

TRANSACTIONAL REAL ESTATE

A Field Guide to Asset Forfeiture



By
**Peter E.
Fisch**



And
**Mitchell L.
Berg**

A sset forfeiture is a process by which the U.S. federal government may seize, without compensation, any privately-owned real or personal property that facilitated or was otherwise involved in the commission of certain types of criminal activities. The government may initiate forfeiture proceedings in either civil or criminal court depending on the underlying violation, and civil and criminal forfeitures are governed by distinct sets of statutory rules. While asset forfeiture is commonly thought of as applying to personal property, such as a vehicle used to illegally transport narcotics, this article will discuss its application to real property. Consider the high-profile seizure of the midtown-Manhattan

skyscraper at 650 Fifth Avenue: in what is being called the largest terrorism-related civil forfeiture in U.S. history, the federal government seized the billion-dollar property after a jury concluded that its owners had violated monetary sanctions against Iran and had engaged in money laundering schemes.¹

The risks of real property forfeiture are not limited to anti-money laundering or terrorism-related violations. With many state legislatures legalizing the medical and recreational use of marijuana, potential criminal forfeitures stemming from violations of the Controlled Substances Act—which may be enforced with respect to marijuana notwithstanding the liberalization of state law—leave landlords, lenders, and tenants exposed to greater risk of losing their property interests.²

Asset forfeiture can present catastrophic risk to a lender in a non-recourse loan secured by real prop-

erty (similarly, a property owner is subject to risk based on the activities of its tenants). Recently, lenders have increasingly focused on the risk exposure that asset forfeiture presents. While, as outlined below, lenders and owners alike have available defenses to asset forfeiture, lenders have also resorted to non-recourse carveout guarantees in order to ameliorate the risk of asset forfeiture.

Civil Asset Forfeiture

The Civil Asset Forfeiture Reform Act (CAFRA) sets forth the procedures used in almost all civil forfeitures under federal law. As a general rule, any real or personal property may be subject to civil forfeiture if it is used to commit or attempt to commit certain illegal acts. The lengthy list of violations leading to civil forfeiture is codified in 18 U.S.C. §981(a)(1) and includes such federal crimes as money-laundering, wire and mail fraud, and acts of

PETER E. FISCH and MITCHELL L. BERG are partners at Paul, Weiss, Rifkind, Wharton & Garrison. MATHEW SAIONTZ, a summer associate at the firm, assisted with the article.

terrorism against the United States. In order for the government to seize any real or personal property, it must establish, by a preponderance of the evidence, that the property is appropriately subject to forfeiture under §981. 18 U.S.C. §983(c).

The government's capacity to seize real property can have harsh consequences for a wide range of interested parties. Consider, for example, a residential landlord whose tenant commits a criminal act resulting in civil forfeiture of her real property. Can the government seize the landlord's real property if she, as the owner, is innocent of any crime? Alternatively, what happens to a lender with a mortgage lien on the landlord's seized real property? Further, what happens to the other tenants in the building? Can each of their tenancies be forfeited by the actions of a fellow tenant? Section 981(f) clarifies that "all right, title, and interest" in property subject to civil forfeiture "shall vest in the United States upon commission of the act giving rise to forfeiture," implying that the landlord's, lender's, and each of the tenants' interests in the real property are in fact subject to the government's forfeiture rights. Fortunately, these parties are not without a defense.

The Innocent Owner Defense

CAFRA provides a statutory defense for each innocent party

who has an ownership interest in property that is subject to forfeiture. As codified in 18 U.S.C. §983(d), the Innocent Owner Defense states that an "innocent owner" shall not have its property interest forfeited under any civil forfeiture statute. An individual asserting this defense bears the burden of proving, by a preponderance of the evidence, that she is an innocent owner of the forfeited property. 18 U.S.C. §983(d)(1). CAFRA strictly defines an "innocent owner" as an "owner" who "(i)

While asset forfeiture is commonly thought of as applying to personal property, such as a vehicle used to illegally transport narcotics, it can also be applied to real property.

did not know of the conduct giving rise to forfeiture, or (ii) upon learning of the conduct giving rise to the forfeiture, did all that reasonably could be expected under the circumstances to terminate such use of property." 18 U.S.C. §983(d)(2)(A). Further, an "owner" is broadly defined to include any person "with an ownership interest in the specific property sought to be forfeited, including a leasehold, lien, mortgage, recorded security interest, or valid assignment of an ownership interest." 18 U.S.C. §983(d)(6).

However, the statute does not permit a person with a general unsecured interest in, or claim against, the property to raise the defense. If a court determines that a particular individual is an innocent owner, the court has the discretion to fashion an appropriate remedy by (a) severing the property (so that the interest of the innocent owner is not subject to the forfeiture), (b) transferring the property to the government with a provision that the government compensate the innocent owner to the extent of her ownership interest, or (c) permitting the innocent owner to retain the property subject to a lien in favor of the government to the extent of the forfeitable interest in the property. 18 U.S.C. §983(d)(6); *see also* 28 C.F.R. § 9.7.

The innocent owner defense protects an unknowing landlord whose tenant's actions led to forfeiture of real property, the lender with a lien on the property and the innocent tenants of the property, by allowing each such party to protect its interest in the property by establishing the elements of the defense. If such a party succeeds in doing so, the court then bears the burden of fashioning an equitable and just remedy that accommodates the government's interest in forfeiture while protecting the interests of the innocent owner or

compensating the innocent owner for its losses.

Criminal Forfeitures and the CSA

Criminal forfeiture proceedings relating to the Controlled Substances Act (CSA) are generally governed by a separate set of rules than civil forfeitures.³ Perhaps most notably, criminal forfeiture requires a far higher standard of culpability: under 21 U.S.C. §853(a)(2), a person must be convicted of a CSA violation that results in one or more years of imprisonment before the government may seize any property used or intended to be used to commit or facilitate the violation. Unlike civil forfeiture, the government must prove beyond a reasonable doubt that the individual committed the CSA violation before the property may be seized.

21 U.S.C. §881(a) provides that criminal forfeiture may apply to any real or personal property that is used or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of the CSA. For such property, any right, title, or interest in the land is automatically forfeited to the government at the moment that the CSA violation occurs. 21 U.S.C. §853(c). As written, §881(a) forfeits to the government all property rights associated with real property that was used, in any manner

or part, to commit or facilitate the commission of a violation of the CSA, and courts have consistently maintained that forfeiture of an entire tract of real property is justified by such violations.⁴ Consequently, criminal forfeiture may leave a wide range of stakeholders in real property, like the landlords, lenders, and tenants as discussed above, vulnerable to financial loss. However, unlike civil forfeitures, each of these parties has multiple options for protecting its interests in the criminally forfeited property.

The government's capacity to seize real property can have harsh consequences for a wide range of interested parties.

First, in accordance with 21 U.S.C. §853(n)(6)(a), any person (other than the defendant committing the crime) may petition for recovery if it establishes, by a preponderance of the evidence, that it has a legal right, title, or interest in the property that invalidates the order of forfeiture because (i) this right vested in the petitioning party before vesting in the defendant, or (ii) this right was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property. 21 U.S.C. §853(n)(6)(A). The question of whether a particular legal right vested in

the petitioning party before vesting in the defendant is determined by state law.⁵

However, whether the petitioning party's legal right was superior to any right, title, or interest of the defendant at the time of commission of the acts giving rise to forfeiture may be determined by state or federal law, depending on the jurisdiction. For example, while the U.S. Court of Appeals for the Seventh Circuit held that courts should look to state property law to determine whether a given property interest is subject to forfeiture,⁶ the U.S. Court of Appeals for the Eleventh Circuit disagreed, concluding that "while state law defines the property interests a defendant has, federal law determines whether those property interests are forfeitable for the commission of a federal crime." *U.S. v. Fleet*, 498 F.3d 1225, 1231 (11th Cir. 2007).

Alternatively, even if a petitioning party's interest did not vest prior to the interest of the defendant, §853(n)(6)(b) provides that a party may petition for recovery if it establishes, by a preponderance of the evidence, that it is a "bona fide purchaser for value of the right, title, or interest in the property" and that, at the time of purchase, such party was "reasonably without cause to believe that the property was subject to forfeiture." Notably, in the context

of criminal forfeiture, “property” is broadly defined to include both real property and tangible and intangible personal property, including rights, privileges, interests, claims, and securities. 21 U.S.C. §853(b). Thus, under this approach, if a mortgagee with a lien on the forfeited property is a bona fide purchaser for value, it might be able to recover some or all of its financial interest in the property, though the amount of the reward is determined by the court. *See* 21 U.S.C. §853(n)(6).

To date, only one circuit court has squarely addressed this issue: in *U.S. v. Huntington Nat. Bank*, 682, F.3d 429 (6th Cir. 2012), the U.S. Court of Appeals for the Sixth Circuit determined that a party “who takes a security interest in property, tangible or intangible, in exchange for value, can be a BFP [bona fide purchaser for value] of that property interest under §853(n)(6).” In that case, Huntington National Bank (Huntington) had granted a client (hereinafter referred to as Cyberco) a line of credit secured by “a continuing security interest and lien” in all of Cyberco’s tangible and intangible personal property. After a number of Cyberco principals were charged with federal fraud and money laundering crimes, these principals agreed (through plea agreements) to forfeit to the U.S. government any interests they

possessed in relation to the alleged violations.

After receiving notice that Cyberco’s accounts were forfeited to the federal government, Huntington asserted its right to the funds in the Cyberco accounts by arguing that it was a bona fide purchaser of, and had a direct ownership interest in, the accounts under §853(n)(6)(b). The Sixth Circuit agreed, holding that “because Huntington purchased its security interest in the Cyberco Account for valuable consideration—in the form of loans and a line of credit—and had no cause to believe that the Cyberco Account was subject to forfeiture, Huntington is entitled to the protections of 21 U.S.C. §§ 853(c) and (n)(6)(B) as a bona fide purchaser for value.” While the *Huntington* case involves personal property, §853(b)’s broad definition of “property” strongly suggests that the holding should apply to real property as well.

.....●.....

1. Vivian Wang, *Manhattan Skyscraper Can Be Seized by U.S., Jury Finds*, New York Times (June 29, 2017).

2. Because 21 U.S.C. §903 states that the CSA preempts state law any time there is a “positive conflict between that provision of [the CSA] and that State law so that the two cannot consistently stand together,” the likelihood of a CSA-related forfeiture is largely dependent on the Department of Justice’s enforcement policy for marijuana-related violations. Notably, on January 4, 2018, Attorney General Sessions released a Memorandum rescinding the Obama-era policy of selective enforcement promulgated under Deputy Attorney

General James Cole, and directing all U.S. Attorneys to “enforce the laws enacted by Congress and to follow well-established principles when pursuing prosecutions related to marijuana activities.” *See Justice Department Issues Memo on Marijuana Enforcement*, Department of Justice, Office of Public Affairs (Jan. 4, 2018), <https://www.justice.gov/opa/pr/justice-department-issues-memo-marijuana-enforcement>.

3. While the two forms of forfeiture are governed by distinct statutory rules, 21 U.S.C. §881(d) states that the statutes governing civil forfeiture shall apply to criminal forfeitures so long as they are “applicable and not inconsistent” with the provisions thereof.

4. *See U.S. v. A Parcel of Land with A Bldg. Located Thereon at 40 Moon Hill Road, Northbridge, Mass.*, 884 F.2d 41, 44 (1st Cir. 1989) (“Even for an infraction of the narcotics laws far smaller in magnitude than that of appellants, forfeiture of the entire tract of land upon which the drugs were produced or possessed with intent to distribute is justifiable as a means of remedying the government’s injury and loss.”); *U.S. v. Santoro*, 866 F.2d 1538, 1543 (4th Cir. 1989) (rejecting the argument that §881(a)(7) only applied to the portion of the land where the drug violations occurred).

5. *See, e.g. U.S. v. Lester*, 85 F.3d 1409, 1412 (9th Cir. 1996) (“in drug forfeiture actions, ownership of property is determined by state law”).

6. *U.S. v. Lee*, 232 F.3d 556, 560 (7th Cir. 2000) (“we look to state property law to determine whether [Appellant’s property interest] was a property interest subject to forfeiture”).