conveyance forfeitures also differ from the model act. In California, only a vehicle that is worth less than \$10,000, is the sole family vehicle, and is community property is exempt from forfeiture; this exemption applies only in the case of an innocent owner.¹¹⁴ An innocent owner's real property likewise is exempt if it is: worth less than \$100,000; used as a family residence; and owned by two or more persons.¹¹⁵ An innocent lienholder retains his property interest.¹¹⁶ No third-party rights forfeiture cases have been litigated in California state courts; however, a court has held that the California forfeiture provisions do *not* exempt from forfeiture property necessary for bona fide attorney fees in the underlying criminal case. *People v. Superior Court (Clements)* (App. 1 Dist. 1988) 246 Cal. Rptr. 122, 200 C.A. 3d 491.

The California Control of Profits of Organized Crime Act¹¹⁷ provides another means for forfeiting property. Once the court finds that a person has violated the Act, it may require forfeiture of any tangible or intangible property interest acquired through profiteering activity.¹¹⁸ Also forfeitable are all proceeds and derivative proceeds of racketeering activity.¹¹⁹

The statute protects third-party rights by provisions similar to the amended provisions of federal RICO.¹²⁰ A third-party interest recorded prior to the recording of a *lis pendens* is exempt from forfeiture.¹²¹ Property solely owned by a bona fide purchaser also is exempt.¹²² Failure to assert any other interest after notice will subject that interest to forfeiture.¹²³ The

court may direct a distribution of proceeds to identifiable, innocent third parties after a sale, even if they fail to claim those interests.¹²⁴ A person with a valid lien, mortgage, security interest, or interest under a conditional sales contract, who is without actual knowledge that the property was to be used in violation of the law, is protected and may receive either the property¹²⁵ or payment for the appraised value of his interest therein.¹²⁶

Colorado

The Colorado Controlled Substances Act,¹²⁷ while modeled after the Uniform Controlled Substances Act,¹²⁸ contains no forfeiture provisions. Such provisions are located in the state's Contraband Forfeiture Act.¹²⁹ That statute permits forfeiture of vehicles, personal property, currency, securities, negotiable instruments, and proceeds traceable to a narcotics violation.¹³⁰ An innocent owner is protected if the property was taken from him and used without his consent or he did everything he reasonably could to prevent the proscribed use of his property, and he was uninvolved in the unlawful activity.¹³¹ The owner's claim is an affirmative defense that must be established by a preponderance of the evidence. A bona fide lienholder's interest likewise is protected. If the forfeiture of a lien is not sought by the prosecutor, the lienholder need not appear to preserve his interest—the court will order the lien to be paid by the seizing agency or from the proceeds of the sale.¹³²

The Colorado Organized Crime Control Act¹³³ provides another means for forfeiting property. Once the court finds that a person has violated the Act, it may require forfeiture of "all property, real or personal, including money, used in the course of, intended for use in the course of, derived from, or realized through [racketeering]."¹³⁴

The statute protects third-party rights by provisions similar to the original provisions of federal RICO.¹³⁵ These protections state only that in disposing of proceeds, the state must make "due provision for the rights of innocent persons."¹³⁶

In addition to the Contraband Forfeiture Act and the Organized Crime Control Act, Colorado permits forfeiture under

its Abatement of Public Nuisance statute.¹³⁷ That statute subjects real property, vehicles, and personal property involved in controlled substance offenses to forfeiture.¹³⁸ An innocent owner is protected if he can establish that the possession of the property was not unlawful, that he was not a party to the creation of the nuisance,¹³⁹ and that he or his immediate family would suffer undue hardship if forfeiture were ordered.¹⁴⁰ Bona fide lienholders also are protected.¹⁴¹

Connecticut

The forfeiture provisions of the Connecticut Dependency-Producing Drugs Act (Conn. Gen. Stat. Ann., §21A-246(d)) are based on the Uniform Controlled Substances Act (see *Supra* note 82 and accompanying text). These provisions apply only to conveyances, and include exceptions to protect common carriers and innocent owners from forfeitures.

In addition, effective July 1, 1986, §54-36h was added to the Connecticut Criminal Procedure provisions (Conn. Gen. Stat. Ann. §54-36h), to allow forfeiture of money used in the manufacture of or derived from the sale of controlled substances. The forfeiture action under §54-36h is deemed a civil suit in equity, in which the state has the burden of proving all material facts by a preponderance of the evidence. The court also orders the state to give notice by certified or registered mail to the owners and ". . . to such other person as appears to have an interest therein . . .," and promptly, but not less than two weeks after notice, hold a hearing.

Florida

The Florida Comprehensive Drug Abuse Prevention and Control Act¹⁴² is modeled loosely after the Uniform Controlled Substances Act.¹⁴³ The Florida statute, however, provides only for the forfeiture of vessels, vehicles, and aircraft that are used in a narcotics violation.¹⁴⁴ The rights of bona fide mortgage holders and vendors are protected from forfeiture.¹⁴⁵

In addition, Florida provides for the forfeiture of conveyances and personal property under the state Contraband Forfeiture Act.¹⁴⁶ Under that statute, innocent owners, co-

owners, and lienholders are protected.¹⁴⁷ Numerous state court decisions have addressed the issue of third-party rights in the narcotics forfeiture context.¹⁴⁸

The Florida RICO Act¹⁴⁹ provides another means for forfeiting property. "All property, real or personal, including money, used in the course of, intended for use in the course of, derived from, or realized through conduct in violation of [RICO] is subject to civil forfeiture to the state."¹⁵⁰

The statute protects third-party rights by provisions similar to the original provisions of federal RICO.¹⁵¹ These protections state that in forfeiting or disposing of property the state must make "due provision for the rights of innocent persons."¹⁵² A racketeering lien filed pursuant to the statute is superior to all later acquired liens or interests,¹⁵³ however, where the owner of real property neither knew nor reasonably should have known that the property was used in violation of the statute, the lien in criminal proceedings may be discharged.¹⁵⁴

Georgia

The forfeiture provisions of the Georgia Controlled Substances Act¹⁵⁵ are based on the Uniform Controlled Substances Act.¹⁵⁶ The Georgia statute adds that "[a]ll moneys, negotiable instruments, securities, or other things of value, furnished or intended to be furnished by any person in exchange for a controlled substance . . . , all proceeds traceable to such an exchange, all moneys, negotiable instruments, securities, or other things of value used to facilitate any violation" are forfeitable.¹⁵⁷ Money found in close proximity to controlled substances or related items is subject to forfeiture.¹⁵⁸ Several state court decisions have addressed the issue of third-party rights.¹⁵⁹

The Georgia RICO Act¹⁶⁰ provides another means for requiring forfeiture of property. Once the court finds that a person has participated in racketeering activity, it may require forfeiture of any "property . . . used or intended for use in the course of, derived from, or realized through a pattern of racketeering."¹⁶¹

The statute protects third-party rights by provisions similar

to the amended provisions of federal RICO.¹⁶² These protections require the state to give notice to third parties if notice will not cause loss of or destruction to the property.¹⁶³ The statute further provides that the "interest of an innocent party in the property shall not be subject to forfeiture," and that an innocent party is "one who did not have actual or constructive knowledge that the property was subject to forfeiture."¹⁶⁴

Hawaii

The forfeiture provisions of the Hawaii Uniform Controlled Substances Act¹⁶⁵ are based on the Uniform Controlled Substances Act.¹⁶⁶ The Hawaii statute does not exempt conveyances involved in misdemeanor offenses from forfeiture. In addition, "[a]ll moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance . . . , all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate a . . . violation" are forfeitable; however, an innocent owner's property shall not be forfeited.¹⁶⁷ Lienholders also are protected.¹⁶⁸ Firearms used during a narcotics violation are forfeitable.¹⁶⁹ No state court decision has ruled on the issue of third-party rights.

The Hawaii organized-crime statute¹⁷⁰ provides another means for requiring forfeiture of property. Once the court finds that a person has participated in an organized-crime activity, it may require forfeiture of any "interest or property . . . acquired or maintained" through such activity.¹⁷¹

The statute protects third-party rights by provisions similar to the amended provisions of federal RICO.¹⁷² These protections, added in 1988, provide third parties with the same protections under the organized-crime statute as those provided in the Controlled Substances Act.¹⁷³

The newly enacted state Omnibus Criminal Forfeiture Act¹⁷⁴ reinforces the forfeiture provisions of the Controlled Substances Act and the organized-crime statute. In addition, that Act provides for the forfeiture of proceeds and derivative proceeds.¹⁷⁵

Illinois

The forfeiture provisions of the Illinois Controlled Substances Act¹⁷⁶ are based on the Uniform Controlled Substances Act.¹⁷⁷ The Illinois statute makes no provision for the forfeiture of containers, and it does not exempt conveyances involved in misdemeanor offenses from forfeiture.¹⁷⁸ The Illinois Cannabis Control Act¹⁷⁹ also is modeled after the Uniform Controlled Substances Act, with identical forfeiture provisions to that model act, except that containers are not forfeitable.¹⁸⁰

In addition, "everything of value furnished, or intended to be furnished, in exchange for a substance in violation of this Act, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used, or intended to be used, to facilitate any violation of this Act" are forfeitable.¹⁸¹ An innocent-owner defense is provided, but money found in close proximity to controlled substances or related items is presumed forfeitable.¹⁸² Several state court decisions have addressed the issue of third-party rights.¹⁸³

The Illinois Narcotics Profit Forfeiture Act¹⁸⁴ provides another means for forfeiting property. Once the court finds that a person has participated in narcotics racketeering, it may require forfeiture of any "profits or proceeds and any interest or property . . . acquired or maintained as a result of narcotics racketeering."¹⁸⁵

The statute protects the rights of "any bona fide purchaser, mortgagee, judgment creditor or other lien holder" whose interest arose prior to the filing of a restraining order or injunction issued to keep the defendant from concealing or destroying the property.¹⁸⁶ This provision seems to protect only these third-party interests from harm arising out of the injunction or restraining order.

Iowa

The Iowa Uniform Controlled Substances (Drugs) Act¹⁸⁷ is based on the Uniform Controlled Substances Act.¹⁸⁸ The Iowa Act repealed its forfeiture provisions in favor of the Disposition of Seizable and Forfeitable Property statute¹⁸⁹ in the criminal code. That statute subjects the following types of property to forfeiture:

-
- a. Property that is possessed illegally.
 - b. Property that has been used or is intended to be used to facilitate the commission of a criminal offense or to avoid detection or apprehension of a person committing a criminal offense.
 - c. Property that is acquired as or from the proceeds of a criminal offense.
 - d. Property offered or given to another as an inducement for the commission of a criminal offense.¹⁹⁰

Lienholders' and innocent owners' interests specifically are exempt from forfeiture; however, the innocent owner must not have permitted the use of his property under circumstances that he should have recognized as criminal. Joint tenants are excluded from the innocent-owner exemption.¹⁹¹ Several state court decisions have addressed the issue of third-party rights under the repealed legislation, but no reported cases exist under the replacement law.¹⁹²

Kentucky

The forfeiture provisions of the Kentucky Controlled Substances Act¹⁹³ are based on the Uniform Controlled Substances Act.¹⁹⁴ The Kentucky statute adds that "[e]verything of value furnished, or intended to be furnished, in exchange for a controlled substance in violation of this chapter, all proceeds, including real and personal property, traceable to such an exchange, and all moneys, negotiable instruments, and securities used, or intended to be used, to facilitate any violation" are forfeitable.¹⁹⁵ An innocent-owner defense is provided, but money found in close proximity to controlled substances or related items is presumed forfeitable.¹⁹⁶ No state court opinions have been rendered on the issue of third-party rights. Forfeiture provisions do not apply to misdemeanor offenses involving marijuana.

Louisiana

The forfeiture provisions of the Louisiana Uniform Controlled Dangerous Substances Act¹⁹⁷ are based on the Uniform Controlled Substances Act.¹⁹⁸ Louisiana moved its forfeiture provisions from the aforementioned act to the seizure and forfeiture of contraband statute.¹⁹⁹ That statute is similar to the

model act's forfeiture provisions, except that conveyances involved in misdemeanor offenses are not exempt from forfeiture. In addition, cash used or intended to be used to violate the statute²⁰⁰ and "[a]nything of value furnished, intended to be furnished, or acquired in exchange for a controlled dangerous substance . . . including . . . all proceeds or property traceable to such an exchange and all moneys, negotiable instruments, property, and securities used, or intended to be used to facilitate such violation or acquired from the proceeds of such violation" are forfeitable.²⁰¹ Innocent-owner and lienholder defenses²⁰² are provided. Originally the law also provided for a close proximity presumption favoring forfeiture where money was found in close proximity to contraband and seized incident to a valid arrest, but the Louisiana Supreme Court recently held that such a presumption is unconstitutional.²⁰³ Several state court decisions have addressed the issue of third-party rights.²⁰⁴

The Louisiana Drug Racketeering Act²⁰⁵ provides another means for forfeiting property. Under the act, "all property, immovable or movable, including money, used in the course of, intended for use in the course of, derived from, or realized through, conduct in violation of [the drug racketeering act] is subject to civil forfeiture to the state."²⁰⁶

The statute protects third-party rights by provisions similar to the original provisions of federal RICO.²⁰⁷ These protections state only that in disposing of proceeds the state must make "due provision for the rights of factually innocent persons."²⁰⁸

Maryland

The forfeiture provisions of the Maryland Controlled Dangerous Substances Act²⁰⁹ are based on the Uniform Controlled Substances Act.²¹⁰ The Maryland statute does not exempt conveyances involved in misdemeanor offenses and makes no provision for innocent lienholders. The law merely provides an innocent-owner defense when the conveyance was unlawfully in the possession of another during the commission of the unlawful act.²¹¹

In addition, drug paraphernalia,²¹² proceeds,²¹³ money used

in connection with an illegal act or found in close proximity to controlled substances or related items,²¹⁴ and "[e]verything of value furnished, or intended to be furnished, in exchange for a controlled dangerous substance . . . , all proceeds traceable to such an exchange, and all negotiable instruments and securities used, or intended to be used, to facilitate a . . . violation"²¹⁵ are subject to forfeiture. An innocent owner's property, however, is not forfeitable.²¹⁶

In addition to the aforementioned exemptions, Maryland provides exemptions related specifically to motor vehicles. An innocent-owner defense is provided when the vehicle is used by the owner's family member, contains controlled substances in insufficient quantities to suggest a sale, and no sale is made or attempted.²¹⁷ An innocent owner also is protected if he lent the vehicle to someone who allowed controlled substances or paraphernalia to be brought into it.²¹⁸ Secured parties are protected.²¹⁹ Several state court decisions have addressed the issue of third-party rights.²²⁰

Michigan

The forfeiture provisions of the Michigan Controlled Substances Act²²¹ are based on the Uniform Controlled Substances Act.²²² The Michigan statute also subjects imitation controlled substances to forfeiture. In addition, "[a]ny thing of value that is furnished or intended to be furnished in exchange for a controlled substance or an imitation controlled substance . . . traceable to an exchange . . . , or used or intended to be used to facilitate any violation of this article" is forfeitable.²²³ An innocent-owner defense is provided, but money found in close proximity to any controlled substance is presumed forfeitable.²²⁴ Several state court decisions have addressed the issue of third-party rights.²²⁵

Mississippi

The forfeiture provisions of the Mississippi Uniform Controlled Substances Act²²⁶ are based on the model statute.²²⁷ The Mississippi statute adds that drug paraphernalia²²⁸ and "everything of value, including real estate, furnished, or intended to be furnished, in exchange for a controlled sub-

stance in violation of this article, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, businesses or business investments, securities, and other things of value used, or intended to be used, to facilitate any violation of this article"²²⁹ are subject to forfeiture. Money found in close proximity to controlled substances or related items is presumed forfeitable. For both personal and real property, innocent-owner and innocent-lienholder exemptions exist.²³⁰ Several state court decisions have addressed the issue of third-party rights.²³¹

The Mississippi Racketeer Influenced and Corrupt Organization Act²³² provides another means for forfeiting property. The act subjects "[a]ll property, real or personal, including money" used in or derived from racketeering, to civil forfeiture.²³³

The statute protects third-party rights by provisions similar to the amended provisions of federal RICO.²³⁴ Third parties qualifying for this protection are secured parties who have registered or filed a financing statement, secured parties of whose interest the state has actual knowledge, and holders of recorded real-estate interests.²³⁵ Under these provisions, the state must give notice to any person who may have an interest in the property.²³⁶ Third parties must then prove at the forfeiture hearing that their interest is "bona fide and created without knowledge or consent that the property was to be used so as to cause the property to be subject to forfeiture."²³⁷

Nevada

The Nevada Controlled Substances Act²³⁸ is based on the Uniform Controlled Substances Act.²³⁹ The Nevada statute does not provide for any exemptions from forfeiture. Drug paraphernalia, imitation controlled substances, and "[e]verything of value furnished or intended to be furnished in exchange for a controlled substance . . . , all proceeds traceable to such an exchange, and all property used or intended to be used to facilitate a violation" are forfeitable.²⁴⁰ Cash in excess of \$300 found in the possession of a person who is arrested for a controlled substances violation is rebuttably presumed forfeitable.²⁴¹

Nevada has enacted an additional statute providing for forfeiture in criminal proceedings.²⁴² By reference, all property and proceeds forfeitable under the Controlled Substances Act also are forfeitable under the criminal forfeiture statute.²⁴³ Proceeds, statutorily defined as "derived directly or indirectly" from a violation, also are subject to forfeiture.²⁴⁴ The criminal forfeiture statute provides a general defense for the property interest of any claimant who did not know of, or consent to, the illicit act;²⁴⁵ that defense relates back to forfeitures under the Controlled Substances Act.²⁴⁶ One state court decision has been rendered on the issue of third-party rights.²⁴⁷

The Nevada racketeering statute²⁴⁸ provides another means for requiring forfeiture of property. Once the court finds that a person has participated in racketeering activity, it may require criminal forfeiture of property and proceeds "derived from, realized through, or used or intended for use in the course of the" racketeering activity.²⁴⁹ The state may require civil forfeiture of all property including money "used in the course of, intended for use in the course of, derived from or gained through" racketeering activity.²⁵⁰

The statute protects third-party rights by provisions similar to the amended provisions of federal RICO.²⁵¹ A person claiming an ownership interest in property may be a party to the forfeiture proceedings.²⁵² Property is unreachable in criminal forfeiture if it has been sold to a good-faith purchaser, or if forfeiture would unduly injure innocent persons.²⁵³ Under the civil forfeiture provisions, property is exempt from forfeiture if used without the owner's knowledge or consent.²⁵⁴ The civil forfeiture provisions specifically exempt common carriers unless the owner or a person in charge of the carrier knew of or consented to the violation.²⁵⁵ The state must pay third parties for an interests if it is a bona fide security interests, and the third party did not consent to or have knowledge of the property's use in the racketeering activity.²⁵⁶

New Jersey

The New Jersey Narcotic Drugs and Other Dangerous Substances Act²⁵⁷ is modeled after the Uniform Controlled Sub-

stances Act.²⁵⁸ The New Jersey statute does not contain forfeiture provisions. Instead, narcotics forfeiture provisions are part of New Jersey's general criminal forfeiture statute.²⁵⁹ That statute allows forfeiture of controlled substances, property used or intended to be used to further unlawful activity, and proceeds.²⁶⁰ Exemptions are provided for innocent lienholders and innocent owners who did "all that could reasonably be expected to prevent the proscribed use of the property."²⁶¹ Several state-court decisions have addressed the issue of third-party rights.²⁶²

The New Jersey statute dealing with racketeering²⁶³ provides another means for forfeiting property. Any person who violates the statute forfeits "any interest including money or anything of value" acquired or maintained in violation of the statute.²⁶⁴

The statute protects third-party rights by provisions similar to the original provisions of federal RICO.²⁶⁵ These protections state only that in disposing of proceeds the state must make "due provision for the rights of innocent persons."²⁶⁶

New York

While the New York Controlled Substances Act²⁶⁷ is patterned after the Uniform Controlled Substances Act,²⁶⁸ the New York statute confines its forfeiture provisions to conveyances. Vehicles, vessels, and aircraft are subject to forfeiture if used to transport, conceal, or facilitate the transportation or sale of a controlled substance for a felony violation.²⁶⁹ Common carriers²⁷⁰ and innocent owners²⁷¹ are exempt from forfeiture. In the case of the innocent owner, the unlawful act must have been either unintentional on the part of the owner or committed by someone other than the owner while unlawfully in the possession of the conveyance. Several state court decisions have addressed the issue of third-party rights.²⁷²

The New York statute dealing with organized crime²⁷³ provides another means for forfeiting property. Once the court finds that a person has violated the statute, it may require the person to forfeit "any interest, including proceeds, he has acquired or maintained" through organized criminal activity.²⁷⁴

The statute protects third-party rights by provisions similar

to the amended provisions of federal RICO.²⁷⁵ A third party holding rights in the property may bring an action before or after trial to assert those rights.²⁷⁶ The third party also may ask for remission as a means of protecting the value of an interest.²⁷⁷ Remission is available to any person who did not receive actual notice of the forfeiture if the person "did not know or should not have known that the forfeited property was connected to a crime" and if the court determines that restoration would serve the ends of justice.²⁷⁸

Pennsylvania

The forfeiture provisions of the Pennsylvania Controlled Substance, Drug, Device and Cosmetic Act²⁷⁹ are based on the Uniform Controlled Substances Act.²⁸⁰ The Pennsylvania statute adds that "[m]oney, negotiable instruments, securities or other things of value furnished or intended to be furnished" in exchange for controlled substances or to facilitate violation of the statute; proceeds and real property are forfeitable.²⁸¹ An innocent-owner defense is provided, and an entire section is included regarding liens and lienholder rights.²⁸² Several state court decisions have addressed the issue of third-party rights.²⁸³

The Pennsylvania corrupt organizations statute²⁸⁴ provides for divestment of an interest in a racketeering enterprise, and requires "making due provision for the rights of innocent persons."

South Carolina

The forfeiture provisions of the South Carolina Narcotics and Controlled Substances Act²⁸⁵ are based on the Uniform Controlled Substances Act.²⁸⁶ The South Carolina forfeiture statute makes no provision for exempting conveyances from forfeiture.²⁸⁷ Innocent owners, common carriers, lienholders, and rental-agency owners nevertheless are protected under a subsequent statute.²⁸⁸ In the case of rental-agency owners, the tenant may not be within the third degree of kinship to the owner or his agents if forfeiture is to be avoided.

In addition, property furnished or intended to be furnished in exchange for a controlled substance and proceeds traceable

to an exchange are forfeitable.²⁸⁹ Money found in close proximity to controlled substances or related items is subject to forfeiture, as is money seized incident to an arrest. But if the person from whom money is taken can establish that the money was not the result of an illegal act, the money will be returned to him.²⁹⁰ Several state court decisions have addressed the issue of third-party rights.²⁹¹

Texas

The Texas Controlled Substances Act forfeiture provisions (Civil Statutes of State of Texas Title 71, Art. 4476-15, §5.03 to 5.15) were enacted in 1973, and replaced the Texas Uniform Drug Act under which such forfeiture actions were brought previously. The Texas provisions in §5.03 include as forfeitable those conveyances used in felony drug violations and "money . . . real estate, personal property or other things of value used or intended for use . . . or derived from the sale, manufacture, distribution, dispensation, delivery, or other commercial undertaking violative of this Act." §5.03 also protects nonconsenting parties and holders of bona fide security interests with no knowledge of, or consent to, the act that caused the forfeiture.

§5.05 of the Texas statute requires that the seizing officer "shall immediately cause" a notice of seizure and intended forfeiture to be filed with clerk of the district court in the county of seizure, and that forfeiture proceedings be instituted within 30 days after the seizure and not thereafter. A recent Texas case, *State of Texas v. Sandra Garza*, No. C-8267 (Supreme Court of Texas 9/20/89), held that the 30-day period in §5.05 does not start to run until state officers receive the property from federal authorities (17 months after the federal authorities first seized the vehicle).

Moreover, §507(a) requires that a claimant file an answer within 20 days of the mailing or publication of the notice of seizure, and that "if an answer is filed, a time for hearing on forfeiture shall be set within 30 days of filing the answer." Another recent Texas case held that the failure of the state (or actually the court involved) to set a time for hearing within 30 days of the filing of the answer requires a dismissal of the

forfeiture. *State of Texas v. \$4097 in U.S. Currency and 1980 GMC P/U*, No. 2-88-213-CV, (Court of Appeals of Texas, Second Dist. Ft. Worth, 773 S.W. 2d 674 6/1/89).

§5.05 of the Texas provisions also imposes a heavy burden on the seizing agency to check vehicle and aircraft records at the Texas, other state, and federal (FAA) levels in order to ascertain the identity of owners, lienholders, and secured parties in order to provide seizure notices to such parties; however, §5.10 regarding burden of proof places the burden of going forward with evidence in respect to any exemption or exception upon the person claiming its benefit. In other words, a claimant must prove lack of consent or knowledge of the offense. In a 1982 case, a father who alleged his lack of consent in an affidavit, but failed to appear at the hearing to establish his lack of knowledge or consent to his son's unlawful use of the vehicle, was not protected by the court. *Gaston v. State*, 641 S.W. 2d 261 (Tex. Ct. App.).

The Texas courts are inclined to protect bona fide lienholders, even those who have failed to register or record their security interests. The test used in a 1987 Texas case is whether the lienholder entered into the security agreement in good faith. *M Bank Grand Prairie v. State*, 737 S.W. 424 (2nd Dist, Tex. Ct. App.). The Texas courts have not been as sympathetic to community-property owners, and have held that such property is *not* exempt from forfeiture under §5.03, notwithstanding that such property is used by one spouse without knowledge or consent of the other spouse. *Amrani-Khalidi v. State*, 575 S.W. 2d 667 (Tex. Civ. App. 1978); for contra result, see *Four Acres of Property v. State*, 740 S.W. 2d 494 (Tex. Ct. App. 1987).

Texas also has enacted civil provisions to forfeit simulated controlled substances (Title 71, Art. 4476-15b), and criminal provisions to forfeit gambling paraphernalia, prohibited weapons, criminal instruments, and other contraband (Texas Code of Criminal Procedure, Art. 18.18).

Endnotes

1. For an excellent review of the role of forfeiture in federal crime control efforts, see D. SMITH, PROSECUTION AND DEFENSE OF FORFEITURE CASES 1-1 to 1-17 (1986).
2. Pub. L. 91-513, Title II, §408 & 511, Oct. 27, 1970, 84 Stat. 1265 & 1276; Pub. L. 91-452, Title IX, §901(a), Oct. 15, 1970, 84 Stat. 943.
3. See, e.g., United States v. A Single Family Residence, 803 F.2d 625 (11th Cir. 1986) (condominium); United States v. One Blue 1977 AMC Jeep, 783 F.2d 759 (8th Cir. 1986) (automobile); United States v. \$5,644,540, 799 F.2d 1357 (9th Cir. 1986) (currency); United States v. 1966 Beechcraft Aircraft, 777 F.2d 947 (4th Cir. 1985) (plane); United States v. Four Million, Two Hundred Fifty-five Thousand, 762 F.2d 895 (11th Cir. 1985) (currency); United States v. Monkey, 725 F.2d 1007 (5th Cir. 1984) (vessel); United States v. D.K.G. Appaloosas, Inc., 630 F. Supp. 1540 (E.D. Tex. 1986) (business); United States v. Certain Real Property, 612 F. Supp. 1491 (D.C. Fla. 1985) (hotel).
4. See generally, Strafer, *Civil Forfeitures: Protecting the Innocent Owner*, 27 U. FLA. L. REV. 841 (1985); Comment, *Civil Forfeiture and Innocent Third Parties*, 1983 N. ILL. L. REV. 323 (1983).
5. See, e.g., D. SMITH, *supra* note 1, at 2-1; Calero-Toledo v. Pearson Yacht Leasing Co., 94 S. Ct. 2080, 2091-93 (1974).
6. See, e.g., Reed, *Criminal Forfeiture Under the Comprehensive Forfeiture Act of 1984: Raising the Stakes*, 22 AM. CRIM. L. REV. 747, 756 (1985); Note, *Bane of American Forfeiture Law—Banished at Last?*, 62 CORNELL L. REV. 768, 773 n.37 (1977).
7. See, e.g., United States v. A Single Family Residence, 803 F.2d 625, 628-29 (11th Cir. 1986); United States v. One Blue 1977 AMC Jeep, 783 F.2d 759, 761 (8th Cir. 1986).
8. See *infra* notes 24-26 and accompanying text.
9. See, e.g., Reed, *supra* note 6, at 748; Calero-Toledo v. Pearson Yacht Leasing Co., 94 S. Ct. 2080, 2091-92 (1974); United States v. Schmalfeldt, 657 F. Supp. 385, 387 (W.D. Mich. 1987).
10. See *infra* notes 63-65 and accompanying text.
11. 94 S. Ct. 2080 (1974).
12. *Id.* at 2095 n.27.
13. *Id.* at 2083-84.
14. *Id.* at 2084.
15. *Id.* at 2089-90.
16. *Id.* at 2090. Ordinarily, the owner would have received notice shortly after seizure. In this case, however, the lessor did not receive such notice because the vessel had not been registered with Puerto Rican authorities by the lessor. *Id.* at 2084 n.3.
17. *Id.* at 2091.
18. *Id.* at 2092.
19. *Id.*
20. See *infra* notes 37-39 and accompanying text.
21. 94 S. Ct. at 2093-94.
22. *Id.* at 2094-95.
23. *Id.* at 2095. Of course, the lessor had to make this argument since no prior Supreme Court decision had recognized this principle.
24. 21 U.S.C. §881(a)(4) (1987).
25. See *infra* notes 72-73 and accompanying text.
26. See United States v. One Yacht, 702 F.2d 1276, 1279 (9th Cir. 1983) (implying no protection for bona fide buyers); United States v. One Chevrolet, 477 F. Supp. 32, 34-35 (E.D. Pa. 1979) (protecting bona fide buyer); United States v. 1984 Chrysler (D. Minn. Apr. 9, 1986) (LEXIS, Genfed library) (protecting lienholder); United States v. All That Tract, 602 F. Supp. 307, 311 n.8 (N.D. Ga. 1985) (citing decisions implying no lienholder protection).
27. D. SMITH, *supra* note 1, at 12-62.
28. *Id.* at 12-70.

29. See *supra* note 7 and accompanying text.
30. *United States v. One Blue Lobster Vessel*, 639 F. Supp. 865, 872 (S.D. Fla. 1986) (citing extensive authority). See also *United States v. One 1966 Beechcraft Aircraft*, 777 F.2d 947, 951 (4th Cir. 1985) (applying above factors); *United States v. One 1981 Datsun*, 644 F. Supp. 1280, 1287 (E.D. Pa. 1986) (noting that commercial lenders are expected to take more precautions); *United States v. One Defender Lobster*, 606 F. Supp. 32, 36 (S.D. Fla. 1984).
31. *United States v. 1985 Chevrolet Camaro*, (C.D. Cal. Sept. 11, 1986) (LEXIS, Genfed library).
32. *Id.*; See also *United States v. One 1983 Homemade Vessel*, 625 F. Supp. 893, 899 (S.D. Fla. 1986).
33. See generally D. SMITH, *supra* note 1, at 12-78 to 12-79.
34. See generally *United States v. One Brown Mercedes*, 657 F. Supp. 316, 319 (E.D. Mo. 1987); *United States v. One 1982 Datsun*, 627 F. Supp. 62, 63 (W.D. Pa. 1985).
35. 624 F. Supp. 290, 296 (S.D. Fla. 1985).
36. *United States v. One Mercedes-Benz*, 604 F. Supp. 1307, 1317 (S.D.N.Y. 1984).
37. See *United States v. One Blue AMC Jeep*, 783 F.2d 759, 762 (8th Cir. 1986); *United States v. One 1986 Chevrolet Corvette* (N.D. Ill. Dec. 5, 1986) (LEXIS, Genfed library); *United States v. 1984 Chrysler LeBaron* (D. Minn. Apr. 9, 1986) (LEXIS, Genfed library).
38. See *United States v. A Fee Simple*, 650 F. Supp. 1534, 1537-39 (E.D. La. 1987); *United States v. \$285,500*, 655 F. Supp. 1487, 1492-96, 1501-03 (S.D. Fla. 1986); *United States v. \$501,958*, 633 F. Supp. 1300, 1300-01 (N.D. Ill. 1986).
39. See *United States v. A Single Family Residence*, 803 F.2d 625, 629-30 (11th Cir. 1986); *Ramaria v. United States*, 643 F. Supp. 139, 140-44 (S.D. Fla. 1986); *United States v. One 36 Foot Racer*, 624 F. Supp. 290, 292-93 (S.D. Fla. 1985) (noting use of straw-men as frequent technique).
40. Joint Explanatory Statement of Titles II and III, Psychotropic Substances Act, contained in 1978 U.S. CONG. & AD. NEWS 9522. As a result, for example, cash narcotics proceeds by banks and other businesses may be subject to forfeiture.
41. See, e.g., *United States v. A Single Family Residence*, 803 F.2d 625 (11th Cir. 1986); *United States v. \$5,644,540, 799 F.2d 1357* (9th Cir. 1986).
42. See *United States v. One 18th Century Columbian Monstrance*, 797 F.2d 1370, 1376 (5th Cir. 1986); *In re Metmor Financial Inc.*, 819 F.2d 446 (4th Cir. 1987) (citing legislative history regarding expansion of protections for innocent parties).
43. 21 U.S.C. §881(a)(6) (1987 Supp.).
44. 21 U.S.C. §881(h) (1987 Supp.). See also 18 U.S.C. §1963(c) (1987).
45. See *United States v. \$4,255,000*, 762 F.2d 895, 906 n.24 (11th Cir. 1985).
46. See *id.* at 906.
47. See *supra* text accompanying note 22.
48. For this reason, law enforcement agents may want to use §881(a)(4) instead whenever possible. This may occur when narcotics proceeds subsequently are used to facilitate another narcotics transaction.
49. See *United States v. \$47,875, 746 F.2d 291, 292 n.1* (5th Cir. 1984) (noting issue); *United States v. \$44,000, 596 F. Supp. 1308, 1310* (E.D. Mo. 1984) (implicitly accepting argument).
50. See *United States v. Premises Known as 2639 Meetinghouse*, 633 F. Supp. 979, 992-93 (E.D. Pa. 1986).
51. See, e.g., *supra* note 40; *United States v. One 18th Century Columbian Monstrance*, 797 F.2d 1370, 1376 (5th Cir. 1986) (citing legislative history). It is unclear, however, whether this expansive definition of owner also applies to the term "owner" in §881(a)(4).
52. *In re Metmor*, 819 F.2d 446 (4th

Cir. 1987) (protecting lienholder and subsequent purchaser); *United States v. All That Tract*, 602 F. Supp. 307, 312 (N.D. Ga. 1985) (protecting lienholder); *United States v. \$10,000* (N.D. Ill. Feb. 26, 1987) (LEXIS, Genfed library) (protecting bona fide purchaser). A critical issue that has developed is whether lienholders are entitled to receive interest payments for the entire post-seizure period. Since this period may be quite lengthy, the amount involved may be quite high. *In re Metmor* examines this issue in depth and cites all pertinent case law. The court held that the government is not entitled to increase its equity in forfeited property at the expense of an innocent lienholder. This is the better view of the issue.

53. See *United States v. \$4,255,000*, 762 F.2d 895, 907 (11th Cir. 1985); *United States v. \$500,000*, 730 F.2d 1437, 1440 (11th Cir. 1984).

54. 18 U.S.C. §1963(c) (1987); 21 U.S.C. §853(c) & 881(h) (1987). See *supra* note 6 and accompanying text.

55. D. SMITH, *supra* note 1, at 4-35 n.47.

56. *U.S. v. \$38,000 in U.S. Currency*, 816 F.2d 1538 (11th Cir. 1987).

57. Some courts, however, have misapplied the innocent-owner defense language contained in §881 (a)(7). See *United States v. Real Property located at 2011 Calumet*, 699 F. Supp. 108, 110 (S.D. Texas 1988) (applying negligence standard and imposing *Pearson* requirements); *United States v. One Single Family Resident*, 683 F. Supp. 783 (S.D. Fla. 1988) (imposing *Pearson* requirements).

58. See Reed & Gill, *RICO Forfeitures, Forfeitable "Interests," and Procedural Due Process*, 62 N. CAR. L. REV. 57, 60-61, 69-71 (1983).

59. See Continuing Appropriations 1985—Comprehensive Crime Control Act of 1984, S. Rep. 98-225, 1984 U.S. CODE CONG. & AD. NEWS 3183, 3379-80 [hereinafter S. Rep. 98-225].

60. See *supra* note 2 for pertinent legislation.

61. D. SMITH, *supra* note 1, at 14-34.

62. Quoted in *id.* at 14-33; S. Rep. 98-225, *supra* note 59, at 208-09.

63. Most of the recent cases deal with the question of attorney fee forfeiture rather than with third-party rights generally. See *infra* notes 70-71 and accompanying text.

64. *United States v. Crozier*, 777 F.2d 1376, 1384 (9th Cir. 1985) (noting five-year delay).

65. Another issue to develop in this context is whether a court, seeking to preserve potentially forfeitable assets, may enjoin third parties in any respect. The difficulty, of course, is that the third party is not part of the criminal action itself. For this reason, such injunctions should not be issued. See *United States v. Ambrosio*, 575 F. Supp. 546, 551-52 (E.D.N.Y. 1983).

66. See D. SMITH, *supra* note 1, 14-38.

67. 21 U.S.C. §853(n)(6) (1987); 18 U.S.C. §1963(l)(6) (1987).

68. *United States v. Mageean*, 649 F. Supp. 820, 828 (D. Nev. 1986) (citing legislative history). In *Mageean*, this limitation had the effect of denying relief to tort claimants from a tragic airplane crash.

69. In addition, civil claimants under §881(6) and (7) need not necessarily be purchasers. Arguably they may be donees acting in good faith.

D. SMITH, *supra* note 1, 13-29.

70. See generally Brickey, *Forfeiture of Attorneys' Fees: The Impact of RICO and CCE Forfeitures on the Right to Counsel*, 72 VA. L. REV. 493 (1986); Note, *Forfeiture of Attorneys' Fees: Should Defendants Be Allowed to Retain the "Fruits of Crime"?*, 39 STAN. L. REV. 663 (1987). Similar concerns can arise in civil forfeiture contexts as well. See *United States v. One Parcel*, 614 F. Supp. 183, 186 (N.D. Ill. 1985) (lawyer not a bona fide purchaser under §881(a)(6)). Note that, although this issue has surfaced principally in the area of attorney fee forfeitures, other persons dealing with an indicted drug dealer also may be

affected. For example, any merchant selling goods to such an individual may have difficulty establishing his belief that payment was not derived from narcotics proceeds.

71. 109 S. Ct. 2657; 109 S. Ct. 2646 (1989).

72. The Uniform Controlled Substances Act has been the basis for legislation in approximately 48 states. D. SMITH, *supra* note 1, at 4-10.

73. Quoted in *id.* at 4-10 to 4-11.

74. §505(a)(4) of the Act provides this protection. *Id.*

75. See Appendix.

76. See, e.g., ARIZ. REV. STAT. ANN. §13-2314(B) (1987); COLORADO REV. STAT. §18-17-106(a)(6) (1987). Although both Arizona and Colorado have characterized these sections of their laws as civil, they are based on the criminal forfeiture provisions of RICO. Illinois also seems to have ignored this issue in its narcotics racketeering law. See ILL. ANN. STAT. ch. 56 ½ §1655 (1987).

77. For example, Illinois and Georgia protect lienholders when conveyances are being forfeited, yet seem to deny lienholders protection when proceeds are being forfeited. ILL. STAT. ANN. ch. 56 ½ §1505(3)(5) (1987); GA. CODE ANN. §16-13-49(5) (1987).

78. See, e.g., GA. CODE ANN. §16-13-49(6) (1987).

79. For a more detailed discussion of state forfeiture laws, see Appendix.

80. Pertinent federal remission procedures are contained in D. SMITH, *supra* note 1 at 15-1 *et seq.* The procedures themselves are printed in the *Code of Federal Regulations* (28 CFR Part 9). See also ILL. ANN. STAT. ch. 38 §36-4 (1987) (remission by state Attorney General).

81. Indeed, the complexity of the regulations has been criticized. D. SMITH, *supra* note 1, at 15-4.

82. UNIF. CONTROLLED SUBSTANCES ACT §101-607, 9 U.L.A. 1 (1970). The Act was promulgated to

supplant the Uniform Drug Act (1933) and the Model State Drug Abuse Control Act (1966). *Id.*

83. §401(c) prohibits the unlawful possession of controlled substances and makes such possession a misdemeanor.

84. *Id.* at §505(a).

85. 18 U.S.C.A. §1961-68 (West 1984). See note 51 and accompanying text.

86. *Id.* at §1963.

87. *Id.* at §1961-1968.

88. *Id.* at §1963(1).

89. *Id.* at §1963(1)(6).

90. ARIZ. REV. STAT. ANN. §36-2501 to 36-2553 (Supp. 1988).

91. See *supra* notes 82-84 and accompanying text.

92. ARIZ. REV. STAT. ANN. §13-3413(A).

93. *Id.* at §13-3415(D).

94. *Id.* at §13-3460.

95. *Id.* at §13-4313.

96. Neither the Drug Offenses statute, *id.* at §13-3401 to 13-3416, nor the forfeiture statute, *id.* at §13-4301 to 13-4315, defines the term "vehicle." The Uniform Controlled Substances Act defines "conveyances" as "aircraft, vehicles or vessels." UNIF. CONTROLLED SUBSTANCES ACT §505(a)(4). This definition of conveyance would seem to indicate that the definition of "vehicle" is confined to motorized ground transportation (e.g., cars and trucks).

97. ARIZ. REV. STAT. ANN. §13-4304(1).

98. *Id.* at §13-4304(2).

99. *Id.* at §13-4304(3).

100. *Id.* at §13-4304(4).

101. *State v. Lewis (In re One Ford Mustang)*, 105 Ariz. 293, 463 P.2d 827 (Ariz. 1970) ("an automobile may not be forfeited . . . unless the owner had some connection with the unlawful act, or intended to permit the automobile to be used by a third person in the commission of the unlawful act, or

had knowledge it was to be so used"); State v. Cook (*In re* One 1962 Volkswagen Sedan), 105 Ariz. 315, 464 P.2d 338 (Ariz. 1970) (no forfeiture where either owner or person in possession of title intended to permit use of automobile in illegal activity); State v. Barrett (*In re* 1979 Dodge Van) 150 Ariz. 25, 721 P.2d 683 (Ariz. Ct. App. 1986) (wife who owned van in joint tenancy with husband entitled to recover vehicle; holding called into question the court's earlier decision in State v. Pyle (*In re* 1976 Blue Ford Pickup) 120 Ariz. 432, 586 P.2d 993 (Ariz. Ct. App. 1978), in which the court ordered forfeiture of a joint tenant's interest where a son used his mother's truck in a narcotics transaction); State v. Hansen (*In re* 1977 Honda Motorcycle), 131 Ariz. 179, 639 P.2d 369 (Ariz. Ct. App. 1981) (court held that "an automobile may not be forfeited pursuant to these statutes unless the owner had some connection with the narcotics violation, or intended to permit such use of the vehicle, or had knowledge it was so used," but upheld the forfeiture on other grounds).

102. ARIZ. REV. STAT. ANN. §13-2301 to 13-2317.

103. *Id.* at §13-2314(D)(6)(c).

104. *See supra* notes 85-86 and accompanying text.

105. ARIZ. REV. STAT. ANN. §13-2314(B).

106. *Id.* at §13-2314.02(G)(1).

107. *Id.* at §13-2314.02(G)(2).

108. *Id.* at §13-2314.02(G)(3).

109. *Id.* at §13-2314.02(H).

110. CAL. HEALTH & SAFETY CODE §11000-11651 (1975 & Supp. 1989).

111. *See supra* notes 82-84 and accompanying text.

112. CAL. HEALTH & SAFETY CODE §11470(c).

113. *Id.* at §11470(f).

114. *Id.* at §11470(e).

115. *Id.* at §11470(g).

116. *Id.* at §11488.6(a).

117. CAL. PENAL CODE §186-186.8 (West 1988).

118. *Id.* at §186.3.

119. *Id.*

120. *See supra* notes 87-88 and accompanying text.

121. CAL. PENAL CODE §186.4(a).

122. *Id.* at §186.7(a).

123. *Id.* at §186.5(b)(1).

124. *Id.* at §186.8(a).

125. *Id.* at §186.7(b). To receive the property the innocent third party must pay the difference between the value of his interest and the appraised value of the owner's equity. *Id.*

126. *Id.* at §186.7(b).

127. COLO. REV. STAT. §12-22-301 to 12-22-322 (1985 Supp. 1987).

128. *See supra* notes 82-84 and accompanying text.

129. COLO. REV. STAT. §16-13-501 to 16-13-508.

130. *Id.* at §16-13-504(1).

131. *Id.* at §16-13-504(2). *People v. Garner*, 732 P.2d 1194 (Colo. 1987)

(innocent co-owner, in this case defendant's wife, entitled to one-half interest in forfeited vehicle; the trial court had vested a total interest in the wife and had not recognized the state's one-half interest; the appeals court vested a one-half interest in the state and suggested several ways in which wife could equitably retain her one-half interest).

132. COLO. REV. STAT. §16-13-504(3).

133. *Id.* at §18-17-101 to 18-17-109 (1986 & Supp. 1987).

134. *Id.* at §18-17-106(2).

135. *See supra* notes 85-86 and accompanying text.

136. COLO. REV. STAT. §18-17-105(6), 18-17-106(2).

137. *Id.* at §16-13-301 to 16-13-317.

138. *Id.* at §16-13-303.

139. The owner must show that the property had been taken from him and

used without his consent or that he was uninvolved in the illicit acts and had no reason to know of them. He must also demonstrate that he did all that reasonably should have been done to prevent the property from becoming a public nuisance. *Id.* at §16-13-303(5).

140. The court may consider whether the owner was the primary user of the property, whether the property was titled to the owner in order to avoid forfeiture, how much of the purchase price was furnished by the owner, and whether the owner's immediate family would be unduly prejudiced by forfeiture. *Id.*

141. *Id.* at §16-13-316(1).

142. FLA. STAT. ANN. §893.01-893.15 (1976 & Supp. 1988).

143. See *supra* notes 82-84 and accompanying text.

144. FLA. STAT. ANN. §893.12 (2).

145. *Id.* at §893.12 (4).

146. *Id.* at §932.701-932.705.

147. *Id.* at §932.703. "Property titled or registered jointly between husband and wife by use of the conjunctives 'and,' 'and/or,' or 'or' shall not be forfeited if the coowner establishes that he neither knew, or should have known after a reasonable inquiry, that such property was employed or was likely to be employed in criminal activity." *Id.* at §932.703(2).

148. *In re Forfeiture of 1978 BMW Auto.*, App. 2 Dist., 524 So. 2d 1077 (1988) (where co-owners of property are not husband and wife, guilty knowledge of one co-owner is sufficient basis to justify forfeiture, whether ownership is conjunctive or alternative) *Lamar v. Wheels Unlimited, Inc.*, 513 So. 2d 135 (Fla. 1987) (corporation which did not hold title to motor vehicle did not have standing to contest forfeiture); *Russell v. Wanicka (In re 1978 BMW Auto.)*, 524 So. 2d 1077 (Fla. Dist. Ct. App. 1988) (vehicle ordered forfeited where co-owner was father of wrongdoer); *In re One 1984 Chevrolet S-10 Pickup Truck*, 515 So. 2d 274 (Fla.

Dist. Ct. App. 1987) (vehicle not forfeitable where wife did not know that husband used vehicle to consummate illegal drug transaction); *D.V. & A., Inc. v. Town of Golden Beach*, 498 So. 2d 960 (Fla. Dist. Ct. App. 1986) (bare assertion of purported holder of lien on vessel that it had perfected lien insufficient to overcome forfeiture); *Kam Seafood Co. v. State*, 496 So. 2d 219 (Fla. Dist. Ct. App. 1986) (employer-owner's vehicle not subject to forfeiture where employee used car while in possession of cocaine, despite the fact that the employee involved was the company president's son); *One 36 Foot Mirage v. State*, 487 So. 2d 1134 (Fla. Dist. Ct. App. 1986) (owner knew or should have known that boat was being used in smuggling operation); *Wheeler v. State*, 472 So. 2d 847 (Fla. Dist. Ct. App. 1985) (innocent owner who lent car to friend, unaware that husband of friend had reputation as a dealer, retained possession of her car); *In re Forfeiture of Cessna 401 Aircraft*, 431 So. 2d 874 (Fla. Dist. Ct. App. 1983) (attorney as assignee of claimed owner did not have standing to contest forfeiture of aircraft); *City of Clearwater v. Malick (In re One 1976 Dodge Van)*, 429 So. 2d 718 (Fla. Dist. Ct. App. 1983) (vehicle subject to forfeiture, despite co-owner's lack of knowledge of the illegal activity, where co-owner was preparing to snort cocaine in the vehicle when arrested); *Brown v. City of Miami (In re 1979 Lincoln Continental)*, 405 So. 2d 249 (Fla. Dist. Ct. App. 1981) (guilt of one co-owner sufficient to justify forfeiture); *Garcia v. State (In re 36 Foot Uniflite)*, 398 So. 2d 457 (Fla. Dist. Ct. App. 1981) (no forfeiture where boat owner left his boat with a broker and was not involved in illegal activities); *In re 1978 Ford Truck*, 389 So. 2d 310 (Fla. Dist. Ct. App. 1980) (no forfeiture where truck owner was unaware of presence of methaqualone tablets); *Alvarez v. Florida (In re 1976 Pontiac Grand Prix)*, 374 So. 2d 1119 (Fla. Dist. Ct. App. 1978) (no forfeiture where owner lent vehicle to person without knowledge of that person's illegal ac-

- tivities); One 1973 Cadillac v. Florida, 372 So. 2d 103 (Fla. Dist. Ct. App. 1978) (no forfeiture where contraband transported without owner's knowledge).
149. FLA. STAT. ANN. §895.01-895.09.
150. *Id.* at §895.05(2)(a).
151. *See supra* notes 85-86 and accompanying text.
152. FLA. STAT. ANN. §895.05(2)(c), 895.07(11).
153. *Id.* at §895.07(4)-895.07(5). The state may subject a party with a subsequently acquired interest in real property to the forfeiture judgment by naming him as a defendant in the forfeiture proceedings.
154. *Id.* at §895.05(12)(c). Once a lien has been filed the owner is deemed to be on notice of improper use in any future actions. *Id.* at §895.05(12)(f).
155. GA. CODE ANN. §16-13-20 to 16-13-55 (1988).
156. *See supra* notes 82-84 and accompanying text.
157. GA. CODE ANN. §16-13-49(a)(6).
158. *Id.*
159. *Morrow v. State*, 186 Ga. App. 615, 367 S.E.2d 854 (Ga. Ct. App. 1988) (state failed to meet its burden of proof to justify seizure); *Hill v. State*, 178 Ga. App. 563, 343 S.E.2d 776 (Ga. Ct. App. 1986) (claimant has burden of proof to refute forfeiture); *Morgan v. State*, 172 Ga. App. 375, 323 S.E.2d 620 (Ga. Ct. App. 1984) (defendant had burden to prove he had no knowledge that aircraft was being used in narcotics violation); *Chester v. State*, 168 Ga. App. 618, 309 S.E.2d 897 (Ga. Ct. App. 1983) (claimant had no standing because he had previously denied any property interest in the cash at issue, presumably to avoid criminal liability); *Farmer's & Merchant's Bank v. State* 167 Ga. App. 77, 306 S.E. 2d 11 (1983) (the fact that security agreement concerning airplane had not been registered or recorded with FAA did not bar the secured party from protecting its security interest in forfeiture proceeding); *State v. Sewell*, 155 Ga. App. 734, 272 S.E.2d 514 (Ga. Ct. App. 1980) (mother retained security interest in her son's forfeited vehicle because she had lent him the money for purchase "and was also unaware of son's transportation of marihuana"); *First Bank & Trust v. State*, 150 Ga. App. 436, 258 S.E.2d 59 (Ga. Ct. App. 1979) (bank had no security interest in airplane at time of seizure); *H.J. Hallman v. State*, 141 Ga. App. 527, 233 S.E.2d 839 (Ga. Ct. App. 1977) (state does not occupy status "of creditor or lienholder, and hence, state's interest is" superior to that of holder of unrecorded security interest).
160. *Id.* at §16-14-1 to 16-14-15.
161. *Id.* at §16-14-7.
162. *See supra* notes 87-88 and accompanying text.
163. *Id.* at §16-14-7(e), (g).
164. *Id.* at §16-14-7(j).
165. HAWAII REV. STAT. §329-1 to 329-58 (1985 & Supp. 1987).
166. *See supra* notes 82-84 and accompanying text.
167. HAWAII REV. STAT. §329-55(a)(6).
168. *Id.* at §329-55(c).
169. *Id.* at §329-55(a)(7).
170. *Id.* at §842-1 to 842-12.
171. *Id.* at §842-3.
172. *See supra* notes 87-88 and accompanying text.
173. 1988 HAW. SESS. LAWS 260 §2.
174. *Id.* at 260.
175. *Id.* at 260 §1-5.
176. ILL. ANN. STAT. ch. 56 1/2 §1101-1603 (1985 & Supp. 1988).
177. *See supra* notes 82-84 and accompanying text.
178. Conveyances used in a narcotics violation with the knowledge and consent of the owner are also forfeitable under ch. 38 §36-1. Lienholders and common carriers are protected. *Id.* at §36-1a to 36-3.
179. ILL. ANN. STAT. ch. 56 1/2 §701-719.

180. *Id.* at §712.
181. *Id.* at §1505.
182. *Id.*
183. *People v. One 1980 Mercedes*, 166 Ill. App. 3d 467, 518 N.E.2d 1078 (Ill. App. Ct. 1988) (wife's ignorance of drug transportation precluded forfeiture); *People ex rel. Foreman v. Estate of Kawa*, 152 Ill. App. 3d 792, 504 N.E.2d 983 (Ill. App. Ct. 1987) (executor of estate would have to prove that neither he nor the heirs had knowledge of, or gave consent to, the sale of narcotics to prevent forfeiture); *Barra v. Wiebler*, 127 Ill. App. 3d 488, 468 N.E.2d 1007 (Ill. App. Ct. 1984) (father who co-owned van with son was legitimate lienholder entitled to retain his interest); *People ex rel. Carey v. 1976 Chevrolet Van*, 72 Ill. App. 3d 758, 381 N.E.2d 137 (Ill. App. Ct. 1979) (father not recognized as co-owner where vehicle registered solely in son's name).
184. ILL. ANN. STAT. ch. 56 ½ §1563-1660.
185. *Id.* at §1655(a)(3).
186. *Id.* at §1655(c).
187. IOWA CODE §204.101-204.602 (1987 & Supp. 1986).
188. *See supra* notes 82-84 and accompanying text.
189. IOWA CODE §809.1-809.21.
190. *Id.* at §809.1(2).
191. *Id.* at §809.14.
192. *State v. One Certain Conveyance 1978 Dodge Magnum*, 334 N.W.2d 724 (Iowa 1983) (claimant's security interest must be perfected as of date of seizure); *State v. One Certain Conveyance 1968 Cadillac*, 207 N.W.2d 547 (Iowa 1973) (lienholder overcame statutory presumption of knowledge that vehicle was being used illegally, even though he made no investigation of buyer, who had charges of transporting controlled substances pending against him and whose previous automobile had been seized and forfeited for transportation of a controlled substance); *State v. One Certain 1969 Ford Van*, 191 N.W.2d 662 (Iowa 1971) (testimony of owner's agents and employees having significant connection with rental agreement sufficient to rebut statutory presumption).
193. KY. REV. STAT. §218A.010-218A.991 (Michie 1982 & Supp. 1988).
194. *See supra* notes 82-84 and accompanying text.
195. KY. REV. STAT. §218A.410(1)(j).
196. *Id.*
197. LA. REV. STAT. ANN. §40:961-40:995 (1977 & Supp. 1989).
198. *See supra* notes 82-84 and accompanying text.
199. LA. REV. STAT. ANN. §32:1550-32:1553.
200. *Id.* at §32:1550(A)(3).
201. *Id.* at §32:1550(A)(7)(a).
202. *Id.* at §32:1550(A)(7)(b).
203. *State v. Spooner*, 520 So. 2d 336 (La. 1988).
204. *State v. 1971 Green GMC Van*, 364 So. 2d 479 (La. 1977) (statute permitting forfeiture of innocent owner's interest unlawfully impinged on right of property guaranteed by state constitutional provision); *Greenburg v. One Hundred Seventy-Five Thousand Dollars in Cash*, 517 So. 2d 430 (La. Ct. App. 1987) (money in safety deposit box not subject to forfeiture where not a scintilla of evidence linked it to narcotics violation).
205. LA. REV. STAT. ANN. §15:1351-15:1356 (West Supp. 1989).
206. *Id.* at §15:1356(A)(1).
207. *See supra* notes 85-86 and accompanying text.
208. LA. REV. STAT. ANN. §15:1356(A)(2).
209. MD. ANN. CODE art. 27, §276-302 (1988 & Supp. 1988).
210. *See supra* notes 82-84 and accompanying text.
211. MD. ANN. CODE art. 27, §297(a)(4)(ii).
212. *Id.* at §297(a)(7).
213. *Id.* at §297(a)(8).

214. *Id.* at §297(a)(6).
215. *Id.* at §297(a)(9).
216. *Id.*
217. *Id.* at §297(f)(2)(i).
218. *Id.* at §297(f)(2)(ii).
219. *Id.* at §297(n).
220. *State v. One 1984 Toyota Truck*, 311 Md. 171, 533 A.2d 659 (Md. 1987) (innocent spouse protected as tenant by the entirety); *Prince George's County v. Blue Bird Cab Co.*, 263 Md. 655, 284 A.2d 203 (Md. 1971) (owner of leased taxi cab could not recover property where lessee had engaged in heroin transaction; lessee's failure to pay several lease installments did not put him in unlawful possession of the vehicle); *State v. One 1985 Ford*, 72 Md. App. 144, 527 A.3d 1311 (Md. Ct. Spec. App. 1987) (parent/owner may be able to establish lack of knowledge); *1983 Chevrolet Van v. State*, 67 Md. App. 485, 508 A.2d 503 (Md. Ct. Spec. App. 1986) (innocent-owner defense not available where owner lent car to close friend whom he knew used drugs).
221. MICH. COMP. LAWS ANN. §333.7101-333.7545 (1980 & Supp. 1988).
222. *See supra* notes 82-84 and accompanying text.
223. MICH. COMP. LAWS ANN. §333.7521(1)(f).
224. *Id.*
225. *People v. United States Currency*, 164 Mich. App. 171, 416 N.W.2d 700 (Mich. Ct. App. 1987) (vehicle placed in another party's name does not prevent forfeiture); *People v. One 1979 Honda Automobile*, 139 Mich. App. 651, 362 N.W.2d 860 (Mich. Ct. App. 1984) (guilty knowledge of one co-owner sufficient to justify forfeiture).
226. MISS. CODE ANN. §41-29-101 to 41-29-185 (1972 & Supp. 1988).
227. *See supra* notes 82-84 and accompanying text.
228. MISS. COMP. ANN. §41-29-153(a)(6).
229. *Id.* at 41-29-153(a)(7).
230. *Id.*
231. *Saik v. State*, 473 So. 2d 188 (Miss. 1985) (father retained possession of his car where son was not permitted to use the vehicle at the time of the sale of marijuana and father had no knowledge of the illegal use); *Ervin v. State*, 434 So. 2d 1324 (Miss. 1983) (automobile not subject to forfeiture where innocent spouse gave access to her husband without knowledge of, or consent to, illegal use—eight-year-old conviction of husband for drug offense held not sufficient to warrant forfeiture).
232. MISS. CODE ANN. §97-43-1 to 97-43-11 (Supp. 1988).
233. *Id.* at §97-43-9(2).
234. *See supra* notes 87-88 and accompanying text.
235. MISS. CODE ANN. §97-43-11(2)(a).
236. *Id.* at §97-43-11(2)(a).
237. *Id.* at §97-43-11(3)(c).
238. NEV. REV. STAT. §453.011-453.810 (1987).
239. *See supra* notes 82-84 and accompanying text.
240. *Id.* at §453.301(8).
241. *Id.*
242. *Id.* at §179.015-179.525.
243. *Id.* at §179.1164(1).
244. *Id.* at §197.1161.
245. *Id.* at §197.1164(2).
246. *Id.* at §179.1164.
247. *One 1978 Chevrolet Van v. County of Churchill*, 97 Nev. 510, 634 P.2d 1208 (Nev. 1981) (wife's interest in co-owned van not forfeitable where the state failed to establish that she knew of her husband's illegal use).
248. NEV. REV. STAT. §207.350 to 207.520 (1987).
249. *Id.* at §207.420, 207.450.
250. *Id.* at §207.460.
251. *See supra* notes 87-88 and accompanying text.
252. NEV. REV. STAT. at §207.510.

253. *Id.* at §207.420(3).
254. *Id.* at §207.460(2).
255. *Id.*
256. *Id.* at §207.500(2).
257. N.J. STAT. ANN. §2C:35-1 to 2C:35-23; 2C:36-1 to 2C:36-9; 24:21-1 to 24:21-53 (West 1982 & Supp. 1988).
258. *See supra* notes 82-84 and accompanying text.
259. *Id.* at §2C:64-1 to 2C:64-9.
260. *Id.* at §2C:64-1.
261. *Id.* at §2C:64-5.
262. *State v. 1978 Pontiac Trans Am*, 98 N.J. 474, 487 A.2d 722 (N.J. 1985) (forfeiture of innocent owner's property does not constitute unlawful taking of property without just compensation); *State v. One 1976 Pontiac Firebird*, 168 N.J. Super. 168, 402 A.2d 254 (N.J. Super. Ct. App. Div. 1979) (bona fide security-interest holder prevails despite state's seizure of secured property); *State v. One Ford Van*, 154 N.J. Super. 326, 381 A.2d 387 (N.J. Super. Ct. App. Div. 1977) (innocent owner's exemption inapplicable where owner lent vehicle to person who used it for illicit drug transportation); *State v. One 1977 Dodge Van*, 165 N.J. Super. 113, 397 A.2d 733 (Middlesex County Ct. 1979) (security interest holder entitled to possession of vehicle).
263. N.J. STAT. ANN. §2C:41-1 to 2C:41-6.2.
264. *Id.* at §2C:41-3(b)(1).
265. *See supra* notes 85-86 and accompanying text.
266. N.J. STAT. ANN. §2C:41-3(e), 2C:41-4(a)(9).
267. N.Y. PUBLIC HEALTH LAW §3300-3396 (McKinney 1985 & Supp. 1989).
268. *See supra* notes 82-84 and accompanying text.
269. N.Y. PUBLIC HEALTH LAW §3388(1).
270. *Id.* at §3388(2).
271. *Id.* at §3388(6).
272. *Vergari v. Kraisky*, 120 A.D.2d 739, 502 N.Y. Supp. 2d 788 (N.Y. App. Div. 1986) (son's possessory interest in car sufficient to establish that son was owner, despite father's claim to the contrary); *City of New York v. Siegel*, 134 Misc. 2d 172, 509 N.Y.S.2d 1021 (N.Y. Sup. Ct. 1986) (evidentiary hearing required to determine whether van's owner did all that could reasonably be expected to prevent use of van in unlicensed vending activities); *Henry v. Catagnaro*, 106 Misc. 2d 574, 434 N.Y.S. 2d 592, 1980 (domestic-relations law did not mandate finding that defendant's wife was equitable owner of seized vehicle); *Blaine v. G.M.A.C.*, 370 N.Y.S.2d 323 (N.Y. Co. Ct. 1975) (vehicle not forfeitable where owner did not consent to unlawful use); *Chmielewski v. Rosetti*, 59 Misc. 2d 335, 298 N.Y.S. 2d 875, 1969 (where owner had no knowledge of son's illegal conduct and did not acquiesce therein, owner could replevin car from police).
273. N.Y. PENAL LAW §460.00 to 460.80 (McKinney Supp. 1989).
274. *Id.* at §460.30(1).
275. *See supra* notes 87-88 and accompanying text.
276. N.Y. PENAL LAW §460.30(3)(b). The third party brings this proceeding under §1327 of the Civil Practice Law and Rules. *Id.*
277. *Id.* at §460.30(3)(b).
278. N.Y. CIV. PRAC. L. & R. 1311(7) (McKinney Supp. 1989).
279. 42 PA. CONS. STAT. ANN. 6801 to 6802 (P.L. 464, No. 79 §4 6/30/88).
280. *See supra* notes 82-84 and accompanying text.
281. 42 PA. CONS. STAT. ANN. §6801(6)(i).
282. *Id.* at §6802.
283. *Commonwealth v. One 1985 Cadillac Seville*, 371 Pa. Super. 390, 538 A.2d 71 (Pa. Super. Ct. 1988) (claimant failed to establish ownership of vehicle by a preponderance of the evidence even though she was on title and registration as owner); *Commonwealth v. One 1970 Fiat Sedan*, 6 Pa. D.&C.3d

607 (1978) (where vehicle is co-owned, it must be sold and only the guilty party's proportionate share forfeited).

284. 18 PA. CONS. STAT. ANN. §911(d)(ii) (Purdon 1983).

285. S.C. CODE ANN. §44-53-110 to 44-53-590 (Law Co-op. 1985 & Supp. 1988).

286. See *supra* notes 82-84 and accompanying text.

287. S.C. CODE ANN. §44-53-520.

288. *Id.* at §44-53-586.

289. *Id.* at §44-53-520.

290. *Id.* at §44-53-520(a)(8).

291. South Carolina Law Enforcement Div. v. The "Michael and Lance," 281

S.C. 339, 315 S.E.2d 171 (S.C. Ct. App. 1984) (no forfeiture where innocent owner did not know that the master of this shrimp boat was smuggling marijuana. *Reversed on appeal*, S.C. Appeals Court, 327 S.E. 2d 327 (1985) (corporation held not innocent even if corporate officer (captain of vessel) was not acting on behalf of corporation when he hauled marijuana); South Carolina Law Enforcement Div. v. Crook, 273 S.C. 285, 256 S.E.2d 846 (for lienholder's interest to be protected from forfeiture, he must inquire into borrower's character and secure affidavit stating that borrower has not been convicted and presently is not charged with any narcotics violation).

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