ASSET FORFEITURE

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Bulletin

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What To Do When Targeted Assets Turn Up Abroad...

Civil, *in personam,* forfeiture statutes make new approaches available for state and local law enforcement officials to reach assets outside the U.S. This article addresses methods that states with civil, *in personam,* forfeiture statutes may use to freeze and forfeit assets located in foreign countries.

Traditionally, states have passed statutes providing a means for seizing and forfeiting assets through civil, *in rem* jurisdiction. Civil forfeiture proceedings are not intended to punish a defendant or directed toward any property owner personally. The legal theory underlying civil forfeiture is that the thing—the *res*—itself is "guilty." In civil forfeiture, the *res* is vulnerable to forfeiture if it can be identified as the actual property involved in the criminal offense. Burdens of proof are the same as those for property interests elsewhere in the legal system. The government must demonstrate how the *res* was involved in the criminal offense. Procedural safeguards are in place to protect innocent owners who do not know that their property is being used to commit crimes, or who acquire the property afterwards.

Several states[1] have recently enacted legislation permitting assets to be frozen or forfeited through civil, *in personam,* jurisdiction. Under these new statutes, the state may proceed against a person within its jurisdiction, alleging the defendant owned instrumentalities, contraband substances, or the proceeds from certain crimes. The judgment makes the respondent personally responsible for surrendering those assets to the state. If the crime-related assets are outside the state's jurisdiction, assets within the state, equal in value to the tainted assets, may be substituted and forfeited to the state.[2]

In personam statutes share similar problems with *in rem* statutes when no assets are within the state to substitute for the crime-related assets outside the state's jurisdiction. Reaching assets in other states is difficult; freezing and forfeiting assets located in foreign countries may appear impossible. However, in the international context, *in personam* statutes can overcome these obstacles more easily than *in rem* statutes. Foreign governments often will not cooperate with *in rem* proceedings, especially when the requesting government does not have the object within its jurisdiction. They are more willing to assist in the investigation and with the final judgment when the proceeding is *in personam.* When the proceeding is *in personam,* the principles of civil and criminal forfeiture are blended to accommodate complex financial cases involving bank records, electronic funds, and intricate transactions routinely encountered in money laundering investigations.

With assistance from the Financial Crimes Enforcement Network (FinCEN)[3] of the U.S. Department of Treasury, as well as from Interpol,[4] state and local enforcement officials may identify and locate bank accounts and other assets owned by suspects or respondents in other countries. Two offices within the U.S. Department of Justice, the Office of International Affairs (OIA) and the Asset Forfeiture Office (AFO),[5] process requests to freeze and forfeit assets outside the U.S. They assist state and local officials in implementing the various means that federal prosecutors use to reach assets abroad.

Three Ways to Seek Forfeiture of Foreign Assets

Mutual Legal Assistance Treaties

Working together, the OIA and AFO attempt to freeze and forfeit foreign assets by three separate means. The most effective method is through Mutual Legal Assistance

Treaties (MLATs). MLATs are bilateral treaties that establish cooperative assistance between countries in criminal enforcement matters. MLATs clearly specify the duties and responsibilities of each signatory country; they have the force of law. Included in the MLATs are provisions for enforcing foreign seizure and forfeiture requests. Currently, the U.S. is a party to MLATs with 12 foreign jurisdictions: Anguilla, the Bahamas, the British Virgin Islands, Canada, the Cayman Islands, Italy, Mexico, Montserrat, the Netherlands, Switzerland, Turkey, and the Turks and Caicos Islands. In addition, executive agreements have been reached with Hong Kong and Great Britain, which contain terms similar to those in the MLATs for assistance in drug-related forfeiture matters.

In response to MLAT requests, many foreign countries may freeze and forfeit not only the assets directly related to the crime, but also substitute assets of equal value owned by the respondent or suspect.[6] If state or local officials have identified assets in a country with whom the U.S. has signed an MLAT, the AFO and OIA can assist in freezing and forfeiting the assets under the authority of the MLAT. All MLAT assistance is contingent upon an ongoing criminal investigation; any request for assistance must show that such an investigation is underway. Additionally, many MLATS are applicable only to certain criminal behavior; often crimes such as tax evasion will not warrant assistance from foreign countries under their MLAT with the U.S.

Letters Rogatory

If a state knows that a suspect's or respondent's assets are in a foreign country with whom the U.S. has not signed an MLAT, there are two other methods by which assets may be frozen and forfeited: letters rogatory and Vienna Convention requests. Letters rogatory, i.e., letters requesting legal action from a judge in one country to a judge or judicial authority in another, have been used successfully to forfeit assets abroad. Unlike the assistance guaranteed by an MLAT, the recipient country has no legal duty to cooperate with the request. Also, the process takes more time: the letter must be signed by a U.S. judge, approved by the State Department, and finally transmitted to the proper foreign authority. Yet, despite their time-consuming and voluntary nature, letters rogatory are a feasible method for seeking the freezing and forfeiture of assets in other countries.

Vienna Convention

The second method for reaching assets within a country with whom the U.S. has not signed an MLAT is a request under the terms of the *United Nations Convention Against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, also known as the Vienna Convention.[7] More than 70 countries have ratified the Vienna Convention. According to its Article V, these signatory countries are required to cooperate with foreign requests to freeze and forfeit assets related to criminal narcotics activity. However, the Vienna Convention is not self-executing, and some countries have not yet enacted legislation for responding to foreign asset forfeiture requests. It may not be possible to obtain cooperation from those countries. However, the OIA and AFO have been successful in using Vienna Convention requests in the past, and they can guide local and state law enforcement officials in using the Vienna Convention to freeze and forfeit assets related to illegal narcotics activity.

Locating Foreign Assets — General Guidelines

Before seeking aid in freezing and forfeiting assets abroad, the suspect's or respondent's foreign assets must be located and identified. Two agencies have state contacts for such assistance. The FinCEN office employs intelligence analysts and computer specialists, as well as special agents from other federal law enforcement and regulatory agencies, to compile information and assist with the investigation of financial crimes. FinCEN's Office of Tactical Support can provide law enforcement officials with information (such as financial asset and property owner identity) from a broad array of databases when appropriate, including the Treasury Department's financial database of cash transaction information. FinCEN is also creating a special unit to facilitate the seizure and forfeiture of assets by law enforcement agencies.[8]

FinCEN is establishing coordinating officers in most states to provide a contact between the states and FinCEN. To obtain the name and number of the FinCEN coordinator in a specific state, telephone the FinCEN Operations Center in Arlington, Virginia, (703) 516-0508.

Interpol is another useful agency to contact for assistance in locating and identifying foreign assets. Interpol has been very successful in facilitating international cooperation in asset forfeiture and is a valuable resource for state and local law enforcement officials. Because Interpol is a cooperative organization of officials from

"Depriving the respondent of the means for and profits from illegal acts...is a victory for every law enforcement official."

many countries, it has access to a wide array of foreign information, including the identity of bank account and property owners. Like FinCEN, Interpol has liaison officers in each state. To obtain the name and number of the Interpol liaison officer in a particular state, telephone Dick Kelly at Interpol's National Central Bureau in Washington, DC, (202) 272-8383.

Guidelines for Making Requests

Persons interested in submitting a request using one of the above three methods (MLAT, letters rogatory, or Vienna Convention), should contact either Juan Merrero of the OIA or Linda Samuel of the AFO in Washington, DC, (202) 514-1263. They will assist in determining the best procedure for requesting a foreign jurisdiction to freeze and forfeit assets. The general procedures for making MLAT, letters rogatory, and Vienna Convention requests follow.

MLAT Request Procedures

To request another country to freeze or forfeit assets under the terms of an MLAT, contact the OIA at (202) 514-0000 for a model request for the country in which the assets you wish to reach are located. Each MLAT differs in format and information required. The OIA has models outlining the form of the request and the information necessary for each country with whom the U.S. has signed an MLAT. The following information is usually included:

(1) Background information, such as who is conducting the investigation, who is the subject of the investigation, and what are the charges being investigated;

(2) Facts underlying the charges and the relationship between the assets and the charges;

(3) Text of the statute(s) alleged to have been violated;

(4) Assistance being requested (e.g., freezing, seizing, or forfeiting); and

(5) Identities of the people who will be affected by this action.

After preparing the request, the state will return it to the OIA for approval. Once approved, the state must have the request translated into the language of the country to whom the request will be sent. The OIA will then transmit the translated request to the proper authorities in the foreign country.

Letter Rogatory Procedures

If the assets are located in a country with whom the U.S. has not executed an MLAT, a letter rogatory may be used instead. Like the MLAT request specifications, each country has specified a format for letters rogatory. Additionally, an application for issuance of letters rogatory and a memorandum in support must be attached to the letter rogatory when it is presented to the judge in the U.S. The OIA will provide the state with a model of a letter rogatory meeting the requested country's specifications and a model of the application for issuance with a supporting memorandum. The state can then prepare the letter and documents in accordance with the models provided.

Generally, a letter rogatory contains the same information as an MLAT request. Additionally, a promise of reciprocity may be necessary. The people who will be affected by the action need not be identified. The letter must also be accompanied by a chain certification or apostille for authentication. Chain certification requires signatures from the U.S. Department of Justice, the U.S. Department of State, and the embassy of the foreign country that is being requested to freeze or forfeit assets. An apostille may be substituted for the chain certification if the requested country has signed the *Hague Convention Abolishing Legalisation of Foreign Public Documents.* The OIA and AFO will guide you through the appropriate process.

A state should submit its draft of the letter rogatory and documents to the OIA for review. Upon approval by the OIA, the state submits two copies of the letter and accompanying documents to the court for signature. One copy will be retained by the court; the other must be attached to the authentication document (either a chain certification or apostille) and sent to the OIA with a translation of the letter rogatory. Translations of the application and supporting memorandum are not required. The documents are then forwarded to the U.S. Department of State, which will send them to the U.S. embassy in the requested country. The documents will be transmitted to the appropriate court for executing the request. In certain urgent cases, Interpol may be used to accelerate the process by transmitting the letter itself, but the OIA should be contacted first to ensure that transmittal through Interpol is acceptable to the particular foreign country in question.

Vienna Convention Request Procedures

Requests to freeze or forfeit assets through the Vienna Convention have been made infrequently, but are possible. Consult with the OIA and AFO for guidance in making such requests.

Potential Pitfalls

Countries responding to MLAT, letters rogatory, and Vienna Convention requests are governed by their domestic law. Although the law may allow for cooperation with such requests, often it will not allow for transferral of the asset out of the country. This aspect of international forfeiture should not discourage law enforcement officials from seeking foreign forfeiture. Although the state may not profit by adding to its revenue, the respondent will be hurt by the loss of his or her property. Depriving the respondent of the means for and profits from illegal acts and decreasing the respondent's monetary base for financing new illegal efforts is a victory for every law enforcement official.

A more serious potential problem exists. Other countries, while honoring the federal government's requests for assistance under federal statutes, may not feel compelled to honor requests for assistance

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Use of Financial Transaction Reports to Generate Money Laundering Leads

In 1985, Arizona became the first state in the nation to enact a money laundering statute, largely out of concern for the integrity of the state's financial markets. Because of a dramatic increase in narcotics importation through Arizona between 1985 and 1991, the state passed legislation in 1991, modeled after federal reporting requirements, regulating its money transmitters and requiring reports of monetary transactions above a certain threshold.

Arizona businesses are now required to submit to the state copies of: the federal Currency Transaction Report, Form 4789 (State CTR), a Currency and Monetary Instrument Report (State CMIR), a duplicate of IRS Form 8300 (State Form 8300), and an Arizona-developed version of a federal form, a Suspicious Transaction Report (State STR). These forms are sent to the Arizona attorney general's office, where a newly-created Transaction Report Analysis Center (TRAC) in the Financial Remedies Unit of the Arizona attorney general's office analyzes the data and provides investigative leads for law enforcement authorities. This article describes the data collected and how it is used to develop leads in money laundering cases.

Federal Forms

Currency Transaction Reports (Form 4789)

The most numerous forms submitted are the CTRs. Under federal law, any transaction involving currency over $10,000 requires the financial institution that is receiving or transacting the currency to file a CTR with the IRS within 15 days of the transaction. These reports have contributed to the development of an already sizable, and rapidly growing, database of currency movements. All persons who conduct currency transactions with financial institutions that exceed $10,000 must provide the financial institution with the information necessary to complete a CTR, unless the institution grants them an exemption. Some businesses, as well as banks, are also required by law to file CTRs.

Currency and Monetary Instrument Report (U.S. Customs Service Form 4790)

The Currency and Monetary Instrument Report (CMIR, U.S. Customs Service Form 4790), must be completed by any person transporting over $10,000 in currency or monetary instruments into or out of the United States. The CMIR filing requirement can be an effective deterrent to smuggling currency out of the country for money laundering purposes.

IRS Form 8300

Federal Form 8300 is currently the least used,[1] but potentially the most effective, federal form. Its was first mandated by Internal Revenue Code §6050I, effective January 1, 1985. It requires all persons engaged in a trade or business to report cash transactions over $10,000 to the IRS by filing Form 8300 within 15 days of the transaction. The term "trade or business" is very broad, since it employs the same definition used to determine whether business expenses are deductible (IRC §162). "Cash" now includes not only U.S. and foreign currency, but in certain cases, cash-like instruments such as cashier's checks, bearer bonds, bank drafts, traveler's checks, and money orders. A transaction is considered to be over $10,000 if it totals over $10,000, even if the payments are not all made at the same time. The 15-day period begins as of the day of the payment that puts the total amount of cash in the transaction over $10,000. A transaction must be reported if any part of it took place in the United States. If a person engaged in a trade or business is also a financial institution that is required to file a CTR, and indeed files that form, that person need not file a Form 8300 as well.

Suspicious Transaction Report

Arizona law requires all money transmitters to submit a Suspicious Transaction Report (STR) whenever a transaction is believed to represent potential money laundering or other serious offenses. The STR form calls for the identification of the person(s) involved and a description of the suspicious activity.

Arizona Reporting Requirements

Arizona's transaction reporting requirements became effective September 30, 1991. Federal forms are used to satisfy the state, as well as the federal, filing requirements in order to minimize the burden on Arizona businesses. The state obtains CTR and CMIR data on computer tapes directly from the U.S. Treasury data center. The Treasury Department examines its national database for Arizona-related CTRs and CMIRs, loads them onto computer tapes, and mails the tapes to Arizona periodically (2–3 tapes per week), at cost. Arizona businesses therefore need not file any additional forms. When a business complies with the federal requirement, its compliance is considered to be compliance with state law as well. Unfortunately, it is not possible for the state to acquire IRS Form 8300s in the same manner. These forms are considered tax forms; hence, they cannot be released after they are received

by the IRS. Thus, Arizona requires persons engaged in trade or business in the state to mail separate copies of their 8300 forms to the state attorney general's office. Since the content of the federal and State Form 8300 is identical, it is not difficult to comply with this requirement. Also submitted by mail are the STRs prepared by financial institutions.

The Arizona attorney general's office has established a smaller version of the federal IRS Detroit Data Center, staffed by one computer specialist who is responsible for entering data from the state-filed copies of the IRS Form 8300s and Arizona STRs. Each State Form 8300 and STR is assigned a number and entered into the database within a few days of its receipt. The forms thus are available to law enforcement authorities somewhat sooner than the IRS 8300s that are sent to Detroit for processing.

Analysis of the Arizona database indicates good compliance with CTR filing requirements but poor compliance with State Form 8300 filing requirements. Car dealerships, quite expectedly, account for a substantial portion of the 8300s filed nationally. Nevertheless, many large dealerships in Arizona have yet to file any 8300 forms. Since it is unlikely that these dealerships are turning away cash customers, this suggests that compliance still lags even in the industry hardest hit by law enforcement. There have been several Form 8300-related enforcement actions brought by state authorities against car dealerships. Two used car dealerships were seized and forfeited based on their use in drug enterprises for money laundering through and to them. Two new car dealerships have been subjected to prosecution, one by state and one by federal authorities, based on money laundering and Form 8300 violations. Separately, law enforcement experience indicates that major drug and fraud defendants are frequently found to have purchased real estate with cash. Very few Form 8300s have been filed in connection with real estate transactions, and compliance in the real estate business in Arizona is also inadequate. Vehicle sales and real estate sales are of special interest to Arizona law enforcement because vehicles and stash house/warehouse facilities are key assets in the importation of illegal drugs. Similar indicators of noncompliance are present in other businesses as well.[2]

Uses of Transaction Report Data

Transaction report data is useful proactively (for general resource allocation), reactively (to enhance investigations in progress), and strategically (in the development of well-targeted cases).

Allocating Resources

Law enforcement resources are generally distributed in proportion to population. Major population centers tend to contain not only the bulk of the manpower but also the core of expertise and specialized enforcement units, which are housed in the state or district headquarters of the respective state or federal agencies. This tends to be true even where the population centers are far from areas with major criminal problems. This pattern is certainly true of Arizona, where all federal agencies except U.S. Customs are headquartered in Phoenix, four or more hours from the border. Financial transaction reports clearly indicate that far more resources must be devoted to border cities, a trend that is slowly developing despite bureaucratic resistance to stationing more people in rural towns.

Aiding Investigations

Arizona's reactive use of transaction reports has proven to be effective enough by itself to justify the effort expended. For example, the information is available to any local, state, or federal law enforcement official whose duties include related investigations. In most cases, information is released in conjunction with a grand jury investigation or to a person with an official need for the data. The statute that requires the filing of transaction information reports also prohibits the unrestricted disclosure of their contents. In practice, this is implemented by means of a one-page data request form, which may be faxed or mailed to the Transaction Report Analysis Center (TRAC) for immediate response. Simple requests for reports may be handled by phone in a matter of minutes.

The TRAC's automated system permits a query of the database according to any item, or field, on the form. Thus, names, addresses, post office boxes, social security numbers, and driver's license numbers can be used to provide links to persons or groups under investigation, or to reveal additional members of such groups. If reports are located concerning a suspect who is under investigation because of other circumstances, the probable cause for a search warrant is likely to increase. The data may also show substantial cash purchases beyond a suspect's apparent legitimate sources of income. If this is the case, a net worth/source and application of funds analysis will help develop a probable cause to believe that particular assets are the proceeds of an offense.

If analysis of the database shows that a business is paying close attention to State CTRs, state-filed copies of Form 8300s and State STRs, there are several benefits. First, it may allay suspicion that the business owners are knowing participants in illegal activities. Second, it will save resources that may otherwise have been expended to determine whether or not a business is engaging in improper activities. Third, analysis of the actual forms may suggest that only one person or group within the business is using it for money laundering, in violation of the business' own policies. This is more often the case than business-wide complicity. Criminals usually refer one another to persons inside a business whom they have found they can trust. (For example, if a salesperson is willing to arrange false or misleading forms despite strict company policies to the contrary, he or she soon learns that it leads

to increased sales.) It is important for an official who is investigating the criminal clients or the compromised employees to realize that a problem may be limited to one or a few employees within an organization.

Developing Strategies

The most promising use of transaction report data is to support the strategic development of previously ur rgeted cases. This is the area in which the TRAC has expended its greatest efforts and where it has had, and probably will have, its most important impact.

The TRAC has acquired a new, sophisticated computer capability that permits the isolation and analysis of commonalities among many records. It can recognize and graphically display networks of commonality. For example, a data set of State Form 8300s may be scanned for names associated with the same social security number (an indicator of a group of straw owners), or for cases where more than one social security number is associated with the same name (an indicator of a fraudulent operator). A data set of State Form 8300s and State CTRs together may make it possible to identify businesses whose financial institutions have filed numerous CTRs in connection with deposits the business has made, but who have failed to file the appropriate State Form 8300 in connection with the acquisition of cash from their customers. If the businesses have made substantial cash deposits, what is the source of this revenue, if not its customers? The numbers alone may be sufficient to spot a knowing violator. An audit, search warrant, undercover approach to the business, or other investigative means may confirm the presence of illegal activity.

Transaction reports have already provided useful information on several levels. On the simplest level, they supply information about cash transactions that may require the attention of law enforcement authorities. For example, probable tax fraud is evident on the face of some Form 8300s. Large cash transactions for the purpose of purchasing interests in such instruments as a "living trust" or a "family trust" may indicate illegal tax avoidance. Client fraud may also be evident. The acceptance of large cash amounts from numerous elderly investors, or from retirement communities, may require referral to fraud investigators for further inquiry. The purchase of large-ticket items may also be cause for suspicion. The use of a post office box for cash purchases, or a purchase inconsistent with common practice (such as the purchase of a "muscle" car by an elderly woman or the acquisition of a house in Arizona by an offshore corporation), may indicate tax fraud or the involvement of a straw buyer for the purpose of concealing the true identity of a criminal.

The *absence* of transaction reports may also be indicative of money laundering activity. If a business is consistently failing to file the reports, it may lead to the prosecution of an employee or of the business itself. If an individual is not submitting the required documents (for example, a person whose record shows numerous CTRs, STRs or CMIRs on file but few or no Form 8300s), the investigation may center on his or her role in a larger criminal enterprise. Here again, the network mapping software is extremely valuable. The software permits an analyst to collect data from a form or from other sources and compare it with other data in the database. For example, the Arizona database now contains Motor Vehicle Division data on vehicle ownership, addresses, and lienholders. The database can be expanded to include real property ownership data and data from other public records, which may provide key links among criminal enterprises, their operators, straw owners, and money launderers.

Because of its ability to process vast amounts of data, the TRAC computer may discern patterns among or within transaction report forms. The TRAC is currently experimenting with methods of setting search criteria in order to spot groups, flag anomalies, and recognize sets of suspicious circumstances. These so-called "expert system" rules are designed to mimic the judgments that experts would apply to the data if they had time to examine all reports and a flawless memory of what they had seen. Although true "artificial intelligence" is not yet available in this field, early applications show promise.

Conclusion

The Arizona attorney general's office has found the transaction report database to be a particularly valuable tool in money laundering investigations. As compliance with filing requirements improves, the database will become even more useful, because it will be more complete and because the TRAC is expanding the complementary databases that are available for comparative analysis. The financial transaction report is rapidly becoming a fundamental element in the overall money laundering targeting effort.

—Cameron Holmes

Endnotes

1. A congressional oversight committee found nationwide compliance with the Form 8300 filing requirement very poor in 1990. IRS efforts to educate the business community and to increase enforcement have resulted in dramatic increases in Form 8300 filings nationwide, but the level of 8300 filings is still a tiny fraction of the CTR filings. Thus, 8300 compliance is still inadequate.
2. The Arizona attorney general's office conducted its first audit of State Form 8300 compliance at the mid-point of 1992. Fifty-two percent of the forms were found to be incomplete in some respect. The documents were further screened to eliminate minor or nonrecurring errors and to identify cases of incomplete data in connection with otherwise documented transactions. The noncomplying forms were then

grouped together by filer, since many filers had more than one noncomplying form. The filers were sent letters on August 5, 1992, thanking them for their efforts and requesting more complete data. The letters included copies of the noncomplying forms, and filers were requested to complete and resubmit them. To date, most filers have responded with the requested data. In some cases, the filers' problems were related to new 8300 forms or the incomplete training of employees; such problems are not likely to recur. Most filers have been positive in their desire to assist law enforcement officers and to comply with the law. The cover letters indicated to the filers that copies of the letters and all noncomplying forms had been sent to the IRS and to the Treasury Department's Office of Financial Enforcement. The rate of compliance is expected to improve among Arizona businesses as the business community becomes increasingly aware of the fact that the state is pursuing this course of action. ❑

New Forfeiture Program for Executives...

This BJA-PERF project will soon develop and pilot test an educational program for enforcement executives. Its purpose is to explain key issues in leadership, management, coordination, and integrity maintenance. The program will also address alternatives for targeting different types of assets, and the level of agency support required for agencies to adopt appropriate investigative and legal strategies.
For further information, call Cliff Karchmer, PERF Project Manager, at (202) 466-7820.

Legal Corner

ALABAMA – Facilitation/ Possession

Simmons v. State, No. 2910214, Ala. Civ. App. (8/14/92). Two police officers observed an individual approach a van and receive a clear bag in exchange for money from the person inside the van. The officers then approached the van and seized from the driver of the van a belt pouch, which contained a leafy substance believed to be marijuana. A black bag, which also contained a leafy substance believed to be marijuana, was also found in the van. The State filed a petition for condemnation of the van. The petition was granted by the trial court. The owner of the van appealed, contending the State had not met its burden of proof and contending the State did not prove that the substance in the van was marijuana. The Court of Appeals affirmed the forfeiture by the trial court and held that the State had established a *prima facie* case for the seizure and forfeiture and that the standard of proof, which had been properly made by the State, was "one of reasonable satisfaction." The Court of Appeals held that the burden had been met by the State establishing that two officers had witnessed the driver's involvement in a drug transaction and that the driver had pleaded guilty to the possession of the marijuana that was in the belt pouch when he was in the van.

ARKANSAS – Civil/Criminal Forfeiture—Delay

Lewis v. State, 831 S.W.2d 145, Sup. Ct. Ark. (1992). The defendant in this case was charged with selling marijuana to a police informant. At the time of his arrest some months after the drug sale, the defendant's 1987 Chevrolet pickup truck was seized for forfeiture by the State. Although the State served the defendant with a civil complaint for forfeiture, the complaint was not filed with any court. Subsequently, the defendant answered the complaint, denying that the truck was used to transport marijuana. The defendant's answer was filed of record under the criminal case number. Subsequent to the defendant's conviction for the offense of delivering marijuana and following his sentencing, the criminal court then considered the State's complaint for forfeiture and heard testimony and arguments of counsel concerning the forfeiture. The criminal court ruled that the State had established a basis for forfeiture by a preponderance of the evidence and had also established that the truck was used to consummate the drug sale in some manner. The defendant appealed and contended that the State was required to bring a separate civil action of forfeiture, which had not been done, and also contended there was no proof warranting the forfeiture of his truck. The Court of Appeals affirmed the forfeiture of the criminal trial court and noted that although the defendant was correct that forfeiture is normally an *in rem* civil proceeding, there was no prejudice to the defendant in the procedure followed in this case. The Appeals Court noted that the forfeiture issue was joined by the parties as a civil matter separate from the criminal trial, and was decided in a hearing which came after the criminal prosecution. The Appeals Court further held that the State had properly established the use of the vehicle to facilitate the marijuana transac-

tion and that the delay of approximately three months before forfeiture proceedings were instituted satisfies the statutory requirement of promptness in such forfeiture matters.

CONNECTICUT – Mechanic's Lien/ State's Possession in Federal Forfeiture

Turner v. Smith, et al., No. 30 06 65, Sup. Ct. Conn. Danbury (5/13/92). This case involves a dispute over lien priorities of a car under the Federal drug forfeiture statute. The claimant in the case had performed approximately $25,000 in repairs to a 1982 Ford Custom Cobra automobile and had allowed the owner of the vehicle to obtain possession and use of the vehicle without receiving payment for the repairs. Subsequently, the DEA seized the vehicle for Federal forfeiture and designated the New Milford Police Department (NMPD) as the storage site for the vehicle. The claimant mechanic's lien holder had not filed any formal lien on the car, and hence, when DEA checked for lien holders, such check was negative. Subsequent to the Federal seizure, the lien holder obtained a mechanic's lien attachment, and a sheriff placed a copy of the attachment on the windshield of the vehicle while it was in the possession of the NMPD. Ultimately, the vehicle was transferred to the NMPD by DEA for disposition, and the vehicle was sold for $22,000 for the benefit of the NMPD. In this trial level case, the defendant contended that all parties concerned should have been placed on notice of his mechanic's lien when the attachment was placed on this vehicle at the NMPD, and hence, his security interest should have been protected. The court held against the claimant and concluded that the claimant lost his mechanic's lien when he allowed the owner of the vehicle to regain possession of it subsequent to the repairs. Hence, the court ruled that when the Federal government seized the car, it was not subject to any lien by the claimant. The court further held that the Federal administrative forfeiture has the same force and effect as a Federal judicial forfeiture and that there is no equitable remedy available to a claimant after such a Federal forfeiture. Even though the court recognized that the claimant was unaware of the vehicle owner's illegal drug activities, the court held that the claimant was never an owner of the car and did not have a lien on it when it was seized or any time thereafter.

DELAWARE – Innocent Owner/ Date of Lien Effectiveness

Campbell v. State, No. 91M-03-18, Super. Ct. Del. N.Castle (6/4/92). This trial level case concerns the effective date of a lien filing. The facts reveal that on January 30, 1991, a son executed a $5,000 note to his father to allow the son to purchase a 1985 Nissan vehicle to be owned by the son. On a date preceding February 11, 1991, the father presented the notarized note to the State Department of Motor Vehicles in order to obtain a lien on the 1985 Nissan. On February 11, 1991, the son used the vehicle in violation of State drug laws and the vehicle was seized. The Motor Vehicle Department kept the father's copy of the note and, thereafter, mailed the title to the vehicle with the date of the lien noted on the title as February 15, 1991, four days after the son's arrest. The facts further reveal that the father had no knowledge of, nor did he consent to, the drug violation by the son. It is clear that the note was executed prior to the commission of the offense even though the lien date on the title is four days subsequent to the son's arrest. The court notes that the only issue in the case was whether the security interest attaches when a creditor files for a lien or attaches as of the date of issue indicated on the title. The court notes that the applicable Delaware statute provides that filing occurs at the time of "presentation for filing" and hence, the court concludes that the father involved established a lien on the vehicle as of February 11, 1991, and is therefore excepted from the forfeiture under the terms of the Delaware forfeiture statute.

FLORIDA – Federal/State Real Property Transfer/Lien Valid

Alachua County, Florida v. Cheshire, No. 91-3184, Ct. of App. 1st Dist. (8/12/92). The trial court in this case granted a judgment of foreclosure to satisfy a $15,000 note, which was secured by a mortgage on property that had been seized in 1984 in a Federal forfeiture proceeding. Subsequent to the Federal forfeiture proceeding, the property was transferred to GSA, which in turn, transferred the property to Alachua County as a park site. While the forfeiture proceeding was being completed and at the time the property was held by GSA, the mortgage holder in this case maintained extensive contact with the Department of Justice and GSA regarding his outstanding $15,000 mortgage. He was assured that his mortgage would be satisfied upon disposal of the property. In 1988, the Federal government executed a quit claim deed to Alachua County for the property, and although the County authorities were aware of the $15,000 outstanding mortgage, they sought to avoid payment of the mortgage by contending that the mortgage holder had failed to file a court action to foreclose the mortgage within the applicable statute of limitations. The mortgage holder contended that the county was estopped from raising the statute of limitations defense, since the mortgage holder had not filed the foreclosure action because of the assurances furnished him by numerous Federal officials that his mortgage would be satisfied. The trial court and the Court of Appeals agreed with the mortgage holder and held that since Federal officials affirmatively represented that the mortgage would be satisfied and that the mortgage holder relied on these representations, the County was estopped from seeking to bar the foreclosure action on the mortgage based on the statute of limitations involved. The Appeals Court

noted that there was no requirement that the government officials intentionally mislead the mortgage holder before estoppel would apply, but rather that the representations made by the Federal officials and his reliance on them was sufficient.

FLORIDA – Currency/Facilitation

In re Forfeiture of $21,650 in U.S. Currency, No. 91-0302, Fla. Ct. of App. 4th Dist. (8/5/92). This case involves the seizure of $21,650 discovered by a police officer in a briefcase taken from the trunk of a vehicle. The State sought forfeiture of the seized currency, and the trial court judge ruled that whether the currency was to be used in furtherance of a criminal enterprise was a jury question, while the claimants sought a directed verdict that the currency was not subject to forfeiture as a matter of law. The Appeals Court reversed the ruling by the trial court and noted that there was no evidence presented by the State establishing a nexus between the money and any criminal activity, and although a police detector dog had alerted to the briefcase, no drugs had been found in it. The Appeals Court holds that the "clear and convincing evidence" test established by the Florida Supreme Court in the case of *Department of Law Enforcement v. Real Property,* 588 So.2d 957 (Fla. 1991), applies in this case and that a dog alert alone does not meet such test. The Court distinguishes the Florida *$55,000* case (593 So.2d 266 (1992)), which upheld forfeiture of currency when large quantities of narcotics were seized from the defendant's business premises along with the currency.

FLORIDA – Facilitation/Jewelry Worn

Jenkins v. City of Pensacola, No. 91-2886, Fla. Ct. of App. 1st Dist. (7/29/92). The trial court in this case ruled that jewelry worn by a defendant during a drug sale was subject to forfeiture pursuant to Section 932.701 *et seq.* Fla. Statutes (1989) and ordered that the jewelry be forfeited to the City of Pensacola. The Court of Appeals reversed the decision of the trial court and held that under the clear and convincing proof standard approved in *Department of Law Enforcement v. Real Property,* 588 So.2d 957 (Fla. 1991) the evidence was legally insufficient to establish the connection between the currency and the illegal activity charged. The Appeals Court further noted that there was no basis to support the trial court finding that the jewelry was employed as an instrumentality in the commission of the drug offense or that the jewelry aided and abetted in the commission of the drug offenses.

GEORGIA – Assignment After Seizure

Allmond et al. v. State, 415 S.E.2d 924, Ga. Ct. of App. (1992). An officer assigned to a local drug enforcement task force seized $1973 and a personal computer in close proximity to cocaine, and the State sought forfeiture alleging that both the currency and the computer had been used to facilitate the distribution of drugs. Several days after the State filed its forfeiture action, the defendant executed a document captioned "Assignment of Interest in Pending Action" in which he purported to assign all of his interest in the property to his wife and children. The assignees then filed a motion to intervene in the forfeiture action, alleging an interest in the property. The trial court denied the motion on grounds that the assignees lacked standing to intervene in the forfeiture proceedings. The Court of Appeals affirmed the forfeiture by the trial court and held that although the Georgia forfeiture statute does not address the specific situation presented by this case, the court could not conclude that the legislature intended that property owners of seized property be allowed to execute a post-seizure assignment of that property to a third party. The Appeals Court also noted that they found no merit in the assignees' argument that they had an interest in the property resulting from the family relationship and the duty of support owed to them by the defendant. The Court further noted that they would not interpret the Georgia statutes in such a way as to allow persons to claim an interest in seized property due to a debt or duty owed to them by the property owner.

HAWAII - Facilitation/ Currency—Dog Sniff

Kaneshiro v. $19,050. in U.S. Currency, 832 P.2d 256, Sup. of Hawaii (1992). During a routine agricultural inspection at the Honolulu Airport, a Federal Express package addressed to the claimant's address in San Francisco was opened by an inspector who believed, after shaking the box, that it contained seeds, plants, or other items prohibited by Federal laws from leaving Hawaii. The inspector discovered heat-sealed plastic bags containing $19,050 in cash and peppercorns. The inspector turned the package and its contents over to the Honolulu Police Department, and a police detection dog subsequently alerted to the presence of illegal substances among the contents of the package. However, no illegal drugs were found. The currency was seized by the police department, forfeiture proceedings were instituted in State court, and after a hearing, the trial court found that the State had demonstrated probable cause to support the seizure of the $19,050. The claimant in the case refused to comply with the request for interrogatories and contended that there was no probable cause to support the seizure and that, therefore, a default judgment against him was improper. The Court of Appeals agreed with the claimant, reversed the forfeiture, and held that the trial court's reliance on the alert by the drug detection dog was misplaced and that merely the smell of drugs was not sufficient to support forfeiture. The Court of Appeals, after distinguishing a number of cases where currency forfeitures were sustained involving alerts by drug detector dogs, noted that those cases included more

evidence of illegal drug activity. In this case, although the packaging of the currency may have been suspicious, the State did not present sufficient evidence that a covered offense had been committed or even attempted in order to support a finding of probable cause for the seizure. The Court concluded by denying the claimant's request for interest on the currency from the date of seizure.

ILLINOIS – Ownership Interest Required

State v. One 1990 Chevrolet Suburban, No. 2-91-0717, App. Ct. Ill. 2nd Dist. (7/1/92). The trial court in this case ordered the forfeiture of a vehicle that had been used by the claimant's wife to sell LSD. The vehicle and another vehicle were purchased by the claimant with the proceeds from a personal injury settlement. The forfeited vehicle was placed in the wife's name, and the husband/claimant was listed as an additional insured on the insurance policy. The claimant's wife stated that although the claimant was aware that she sold marijuana, he was not aware that she sold LSD. Based on these facts, the trial court found that the claimant had no ownership interest in the seized vehicle and the claimant appealed. The Appeals Court affirmed the forfeiture by the trial court and held that since the claimant's wife had both title and actual possession and control of the seized vehicle, the trial court's conclusion that the wife was the sole owner of the seized vehicle was not against the manifest weight of the evidence. The Appeals Court noted that the inferences raised that the claimant intended to make a gift of the vehicle to his wife, and the fact that the husband was listed on the insurance policy failed to establish an ownership interest for the husband.

Editor's Note: Although neither court in this case relied on the fact that the husband/claimant was aware that his wife sold marijuana, such an awareness on the claimant's part would also have resulted in his not obtaining relief as a "innocent owner" even though the particular drug involved in the vehicle seizure was LSD and not marijuana.

KANSAS – Currency/ Traffic Stop—Profile

State v. 1978 Chevrolet Automobile, No. 66,573, Ct. of App. Kansas (6/19/92). This case involved a traffic stop for speeding by the Kansas Highway Patrol. The two claimants were arrested after the traffic stop when the passenger in the vehicle advised the trooper that the vehicle was uninsured. One claimant was arrested for permitting his vehicle to be operated without insurance, and the other claimant was arrested for driving an uninsured vehicle. Upon exiting the vehicle, the claimant/owner of the vehicle appeared nervous and upon further inquiry, he advised the trooper that he had $30,000 in cash under his jacket. Subsequently, the money under the jacket was found to total $30,900. It was packaged in a number of white envelopes sealed with duct tape, and each envelope had numbers written on it to indicate the amount of cash it contained. The claimant stated that the money was not drug-related and that they were going to use the money to purchase old junk cars in Oklahoma. A further search of the vehicle revealed 1.6 grams of marijuana in the front seat of the car and in a duffel bag in the trunk. Additionally, a police detector dog alerted to the money. At the forfeiture trial seeking to forfeit the vehicle and the seized currency, the trooper and a DEA agent testified that the money was packaged in a manner consistent with drug trafficking and the trooper testified that the occupants of the vehicle fit the profile of drug traffickers. The trial court proceeded to forfeit the vehicle and the currency and relied on the "close proximity" presumption contained in Kansas Statute Section 65-4135(a)(6) which states that currency found in close proximity to controlled substances is presumed to be forfeitable. The Court of Appeals affirmed the forfeitures by the trial court, and held that the claimants had failed to rebut the "close proximity" presumption and that it was not relevant that the marijuana found was insignificant in amount since the statute does not specify that any minimum amount of drugs is required to raise the presumption. The Appeals Court noted that the claimants' contention that there was no evidence that the money in question was from the sale of drugs or was to be used to buy drugs was accurate; however, these facts are of no benefit to the claimant since the statute does not require that the money be from the sale of drugs or be intended for the purchase of drugs. Rather, the statute requires only that the State prove that the money was found "in close proximity" to a controlled substance. The Court concluded that in addition to the proximity presumption, other significant facts were present in the case including: (1) evidence the money was packaged in a manner consistent with drug trafficking; (2) evidence that claimants fit the profile of persons who deal in drugs; and (3) evidence of one claimant's prior involvement with drug trafficking.

LOUISIANA – Currency/Airport Stop

State v. $77,014., No. 91-282, Ct. of App. La. (6/29/92). State police received information from a U.S. Customs agent that the claimant would be arriving at an airport in possession of narcotics or a large sum of money. Subsequently, a vehicle, in which the claimant was a passenger, was stopped by a State trooper for "erratic driving" after it left the airport. The trooper asked the claimant if he could search her luggage. She consented, and the trooper found $77,014 in cash in the claimant's luggage and in a pair of panty hose tied around her waist. A drug detector dog brought to the scene alerted on the claimant's tote bag, which had contained some of the currency; however, no drugs were found. Based on these facts, and after a hearing, the trial court ordered the money forfeited to the State. The defendant appealed. The Appeals Court noted

that forfeiture proceedings in Louisiana are governed by L.A.R.S. 40:2601 *et sec* and that under those provisions, the State has the burden for proving probable cause for forfeiture. The Appeals Court, after reviewing the trial court record, held that the State had not met its burden of proving probable cause for the forfeiture since there was "no evidence connecting the forfeited money to the drug trade, nor was there any evidence connecting Perez (the claimant) with the drug trade." Hence, the Appeals Court reversed the judgment of the trial court and ordered the return of the currency.

MINNESOTA – Actual Owner Not Registered Owner

Rife v. One 1987 Chevrolet Cavalier, 485 N.W.2d 318, Ct. App. Minn. (1992). The claimant in the case is the registered owner of a vehicle which he claims he purchased with $8,000 that he borrowed from his daughter. However, the daughter involved stated that she purchased the vehicle with the proceeds of an injury settlement and that it was registered in her father's name solely for insurance purposes. These conflicting accounts became an issue when the daughter made two sales of narcotics to an undercover officer, and the vehicle was seized for State forfeiture. At the trial of the forfeiture case, the claimant/father sought to intervene in the forfeiture contending that he was the registered owner of the vehicle and that he had no knowledge of his daughter's drug violations. The trial court proceeded to forfeit the vehicle and the father/claimant appealed, contending the forfeiture was precluded because he was the registered owner of the vehicle and that this was incontrovertible evidence of ownership. The Appeals Court, in reviewing the claimant's contention, noted that in Minnesota, the registration of an automobile is *prima facie* evidence of ownership and that a specific forfeiture statute (Section 609.531 Subsection 6a(b)(1988)) designated the registered owner only as the alleged owner for purposes of forfeiture proceedings. The Appeals Court then concluded that the legislature's use of the word "alleged" indicated that ownership is not incontrovertible and that this reference coincided with decisions for other purposes that registration is only a *prima facie* evidence of title. The Appeals Court noted that the trial court's finding that the daughter had "custody and control of said automobile from the date it was purchased until the date it was seized" was supported by the evidence. The Appeals Court gave no credence to the fact that the claimant had not listed his daughter as the primary driver of the vehicle to the insurance company.

NEW YORK – Burden of Proof

Property Clerk, N.Y.P.D. v., McDermott, No. 46333, Sup. Ct. N.Y. App. Div. 1st Dept. (7/2/92). A police officer observed the defendant exiting his vehicle at about 12:30 P.M. walk to an abandoned building, and hand money through a hole in a wall. The defendant was then observed accepting several glassine envelopes, and returning to his vehicle. The police officer had also observed other persons making drug purchases that day at the same location. After receiving information concerning the defendant's actions, other officers a short distance away stopped the defendant's car, searched the defendant, and recovered glassine envelopes from his pants pocket. Subsequently, laboratory analysis revealed that the glassine envelopes contained 1.7 grams of heroin. The city sought forfeiture of the defendant's vehicle, but the trial court denied forfeiture on the basis that the city had failed to prove that the substance mentioned in the chemist's report had been proven to be heroin "beyond a reasonable doubt." The chemist had not been called to testify in the trial court. The Appeals Court reversed the decision of the trial court and held that the city had met its burden to establish the grounds for forfeiture by a preponderance of the evidence and that the trial court was in error in requiring proof "beyond a reasonable doubt" since the action is civil and not criminal in nature. The Appeals Court noted that the trial court had before it credible officer's testimony that the defendant had been observed making an illegal drug purchase and had used his vehicle to leave the area after the purchase. Moreover, the Appeals Court noted that the defendant was discovered to have on him a quantity of white powder, which appeared to experienced police officers to be heroin and, which a subsequent laboratory report (admitted in the trial court as a record maintained in the ordinary course of business) confirmed was heroin. The Appeals Court concluded that the trial court was incorrect in requiring the testimony of the chemist in the case.

OHIO – Longer Hearing Deadline Not Retroactive

Erie County Drug Task Force v. Essian, No. E-91-66, Ct. of App. Ohio (8/21/92). On July 13, 1990, police officers observed the defendant's automobile and camper being used by the defendant in violation of the drug laws. On August 18, the officers executed a warrant, arrested the defendant, and determined that the camper had been used to transport marijuana. On September 19, 1990, the officers seized the defendant's automobile, and on October 19, a petition was filed to forfeit the vehicles. The applicable "seizure statute" was amended effective November 20, 1990. The amendment expanded the time in which a hearing must be held on a petition to forfeit seized property. On December 19, 1990, the defendants answered the forfeiture petition and moved to dismiss the petition on the grounds that the prosecutor involved had failed to obtain a hearing on the forfeiture within the time limit which applied prior to the amendment that became effective on November 20, 1990. The trial court held for the defendant and ruled that the time limitation involved was substantive and not procedural in nature and that there was no

indication that the legislature had intended the more liberal filing deadline to be retroactive to seizures before November 20, 1990. The prosecution contended on appeal that the amendments to R.C.2933-41 regarding filing deadlines were procedural in nature and, therefore, should be applied retrospectively to cases pending on the effective date of the amendment. The Court of Appeals affirmed the decision of the trial court and held that whether a statute is to be applied retrospectively depends on the intent of the legislature, and that unless the legislature specifically states that the statute is to apply to pending cases, the statute is presumed to be applied prospectively only. The Court of Appeals concluded that the legislature did not specifically make the statute in question applicable to pending cases; therefore, the amendment is to be applied prospectively only and not retrospectively.

OHIO – Vehicle Purchased with Drug Money

State v. Brown, No. 60501, Ct. of App. Ohio 8th Dist. (7/30/92). The defendant was arrested in the course of an investigation involving the defendant and other individuals who were selling drugs in a particular housing project. On May 16, 1990, the defendant's younger brother was arrested for possessing crack cocaine "rocks" shortly after he had left the defendant sitting in his 1986 Cadillac. At this time, a police officer warned the defendant that he would lose his car if he persisted in such activity. On May 25, 1990, after the arrest of another person for possession of crack cocaine, the defendant asked others in the vicinity whether the police had gotten the "rocks." On June 1, 1990, police officers, after obtaining a search warrant and observing a pattern of drug trafficking from the defendant's residence, executed the search warrant, retrieved a bag containing 105 "rocks" of cocaine behind a piece of siding at the rear of the house, $720 from the defendant's pockets, and $3,915 from the defendant's bedroom dresser drawer. Subsequent investigation revealed that approximately three months earlier, the defendant had purchased his 1986 Cadillac for $8,000 in cash as well as a stereo system, VCR, and television. The State sought and obtained in the trial court a forfeiture of the 1986 Cadillac and the $3,915 seized from the defendant's bedroom. The forfeiture of the vehicle by the trial court occurred immediately after the defendant's conviction and sentencing since at the time of sentencing, the defendant asked the court to rule immediately on the forfeiture of the Cadillac. The trial court ordered the forfeiture of the Cadillac and held that the Cadillac was acquired through the sale or other transfer of drugs or through the proceeds of the defendant's drug activity. The Court of Appeals affirmed the forfeiture of the trial court and concluded that the trial court had properly found that the State had demonstrated by a preponderance of the evidence that the automobile was contraband, and hence, subject to forfeiture. The Court of Appeals noted that the defendant was not lawfully employed, that he had previously been convicted of drug trafficking on two separate dates, and that the automobile purchase had occurred between those convictions. The Appeals Court concluded that the State had established by a preponderance of the evidence that the 1986 Cadillac was a product of the defendant's unlawful drug activity and that the defendant had failed to offer evidence as to how the automobile could have been lawfully acquired.

OKLAHOMA – Simple Possession Is Forfeiture Basis

State v. Barnard, 831 P.2d 1021, Ct. of App. Ok. (1992). The defendant was arrested for possession of 1.8 grams of marijuana and for possession of drug paraphernalia (Zig Zag rolling papers) while he was in his 1969 Chevrolet Camaro. The State sought and obtained a forfeiture in the trial court of the defendant's vehicle on the basis that the vehicle was a conveyance used by an occupant to possess a controlled substance. The defendant appealed and contended that since his only offense was to possess a small amount of marijuana, the statute should not be applied to his case since the statute was intended to reach trafficking in drugs and not simple possession. The defendant further contended that the statute should be applied only to the sale or distribution of drugs and that the value of the property must be roughly proportional to the offense involved. The State contended on appeal that the statute applies to possession of controlled substances or paraphernalia by an occupant of a vehicle for any purpose. The Appeals Court agreed with the State and held that the particular statute (Section 2-503) does not limit the forfeiture to trafficking in illegal drugs but rather, also includes possession of drugs. The Appeals Court concluded that the statute does not require a defendant to possess a minimum amount of the substance for the statute to be applicable and therefore, any amount of the controlled substance is sufficient to support a forfeiture.

OKLAHOMA – Homestead Not Forfeitable

State v. Lot One (1) in Block Seven, 831 P.2d 1008, Ct. of App. Ok. (1992). The defendant sold LSD to a police informant and to an undercover police officer inside his own residence. A search warrant for the residence was subsequently issued, and officers found various items of drug paraphernalia and marijuana in it. The State of Oklahoma sought forfeiture of the residence under the applicable controlled substances statute, and the trial court denied title forfeiture on the basis that the property in question was the homestead of the defendant and hence, the property was not subject to forfeiture. The Appeals Court affirmed the decision of the trial court and noted that the applicable Oklahoma statute exempts from "attach-

ment or execution and every species of forced sale for the payment of debts" property held as a homestead. The Court of Appeals relied on a similar case in Iowa where the Supreme Court of Iowa reversed a trial court's decision that had ordered the forfeiture of a defendant's homestead interest. The Court of Appeals concluded by noting that the Oklahoma statute does not specifically refer to the forfeiture of a homestead. Hence, lacking such reference, a homestead cannot be forfeited even if used by its owner to facilitate the commission of a criminal offense. The Appeals Court further held that it made no difference as far as the exemption for homestead was concerned, that in this case the defendant was a single person with no spouse or dependents to support.

OKLAHOMA – "Innocent Owner" Defense Not Exclusive to Lien Holder

State v. 1980 Chevrolet Monte Carlo, 813 P.2d 654, Ct. of App. Ok.(1992). After the plaintiff's son was stopped for a traffic violation, a subsequent search revealed a small amount of marijuana in possession of a passenger in the vehicle, scales, and four packages of cigarette rolling papers, one of which was in the possession of the claimant's son. The claimant's son subsequently entered a plea to a reduced charge of simple possession of controlled substances. The State sought forfeiture of the vehicle in the trial court, and the claimant's father answered alleging that he and his wife were the lawful owners of the vehicle, that they had loaned the son the vehicle solely for the purpose of driving to and from work, and that they had no knowledge that drugs would be in or near the vehicle. The trial court proceeded to forfeit the vehicle and rejected the "innocent owner" defense raised by the claimant/father with the trial court, concluding that the "innocent owner" defense was not followed in Oklahoma. The Court of Appeals reversed the trial court and held that the Oklahoma statute does, in fact, recognize the "innocent owner" defense in forfeiture actions, and that the defense applies to owners as well as the holders of security interests of the property. The Appeals Court concluded that to hold otherwise would be to hold the statute constitutionally infirm and would deny owners equal protection under the law. Hence, the case was remanded to the trial court for proper consideration of the claimant/father's "innocent owner" defense.

PENNSYLVANIA – Jury Trial Required in Forfeiture Proceeding

Commonwealth v. One (1) 1984 Z-28 Camaro, No. 20 E.D. App. Doc., Sup. Ct. Pa. (5/20/92). This decision by the Supreme Court of Pennsylvania reverses the Appeals Court decision previously reported in the PERF *Asset Forfeiture Bulletin* in March 1991. The sole issue raised in the case is whether the owner of property subject to forfeiture under the Pennsylvania Forfeiture Act is entitled to a jury trial pursuant to Article 1 Section 6 of the Pennsylvania Constitution. In a lengthy decision wherein the Supreme Court reviewed the common law basis of forfeiture and the right to jury trials, as well as a lengthy review of California and Federal law on the issue of jury trials, the Supreme Court concluded that Pennsylvania forfeiture actions had a common law basis and, hence, owners are entitled to jury trials in forfeiture proceedings. A concurring Supreme Court judge agreed that a jury trial was required by the Pennsylvania Constitution and the common law in this case, but expressed a reservation that a jury trial would not be required if the defendant had a trial by jury in the criminal case and no disputed facts were present as a result of the decision in the criminal matter.

PENNSYLVANIA – Title Owner Held Not Actual Owner

Shapley v. Commonwealth, No. 106 C.D. (1992). Officers executed a search warrant at the dwelling of the claimant's son and seized a weapon, drug paraphernalia, $25,000 in cash, and a 1981 DeLorean automobile. The prosecutor involved filed a forfeiture petition to forfeit the property and the automobile, and the claimant/mother filed an answer in the forfeiture action for return of the automobile. A hearing was held in the trial court at which the parties stipulated that the only issue for consideration was whether the claimant/mother was the actual owner of the automobile. The trial court determined that although the DeLorean was titled in the claimant's name, her son was the actual owner of the vehicle and that the title held by the claimant was a mere sham designed to evade forfeiture. The Court of Appeals affirmed the decision of the trial court and concluded that the claimant had failed to satisfy her burden that she was the owner of the property. The Court stated that a claimant must have a possessory interest in the property with attendant characteristics of dominion and control over the property. The claimant had contended that the son merely used the DeLorean on occasions with her consent and that the DeLorean was originally purchased by her deceased husband for her use. However, the claimant admitted that her husband had been disabled for 15 years prior to his death, and she also conceded that she had never driven the DeLorean because she is unable to drive such vehicles equipped with standard transmissions. Moreover, the claimant presented no proof that her husband had the financial resources to purchase the vehicle. The Appeals Court noted that the son had stated that the vehicle was his property, that the former owner of the vehicle testified that the son had made all arrangements to purchase titled vehicle and had paid $8,000 in cash for the DeLorean. The former owner also testified that it was his understanding that the son was the purchaser of the vehicle and that title was being placed in his mother's name for "technical" reasons only. The Appeals Court concluded that

the son, and not his mother, was in possession of the vehicle and had exercised dominion and control over it. Therefore, the trial court properly ordered forfeiture of the vehicle based on the claimant's failure to prove ownership.

PENNSYLVANIA – Traffic Stop/ Dog Sniff

Commonwealth v. $1920 U.S. Currency, et al, No. 1905 C.D. 1991, Comm. Ct. Pa. (6/30/92). After an attempted traffic stop, the defendants led pursing police officers on an eight-mile, high-speed chase at speeds up to 100 mph. The chase ended when a defendant lost control of the vehicle and crashed. The driver and passengers in the car were charged with various offenses, including possession of marijuana and rolling papers, after officers located 13 marijuana seeds on the front seat, 10 empty cough drop boxes behind the seat, Zig Zag rolling papers, a telephone pager, $1920, and a guitar with amplifying equipment. Subsequently, a drug detector dog alerted to the scent of drugs in the vehicle's glove compartment, in the trunk, and on the seized money. Prosecutors sought forfeiture of the vehicle involved, the currency, the pager, and other property seized from the vehicle. The defendants intervened contending the property was seized without a warrant and that the forfeiture action was not filed "forthwith" as required by the statute. The defendants argued that a delay of four months in the filing of the forfeiture petition after the seizure of the property violated the "forthwith" standard for filing such a petition. The trial court proceeded to forfeit all of the property involved and ruled against the defendants on all their contentions. The Court of Appeals affirmed the forfeiture of the vehicle involved, the $1,920, the telephone pager, and the drug paraphernalia, but reversed the forfeiture of a survival knife, the guitar, and its amplifier. The Court of Appeals in reaching its conclusion stated that: (1) the property involved was properly seized incident to arrest, and a search warrant was not required; (2) the delay of four months in filing a petition for forfeiture after seizure was a reasonable interval since the defendants failed to make the requisite showing of prejudice from such delay; (3) since the Commonwealth failed to establish that the marijuana seeds were capable of germination such marijuana seeds were not a controlled substance; (4) the rolling papers and cough drop boxes that were seized were drug paraphernalia; (5) the trial court's finding that telephone pagers are used to conduct drug transactions was reasonable under the circumstances; and (6) the drug detector dog's alert inside the vehicle and to the seized currency supported the trial court's conclusion that the money was forfeitable.

TEXAS – Facilitation/Vehicle Used as "Shooting Gallery"

1985 Cadillac Limousine v. State, Ct. of App. Tx. (8/13/92). The investigation of this case was initiated by officers responding after being notified of a shooting at a residence. Upon arriving at the residence, they discovered that two individuals, who appeared to be intoxicated on a substance other than alcohol, had been dumped from a limousine in front of the residence. Subsequently, other officers located the limousine and its operator, who also appeared to be intoxicated on a substance other than alcohol. Before towing the limousine, the officers conducted an inventory search and found various drug paraphernalia, syringes, and a quantity of heroin and cocaine. The individuals who had been dumped from the limousine advised that they and the limousine's owner had used the interior of the limousine as a location to inject various narcotics. The trial court forfeited the limousine, and the defendant appealed, contending that there was no evidence that the limousine was used to facilitate any drug trafficking offense, that the statements made by the other persons in the limousine were inadmissible hearsay, and that the forfeiture action amounted to double jeopardy. The Court of Appeals affirmed the forfeiture by the trial court and held that the defendant was relying on a repealed version of the forfeiture statute rather than the current version in order to support his lack of drug trafficking violation contention. The Appeals Court noted that the current statute that applied to this case includes "possession" of drugs under the term "facilitate." The Appeals Court noted that the current Texas statute is very similar to the current Federal statute in such regard. The Court of Appeals further held that the defendant's claim of double jeopardy had been abandoned by him during oral argument, and therefore, they declined to address the issue. The Appeals Court concluded that the statements made by the other persons present in the limousine who used drugs were admissible hearsay on the issue of probable cause to support the forfeiture, and such hearsay was admissible in this civil action.

TEXAS – Delay of More Than 30 Days to Set Hearing After Answer is Fatal

$80, 631 Porsche v. State, No. A14-91-00463-CV, Ct. of App. Tx. (7/30/92). The state sought and obtained a forfeiture in the trial court of a 1984 Porsche and $80,631, which had been seized from the defendant. The defendant appealed. The only issue on appeal was whether the 30-day requirement to set a hearing after an answer is filed contained in the Texas forfeiture statute is mandatory or discretionary. The trial court and the State concluded that such a time limit was procedural and that prosecutors had the discretion to obtain such a hearing beyond the 30-day time limit. The Appeals Court ruled, after reviewing a number of Texas cases, that such a time limit to set a hearing date is mandatory and not discretionary. Hence, the Appeals Court ruled that the failure of the State to comply with the mandatory requirement and the fact that the failure was properly brought to the trial court's attention and was preserved by the

defendant in his motion for summary judgment should have resulted in the dismissal of the forfeiture action. ❑

(Foreign Assets, continued from page 3)

arising from states under state law. This problem may be particularly noticeable when requests are made through letters rogatory, the execution of which is totally at the discretion of a foreign judge. While it is possible that some countries will not honor the requests, it is likely that other countries will comply with them and will freeze and forfeit property within their jurisdiction. MLATS draw no distinction between federal and state charges, investigations, and prosecutions.

Conclusion

Civil, *in personam,* forfeiture statutes provide a new weapon in the state and local prosecutors' arsenal. Even though the respondent owns no property within the state, once enforcement officials have jurisdiction over the person, they can proceed and obtain a judgment against him or her. Under the authority of MLATs, letters rogatory, and Vienna Convention requests, foreign countries recognize and honor foreign *in personam* judgments and the investigations preceding them. The OIA and AFO will assist law enforcement officials in using these three methods to request foreign countries to freeze and forfeit assets. Thus, civil, *in personam,* forfeiture statutes may expand international cooperation in depriving wrongdoers of the means and proceeds of crime.

—by Elizabeth Kingma

Endnotes

1. States that have passed civil, *in personam,* forfeiture statutes are: Arkansas, Arizona, Georgia, Hawaii, Louisiana, Missouri, and New York.
2. Martin C. Aronchick, "Benefits of *In Personam* Civil Forfeiture Remedies," *Civil Remedies in Drug Enforcement Report,* National Association of Attorneys General, February–March 1992, 8.
3. Established on April 25, 1990, FinCEN was designed to assist in combatting money laundering by providing intelligence support and analysis to government agencies.
4. Interpol is an alliance of 158 countries established to facilitate cooperation and assistance in law enforcement investigations.
5. The U.S. has named the OIA as the central authority for processing requests under criminal assistance agreements. Its attorneys are divided by geographical sections to guide prosecutors in requesting aid from foreign countries. The AFO is in the U.S. Department of Justice's criminal division. Two attorneys within the AFO specialize in forfeiting assets located in foreign countries.
6. Foreign countries are not as willing to freeze and forfeit real property, however.
7. The Vienna Convention went into effect in November 1990. One of its terms requires that personal bank secrecy laws not be used to prevent the dissemination of information in international drug trafficking and money laundering investigations. It also allows countries to fulfill their forfeiture and seizure obligations either by initiating their own investigation or by complying with and crediting a foreign order to seize or freeze assets. It recommends that countries dispose of the forfeited property either by donating the assets to global agencies that specialize in fighting drug trafficking or by sharing the assets with all the countries involved in the investigation that resulted in the forfeiture.
8. Brian M. Bruh, "FINCEN — A Tool in the War on Drugs," *Civil Remedies in Drug Enforcement Report,* National Association of Attorneys General, February-March 1992. In FinCEN's first operating year (fiscal year 1990), only one percent of the requests made to FinCEN came from state and local agencies. That number grew to six percent at the end of fiscal year 1991. Requests for assistance from state agencies were 20 percent of the total requests processed by FinCen's Operations Center in fiscal year 1992. ❑

New Forfeiture Publications...

Four recent publications have been added to the list of reports produced by the BJA-PERF Asset Forfeiture Project. They include guides no. 15 *(Preseizure Planning)* and 16 *(How to Present the Forfeiture Case to the Prosecutor); Combating Money Laundering: An Arizona-Based Approach*—a state-level strategy to enhance forfeiture programs; and *Strategies for Combating Narcotics Wholesalers*—a PERF report of a related NIJ study. Limited quantities of these reports can be obtained by calling the BJA Clearinghouse at (800) 688-4252.

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