

# Criminal Forfeiture Laws

## *Tying a Defendant's Hands* *Part One of a Two-Part Article*

By Robert J. Anello

Federal prosecutors increasingly have become enamored with the aggressive use of criminal forfeiture in white-collar cases. In 2008, the Department of Justice (DOJ) created a National Asset Forfeiture Strategic Plan to “develop and implement policies and procedures to ensure that asset forfeiture is an integral part of every investigation and prosecution.” Forfeiture is viewed by the government as a “vital weapon” in its arsenal to “strip criminals of their illicit wealth.” U.S. Department of Justice, Asset Forfeiture Program, “National Asset Forfeiture Strategic Plan 2008-2012” at p. 3. When, however, the government collection process begins before any determination of guilt, the zealous pursuit of the supposed fruits of the yet-to-be-proven crime runs smack into the constitutionally-protected right to a fair trial.

### BACKGROUND

Because criminal forfeiture is considered a part of a defendant's punishment, an individual first must be convicted of a crime before his property actually is subject to forfeiture. That being said, aided by statutes designed to prevent the secreting of assets, the government has exercised wide latitude in freezing or seizing assets connected to a charged crime prior to trial, thereby restricting a defendant's ability to use those funds to mount a defense. This restriction can have

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a particularly devastating impact in complex white collar cases where an effective defense can be expensive and where the government often paints allegations with a broad brush, thus calling into question a defendant's extensive business activity and thereby implicating virtually all of the defendant's assets.

The ability of a defendant to challenge the government's pretrial seizures in such cases is at issue in a case currently pending before the United States Supreme Court.

### THE BASICS OF THE CRIMINAL FORFEITURE STATUTE

For years, most judicial forfeiture actions were civil in nature and, accordingly, were instituted against the property, but not the individual owner. Criminal forfeiture statutes came to the forefront with the passage of the Racketeer Influence and Corrupt Organization Act of 1970 and Comprehensive Drug Abuse Prevention and Control Act of 1970. Heather J. Garretson, “Federal Criminal Forfeiture: A Royal Pain in the Assets,” 18 *Rev. Law and Soc. Just.* 45, 46 (2008). Today, legal authority exists to forfeit the proceeds of virtually all serious offenses.

Section 853 of Title 21 of the U.S. Code provides that any individual convicted of a crime punishable by more than a year in prison shall forfeit to the government any property derived from the proceeds of the crime, used in connection with the crime or associated with a criminal enterprise conducted or operated in conjunction with the criminal offense. The government's coffers have grown handsomely as a result of this legislation and the regular use of criminal forfeiture, which has become a routine part of federal criminal cases. Stefan D. Cassella, “Criminal Forfeiture Procedure: An Analysis of Developments in the Law Regarding the Inclusion of a Forfeiture Judgment in the Sentence Imposed in a Criminal Case,” 32 *Am. J. Crim. L.* 55 (Fall 2004).

Money collected through forfeiture is deposited into the DOJ Assets Forfeiture Fund. The funds are used to pay costs associated with forfeiture actions pursued by the gov-

ernment, but the Attorney General also is authorized to use the money to finance general investigative expenses. Department of Justice, “Asset Forfeiture Program, The Fund” (available at <http://1.usa.gov/1hOUjzt>). According to a July 2012 report from the United States Government Accountability Office, the fund is the largest it has ever been, having grown from \$500 million in 2003 to \$1.8 billion in 2011. GAO Report to Congressional Requesters, “Justice Assets Forfeiture Fund: Transparency of Balances and Controls over Equitable Sharing Should Be Improved” (July 2012).

Subsection (e) of section 853 allows the government to apply for a restraining order or injunction to preserve the availability of potential forfeitable property before trial, upon the filing of an indictment or information for a crime for which criminal forfeiture may be ordered. To sustain such an order, the government need only show that the grand jury has found the existence of probable cause linking the property to the alleged crime. In short, the standard of proof required to forfeit an individual's property is lower than the standard required to prove that the individual is guilty of the criminal activity that supposedly justifies the forfeiture.

### NEXT MONTH

In next month's issue, we will discuss a case currently before the U.S. Supreme Court: *Kalvey v. United States*, 12-464 (Oct. 15, 2012). It poses the question whether defendants who need potentially forfeitable money to finance their defense may challenge the evidentiary support and legal theory of the underlying charges at a pretrial hearing or whether they are limited to challenging the determination that the restrained assets are connected to the alleged criminal activity.