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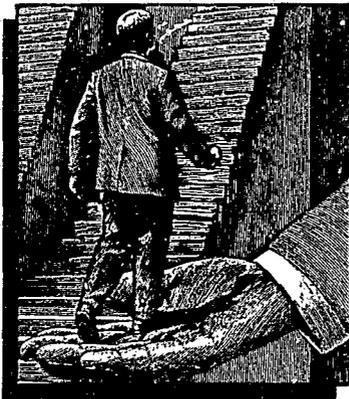
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The Cover: Since mass transit systems are an integral part of metropolitan cities, public officials must look for ways to reduce crime and change citizen perception of this mode of transportation. See article p. 1. Cover photo courtesy of Regina Kosicki.

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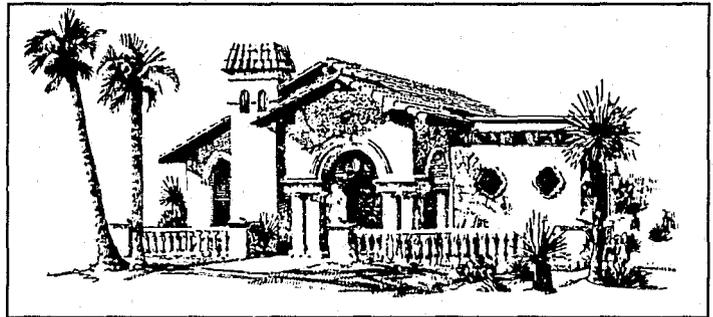
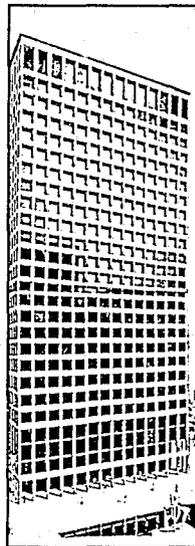
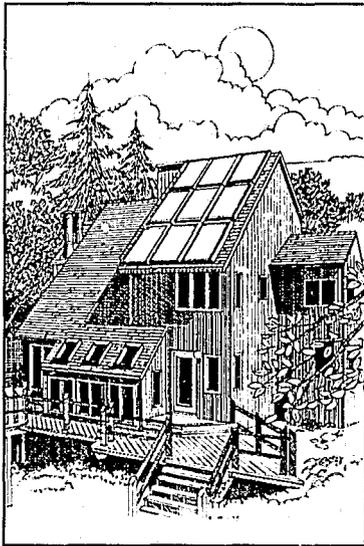
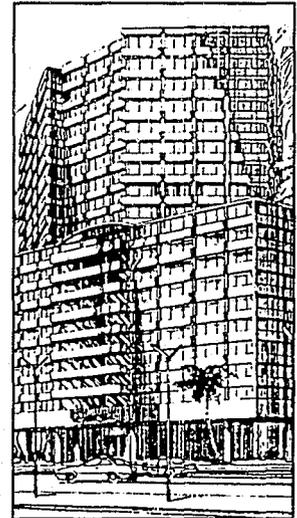
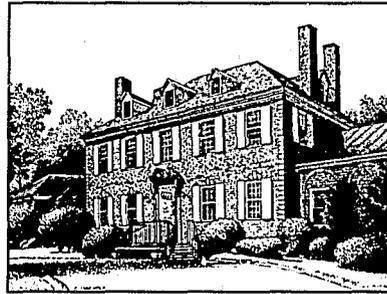
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Civil Forfeiture Real Property Used in Drug Trafficking

By
THOMAS V. KUKURA, J.D.



The U.S. Department of Justice has determined that a crucial component of effective drug law enforcement is the forfeiture of real property used to facilitate illicit drug trafficking. It was not until 1984 that Congress, in 21 U.S.C. Section 881(a)(7) of the Controlled Substances Act (CSA), authorized the civil forfeiture of real property used or intended to be used to facilitate drug trafficking.¹

This article discusses recent court decisions involving both Federal and State investigations where the Federal forfeiture of real property has provided law enforcement with an important additional

weapon to fight the war on drugs. Specifically, the article addresses the following three legal issues:

- 1) How courts define real property subject to civil forfeiture,
- 2) What evidence law enforcement must produce to establish that real property *facilitated* drug trafficking, and
- 3) The circumstances under which the "innocent owner defense" will defeat law enforcement's ability to forfeit real property.

Knowledge of the way Federal courts have addressed these three issues is essential to law enforcement officers contemplating the forfeiture of real property for violation of 21 U.S.C. Section 881(a)(7).

REAL PROPERTY SUBJECT TO CIVIL FORFEITURE

The range of real property subject to civil forfeiture under Section 881(a)(7) is very broad and includes unimproved land, as well as improvements built on land, such as residences,² restaurants, apartment buildings,³ office buildings,⁴ athletic clubs,⁵ and taverns. In addition, real property used to manufac-

ture, grow, store, conceal, deliver, receive, or process illicit drugs, as well as property used as a meeting place to negotiate drug trafficking, is potentially subject to forfeiture.

There is also significant case authority that Section 881(a)(7) allows for the forfeiture of an entire tract of land, even though only a portion of the land is used in violation of the statute. For example, *United States v. Reynolds*⁶ involved a 30-acre tract of land on which only the house, driveway, and swimming pool had been used to facilitate the distribution of cocaine. The U.S. Court of Appeals for the Fourth Circuit upheld the forfeiture of the entire 30-acre tract, finding that "Congress expressly contemplated forfeiture of an entire tract based upon drug-related activities on a portion of the tract."⁷

In a similar case, *United States v. Santora*,⁸ the defendant's real property consisted of approximately 26 acres bisected by a road that had been taxed as two separate parcels. However, the property's deed described it as a single undivided tract. On one side of the road was a 5-acre parcel on which a home, barn, and several outbuildings were located. The balance of the property, all of which was unimproved, was on the other side of the road.

Following a State investigation, a Federal forfeiture action was initiated against the defendant's real property, based on the distribution of small amounts of cocaine to an undercover officer on four separate occasions. All of the cocaine sales occurred on the smaller portion of the property. The owner attempted to characterize the property as two tracts of land and argued that only

the smaller portion of the property, where the cocaine sales actually occurred, could be forfeited.

The Fourth Circuit Court of Appeals rejected the defendant's argument and ruled that "the whole of any lot or tract of land" must be determined from the duly recorded instruments and documents filed in the county offices where the property is located and not simply from the tax records. Thus, the court held the entire 26-acre parcel was subject to forfeiture.⁹ In this regard, law enforcement officers should carefully research county land records to help determine the exact extent of property subject to forfeiture.

EVIDENCE IN CIVIL FORFEITURE CASES

The forfeiture of real property must be based on a showing of probable cause that the property was used or intended to be used to commit or to facilitate a felony drug violation. A Federal forfeiture action against real property is often initiated based on evidence gathered

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during a joint Federal/State criminal investigation or during an independent State criminal investigation. A conviction of the owner in either Federal or State court can serve as the necessary probable cause to initiate civil forfeiture against a parcel of real property, if the violation leading to conviction involved the use of that property.

For example, the U.S. Court of Appeals for the Second Circuit decided that a civil forfeiture of real property pursuant to Section 881(a)(7) may be based on illicit drug activity resulting in a State conviction.¹⁰ In that case, undercover New York City police officers entered a five-story building with a street-level storefront and several residential apartments. Once inside, the undercover officer purchased several vials of crack from the owner, who was subsequently convicted in State court.

Approximately 1 year later, the New York City Police Department and the Drug Enforcement Administration (DEA) determined

that the storefront, operating as a restaurant, was actually a lucrative crack cocaine distribution point. The court noted that the property owner's earlier State court drug conviction *alone* provided sufficient probable cause for forfeiture of the owner's property.

subject to civil forfeiture "even if its owner is acquitted of—or never called to defend against—criminal charges."¹² In this regard, the Supreme Court stated in *Various Items of Personal Property v. United States* that "it is the property which is proceeded against, and by resort

clear connection between real property and a drug felony.

Case Accounts

One of the first cases to interpret the "facilitation" provision was *United States v. 124 East North Avenue, Lake Forest, Illinois*.¹⁵ In this case, the government's complaint alleged that the property was used for a 6-month period to facilitate the sale and delivery of cocaine as follows:

- 1) The telephone at the residence was used *regularly* to negotiate the sale of cocaine;¹⁶
- 2) The owner used an electronic paging device to be contacted at the property regarding cocaine sales;
- 3) The owner used the property as the only location where he would be contacted by telephone regarding the sale of cocaine; and
- 4) The owner arranged to use the property as a location for the delivery of approximately 5 kilograms of cocaine.

The court held that the facts alleged in the complaint were sufficient to constitute probable cause to believe the defendant's property facilitated the violation of Federal drug laws. The court highlighted the "intent" to deliver 5 kilograms to the property and the regular use of the telephone at the property to negotiate the sale of cocaine as providing a "sufficient nexus between the alleged illegal activity and the defendant property."¹⁷ Importantly, the court noted that an isolated use of a telephone in a home

“...there is a judicial willingness to interpret the ‘facilitation’ provision broadly to permit forfeiture whenever law enforcement establishes a clear connection between real property and a drug felony.”

Despite the owner's argument that his State conviction did not support forfeiture because he had filed a notice of appeal, the court found that the trial transcript of the State criminal proceedings provided probable cause that the defendant's property was used for an unlawful purpose.¹¹

It is important to note that if the owner's State conviction had been overturned, civil forfeiture of his property would not be precluded. Unlike criminal forfeiture cases, conviction for the underlying criminal activity is not a prerequisite for the civil forfeiture of real property.

Civil forfeiture is an *in rem* proceeding against the property that has been involved in some violation. *In rem* refers to any legal proceeding directed solely against property. The property is the defendant. Therefore, real property is

to a legal fiction, held guilty and condemned as though it were conscious instead of inanimate....The forfeiture is no part of the punishment for the criminal offense."¹³

A Clear Connection Required

The provision in Section 881(a)(7) for the forfeiture of real property that "facilitates" drug trafficking has spawned considerable litigation and some judicial disagreement. The litigation and extent of disagreement centers on the degree of connection or "nexus" that must be shown between drug trafficking and the property to be forfeited.¹⁴ However, all courts agree that the connection must be more than merely incidental or fortuitous. As the following cases illustrate, there is a judicial willingness to interpret the "facilitation" provision broadly to permit forfeiture whenever law enforcement establishes a

to discuss a drug sale might not be a sufficient basis to subject the home to forfeiture.¹⁸

In another case, *United States v. Real Property and Residence*,¹⁹ the owner arranged for and directed a 10-kilogram cocaine delivery, which occurred on the driveway of his residence. A court-authorized interception of the owner's telephone conversations prior to the transaction demonstrated his insistence that the deal take place on familiar territory at his home. The court upheld the forfeiture since "...a portion of the defendant property, the driveway, served as the planned site of a ten kilogram cocaine delivery."²⁰

A different result was reached in *United States v. Certain Lots in Virginia Beach*,²¹ where a government informant contacted the property owner and requested a drug transaction be consummated at the owner's home. The owner at first refused and only upon the informant's insistence agreed to use his home as the transaction site. A Federal district court did not uphold forfeiture, because the necessary "substantial connection" between the illegal activity and the defendant property did not exist sufficiently to prove facilitation. The court found that the owner merely allowed the government informant to meet him there, and then only as a result of the informant's insistence.²²

In *United States v. Schifferli*,²³ the U. S. Court of Appeals for the Fourth Circuit found a substantial connection between a dentist's office building and his drug offenses, and therefore, permitted forfeiture of the office building and property

on which it was located. Facts in the case indicated the dentist used his office over 40 times during a 4-month period to write illegal prescriptions. In upholding the forfeiture, the court broadly interpreted the "facilitation" requirement by noting that it is irrelevant whether the property's role in the crime is indispensable.²⁴

In another case, the U. S. Court of Appeals for the Eighth Circuit upheld the forfeiture of a residence, finding that it was substantially connected to illegal drug activity because a 2-ounce purchase of cocaine occurred at the residence

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and law enforcement officers found \$12,585 in a pocket of a sportcoat hanging in a closet intermingled with \$250 in official government funds that had been used in previous undercover purchases of cocaine.²⁵ Cocaine, drug scales, and weapons were also found in the residence. The court upheld the forfeiture, even though the quantity of the drug actually involved was "relatively small."²⁶

The U. S. Court of Appeals for the 11th Circuit found probable cause to believe a residence and the surrounding property facilitated the importation of cocaine where evidence indicated the property was used to negotiate and plan the importation of cocaine.²⁷ The co-conspirators met several times on the defendant's property and discussed the details of their plan. They also traveled from the residence to inspect a proposed landing site for the aircraft used to transport the cocaine.²⁸ The court ruled the real property was forfeitable, even though it was not used or intended for use as a delivery or storage site for cocaine.²⁹

As the above cases reveal, courts have broadly interpreted the plain language of the facilitation provision of Section 881(a)(7). However, law enforcement's use of this provision should be tempered by reason and fundamental fairness, because an overzealous use of the facilitation provision to forfeit real property could produce adverse public opinion or court decisions, which could spawn more restrictive legislation.³⁰ It is, therefore, recommended that law enforcement agencies adopt a policy that limits the civil forfeiture of real property to cases where there has been a substantial use of the real property to facilitate a drug felony violation as opposed to a remote or incidental use.³¹

THE "INNOCENT OWNER" DEFENSE

Section 881(a)(7) provides for an "innocent owner" defense to forfeiture where property owners can

establish their lack of knowledge or consent to the drug trafficking. Once the government establishes probable cause that property facilitated drug trafficking, the burden shifts to owners of the property to prove by a preponderance of the evidence that they did not know of or consent to the underlying illegal conduct. This statutory defense is available to any person with a recognizable legal or equitable interest (i.e., standing) in the property, such as an owner, spouse of the owner, or lienholder.

The possession of bare legal title, however, may be insufficient to establish such standing.³² Because people engaged in drug trafficking often attempt to disguise their interest in property to prevent forfeiture by placing title in another's name, law enforcement officers investigating drug trafficking should look behind the formal title to determine whether the record title

legal title by one who does not exercise dominion and control over the property is insufficient to establish standing to challenge a forfeiture. The court found the claimant lacked standing to contest the forfeiture because: (1) He presented no documentary evidence regarding his finances or payments with respect to the purchase of property; (2) he could not remember how much he had contributed or borrowed from others; and (3) there was no record to support his claim that he had paid the property taxes on the land for at least 2 years.³⁴

Courts have also held that a fugitive from justice does not have standing to contest a forfeiture action. For example, the 11th Circuit Court of Appeals ruled that a fugitive who had been indicted for drug trafficking and was residing in Colombia was precluded from contesting the forfeiture of his estate located in Miami, Florida.³⁵

forfeiture by establishing that the illegal drug activity took place on their property without their consent.³⁷ Courts that recognize lack of consent alone as a sufficient basis for the "innocent owner" defense nevertheless require owners to prove they did all that reasonably could be expected to prevent illegal activity after learning of it.³⁸

For example, the "innocent owner" defense based on a lack of consent was rejected by the U. S. Court of Appeals for the Second Circuit in a case involving the forfeiture of a six-story, 41-unit apartment complex that the court characterized as "a veritable anthill of drug activity."³⁹ The court found that the owner who asserted a lack of consent did not prove he did all that reasonably could be expected to prevent the illegal activity.

From December 1986, through May 1988, New York City police received complaints of drug trafficking in 24 of the 41 apartments and determined that the common areas of the building were littered with crack vials and other paraphernalia and that lookouts were constantly posted in front of the building. Law enforcement officers were able to produce evidence of numerous unsuccessful attempts to contact the owner about these drug problems through telephone calls, letters, and discussions with the superintendent of the building. In June 1988, several arrests were made at the apartment complex. While the owner admitted visiting the apartment complex on approximately 100 occasions and speaking with the superintendent on a weekly basis, he claimed he had no idea that

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...for an 'innocent owner' defense...owners of the property [must] prove by a preponderance of the evidence that they did not know of or consent to the underlying illegal conduct.

”

owner is a "strawman"³³ set up to conceal the true owner.

In a recent case illustrating this "strawman" concept, the U. S. Court of Appeals for the 11th Circuit held that possession of mere

Some courts hold that claimants must establish *both* lack of knowledge *and* lack of consent to avoid the forfeiture,³⁶ while others hold that owners with knowledge of drug activity may nonetheless avoid

drug transactions were occurring on the premises until the June 1988, arrests, at which time he instructed the superintendent not to accept rent from the tenants arrested and called his lawyer. The court denied the "innocent owner" defense, reasoning that the owner either knew of the drug activity before June 1988, and did nothing to stop it, or that his response after learning of it was inadequate.⁴⁰

CONCLUSION

The civil forfeiture of an entire tract of land where the whole tract or just a portion of the tract has facilitated drug trafficking is a powerful weapon in the war on drugs. The government must establish probable cause that the property has facilitated and/or is intended to facilitate a felony drug violation.

Owners of real property can successfully assert an innocent owner defense only if they can prove lack of knowledge or consent to the illegal activity subjecting the property to forfeiture. Early coordination between the various investigative agencies and the U. S. Attorney's Office is a strategic necessity in any investigation that may potentially lead to the forfeiture of real property.⁴¹

LEB

Footnotes

¹ 21 U.S.C. Section 881(a)(7) subjects to forfeiture:

"All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit or facilitate the commission of, a violation of this title punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of any 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."

It should be noted that in 1978, Congress, in 21 U.S.C. Section 881(a)(6), authorized the civil forfeiture of real property that is traceable to the proceeds of drug trafficking. Also, real property is subject to criminal forfeiture under 21 U.S.C. Section 853.

² *United States v. Lots 12, 13, 14, and 15, Keeton Heights*, 869 F.2d 942 (6th Cir. 1989).

³ *United States v. All Right, Title and Interest*, 901 F.2d 288 (2d Cir. 1990).

⁴ *United States v. Schiffjert*, 895 F.2d 987

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(4th Cir. 1990).

⁵ *United States v. Parcel of Land With Building App. And Imp.*, 928 F.2d 1 (1st Cir. 1991).

⁶ 856 F.2d 675 (4th Cir. 1988).

⁷ *Id.* at 676.

⁸ 866 F.2d 1538 (4th Cir. 1989).

⁹ *Id.* at 1540-43.

¹⁰ *Supra* note 3.

¹¹ *Id.* at 292.

¹² See *United States v. Property Ident. As 3120 Banneker Dr. N.E.*, 691 F.Supp. 497 (D.D.C. 1988). For a discussion of the various legal procedures available to initiate the seizure of real property, see Landman and Hieronymus, "Civil Forfeiture of Real Property under 21 U.S.C. 881 (a)(7)," *Michigan Bar Journal*, February 1991, pp. 176-177.

¹³ 282 U.S. 577, 581 (1931).

¹⁴ Three Federal circuit courts have held that the government must show the real property had a "substantial connection" to a drug felony. See *United States v. Parcel of Land and Residence at Emery Street*, 914 F.2d 1 (1st Cir. 1990); *United States v. One Parcel of Real Estate Located at 7715 Betsy Bruce Lane*, 906 F.2d 110 (4th Cir. 1990); *United States v. Premises known as 3639—2nd St. N.E.*, 869 F.2d 1093 (8th Cir. 1989). However, another court rejected the "substantial connection" test and required only that the real property had "more than an incidental or fortuitous connection to the crime." See *United States v. Real Estate Commonly Known as 916 Douglas Avenue*, 903

F.2d 490 (7th Cir. 1990).

¹⁵ 351 F.Supp. 1350 (N.D. Ill. 1987).

¹⁶ The use of a telephone to arrange or otherwise facilitate a drug felony violation is itself a felony violation under 21 U.S.C. Section 843(b).

¹⁷ *Supra* note 15, at 1352-54.

¹⁸ *Id.* at 1353.

¹⁹ 921 F.2d 1551 (11th Cir. 1991).

²⁰ *Id.* at 1556.

²¹ 657 F.Supp 1062 (E.D. Va. 1987).

²² *Id.* at 1065.

²³ 895 F.2d 987 (4th Cir. 1990).

²⁴ *Id.* at 990-91.

²⁵ *United States v. Premises Known as 3639—2nd St., N.E.*, *supra* note 14.

²⁶ *Id.* at 1096.

²⁷ *United States v. Approximately 50 Acres of Real Property*, 920 F.2d 900 (11th Cir. 1991).

²⁸ The property used as a landing strip was a separate parcel of property owned by the same claimant and was also forfeited under the authority of Section 881(a)(7).

²⁹ *Supra* note 27, at 903.

³⁰ Possible constitutional challenges to disproportionately severe forfeitures were raised in *United States v. Real Estate Known as 916 Douglas Ave.*, *supra* note 14; and *United States v. Livonia Road*, 889 F.2d 1258 (2d Cir. 1989).

³¹ For example, see DEA's policy statement in *Drug Agents' Guide to Forfeiture of Assets* (rev. 1987). (Available from U.S. Department of Justice, Drug Enforcement Administration.)

³² *United States v. Real Property at 5000 Palmetto Drive*, 928 F.2d 373 (11th Cir. 1991).

³³ The term "strawman" is used to denote one who holds title in name only or is a nominal owner.

³⁴ *United States v. Lot 111-B, Tax Map Key 4-4-03-71(A)*, 902 F.2d 1443 (9th Cir. 1990).

³⁵ *United States v. One Parcel of Real Estate Dade County, Fla.*, 868 F.2d 1214 (11th Cir. 1989).

³⁶ *Supra* note 34.

³⁷ See, e.g., *United States v. 141st Street Corp. by Herch*, 911 F.2d 870 (2d Cir. 1990).

³⁸ *Id.*

³⁹ *Id.* at 877.

⁴⁰ *Id.* at 880.

⁴¹ For more expansive discussions of forfeiture concepts, see *Drug Agents' Guide to Forfeiture of Assets* (rev. 1987) (Available from the U.S. Department of Justice, Drug Enforcement Administration); *Asset Forfeiture: Law, Practice, and Policy* (vols. I & II) (Available from the U.S. Department of Justice, Asset Forfeiture Office); and David B. Smith, *Prosecution and Defense of Forfeiture Cases* (1991).

Law enforcement officers of other than Federal jurisdiction who are interested in this article should consult their legal advisor. Some police procedures ruled permissible under Federal constitutional law are of questionable legality under State law or are not permitted at all.