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## ASSET FORFEITURE

# Bulletin

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## PRESEIZURE PLANNING, PROPERTY MANAGEMENT AND THE ROLE OF SEIZURE WARRANTS

Management of seized property is a relatively new activity for law enforcement agencies, but it quickly has become an important element of a financial remedies program.

The agency's property management unit is the primary point of contact between a financial remedies program and legitimate commerce. This unit must communicate positively so as to maintain the alliance between law enforcement and legitimate commercial establishments, upon which law enforcement success rests.

Further, a smoothly operating property management unit provides essential support for the overall goals of a financial remedies program. These objectives strive to remove from criminal control both the property that is necessary for criminal operations and the wealth that is the motive for crime.

Finally, a well run property management unit can amplify the benefits of property seizure by converting the property to law enforcement use to fund additional investigations.

Property management also presents significant challenges: Maintaining the value of seized property for the sake of all interested parties and maintaining both the reality and the appearance of proper conduct of the public's business.

Property management is the foundation for building upon the success of a financial remedies program, therefore, enforcement agencies should give it a very high priority.

This article discusses how thorough preseizure planning and effectively written seizure warrants can contribute to successful property management. It begins with a brief description of the management function.

### The Management Function

Successful property management units may take different forms. The components of a complete management unit are:

- An in-house professional property manager.

- One or more outside contractors capable of managing and disposing of real property, personal property, and vehicles.
- Access to an asset location and financial investigative group.
- Access to legal advice on management issues, such as contract negotiation and compliance, foreclosure, bankruptcy, and general property law.

### Preseizure Planning

Seizure for forfeiture generally results in possession of valuable property which the seizing agency is responsible for safeguarding. Consequently, some pre-seizure planning must precede every seizure for forfeiture, no matter how routine.

Agency personnel must decide what property to target for seizure, when and where to execute the seizure, and how to approach the seizure in terms of agency roles and responsibilities.

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## Preseizure Planning...

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- *What To Seize* - Both legal and practical considerations will affect decisions about what property to target for seizure. However, the practical concerns of the property manager should substantially limit the portion of legally permissible seizures the agency will actually make. Among the important considerations are the value of the item, its usefulness or marketability, the difficulty and expense of storing it, and any special management problems (Does it eat? Does its engine have to be carefully maintained?). Sometimes, competing goals will weigh against one another. For example, taking possession of a run-down residential property may seem like an inappropriate use of resources--but if that property is a crack house in a residential neighborhood, the financial cost likely is a good investment of public funds.
- *When To Seize* - The timing of a seizure can be important for property management. For example, when a legitimate sale of seizable items is in progress, a delay in the seizure may enable seizure of the sale proceeds seized instead. This is in contrast to a sham sale in progress, where quick action might be necessary to prevent the sale. When a single case involves the seizure of numerous vehicles, rapid coordinated action is usually essential to

prevent the disappearance of vehicles not seized during the first few hours of the sweep.

- *Where To Seize* - The location has important legal significance. Seizure location largely determines jurisdiction and venue.
- *How To Approach Seizure* - Preseizure planning must make clear the roles and responsibilities of all participants. Which agency will take the lead? Who will be the lead agent--the property manager? The prosecutor? The judge? The plan must be both specific and flexible to ensure success despite complexity and unforeseen occurrences.

Finally, preseizure planning may avoid improper invasions of privacy by ensuring that the seizure method planned is in compliance with applicable law. A U.S. Circuit Court has held that a seizure of an occupied residence, even with a substitute custodianship agreement under which the occupants remain in the house, requires an adversarial preseizure hearing on probable cause, in the absence of exigent circumstances.<sup>1</sup> As case law develops on this and other issues, officers should use the preseizure planning mechanism to ensure the use of proper procedures.

### Seizure Warrants

Depending on the circumstances, property seizures may occur with or without a warrant. If a seizure requires an invasion of a protected privacy interest, the agency must obtain a warrant. A seizure on public property generally requires no war-

rant.<sup>2</sup> Probable cause may be the basis for a seizure if there is no invasion of protected privacy interest.

## Whether or not the law requires it, a seizure warrant offers many advantages.

Whether or not the law requires it, a seizure warrant offers many advantages. It provides guidance for officers, it gives direction both to those in possession of the property (for example, banks, renters, or friends) and to potential claimants/defendants, and it establishes a framework for future judges on the case. Most of all, a seizure warrant is an ideal device for avoiding later property management problems.

### "Nonseizures" and "Unseizures"

The easiest property management is management of property that is not in the manager's possession. In a "nonseizure" seizure, the manager never takes possession of the property. An "unseizure" seizure involves the disposal of the property soon after the seizure.

A seizure warrant can accomplish a nonseizure in several ways. First, the warrant may specify seizure of something less than the item of property. Seizure of the item itself is the normal method of *in rem* seizure. However, the selective seizure of some interest in the property (for example, the owner's interest) might occur while other interests in the property (for example, a lienholder's interest) might be exempt.

It is possible to avoid physical possession of a seizable property, even when the entire property is subject to seizure, by specifying a "constructive" (rather than an "actual") seizure. The constructive seizure of real property, for example, can occur by filing notices in the public record, posting the property, and serving the owners, interest holders, and occupants with notice. The removal of premise occupants is unnecessary. Constructive seizures are also effective for vehicles that have escaped capture, for bank or brokerage accounts, and for other property that may become non-transferrable by paper notice.

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**Whether the seizure is actual or constructive, a property manager may avoid active management by arranging for a substitute custodian.**

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Whether the seizure is actual or constructive, a property manager may avoid active management by arranging for a substitute custodian. The custodian may be a trustee or receiver,<sup>3</sup> a private contractor,<sup>4</sup> an individual then associated with the property,<sup>5</sup> or even a claimant/defendant.<sup>6</sup> The warrant may give the seizing agency future authority to designate a substitute custodian of its choice, may designate a property manager or a contractor, or may even designate the owner/occupant as custodian. It may also specify terms and conditions of the custodianship, such as making payments on all obligations (including the mortgage, utilities, insurance, and taxes), main-

taining the property in the condition it was in at the time of seizure, taking reasonable measures (including insurance) against waste, risk, or loss, and indemnifying the seizing agency against liability relating to the property. The seizure warrant may specify that rents on income properties go to the property manager/substitute custodian to prevent a negative cash flow. It may even assess rent against the owner/occupant, payable at the conclusion of the forfeiture proceedings, in the event the government prevails.

A seizure warrant can also accomplish an unseizure seizure after an actual seizure in several ways. First, avoidance of possession and its responsibilities is possible by specifying the release of the property, after the seizure, to the claimant in exchange for a bond, or "substitute *res*." The money, in the amount of the value of the property, substitutes for the seized property. The claimant keeps the property in any event and the party that prevails in subsequent legal actions gets the money. The agency may deposit the money in an interest bearing account, so instead of generating storage costs and depreciating in value, the "seized property" costs nothing to store and appreciates in value. This procedure is commonplace in maritime forfeitures,<sup>7</sup> but it is applicable to all types of property.<sup>8</sup>

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**The sale of seized property, by court order, may occur before the conclusion of forfeiture proceedings, in an action sometimes called an "interlocutory sale."**

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The sale of seized property, by court order, may occur before the conclusion of forfeiture proceedings, in an action sometimes called an "interlocutory sale." The warrant may specify the sale of the property after a stated period of time absent of objection from any interested party. The proceeds of the sale become the substitute *res* which the agency deposits in an interest bearing account. An interlocutory sale is most useful when the property is perishable. However, the agency should consider a seizure warrant ordering the technique in connection with any property when such a sale would obviously benefit all parties and notice to all interested parties is practicable.

**Seizure Actions**

Seizure warrants can also be useful to property managers by giving instructions on how to handle situations that arise during or soon after seizure:

- *Bank, Brokerage, or Other Accounts* - The warrant may direct that a conveyance, such as a cashier's check, is made payable to the clerk of the ordering court or to the seizing agency's special seizure account. Further, the warrant may instead direct the bank to open a new account in the name of the clerk of the court and deposit the seized property into the new account.
- *Renters, Lessees, and Debtors* - The warrant may direct the clerk of the court or the property manager to receive

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## Preseizure Planning...

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payments on rent, a lease, a promissory note, or the like.

- *Keys, Equipment, and Similar Items* - The warrant may direct individuals in possession of keys, equipment, and other items related to seized property to turn these items over to the seizing officer. Such explicit instructions can help to avoid unpleasantness over such issues at the seizure location and can make towing bills and return trips unnecessary.
- *Large Cash Seizures* - The warrant may provide for the deposit of large amounts of seized cash at a place other than with the clerk of the court. This may include a bank of the seizing agency's choice, where after-hours deposit may be possible and where a money-counting machine is available.
- *Ongoing Businesses* - The warrant may designate a property manager or receiver and may outline a general course of action. Such action, for example, may include the closing of a business and sale of its assets, the continuous operation of the firm, or the sale of the business as an ongoing concern. Many criminals operate business in violation of applicable laws or used these firms to launder criminal proceeds. These companies may not be profitable if run legally. Such businesses are best left in the custody of

the owner/operator, with government oversight power, and the seizure warrant can specify such a course.

- *Hazardous Waste and Other Toxic Material* - The warrant may direct the release of the seized property if an inspection reveals the site harbors hazardous waste or toxic material. The warrant should also order for the notification of environmental authorities.
- *Inventory of Seized Items* - The warrant may help to avoid some management problems by specifying for an inventory of seized items. This can be especially helpful for areas not addressed or inadequately addressed by department policy statements. The inventory should be thorough. For example, inspect real property for structural soundness, and examine the contents of closed containers found in seized vehicles.
- *Secondary Seizure Warrants* - The wording of the warrant may avoid the need for a second warrant. For example, the warrant might state that the seizure order applies to unspecified seizable items found in plain sight during the seizure or to third parties. The warrant might instead specify a procedure for amending it easily (with streamlined judicial approval) to cover additional property not described in the original warrant.

- *Possessory Lienholders, Such as Mechanics* - The warrant may state that the seizure does not affect the interest of possessory lienholders. If the government prevails in its forfeiture action, then the lien is paid. If the government does not prevail, the property will revert back to the lienholder.
- *Civil Liability* - The warrant may provide that individuals who turn property over to the seizing agency pursuant to the warrant are not liable for lawsuits based on that action. This provision is useful in getting cooperation from third parties who are in possession of the property.
- *Other Circumstances* - Many other circumstances may merit attention in preparing a warrant. Upon identification of a potential property management, the first consideration should be how the judge can help through some provision in the seizure warrant.

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**Master affidavits can be helpful in organizing information and in planning strategies in complex investigations.**

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### Master Affidavits

Property management success often directly relates to the amount of knowledge on, and preparation for, property issues available at the time the investigation becomes known to

the targets. Master affidavits can be helpful in organizing information and in planning strategies in complex investigations. They can be useful in integrating the criminal and civil remedies, search and seizure warrants, and investigative, management, and prosecutive functions.

### **Preparation of a master affidavit should begin as soon as it appears the case will become complex.**

Preparation of a master affidavit should begin as soon as it appears the case will become complex. The agency should coordinate the master affidavit, as it grows, with a link chart that does more than link suspects. The link chart should be a "case chart" listing the actors, acts, search warrant scenes, seizure warrants, and, if possible, key evidence and witnesses. It and/or its matrix foundation should display the key names, dates, places, vehicle identification numbers (VIN's), addresses, and descriptions necessary to write the search and seizure warrant, guide witness interviews and grand jury testimony, structure the indictment and civil complaint, and initiate civil discovery.

The master affidavit can serve, along with its companion matrix foundation and case chart, to communicate with investigators, supervisors, and prosecutors.<sup>9</sup> The organization for it should be similar to an affidavit for a search or seizure warrant and should describe the background and expertise of the affiant and the affiant's sources, give a summary of the case and the offenses,

and state the facts, chronologically, by area of the case if there are several. The master affidavit should state conclusions about both search and seizure issues based on the facts and expertise and should support the property management aspects of the proposed seizure warrant.

Seizure warrant affidavits that grow from the master affidavit are little different in content from search warrant affidavits. The same type of evidence supports probable cause for seizure.<sup>10</sup> Therefore, it may rely heavily on the expertise of individuals other than the affiant. The appendix to the affidavit and its seizure warrant lists what property the agency may seize. This appendix should include such specifics as VIN's, addresses, legal descriptions and tax parcel numbers of real property, and serial numbers, to the extent known.

#### **In Summary**

Property management, from pre-seizure planning through property disposition, is a critical element of a financial remedies program. The process of preparing for seizures, including development of affidavits, also offers an opportunity to organize a complex case and to better coordinate a prosecution. The law often requires seizure warrants. In the absence of a legal requirement, a seizure warrant can present important advantages for seizure and later property management. A well planned seizure warrant, based on practical experience, is the most important single tool of a successful property management unit.

- Cameron Holmes

#### *About the Author*

*Cameron Holmes, an Assistant Attorney General in Arizona, is in charge of the State Financial Remedies Unit.*

#### **ENDNOTES**

<sup>1</sup>*G.M. Leasing Corp. v. United States*, 429 U.S. 338, 97 S.Ct. 619, 50 L.Ed.2d 530 (1977).

<sup>2</sup>*United States v. Property at 4492 S. Livonia Road*, 889 F.2d 1258 (2d Cir. 1989).

<sup>3</sup>See 18 U.S.C. § 1963 (e), 21 U.S.C. § 853 (g), A.R.S. § 13-4310 (A).

<sup>4</sup>*New River Yachting Ctr., Inc. v. M/V Little Eagle II*, 401 F. Supp. 132 (S.D. Fla. 1975).

<sup>5</sup>*United States v. One Parcel of Real Property*, 767 F.2d 1495 (11th Cir. 1985) (wife of restaurant owner).

<sup>6</sup>*In re Kingsley*, 802 F.2d 571, 579 (1st Cir. 1986) (residence).

<sup>7</sup>*United States v. Marunaka Maru No. 88*, 559 F. Supp. 1375 (D. Alaska 1983).

<sup>8</sup>*In re Jackson*, 35 F.2d 931 (N.D. N.Y. 1929) (plane in winter).

<sup>9</sup>Since complex cases often involve facts relevant to other cases and future cases, they may also help bridge these gaps of space and time.

<sup>10</sup>*United States v. \$400,000 in U.S. Currency*, 831 F.2d 84, 87 (5th Cir. 1987), *United States v. One 56-Foot Yacht Named Tahuna*, 702 F.2d 1276, 1282 (9th Cir. 1983), *United States v. 1975 Mercedes 280S. Etc.*, 590 F.2d 196, 199 (6th Cir. 1978), *Ted's Motors, Inc. v. United States*, 217 F.2d 777, 780 (8th Cir. 1954).

B O O K S H E L F

**Trafficking**, by Berkeley Rice, St. Martin's Press, New York, 1991, \$5.95 (softcover).

The media often treat the illegal drug trade as though young, uneducated, violence-prone males dominate it. Actually, the street-level dealer is the last link in a long illicit business chain that usually starts in another country.

*Trafficking* provides a refreshingly accurate, alternative look at another vital link in the drug distribution chain: high-level drug smuggling.

In 1986, indictments were handed down against the so-called "Air America" ring. At that point, it was the largest drug smuggling operation in U.S. history. Headquartered in Scranton, Pennsylvania, the ring moved more than \$2 billion in illegal drugs (street value) over a four-year period.

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### **...Trafficking explores both the "how" and "why" of drug smuggling.**

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In its detailed look at the Air America ring, *Trafficking* explores both the "how" and "why" of drug smuggling. The book begins by recounting one of the ring's many flights from a small dirt runway in Columbia. Soon after, the author delves into the smugglers' pasts and describes their reflections after a halt in their operations due to arrests. These observations offer valuable insight into the financial motivations of high-level drug traffickers.

The role of financing is a little understood aspect of the illegal drug business. Many perceive these transactions to be too complex for narcotics investigators to unravel and understand. Therefore, its study is for the most part avoided.

*Trafficking* helps to shed some light on this subject by providing an understandable overview of how the pieces of the drug-financing and money-laundering puzzle fit together.

A lot of the drug money ends up in accounts at banks and brokerage houses where smugglers convert a good deal of it into cashier's checks, traveler's checks, bearer bonds, or other convenient negotiable instruments.

In more imaginative schemes, traffickers use illegal funds to purchase airline tickets (serving as a highly liquid form of scrip) or to buy winning lottery tickets at a premium so the "owner" has a new-found source of income to declare.

In describing money-laundering strategies used by the Air America ring, the author reveals that these drug smugglers were sophisticated businessmen driven by greed, rather than stereotypical uneducated thugs.

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**In the summer of 1984, Air America's founder, Rik Luytjes, was earning more than \$1.5 million a week and needed a quick and easy way to launder this enormous amount.**

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In the summer of 1984, Air America's founder, Rik Luytjes, was earning more than \$1.5 million a week. He needed a quick and easy way to launder this enormous amount of money.

His solution was the fraudulent sale of a legitimate company he owned. The company which he had not been able to sell the year before for \$2 million, was miraculously sold--on paper--for \$14.2 million.

As the company's value had not changed appreciably during the year, the inflated selling price was an instant tipoff of a possible sham. Other indicators of an illegal scheme were Luytjes' retention under a management contract for \$288,000 a year and, most importantly, the absence of a legitimate buyer.

For income tax purposes, Luytjes declared the sale at only \$10.2 million and paid a capital gains tax of \$2.3 million. The other \$4 million went directly into an account in the Cayman Islands, whose strict bank secrecy laws at that time provided an additional shield of anonymity for Luytjes' money.

In sum, *Trafficking* is an interesting account of one of America's largest and most profitable drug-smuggling rings and the financial motivations of its members.

- Steve DeNelsky

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## RECENT JURISDICTIONAL ISSUES IN ADOPTIVE SEIZURES

The recent decision by the United States Court of Appeals for the Seventh Circuit in *United States v. One Chevrolet C-20 Van*, 924 F.2d 120 (7th Cir. 1991), and other decisions on jurisdictional issues in adoptive seizures, bring to mind how essential it is to exercise care when one agency of the government attempts to adopt a seizure originally made by another government agency.

It is settled law that the United States may adopt the seizure of a state government agency with the same effect as if it had originally been made by the authorized seizing agency. *The Caledonian*, 4 Wheat. 100, 101.

### This doctrine may become the "Catch 22" of adoptive seizure practice and snare the unwary.

However, care should be exercised before any seizure is adopted because there may be unresolved jurisdictional issues which affect the second (adoptive) seizure. This results from a long established doctrine known as the "exclusive jurisdiction doctrine." This doctrine may become the "Catch 22" of adoptive seizure practice and snare the unwary.

The exclusive jurisdiction doctrine was established by the United States Supreme Court in *Penn General Casualty Co. v. Pennsylvania*, 294 U.S. 189 (1935), and provides a common thread throughout the recent

decisions in adoptive seizures. In *Penn General Casualty Co.*, the Pennsylvania Court of Common Pleas and the Federal District Court each asserted authority to enjoin the insolvent Penn General Casualty Company, and its officers or agents, from transacting any business and from disposing of its property and restraining and enjoining all persons, other than the insurance commissioner and his agents, from taking possession of, or interfering with, its property.

### The company refused to comply because of the restraining order of the Federal District Court.

Both courts issued restraining orders on the company. The Court of Common Pleas then entered its final decree that the Penn General Casualty Co. be dissolved and directed the insurance commissioner to take possession of and liquidate the business. The company refused to comply because of the restraining order of the Federal District Court. The issue before the Supreme Court in *Penn General Casualty Co.* was whether the State court, in view of the pendency of the suit in the Federal District Court, had jurisdiction to enter a decree.

The Supreme Court explained that where actions are *in personam* for recovery of money or injunction, both state and federal courts having concurrent jurisdiction may proceed with litigation, at least until judgment is obtained in one court. *Id.* at 195.

However, of two courts having concurrent jurisdiction *in rem*, the one first taking possession acquires exclusive jurisdiction over the control and disposition of the property. *Id.* Since a bill was filed in the Federal District Court before the application of the Attorney General to the Pennsylvania Court of Common Pleas, the jurisdiction of the Federal District Court first attached and it alone could assert control over the property and proceed with litigation. This principle has application in adoptive seizure litigation.

Application of the exclusive jurisdiction doctrine enunciated in *Penn General Casualty Co.* to the adoptive seizure context depends on the facts of the individual case and whether the Federal District Court considers the prior state forfeiture proceeding *in personam* or *in rem*.

Some of the cases which have recently considered this issue hold that when Federal authorities adopt a seizure from state authorities using a proceeding considered *in personam* under state law, the Federal District Court then has exclusive *in rem* jurisdiction.

Several recent cases support this proposition. For example, in *United States v. One 1986 Chevrolet Van*, 927 F.2d 39 (1st Cir. 1991), a 1986 Chevrolet van was seized from the owner after a search warrant was obtained and issued pursuant to the request of the Middletown Rhode Island Police. A subsequent search revealed two bags of marijuana hid-

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### Recent Jurisdictional Issues... from page 7

den in the van. Since enforcement under federal seizure laws allowed for seizure of the vehicle, the Middletown Police referred the van to the U.S. Drug Enforcement Agency (DEA) for the institution of an administrative forfeiture action. After the owner filed a claim and cost bond, the matter was referred to the United States Attorney.

In November, 1988, the owner, Mr. Marshall, was a defendant in a state criminal case for possession of marijuana, and in that case, subsequently filed a motion to return his van. In April, 1989, the United States filed a verified complaint for forfeiture *in rem* against Marshall's van in the district court pursuant to 21 U.S.C. § 881. The First Circuit Court of Appeals ruled that the district court had subject matter jurisdiction to hear the action because Rhode Island authorities never instituted a forfeiture action against the van.

### The First Circuit Court of Appeals ruled that the district court had subject matter jurisdiction to hear the action....

The only action in state court was the *in personam* criminal action against the claimant for possession of marijuana. The district court action, in contrast, was a forfeiture action under 21 U.S.C. § 881 and was a civil *in rem* proceeding which was "independent of any factually related criminal actions." 927 F.2d, at 44. Since the federal court was the only

court attempting to exercise *in rem* jurisdiction, there were not conflicting *in rem* proceedings in state and federal courts.

In another recent case, the Fourth Circuit Court of Appeals decided that North Carolina state forfeiture proceedings are also criminal in nature and are thus *in personam* proceedings. *United States v. Winston Salem Forsyth County Bd. of Ed.*, 902 F.2d 267, 271 (4th Cir. 1990). In *Winston Salem*, police officers, pursuant to a search warrant, searched the residence of a Mr. Alston and recovered weapons, cocaine, and cash.

Alston was then arrested and charged with possession of cocaine with the intent to sell or deliver it and intentionally maintaining a building to keep or sell controlled substances. Subsequently, on April 15, 1987, the state prosecution of Alston was voluntarily dismissed. On April 23, 1987, the state district court ordered the police department to return the seized cash to Alston. The police department did not comply because no notice of the order was delivered to it.

At the request of the police department, the DEA officials adopted the seizure of the cash on February 10, 1987. The cash was then transferred to the DEA which initiated administrative forfeiture proceedings. On April 24, 1987, the DEA declared the cash forfeited to the United States and honored the request of the police department for an equitable distribution. State charges were then reinstated and Alston was subsequently indicted and convicted.

### The court held that the state forfeiture proceeding was criminal in nature and was an *in personam* proceeding.

The court held that the state forfeiture proceeding was criminal in nature and was an *in personam* proceeding. *Id.* at 271. The court claimed that this interpretation was consistent with the traditional rule that unless otherwise provided, criminal forfeitures are *in personam*, not *in rem*, proceedings.

Since federal forfeitures under section 881 are civil in nature and are *in rem* proceedings, they were not competing *in rem* proceedings. *Penn General Casualty Co.* did not require that the jurisdiction of the district court give way to the state court.

In a civil forfeiture proceeding for a motorcycle seized in connection with drug offenses, the United States sought to enjoin state court orders which affected possession of the motorcycle. *United States v. Lot B Governor's Rd.*, 755 F. Supp. 487 (D.N.H. 1990). The district court observed, under the doctrine of adoptive forfeiture, a federal writ of arrest of the motorcycle dated back to the date the motorcycle was initially seized by state law enforcement authorities.

In contrast to those courts that found the state action to be *in personam*, some courts have held that the state action was *in rem*, giving the state court the initial exclusive jurisdiction.

Under such circumstances, some courts have held that, unless the *res*

was abandoned by the state court, federal authorities should first seek a turnover order (to require the court to release the property) from the state court before adopting a seizure of a state agency. Several recent cases have espoused this proposition.

In *United States v. One Chevrolet C-20 Van*, 924 F.2d 120 (7th Cir. 1991), a woman named Anderson was arrested by the Batavia, Illinois, police for driving under the influence of alcohol. The police department took custody of her van after a post-arrest inventory search revealed over 100 grams of marijuana under the driver's seat.

Four days later, the police requested by letter that the Federal Bureau of Investigation (FBI) initiate forfeiture proceedings. Anderson then notified the FBI that she wished to contest the forfeiture. The matter was referred to the United States Attorney's Office for institution of judicial forfeiture proceedings. Throughout this period, the FBI maintained control of the van. On September 22, 1988, the State of Illinois filed a complaint in state court for motor vehicle forfeiture against the van.

The federal government did not file a forfeiture action in Federal District Court until October 27, 1988. Following the filing of the Federal judicial forfeiture case, the van was transferred to the custody of the United States Marshals Service. On December 7, 1988, the state voluntarily dismissed the state forfeiture action, but took no action with respect to the return of the vehicle to Anderson. On January 31, 1989, Anderson was indicted for posses-

sion of marijuana with intent to deliver and simple possession. Following her conviction of possession and sentencing to probation, the Federal District Court, on February 15, 1990, issued a decree ordering forfeiture of the vehicle pursuant to 21 U.S.C. § 881(a)(4).

The Seventh Circuit Court of Appeals held that the state court and not the Federal District Court had jurisdiction over the van. It asserted that there was no authority for this type of transfer between executives of agencies.

The Batavia police had no authority to transfer the van to the United States Marshal without a turnover order from the circuit court of the county in which the van was seized. Because possession obtained through an invalid seizure neither strips the first court of jurisdiction nor vests it in the second, the state court was the first and only court to acquire possession over the property at issue.

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### **A failure on the part of the state court to prosecute does not allow the Federal District Court to assume jurisdiction.**

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A failure on the part of the state court to prosecute does not allow the Federal District Court to assume jurisdiction. Jurisdiction was not conferred on the Federal District Court because federal authorities, before state court forfeiture action was filed, began an administrative forfeiture proceeding concerning the van.

The Federal District Court had no jurisdiction to order forfeiture of the van because at the time the complaint was filed in federal court, the state forfeiture action was pending and the state court, therefore, had jurisdiction over the van to the exclusion of federal court. Also, the federal authorities did not seek a prior turnover order from the circuit court of the county in which the van was seized before proceeding with the federal action.

The Seventh Circuit Court of Appeals previously again examined this same issue in *United States v. \$79,123.49 in United States Cash and Currency*, 830 F.2d 94 (7th Cir. 1987) where it held that a federal court may not take jurisdiction over property seized by a federal agent prior to the termination of a state court proceeding involving the same *res*.

In *\$79,123.49*, Wisconsin officials brought a forfeiture action against the currency taken from the claimants in the course of a drug deal. In dismissing the action, the Wisconsin court ordered the state to deposit the money with the clerk of courts for later delivery to the claimants. After the currency was deposited with the court, a Deputy United States Marshal came to the state courthouse and seized the currency to subject it to a federal forfeiture action pursuant to 21 U.S.C. § 881(a)(6). The court held the doctrine of exclusive jurisdiction applied: "when state and federal courts each proceed against the same *res*, 'the court first assuming jurisdiction over the property may maintain and

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exercise that jurisdiction to exclusion of the other.'" *Id.* at 96 (quoting *Penn General Casualty Co. v. Pennsylvania*, 294 U.S. 189, 195 (1935)).

The Appeals Court noted "if only one of the actions is *in rem* or *quasi in rem*, both cases may proceed side by side." *Id.* at 97. In the case at hand both proceedings were *in rem*; "the statute under which the Wisconsin case was brought specifically provided that a forfeiture 'is an action *in rem*,' Wis. Stat. § 161.555, and federal courts have consistently interpreted 21 U.S.C. § 881 to like effect." *Id.*

Thus, the Court explained that under Wisconsin law, federal authorities could have applied to the court for an order directing that the money be turned over directly to them or in their presence. Had they done so, of course, it would still have been up to the state court to decide whether to grant the relief sought. If the court had denied relief, the federal government might have had difficulty acquiring the money.

The only possible significance of the district court's exclusive jurisdiction is that the United States might not have been able to receive a final judgment of forfeiture in the state court. That fact, however, would not preclude federal authorities from applying to the district court for an orderly turnover that would permit them to protect the federal government's interest. *Id.*, at 98.

In *United States v. One 1985 Cadillac Seville*, 866 F.2d 1142, 1145 (9th Cir. 1989), the District At-

torney filed a complaint for forfeiture of the money seized pursuant to an arrest for driving under the influence on March 11, 1985. That day, the Internal Revenue Service (IRS) issued jeopardy and termination assessments against the claimant. The next day, the IRS filed a tax lien on the money and, on March 13, the IRS served a levy on the Santa Cruz County Sheriff's Department.

The DEA seized the money on March 19 as narcotics-related property subject to forfeiture under 21 U.S.C. § 881. On August 1, the United States filed a complaint in the district court for forfeiture of the money and the automobile.

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### **Some affirmative act of abandonment on the part of the state court is required for the federal court to have jurisdiction.**

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On September 4, 1986, the government moved for summary judgment, which the court granted. The claimant appealed both the order granting summary judgment, as well as the dismissal of his motion for declaratory judgment that the tax lien was superior to the DEA forfeiture claim. Some affirmative act of abandonment on the part of the state court is required for the federal court to have jurisdiction.

Following the reasoning in this line of cases, if the state has commenced an *in rem* proceeding, the United States should seek a turnover from the state court even when the state authorities ask the United States to adopt their seizure and are willing to dismiss voluntarily the state case.

This should also be the proper procedure to follow where it is not known whether the court will consider the state action as *in rem* or *in personam* under the state forfeiture law. This is the recommended procedure, otherwise counsel for the United States may subsequently find the federal case dismissed for lack of jurisdiction.

An alternative may be for counsel for the United States to file the federal action and request a stay pending the resolution of the state court action. At the same time, counsel for the United States can notify the state court of its pending action, and request the state court to notify the federal court when the former has concluded its action against the property. Once the state court action is concluded, the federal court can dissolve the stay and proceed to exercise exclusive jurisdiction over the *res*. This certainly is the type of procedure advocated by the Supreme Court in the *Penn General Casualty Co.* case.

- James J. Brown

#### *About the Author*

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**FEDERAL--Innocent Owner;  
Consent**

*United States of America v. Certain Real Property and Premises*, 737 F. Supp. 749, 2nd Cir. (1990). The U.S. District Court for the Eastern District of New York granted summary judgment in favor of the government upholding forfeiture of the claimants' real estate pursuant to 21 U.S.C. 881(a)(7).

The forfeiture involved the claimants', building, which was leased to two tenants who were involved in various drug-related violations. The claimants had been alerted to the drug violations by their city councilman, who had advised them of narcotics sales and arrests on the premises.

The councilman recommended that the claimants consult an attorney. Their attorney advised that mere allegations of drug activity could not justify institution of eviction proceedings and until a tenant was "convicted" such action would constitute harassment. Accordingly, the claimants did not attempt to evict their tenant.

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**The trial court ruled, as a matter of law, that knowledge alone by a property owner is sufficient grounds for forfeiture in a case of this type.**

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The trial court ruled, as a matter of law, that knowledge alone by a property owner is sufficient grounds for forfeiture in a case of this type. The Second Circuit Court of Appeals reversed the summary judgment granted by the trial court and noted that when the trial court made its decision, it did not have the benefit of the Second Circuit's decision in the case of *U.S. v. 141 Street Corp.*, 911 F.2d 870 (2nd Cir. 1990).

This decision mandated consideration of consent as well as knowledge when adjudicating an innocent owner defense to drug forfeiture.

On appeal in this case, the government contended that proof of an owner's knowledge precludes a defense based on lack of consent. The Second Circuit, in reviewing the legislative purpose of Section 881(a)(7) and its decision in the *141 Street* case, construed the language of the statute to reflect Congress' concern that innocent owners be insulated from the severe penalties of the act. Further, it rejected the concept that a defense may depend on lack of consent or lack of knowledge as being nothing more than dicta in the *141 Street* case.

In conclusion, the court further rejected the government's contention that the consent of the owners was present in this case and proceeded to remand the case to the District Court to resolve the issue of possible consent.

The Second Circuit concluded by stating, "...we recognize that Congress struck a balance between law enforcement and the constitutional rights of individuals. Our opinion simply reflects these competing concerns with an eye toward maintaining the intended balance."

**FEDERAL--Innocent Owner;  
Consent**

*U.S. v. Premises Known as 710 Main Street, Peekskill, N.Y.*, 753 F. Supp. 121 (S.D.N.Y. 1990). On August 13, 1990, the District Court ordered return of the claimant's real property (744 F. Supp. 510 (S.D.N.Y. 1990)).

Subsequently, the government moved for a reargument of that decision for various reasons, including the government's contention that the Second Circuit Court of Appeals decision in the case of *U.S. v. 141 Street Corp.*, 911 F.2d 870 (2nd Cir. 1990), rendered four days after the August 13 opinion, would change the decision.

Upon rehearing, the District Court noted the claimant in this case, unlike the claimant in the *141 Street* case, introduced evidence at trial demonstrating he took various steps to terminate the drug problem at his property.

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**Legal Corner**  
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The court then held that even under the standard set forth by the Second Circuit in the *141 Street* case, the claimant "...did all that he could have reasonably been expected to do to keep the illegal drug activity from his property once he learned of it."

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**The fact that the claimant was unsuccessful in resolving the drug problems ...should not be interpreted as the claimant's consent to that activity.**

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The court also held that the fact the claimant was unsuccessful in resolving the drug problems (as were the well-trained police who patrol the area) should not be interpreted as the claimant's consent to that activity.

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**A S S E T F O R F E I T U R E B U L L E T I N**

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The District Court further held that "...a property owner is not required to take heroic or vigilante measures to rid his or her property of narcotics activity....Indeed, encouraging such a standard would result in the dangerous precedent of making

property owners in drug-infested neighborhoods into substitute police forces. Rather, a property owner need only take all reasonable steps to accomplish that result."