

Civil and Criminal Forfeiture Procedure

U.S. Department of Justice
Asset Forfeiture & Money Laundering Section
January 2004

Electronic version scanned in by Forfeiture Endangers American Rights Foundation,
corrected December 19, 2004

Part I - pages 1-50

Part I-Civil Forfeiture

Case Outline

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I. The Nature of Civil Forfeiture

- Civil forfeitures are "*in rem*":
 - *United States v. All Funds in Account Nos. 747.034/278 (Banco Espanol de Credito)*, 295 F.3d 23 (D.C. Cir. 2002) ("Civil forfeiture actions are brought against property, not people. The owner of the property may intervene to protect his interest");
 - *United States v. \$734,578.82 in U.S. Currency*, 286 F.3d 641 (3d Cir. 2002) (civil forfeiture is an *in rem* action against the property itself; the forfeiture is "not conditioned on the culpability of the owner of the defendant property");
 - *United States v. One-Sixth Share*, 326 F.3d 36 (1st Cir. 2003) ("Because civil forfeiture is an *in rem* proceeding, the property subject to forfeiture is the defendant. Thus "defenses against the forfeiture can be brought only by third parties, who must intervene.");
 - *United States v. Cherry*, 330 F.3d 658, 666 n.16 (4th Cir. 2003) ("the most notable distinction between civil and criminal forfeiture is that civil forfeiture proceedings are brought against property, not against the property owner; the owner's culpability is irrelevant in deciding whether property should be forfeited);

II. Seizure of Property for Civil Forfeiture

- Precomplaint seizure of property for civil forfeiture is now governed by 18 U.S.C. § 981(b), which was amended in 2000 to permit warrantless seizures where an exception to the Fourth Amendment warrant requirement applies (section 981(b)(2)(B)) and to authorize out-of-district seizure warrants (section 981(b)(3)).

A. Standard for seizure:

- CAFRA did not change the standard for seizing property; it is still probable cause:

- "Under H.R. 1658, a property owner would still have the burden of proving affirmative defenses, such as the (innocent owner' defense, by a preponderance of the evidence. Also, property can still be initially seized by the Government based on probable cause, and this standard is sufficient to affect forfeiture in cases where a claim to the seized property is not filed." CAFRA Legislative History, DOJ Extract at 279.

- The distinction between "seizure" and "forfeiture":

- *United States v. A Group of Islands*, 185 F. Supp. 2d 117, 121 n.7 (D.P.R. 2001) (seizure may be based on probable cause to believe the property will ultimately be proved forfeitable, but it entails only taking possession and control; to become the owner of the property, *i.e.*, to transfer title to the property to the United States, the Government must commence a forfeiture action);

B. Warrantless seizures:

1. Warrantless seizures for forfeiture may be based on the automobile, plain view, exigent circumstances, and search incident exceptions to the Fourth Amendment:

- *Florida v. White*, 526 U.S. 559 (1999) (warrantless seizure of automobile did not violate the Fourth Amendment where there was probable cause to believe the automobile was subject to forfeiture and it was found in a public place);

- *United States v. \$557,933.89, More or Less, in Us. Funds*, 293 F.3d 66 (2d Cir. 2002) (structured money orders found in plain view by airport security could be detained temporarily as a *Terry* stop and ultimately seized on probable cause to believe the items were involved in a structuring offense; the test of whether the criminal connection was "immediately apparent" is objective-the Government does not have to establish that the seizing agent was trained to understand the significance of structured money orders);

- *United States v. Rankin*, 261 F.3d 735 (8th Cir. 2001) (police officer's observation of defendant conducting drug deal from his car provided probable cause for seizure of car for forfeiture and subsequent inventory search);

- *United States v. Daccarett*, 6 F.3d 37 (2d Cir. 1993) (warrantless seizure of funds captured in middle of electronic funds transfer through intermediary bank justified by exigent circumstances);

- *United States v. \$149,442.43 in U.S. Currency*, 965 F.2d 868,875-76 (10th Cir. 1992) (firearms, jewelry, and vehicles may be seized as proceeds or property used to facilitate when found incident to execution of search warrant even if items were not specifically listed in the warrant);

- *United States v. Berry*, 2002 WL 818872 (E.D. Pa. 2002) (officer was entitled to make warrantless seizure under state forfeiture law of vehicle he had seen used in drug deal, and was entitled to seize gun he found in plain view);

- *Seaborn v. Thompson*, 2002 WL 737654 (M.D.N.C. 2002) (following *Florida v. White*; state police may seize automobile for forfeiture under state law without a warrant if they have probable cause);
- *United States v. Wright*, 171 F. Supp. 2d 1195 (D. Kan. 2001) (no warrant required for seizure of vehicle from public place where officer has probable cause to believe vehicle was previously used to transport drugs; lawful inventory search may follow);
- *United States v. Warren*, 181 F. Supp. 2d 1232 (D. Kan. 2001) (items discovered during execution of search warrant, but not named in warrant, may be seized if there is probable cause to believe they are subject to forfeiture under state law);
- *United States v. Washington*, 1997 WL 198046 (D. Kan. 1997) (items found incident to execution of search warrant may be seized for forfeiture under section 881(b)(1)), *aff'd*, 162 F.3d 1175 (10th Cir. 1998);
- *But see United States v. One 1974 Learjet*, 191 F.3d 668,672 n.2 (6th Cir. 1999) (reserving decision on whether a warrant is required to seize property for forfeiture even if the Government has probable cause);
- *United States v. Brookins*, 228 F. Supp. 2d 732 (E.D. Va. 2002) (*Florida v. White* permits warrantless seizure based on probable cause only when the vehicle is in a public place, not when it is on a private driveway);

C. The probable cause standard:

- *United States v. \$404,905.00 in U.S. Currency*, 182 F.3d 643 (8th Cir. 1999) (when a police officer makes a lawful traffic stop and there is a drug dog already on the scene, he may detain the motorist temporarily to allow the dog to sniff the exterior of the vehicle; a dog sniff is not a "search" and requires no prior suspicion, but once the dog alerts, the officer has probable cause to search the vehicle);
- *United States v. One 1993 Ford Pickup*, 148 F. Supp. 2d 1258 (M.D. Ala. 2001) (whether additional delay following completion of traffic stop to allow dog sniff is unconstitutional depends on the circumstances; positive dog sniff provides probable cause for search of vehicle; Government does not have to advise driver that he has right to refuse to submit to dog sniff);
- *United States v. \$57,443.00 in U.S. Currency*, 42 F. Supp. 2d 1293 (S.D. Fla. 1999) (traffic stop and search of vehicle for money involved in money laundering offense valid where agents knew claimant had received laundered money, claimant made false statement denying it and agents observed claimant putting a box in her car);
- *United States v. \$189,825.00 in U.S. Currency*, 8 F. Supp. 2d 1300 (N.D. Okla. 1998), *aff'd*, No. 98-5227 (10th Cir. May 23, 2000) (traffic stop may evolve into search of vehicle if during time permitted for the stop, officer develops reasonable suspicion of other illegal activity; totality of circumstances, including dog sniff, justified search of gas tank where bundles of

currency were found);

- *United States v. Ramos*, 2002 WL 31031639 (D. Mass. 2002) (because police had reasonable suspicion that \$50,000 cash offered as bail money for drug defendant, might be drug money, they could detain it long enough for drug dog to arrive; once dog alerted and part of the money was found to be from a controlled buy, there was probable cause to seize it);

- *But see United States v. Williams*, 267 F. Supp. 2d 1130 (M.D. Ala. 2003) (waiting until the next day to have a dog sniff currency seized at an airport exceeds the limits of a *Terry* stop; evidence suppressed for lack of probable cause);

- *Cf. United States v. Arvizu*, 534 U.S. 266 (2002) (reasonable suspicion for *Terry* stop of automobile is based on totality of the circumstances; stop may be justified even if any of the factors relied on by the officer would be susceptible of an innocent explanation if viewed standing alone);

- *Cf. Maryland v. Pringle*, - U.S. - n.2, 124 S. Ct. 795, 800 n.2, 2003 WL 22938461 *4 n.2 (Dec. 15, 2003) (state court erred in considering presence of currency in vehicle, standing alone, as "innocuous"; it is part of the totality of the circumstances);

- *Cf. United States v. Reed*, 349 F.3d 457 (7th Cir. 2003) (when police find \$94,000 in cash wrapped in pink cellophane in concealed compartment of vehicle driven by person with history of drug dealing, who offers implausible explanation, there is probable cause to arrest occupants for money laundering in violation of section 1956);

- *See* cases where probable cause was the standard of proof at trial under pre-CAFRA law at page 97.

D. Out-of-district seizure warrants:

- There are no cases on the use of out-of-district seizure warrants under section 981(b)(3). In general, *see Outline on Seizure Warrants Under CAFRA* by Gordon Kromberg, available on Asset Forfeiture and Money Laundering Online.

E. Anticipatory seizure warrants:

- Only one sovereign may exercise jurisdiction over a *res* at one time, but federal courts may issue orders that anticipate that a state court will release property either to the United States or to the property owner:

- *United States v. \$490,920 in U.S. Currency*, 937 F. Supp. 249, 252-53 (S.D.N.Y. 1996) (the Government may obtain an anticipatory seizure warrant to allow the U.S. marshal to seize the property once it is released by a state court and returned to the property owner);

- *United States v. \$3,000,000 Obligation of Qatar National Bank*, 810 F. Supp. 116, 117-19 (S.D.N.Y. 1993) (federal court, though "second in time," may proceed to judgment, assert a lien

that will result in seizure of the asset only upon release from state jurisdiction, but stay execution of the judgment until federal jurisdiction is perfected);

- *But see United States v. \$506,231 in US. Currency*, 125 F.3d 442 (7th Cir. 1997) (district court lacks authority to issue an anticipatory seizure warrant if the property is in the custody and control of another sovereign at the time the warrant is issued);

- *See* cases on exercise of concurrent jurisdiction in adoptive forfeiture cases at page 58.

F. Appeals:

1. Government may appeal denial of application for seizure warrant:

- *In re: Application for Warrant to Seize One 1988 Chevrolet Monte Carlo*, 861 F.2d 307, 309 (1st Cir. 1988) (denial of warrant is appealable under section 1291 because application was not a "subset of some pending litigation, but itself comprised an independent, self-contained proceeding");

2. Issuance of seizure warrant is not appealable:

- *United States v. Michelle's Lounge I*, 39 F.3d 684, 693 (7th Cir. 1994) (seizure warrants are not appealable under section 1292(a); if seizure warrants were treated as injunctions, every seizure warrant would be appealable in the first instance; but seizure warrant may be appealable under section 1291 and the collateral order doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), if seizure deprives criminal defendant of property needed for attorney's fees);

- *United States v. Victoria-21*, 3 F.3d 571, 575 (2d Cir. 1993) (absent a compelling showing that an *ex parte* warrant has shut down a business, issuance of seizure warrant is not subject to interlocutory appeal);

- *United States v. Quintana-Aguayo*, 235 F.3d 682 (1st Cir. 2000) (seizure warrant that evicts owner from his business and directs Marshals to operate it not subject to interlocutory appeal; following *Michelle's Lounge I* and *Victoria-21* and distinguishing *Statewide Autoparts*);

- *But see United States v. All Assets of Statewide Autoparts, Inc.*, 971 F.2d 896, 901 (2d Cir. 1992). (*ex parte* seizure warrant that shuts down an ongoing business has all the earmarks of an injunction, and is therefore appealable under section 1292(a));

G. Seizure of particular kinds of property:

1. Real property:

- Seizure and forfeiture of real property is governed by 18 U.S.C. § 985. *See* Section VI, *infra*.

2. Bank Accounts:

- *United States v. Daccarett*, 6 F.3d 37, 55 (2d Cir. 1993) (electronic funds passing through an intermediate bank account constitute a seizable *res*);

- See generally *Winter Storm Shipping, Ltd. v. TPI*, 310 F.3d 263 (2d Cir. 2002) (admiralty case; reaffirming holding in *Daccarett* that Government may seize electronic funds passing through intermediary bank under the Supplemental Rules);

H. Remedy for illegal seizure/suppression of evidence:

1. The Fourth Amendment exclusionary rule applies to civil forfeiture cases:

- *United States v. Daccarett*, 6 F.3d 37 (2d Cir. 1993) (there are three methods of seizing property for forfeiture: pursuant to an arrest warrant *in rem*, pursuant to a Rule 41 warrant, and pursuant to specific statutory seizure authority; Fourth Amendment applies to all three types of seizures);

- *United States v. Premises and Real Property ... 500 Delaware Street*, 113 F.3d 310 (2d Cir. 1997) (exclusionary rule applies to civil forfeiture cases) (citing *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965)); *United States v. \$57,443.00 in U.S. Currency*, 42 F. Supp. 2d 1293 (S.D. Fla. 1999) (same); *United States v. One 1993 Ford Pickup*, 148 F. Supp. 2d 1258, 1258 n.1 (M.D. Ala. 2001) (same);

- *United States v. \$404,905.00 in U.S. Currency*, 182 F.3d 643 (8th Cir. 1999) (exclusionary rule applies to "quasi-criminal" civil forfeiture cases; if the seizure is unlawful, the Government must prove its forfeiture case with other untainted evidence);

- *United States v. Real Property Known as 22249 Dolorosa Street*, 167 F.3d 509 (9th Cir. 1999) (all evidence, including officer's testimony, derived from illegal search of house suppressed; suppressed evidence cannot be used to establish basis for forfeiture);

- But see *United States v. 408 Peyton Road*, 162 F.3d 644 (11th Cir. 1998) (*en banc*) (leaving open question of whether suppression of evidence is an appropriate sanction for seizure of real property in violation of *James Daniel Good*);

- The "good faith exception" to the exclusionary rule also applies:

- *United States v. Real Property at 15214 County Highway E.*, 332 F.3d 1070 (7th Cir. 2003) (evidence seized during a search pursuant to a facially valid warrant need not be suppressed where the agents made full disclosure of the source of their evidence to the court, and relied in good faith on a warrant that was invalid only because the issuing magistrate failed to anticipate that the warrantless use of a thermal imaging device - which supplied the probable cause for the warrant - would be ruled unconstitutional by the Supreme Court 3 years later);

2. But the claimant/owner may lack standing to contest the seizure:

- *United States v. \$1,790,021 in U.S. Currency*, 261 F. Supp. 2d 310 (M.D. Pa. 2003) (person

asserting that he is the true owner of currency seized from a courier lacks standing to move to suppress if the money was seized from a third party's vehicle in which the claimant had no expectation of privacy);

- *See United States v. Salvucci*, 448 U.S. 83, 86 (1980); *Rakas v. Illinois*, 439 U.S. 128, 130-31 (1978);

3. Although the illegal seizure of the *res* that is the subject of *in rem* forfeiture may require suppression of evidence, it does not require dismissal of the forfeiture complaint:

- *United States v. Property, Parcel of Aguilar*, 337 F.3d 225 (2d Cir. 2003) (an illegal seizure, standing alone, does not immunize property from forfeiture; it only precludes the Government from introducing evidence gained by the seizure in the forfeiture case);

- *Madewell v. Downs*, 68 F.3d 1030, 1044 n.18 (8th Cir. 1995) (issues in Rule 41(e) hearing and civil forfeiture proceeding are fundamentally different; determination of grounds for return of property pursuant to Rule 41(e) would not necessarily insulate it from forfeiture "because unconstitutional conduct in seizing drug-related property is irrelevant to power of the Federal Government to forfeit property" based on untainted evidence);

- *United States v. One 1974 Learjet*, 191 F.3d 668 (6th Cir. 1999) (district court erred in dismissing forfeiture complaint; illegal seizure of property might result in return of property pending trial or in suppression of evidence, but lack of probable cause at the time of seizure has no bearing on the right of the Government to establish forfeitability of the property at trial);

- *United States v. \$9,041,598.68*, 163 F.3d 238 (5th Cir. 1998) (lack of probable cause for seizure may result in suppression of seized property as evidence but has no other consequence);

- *United States v. Daccaret*, 6 F.3d 37, 46 (2d Cir. 1993) ("even when the initial seizure is found to be illegal, the seized property may still be forfeited," although evidence may be suppressed);

- *United States v. U.S. Currency in the Amount of \$146,800*, 1997 WL 269583 (E.D.N.Y. 1997) (seizure without probable cause has "evidentiary consequences" but does not bar forfeiture of the property);

- *United States v. A Parcel of Land (92 Buena Vista)*, 937 F.2d 98 (3d Cir. 1991), *aff'd on separate issue*, 507 U.S. 111 (1993) (seizure of home without notice and hearing was illegal, but probable cause can be established with untainted evidence); *United States v. All Assets of Statewide Auto Parts, Inc.*, 971 F.2d 896 (2d Cir. 1991) (same result regarding seizure of ongoing business without notice);

- *United States v. \$206,323.56 in U.S. Currency*, 998 F. Supp. 693 (S.D. W. Va. 1998) (seizure of cash from car during traffic stop was legal, but even if it were not, forfeiture case would not have to be dismissed);

- *United States v. 155 Bemis Road*, 760 F. Supp. 245, 251 (D.N.H. 1991) (lack of probable cause

for seizure results only in the suppression of evidence and does not bar forfeiture action or serve as basis for dismissal of complaint); *United States v. Certain Real Property Located in Hanson Brook*, 770 F. Supp. 722, 730 (D. Me. 1991) (same); *United States v. 5633,021.67 in U.S. Currency*, 842 F. Supp. 528 (N.D. Ga. 1993) (same);

- See cases discussing grounds on which motion to dismiss may be based at page 70.

4. Although the *res* itself may not be used to establish grounds for forfeiture, forfeiture may be established with independently derived evidence:

- *United States v. Real Property Known as 415 East Mitchell Ave.*, 149 F.3d 472 (6th Cir. 1998) (even if evidence resulting from search of claimant's residence had to be suppressed, claimant's guilty plea in state court to the underlying criminal offense is sufficient by itself to establish basis for the forfeiture);

- *United States v. \$174,206.00 in U.S. Currency*, 320 F.3d 658 (6th Cir. 2003) (following *East Mitchell Ave.*; whether district court properly denied motion to suppress is irrelevant where independently derived evidence was sufficient to establish the forfeitability of the property by a preponderance of the evidence);

- *United States v. One Parcel... 2030-32 Main Street*, 2000 WL 1336473 (D. Conn. 2000) (remedy for illegal seizure is suppression of evidence, but no suppression is necessary if same evidence was independently obtained with a criminal search warrant executed at the same time as the civil seizure);

- *United States v. 47 West 644 Route 38*, 962 F. Supp. 1081 (N.D. m. 1997) (statements made at the time of the illegal search must be suppressed as fruits, but responses to discovery requests are not fruits);

5. But if the Government has no other evidence to support the forfeiture, the suppression of the fruits of an illegal seizure may result in the dismissal of the case or summary judgment for the claimant:

- *United States v. \$639,588 In U.S. Currency*, 955 F.2d 712 (D.C. Cir. 1992) (case dismissed where the Government had no evidence to establish forfeiture other than drug residue on seized currency, and currency had been seized illegally from claimant's luggage);

- *United States v. Real Property Known as 22249 Dolorosa Street*, 167 F.3d 509 (9th Cir. 1999) (the Government failed to establish that house was purchased with drug proceeds once all financial records were suppressed);

- *United States v. \$53.082 in United States Currency*, 985 F.2d 245 (6th Cir. 1993) (dog sniff that was fruit of an illegal seizure excluded from the forfeiture case; summary judgment for claimant when the Government could not otherwise establish basis for forfeiture);

6. Collateral estoppel on suppression issues:

- *United States v. Real Property Located in El Dorado County*, 59 F.3d 974 (9th Cir. 1995) (defendant who has litigated Fourth Amendment issues in state criminal case is estopped from relitigating same in federal forfeiture case); *United States v. One Parcel of Real Property Known as 16614 Cayuga Road*, 69 Fed. Appx. 915, 2003 WL 21437207 (10th Cir. 2003) (same);

- *United States v. Real Property Known as 415 East Mitchell Ave.*, 149 F.3d 472 (6th Cir. 1998) (same; that the United States was not a party to the state action is irrelevant since the United States is not the party against whom the estoppel is being applied);

- *United States v. U.S. Currency in the Amount of \$ 97,253.00, More or Less*, 2000 WL 194683 (E.D.N.Y. 2000) (defendant who pled guilty to CMIR violation is estopped from challenging the basis for the forfeiture under section 5317; defendant who litigated Fourth Amendment issues in a related criminal case is estopped from challenging the admissibility of evidence in the civil forfeiture case on the same Fourth Amendment grounds);

I. Motion for return of property pending trial based on illegal seizure:

- There are two possible bases for a pretrial motion for the release of property seized for civil forfeiture: (1) release to avoid a hardship under section 983(f) (Section J, *infra*); and (2) release because the seizure was unlawful under Rule 41(e).

1. In general, the court does not have jurisdiction to entertain a Rule 41 (e) motion for return of seized property once forfeiture is commenced because the opportunity to contest the forfeiture provides an adequate remedy at law:

- *United States v. Clymore*, 245 F.3d 1195 (10th Cir. 2001) (a Rule 41(e) motion is properly denied if the seizure was lawful, the property is contraband or is subject to forfeiture, or the Government's need for the property as evidence continues);

- *United States V. One 1974 Learjet*, 191 F.3d 668 (6th Cir. 1999) (once the Government serves notice of a forfeiture action on the claimant, the claimant's only remedy is to contest the forfeiture on the merits; he may not file a Rule 41(e) motion);

- *Ibarra v. United States*, 120 F.3d 472 (4th Cir. 1997) (district courts are divested of jurisdiction over a civil forfeiture action once the Government initiates administrative forfeiture proceedings unless the claimant files a claim); *In re Seizure of \$82,000 More or Less*, 2000 WL 1707495 (W.D. Mo. 2000) (same);

- *United States v. One 1987 Jeep Wrangler*, 972 F.2d 472 (2d Cir. 1992); *United States v. U.S. Currency in the Amount of \$146,800*, 1997 WL 269583 (E.D.N.Y. 1997) (Rule 41(e) motion not appropriate vehicle for challenging legality of seizure where claimant has adequate remedy at law-i.e., contesting the forfeiture in the civil forfeiture case);

- *Rodriguez v. United States Department of Justice*, 2001 WL 180127 (2d Cir. 2001) (false) (once a forfeiture proceeding is commenced, the claimant has no opportunity or occasion to contest the illegal seizure of his property-other than by filing a motion to suppress evidence-

claimant's remedy is to contest the forfeiture action itself On the merits);

- *Albajon v. Gugliotta*, 72 F. Supp. 2d 1362 (S.D. Fla. 1999) (Rule 41 (e) is not a substitute for filing a claim; court lacks jurisdiction to hear Rule 41(e) claim by person who received adequate notice and failed to file a claim);

- *United States v. Douleh*, No. 03-M-4D33P (W.D.N.Y. July 3, 2003) (Magistrate's Report and Recommendation) (claimant cannot use Rule 41(g) to seek return of his property based on an illegal seizure; his remedy is to file a motion to suppress; Rule 1(a)(5)(B) makes clear that Rule 41(g) does not apply to civil forfeiture cases);

- *In Re Motion for Return of \$61,412.00 in U.S. Currency*, No. OO-CV-6654 CARR) (E.D.N.Y. Dec. 21, 2000) (unpublished) (once Government files civil forfeiture complaint, court lacks jurisdiction to consider Rule 41(e) motion based on Fourth Amendment violation unless claimant would suffer irreparable harm and lacks an adequate remedy at law; temporary deprivation of currency that claimant alleges constitutes "every penny" she owns does not constitute irreparable harm; opportunity to move to suppress illegally seized evidence in the civil forfeiture proceeding provides claimant with an adequate remedy for any Fourth Amendment violation);

- *Baranski v. Fifteen Unknown Agents of ATF*, 195 F. Supp. 2d 962 (W.D. Ky. 2002) (court has no jurisdiction to consider Rule 41(e) motion raising Fourth Amendment issues where pending civil forfeiture action gives claimants adequate remedy at law);

2. But some courts hold that a claimant is entitled to a post-seizure, pretrial probable cause hearing:

- *Marine Midland Bank, N.A. v. United States*, 11 F.3d 1119 (2d Cir. 1993) (the Government must have probable cause to seize entire account at time of seizure; court may entertain motion for return of portion of funds seized from interbank account for which the Government lacked probable cause and may return funds pretrial in exercise of authority to review magistrate's probable cause determination);

- *Krimstock v. Kelly*, 306 F.3d 40 (2d Cir. 2002) (construing New York's civil forfeiture statute as applied to the forfeiture of vehicles in drunk driving cases) (claimant's due process right to meaningful hearing at meaningful time requires probable cause hearing immediately after seizure of property; at the hearing, the court must determine not only if there was probable cause for the seizure, but also the viability of any innocent owner defense and the availability of less drastic means to preserve the property pending trial), *rev 'g* 2000 WL 1702035 (S.D.N.Y. 2000) (holding that if the forfeiture proceeding is commenced in a timely way, the opportunity to contest the forfeiture proceeding affords claimant all the due process to which he is entitled);

- *United States v. One 1995 Chevrolet Tahoe*, 1999 WL 33117423 (W.O. Tenn. 1999) (because the standard for forfeiture at trial is higher than the probable cause standard for seizure, and because at trial the claimant can only contest the forfeiture by revealing his defense, the claimant is entitled to a pretrial probable cause hearing);

- See *United States v. All Funds on Deposit at Dime Savings Bank*, 255 F. Supp. 2d 56 (E.D.N.Y. 2003) (rejecting notion that *Krill's* stock applies to federal forfeiture cases where there are built-in due process protections for property owners such as the innocent owner defense and hardship provision);

3. Most courts, however, exercise anomalous jurisdiction over a Rule 41(g) motion only in special circumstances:

a. If the Government has not given the claimant proper notice that he or she could contest the forfeiture action by filing a claim:

- *United States v. One 1974 Learjet*, 191 F.3d 668 (6th Cir. 1999) (court may consider Rule 41(e) motion if the Government did not give claimant notice of its forfeiture action);

- *Muhammed v. United States*, 92 F.3d 648 (8th Cir. 1996) (administrative forfeiture proceeding does not oust district court of jurisdiction over pending Rule 41 (e) motion where DEA notice did not adequately inform claimant that he would have to contest administrative forfeiture by filing claim and cost bond instead of relying solely on Rule 41(e) motion);

- *United States v. Goykhman*, 1999 WL 97895 (S.D.N.Y. 1999) (court has jurisdiction over Rule 41(e) motion until the Government gives claimant proper notice and publishes notice of administrative forfeiture);

- For cases where Rule 41(e) was used to challenge a completed administrative forfeiture, see page 26;

b. Where no forfeiture action has been commenced:

- *United States v. U.S. Currency in the Amount of \$146,800*, 1997 WL 269583 (E.D.N.Y. 1997) (if delay in commencing forfeiture proceeding rises to the level of a due process violation, court may consider claimant's challenge to the probable cause for the seizure pretrial);

- *In re Seizure of All Funds...Registry Publishing, Inc.*, 887 F. Supp. 435,449 (E.D.N.Y. 1995) (where claimant files Rule 41 (e) motion and no forfeiture action is yet pending, the Government must demonstrate probable cause for the seizure at a hearing; motion granted because forfeiture was based on money laundering and there was no probable cause to support the underlying SUA offense), vac'd 68 F.3d 557 (2d Cir. 1995);

- *Stasio v. United States*, 1997 WL 36981 (E.D.N.Y. 1997) (the Government is free to refile motion to dismiss Rule 41(e) motion for lack of jurisdiction once civil judicial action is filed); .

- *In the Matter of the Seizure of One White Jeep Cherokee*, 991 F. Supp. 1077 (S.D. Iowa 1998) (court exercises anomalous jurisdiction because seizure has effectively shut down claimant's business and delay in instituting civil forfeiture action leaves claimant no remedy at law; but court holds that 4-month delay since time of seizure does not violate due process given the

Government's need to avoid jeopardizing ongoing criminal investigation);

- *In Re McCorkle*, 972 F. Supp. 1423 (M.D. Fla. 1997) (seizure of property without filing civil or criminal forfeiture action allows court to exercise anomalous jurisdiction to avoid manifest injustice that would result if the Government seized property without probable cause; motion denied upon finding that probable cause was established);

- *In re: FBI Seizure of Cash and Other Property From Edwin w: Edwards*, 970 F. Supp. 557 (E.D. La. 1997) (where the claimant files a Rule 41(e) motion between the time of the seizure and the Government's filing of a forfeiture complaint, the motion will be stayed for 60 days to give the Government an opportunity to file);

- *United States v. U.S. Currency in the Amount of \$146,800*, 1997 WL 269583 (E.D.N.Y. 1997) (the Government generally not required to establish probable cause pretrial, but where there is undue delay in filing the complaint, a finding of lack of probable cause may result in return of the property to the claimant pending trial);

c. Claimant is entitled to pretrial probable cause hearing if seized funds are needed to pay attorney in criminal case:

- *United States v. Michelle's Lounge I*, 39 F.3d 684 (7th Cir. 1994) (applying *Moya-Gomez* to civil case);

- *United States v. Michelle's Lounge II*, 126 F.3d 1006 (7th Cir. 1997) (extending *Michelle's Lounge I* to funds needed to pay attorney in civil case to litigate motion to free funds for use in criminal case, but noting in *dicta* that funds should not be made available to litigate civil case generally because the Sixth Amendment justification would not apply);

- *United States v. Farmer*, 274 F.3d 800 (4th Cir. 2001) (defendant entitled to pretrial hearing if property is seized for civil forfeiture if he demonstrates that he has no other assets available);

- *United States v. Register*, 182 F.3d 820 (11th Cir. 1999) (filing *lis pendens* is not a taking; no post-filing hearing required to determine basis for filing);

4. Whether courts will continue to exercise anomalous jurisdiction to consider Rule 41(g) motions under CAFRA is unclear:

- Under pre-CAFRA law, when there was no time limit on the Government for filing a judicial forfeiture action, claimants could use Rule 41 (g) motions to force the Government to move the case along; but the availability of hardship relief under section 983(f) and the 60-day deadline for commencing administrative forfeiture proceedings may provide an adequate remedy without the necessity of a post-seizure probable cause hearing.
- Also, CAFRA may be construed as Congress's attempt to set forth an exclusive remedy that preempts other remedies that are not constitutionally required.

- *United States v. Douleh*, No. 03-M-4033P (W.D.N.Y. July 3, 2003) (Magistrate's Report and Recommendation) (there is no reason to exercise anomalous jurisdiction over a Rule 41(g) motion now that CAFRA has created a procedure for releasing property to avoid a hardship);

- *In re motion for Return of \$61,412.00 in U.S. Currency*, No. OO-CV-6654 (ARR) (E.D.N.Y. Dec. 21, 2000) (unpublished) (any due process concern that might result from forcing claimant to litigate her Fourth Amendment claim in the forfeiture proceeding, instead of pursuant to a Rule 41(e) motion, is mitigated by the Government's filing its complaint 6 weeks earlier than it was required to do by CAFRA);

- *See Krimstock v. Kelly*, 306 F.3d 40,62 n.23 (2d Cir. 2002) (contrasting New York civil forfeiture law with federal law that expressly protects claimants from hardships); *id.* at 69 n.33 (noting that balancing factors that weigh in favor of immediate post-seizure hearing in New York drunk driving cases might come out differently when applied to federal cases because the latter involve much more complicated issues); *but see id.* at 69 (fact that forfeiture proceeding under state law had to be commenced in 25 days does not satisfy due process; it may be a long time before trial and final judgment);

5. Inclusion of property in a criminal indictment gives defendant adequate remedy at law:

- *United States v. Williams*, 267 F. Supp. 2d 1130 (M.D. Ala. 2003) (motion for return of seized property denied, despite finding of lack of probable cause and granting of motion to suppress, because property is restrained in a criminal case under section 853(e));

- *Cartwright v. United States*, No. 00-4400-CN-JORDAN (S.D. Fla. Feb. 26, 2001) (refusing to exercise equitable jurisdiction over motion for return of property seized for civil forfeiture because defendant's subsequent indictment, including forfeiture, gives defendant adequate remedy at law; there is nothing wrong with starting case with civil seizure and proceeding with criminal forfeiture);

6. Criminal court lacks jurisdiction to grant Rule 41 (g) motion when civil forfeiture is pending:

- *United States v. Akers*, 215 F.3d 1089 (10th Cir. 2000) (court in district where criminal action has been concluded lacks jurisdiction to grant Rule 41(e) motion for return of property subject to civil forfeiture in another district; civil forfeiture action gives defendant adequate remedy at law);

7. Court lacks jurisdiction over property seized by state:

- *United States v. Rower*, 201 F.R.D. 516 (D. Kan. 2001) (federal court has no subject matter jurisdiction over motion for return of property seized by state agents unless federal agents later had actual possession, federal prosecutors constructively possessed the property for use in a federal prosecution, or federal authorities directed state agents who made the seizure);

J. Motion for pretrial release of seized property to avoid hardship:

- Claimants may seek the pretrial release of seized property to avoid a hardship pursuant to 18 U.S.C. § 983(t).

- *United States v. One Lincoln Navigator* 1998, 328 F.3d 1011 (8th Cir. 2003) (noting that district court denied claimants' hardship petition on the ground that a third party owner who is not the person who generally has use of the car suffers no hardship when the car is seized for forfeiture);

- *United States v. \$1,231,349.68 in Funds*, 227 F. Supp. 2d 125 (D.D.C. 2002) (granting petition for release of family car to avoid hardship where claimant has possessory interest and strong community ties, but denying release of seized cash because the likelihood that it would be unavailable for trial "is almost assured"; claimant has burden of showing that exception for proceeds of legitimate business in section 983(f)(5)(B) applies);

- *United States v. Contents of Account 4000393242*, No. C-I-01-729 (S.D. Ohio Mar. 13, 2002) (under section 983(f)(8), claimant may not seek release of funds seized from a bank account unless he establishes that they were the funds of a business that has been seized; the reference is to the seizure of *the business*, not to the seizure of the funds);

- *United States v. Douleh*, No. 03-M-4033P (W.D.N.Y. July 3, 2003) (Magistrate's Report and Recommendation) (section 983(f) is the exclusive remedy for seeking release of property to avoid a hardship; Rule 41 (g) motion dismissed);

- *See Outline on Hardship Petitions* by Leslie Westphal, available on AFML Online.

K. Maintaining evidentiary value of seized property:

- *United States v. 4333 South Washtenaw Ave.*, 1997 WL 587755 (N.D. 111. 1997) (failure to preserve cocaine found in residence so claimant could have it tested did not deny claimant due process);

- *United States v. Akins*, 995 F. Supp. 797 (M.D. Tenn. 1998) (cash seized for forfeiture may be converted to a cashier's check; the Government is not required to preserve the cash as evidence, even if it relies on a positive dog sniff to establish the connection to drug trafficking);

III. Administrative Forfeiture

- Administrative forfeitures are governed by the Customs laws, 19 U.S.C. § 1602 *et seq.*, as incorporated by 18 U.S.C. § 981(d), 21 U.S.C. § 881(d), and other forfeiture statutes, and by *CAFRA*. (18 U.S.C. § 983(a)(1)) for cases commenced on or after August 23, 2000.

- *United States v. \$557,933.89, More or Less, in U.S. Funds*, 287 F.3d 66, 77 n.7 (2d Cir. 2002) (procedures set forth in 19 U.S.C. § 1602 *et seq.* are superseded by *CAFRA* where inconsistent);

- *Note:* Some forfeiture statutes *do not* incorporate the Customs laws, and thus do provide for administrative forfeiture; *see, e.g.*, 18 U.S.C. § 492 (forfeiture for counterfeiting);

- For a discussion of the application of CAFRA to administrative forfeitures, *see* Stefan D. Cassella, "The Civil Asset Forfeiture Refonn Act of 2000; 27 *Journal of Legislation* 97, Notre Dame Law School (2001), available on AFML Online.

A. Overview:

1. Reasons for administrative forfeiture:

- *United States v. Ninety-Three (93) Firearms*, 330 F.3d 414 (6th Cir. 2003) (administrative forfeitures are "favored" because they proved "a mechanism for the Government and private parties to resolve their forfeiture-related disputes 'without the need for judicial actions'");

- *In re: Application for Warrant to Seize One 1988 Chevrolet Monte Carlo*, 861 F.2d 307, 310 (1st Cir. 1988) (administrative forfeitures conserve judicial resources by allowing Government to use "simpler, quicker, less expensive administrative proceedings");

- *United States v. 557,960.00 in U.S. Currency*, 58 F. Supp. 2d 660 (D.S.C. 1999) (administrative forfeitures are favored because they are less formal and expensive than judicial forfeiture proceedings);

- *In re Seizure of \$82, 000 More or Less*, 2000 WL 1707495 (W.D. Mo. 2000) (administrative forfeitures are often uncontested because "drug traffickers know better than to stake claims to contraband and drug proceeds"; it is "far more sensible for such criminals to disclaim any interest in the property and avoid possible prosecution");

2. Property eligible for administrative forfeiture:

- In general, property may be forfeited administratively only if it is currency or has a value under \$500,000, *see* 19 U.S.C. § 1607; real property may never be forfeited administratively, *see* 18 U.S.C. § 985(a).

- *Yskamp v. DEA*, 163 F.3d 767 (3d Cir. 1998) (\$500,000 threshold in section 1607(a)(1) does not apply to aircraft forfeited under subsection (a)(3); threshold applies to individual items seized, not to aggregate value);

3. Summary of administrative forfeiture procedure:

- For a summary of the pre-CAFRA administrative forfeiture procedure, *see United States v. Gonzalez-Gonzalez*, 257 F.3d 31 (1st Cir. 2001); *United States v. \$57,960,00 in U.S. Currency*, 58 F. Supp. 2d 660 (D.S.C. 1999); *United States v. Derenak*, 27 F. Supp. 2d 1300 (M.D. Fla. 1998); *Concepcion v. United States*, 938 F. Supp. 134 (E.D.N.Y. 1996); *United States v. \$50,200 in U.S. Currency*, 76 F. Supp. 2d 1247 (D. Wyo. 1999);

- *Laconia Savings Bank v. United States*, 2000 WL 1507322 (D.N.H. 2000) (summarizing the remission process);

B. Jurisdiction:

- The Federal Government must have jurisdiction over the *res* before a seizing agency can commence an administrative forfeiture proceeding.

- *United States v. Thomas*, 319 F.3d 640 (3d Cir. 2003) (because money is fungible, seizing agency did not lose jurisdiction when it converted seized currency into a cashier's check; court also rejects notion that, by analogy to the concurrent jurisdiction doctrine, the seized property is not in the jurisdiction of the seizing agency if it was seized pursuant to a federal warrant);

C. Time for sending notice:

1. CAFRA. imposes a 60-day deadline on sending notice of an administrative forfeiture, *see* section 983(a)(1)(A).

2. The time limit may be extended by the seizing agency, or by a court, for certain reasons, *see* sections 983(a)(1)(B), (C), and (D).

3. Consequences of failure to send notice within 60 days:

- *Manjarrez v. United States*, 2002 WL 31870533 (N.D. In. 2002) (failure to send notice of an administrative forfeiture proceeding within the 60-day period prescribed by CAFRA does not bar the Government from commencing a civil judicial forfeiture action against the same property without first returning the property to the claimant);

- *Manjarrez v. United States*, 2002 WL 31870533 (N.D. In. 2002) (even if the Government were required to return the property to the claimant pending trial on the civil complaint, the "return" would be a technical *one* - *i.e.*, to the clerk of the court to hold pending trial, not to the claimant himself)

- *See, generally*, 27 J. Legis 97, *supra*, at pages 125.36;

- Under pre-CAFRA law, the time for sending notice of administrative forfeiture was governed by due process considerations, Justice Department policy, and in a few cases, by statute:

- *Id.* at pages 121-25;

- *United States v. One 1992 Ford Mustang GT*, 73 F. Supp. 2d 1131 (C.D. Cal. 1999) (the Government cannot excuse tardiness in sending notice by asserting that claimant could have filed Rule 41(e) motion if he wanted his property back because the Government takes the position that Rule 41(e) does not apply in administrative forfeitures);

- *United States v. \$557,933.89. More or Less. in U.S. Funds*, 287 F.3d 66 (2d Cir. 2002) (preCAFRA "promptness" requirement in section 981(b)(2) satisfied where Government commenced administrative forfeiture in "little over a month," which was unquestionably

prompt);

D. Manner of sending notice:

1. Constitutional and statutory standards:

- To satisfy due process, notice must be "reasonably calculated" to apprise interested parties of the pendency of the action; to satisfy section 1607, notice must be published for three successive weeks and written notice must be sent to any person appearing to have an interest in the property:

- *United States v. Gonzalez-Gonzalez*, 257 F.3d 31 (1st Cir. 2001) ("the touchstone is reasonableness: the Government must afford notice sensibly calculated to inform the interested party of the contemplated forfeiture and to offer him a fair chance to present his claim of entitlement");

- *United States v. Rodgers*, 108 F.3d 1247 (10th Cir. 1997) (publication in *USA Today* satisfies publication requirement, but the Government has independent duty to provide direct notice; mailing notice to two of defendant's three residences was *not* sufficient where the Government could have learned of the third address with reasonable effort);

- *Adames v. United States*, 171 F.3d 728 (2d Cir. 1999) (published notice that lists only amount seized and not date and location of seizure is not adequate);

- *United States v. Marolf*, 973 F. Supp. 1139 (C.D. Cal. 1997) (failure to send notice to person appearing to have an interest in the property violates due process under *Mullane*);

2. It is not necessary that the written notice actually be received:

- *Krecioch v. United States*, 221 F.3d 976 (7th Cir. 2000) (notice sent to defendant's current home address is adequate where DEA had no way of knowing when it sent the notice that defendant would turn himself in and be incarcerated before the notice arrived; but notice sent to home address after Government becomes aware defendant is incarcerated is not adequate);

- *United States v. Latham*, 54 Fed. Appx. 441, 2002 WL 31890914 (6th Cir. 2002) (publication and attempts to send notice to fugitive's last known address satisfied due process under *Dusenbery*);

- *Berrum v. United States*, 2003 WL 21078040 (N.D. in. 2003) (following *Dusenbery*; actual notice is not required; sending notice to the jail where defendant was confined, to his three residences, and to his attorney was sufficient);

- *Albajon v. Gugliotta*, 72 F. Supp. 2d 1362 (S.D. Fla. 1999) (notice sent to various addresses on claimant's identifications and mailed after claimant was released from jail is sufficient to satisfy due process, *even if* claimant never received notice);

- *United States v. Schiavo*, 897 F. Supp. 644,648-49 (D. Mass. 1995) (sending notice to fugitive's last known address is sufficient; not the Government's fault that notice was not effective);
- *Owens v. United States*, 1997 WL 177863 (E.D.N.Y. 1997) (notice sent to defendant's address by certified mail is reasonable if the Government has no reason to believe it failed to reach defendant; the Government is not responsible if someone forged defendant's name on return receipt card);
- *Gonzalez v. United States*, 1997 WL 278123 (S.D.N.Y. 1997) ("the [G]overnment is not required to ensure actual receipt of notice that is properly mailed");
- *United States v. Randall*, 976 F. Supp. 1442 (M.D. Ala. 1997) (mailing certified notice to correct address is sufficient even if claimant did not receive it and had his attorney call Customs seeking return of his property);
- *Chaidez v. U.S. Department of Justice*, 1998 WL 901690 (N.D. in. 1998) (attempts at personal service and eventual service on counsel were sufficient);
- *Willhite v. United States*, 2001 WL 124937 (N.D. Tex. 2001) (notice mailed to plaintiff at the address he provided for notice was adequate; due process did not require the Government to track plaintiff down when plaintiff was not imprisoned and provided no forwarding address, nor , is Government required to wait until plaintiff returns home ITom his travels before sending the notice);
- *Brown v. United States*, 2002 WL 1339102 (S.D.N.Y. 2002) (notice mailed to residence where claimant's wife and children lived was adequate under *Dusenbery*, even though claimant himself had been deported to Jamaica);

3. But if notice is returned undelivered, the Government must take additional steps:

- *Garcia v. Meza*, 235 F.3d 287 (7th Cir. 2000) (notice sent to claimant's address not adequate where it was returned as undeliverable 5 days later and Government made no further attempt to locate claimant even though it knew he had filed FTCA claim to recover his property; if written notice is inadequate, publication in *The New York Times* will not, by itself, satisfy due process);
- *Foehl v. United States*, 238 F.3d 474 (3d Cir. 2001) (sending notice to address claimant gave at time of arrest is insufficient if notice is returned undelivered and DEA, with minimal effort, could have obtained another address from local police, other DEA divisions, or state motor vehicle bureau); *but see Foehl v. United States*, 2002 WL 32075774 (E.D. Tex. 2002) (on remand and after change of venue) (after *Dusenbery*, question is not what more DEA could have done, but whether what it did, once it learned address claimant gave was wrong, was reasonable);
- *United States v. Ritchie*, 342 F.3d 903 (9th Cir. 2003) (following *Foehl* and others cases; if notice is returned undelivered, DEA has obligation to take additional steps to provide notice; newspaper publication alone is inadequate);

- *Dunn v. Snider*, No. 91.CV.7349 (W.D.N.Y. Aug. II, 1999) (notice sent to address claimant gave when arrested is inadequate if notice is returned undelivered and DEA could have obtained other addresses in state police files by simply caning the police);

- *United States v. Cadillac One 2002 Escalade*, 2003 WL 22220264 (N.D. m. 2003) (notice was adequate where, after first notice is returned undelivered, Government sends second notice to another address; proof of receipt at second address unnecessary);

- *United States v. Gambina*, 1998 WL 199i5 (E.D.N.Y. 1998) (notice is inadequate if notice sent to defendant's last known address is returned undelivered and no effort is made to serve defense counsel Or to apprise AUSA handling related criminal case of the administrative forfeiture);

4. Actual notice comports with due process:

- *Whiting v. United States*, 231 F.3d 70 (1st Cir. 2000) (discussion of civil forfeiture in defendant's presence at his arraignment provided actual notice even if defendant did not receive notice mailed to his prison address);

- *United States v. Gonzalez-Gonzalez*, 257 F.3d 31 (1st Cir. 2001) (there is no due process violation if claimant had actual notice, but Government must show he had notice of the *forfeiture proceeding*, not just notice of the seizure);

- *United States v. Giovanelli*, 807 F. Supp. 351 (S.D.N.Y. 1992) (claimant who had actual knowledge of the forfeiture cannot sit on his claim and then argue that the Government's efforts to provide notice were inadequate), *rev'd*, 998 F.2d 116 (2d Cir. 1993);

- *United States v. One 1987 Jeep Wrangler*, 972 F.2d 472 (2d Cir. 1992) (lack of publication did not amount to violation of due process where claimant had actual knowledge of the seizure); *but see Ikeliomvu v. United States*, 150 F.3d 233 (2d Cir. 1998) (for doctrine of laches to apply, claimant must have actual notice not only of the seizure, but of the fact that he may file a claim);

- *Pimentel v. DEA*, 99 F. Supp. 2d 420, 428 n.6 (S.D.N.Y. 2000) (claimant cannot complain notice was sent to wrong address if he had actual knowledge of the seizure);

- *Pena v. United States*, 1999 WL 138243 (E.D.N.Y. 1999) (prisoner who had actual notice cannot complain that the Government failed to deliver notice to him in prison, as required by *Weng*);

- *Lopes v. United States*, 862 F. Supp. 1178, 1188 (S.D.N.Y. 1994) (where there is actual notice of an impending forfeiture, there is no violation of due process); *U-Series International Service v. United States*, 1995 WL 671567 (S.D.N.Y. 1995) (same);

- *Restrepo v. United States*, 1999 WL 1044359 (S.D.N.Y. 1999) (person who had actual notice cannot complain that the Government's effort to provide notice was defective);

- *But see United States v. 5184.505.01*, 72 F.3d 1160 (3d Cir. 1995) (actual notice of

administrative forfeiture does not suffice where the Government subsequently files judicial forfeiture);

- *United States v. Deninno*, 103 F.3d 82 (10th Cir. 1996) (actual notice does not suffice where the Government was unable to rebut claim that claimant/prisoner was denied access to paper and postage to file claim);

5. Service of notice on attorney:

- *Bye v. United States*, 105 F.3d 856 (2d Cir. 1997) (notice to attorney representing defendant in the criminal case constitutes sufficient notice of administrative forfeiture);

- *McDonald v. DEA*, 1996 WL 157527 (S.D.N.Y. 1996) (service on defense counsel during discovery in criminal case was sufficient notice);

- *United States v. Cupples*, 112 F.3d 318 (8th Cir. 1997) (where there is a parallel administrative forfeiture and criminal prosecution, the Government must serve notice of the forfeiture on the defense attorney in the criminal case);

- *United States v. Cruz*, 1998 WL 326732 (S.D.N.Y. 1998) (notice sent to attorney in then-pending criminal case is adequate);

- *United States v. Franklin*, 897 F. Supp. 1301, 1303 (D. Or. 1995) (attempts to send notice to defendant's home, attorney, and place of confinement were sufficient; failure to receive notice was not the Government's fault); *Allen v. United States*, 38 F. Supp. 2d 436 (D. Md. 1999) (same) (service on attorney sufficient even though notice sent to defendant was sent to wrong jail; declining to follow *Weng*);

- *United States v. Watts*, 1999 WL 493786 (E.D. Pa. 1999) (service on attorney was sufficient);

- *But see United States v. \$184,505.01*, 72 F.3d 1160 (3d Cir. 1995) (service on attorney who represented defendant in criminal case not sufficient because until civil action is commenced, defendant has no attorney in the civil case);

6. Service of notice in English satisfies due process:

- *Toure v. United States*, 24 F.3d 444 (2d Cir. 1994); *Hong v. United States*, 920 F. Supp. 311 (E.D.N.Y. 1996) (collecting cases);

- *Crespo-Caraballo v. United States*, 200 F. Supp. 2d 73 (D.P.R. 2002) (notice published in San Juan newspaper and mailed to claimant in English was valid even though claimant only spoke Spanish, zip code was incorrect on mailed notice, and dollar amount was slightly different from actual amount seized);

E. Special rules for sending notice to prisoners:

1. Government must attempt to serve prisoners at their place of incarceration and cannot rely on publication or mailing to the last known address; but proof of actual receipt by the prisoner is not required:

- *Dusenbery v. United States*, 534 U.S. 161 (2002) (mailing notice to the prison where claimant was incarcerated, and where there were procedures in place for delivering mail to prisoners during "mail call," satisfied due process under *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); more rigorous procedures such as having prisoner sign a logbook, which would guarantee proof of actual receipt of notice, are not required);

- *Alli-Balogun v. United States*, 281 F.3d 362 (2d Cir. 2002) (sending notice to prison 2 weeks after claimant was transferred to another prison violated claimant's due process rights under *Dusenbery*);

- *United States v. Minor*, 228 F.3d 352 (4th Cir. 2000) (publication and mailing notice to home address of incarcerated prisoner is an inadequate "gesture");

- *Small v. United States*, 136 F.3d 1334 (D.C. Cir. 1998) (notice sent to prisoner's place of incarceration is not adequate if notice is returned undelivered to seizing agency before administrative forfeiture is complete and agency could have taken steps to locate prisoner);

- *Lopez v. United States*, 201 F.3d 478 (D.C. Cir. 2000) (same as *Small*; also, parallel notice to prisoner's wife that *her* interest may be forfeited does not cure defective notice);

- *United States v. Giraldo*, 45 F.3d 509, 511 (1st Cir. 1995) (seizing agencies must take steps to locate the prisoner and send him notice in jail);

- *United States v. McGlory*, 202 F.3d 664 (3d Cir. 2000) (it violates due process for DEA to send notice to USMS asking to forward to prisoner; DEA must at least send notice to prison where defendant is confined);

- *United States v. Wade*, 230 F. Supp. 2d 1298 (M.D. Fla. 2002) (notice sent to place of incarceration satisfies *Dusenbery*; Government not required to make "heroic efforts");

- *United States v. Hines*, 2003 WL 22232887 (E.D. Pa. 2003) (detailing evidence showing that prison had procedures in place sufficient to satisfy *Dusenbery*);

- *But see Harris v. DEA*, 2001 WL 310974 (D. Md. 2001) (DEA not expected to know defendant is in state custody on unrelated state charge; therefore notice sent to home address was adequate even though defendant was incarcerated);

- *United States v. Donovan* 2002 WL 730906 (7th Cir. 2002) (Table) (in light of DEA agent's statement to defendant that his property had been seized and that he needed to take steps to recover it, failure to send notice to jail where defendant was held did not violate due process under *Dusenbery*);

F. Person entitled to receive notice:

- Section 1607 provides that the Government must send written notice "to each party who appears to have an interest in the seized article":

- *United States v. Ritchie*, 342 F.3d 903 (9th Cir. 2003) (if a gun is seized from someone's home, the Government must send notice to the homeowner, even if it appears that a third party, not the homeowner, is the person with an interest in the gun);

- *Kadonsky v. United States*, 216 F.3d 499, 503 n.2 (5th Cir. 2000) ("mere possession of an article in and of itself is insufficient to render an individual one 'who appears to have an interest in the seized article' for purposes of [section] 1607(a)");

- *Kadonsky v. United States*, 246 F.3d 681, 2001 WL 113825 (10th Cir. 2001) (Table) (payee on check is entitled to receive notice of forfeiture of check);

- *Arango v. United States*, 1998 WL 417601 (N.D. in 1998) (person who denies ownership of seized currency at the time it is seized cannot seek judicial review of administrative forfeiture on ground that he did not receive personal notice);

-- *United States v. Colon*, 993 F. Supp. 42 (D.P.R. 1998) (sending notice to defendant alone was inadequate where the Government was on notice that another party's name appeared as the owner of record of the seized bank account);

- *Jacobs v. United States*, 2002 WL 31386533 (D. Md. 2002), *aff'd w/o op.* 2002 WL 802196 (4th Cir. 2002) (Government complied with due process when it sent notice to registered owner of seized vehicle; it was not required to send notice to person who now claims to be the true owner but who says he purchased and registered the vehicle in third party's name);

- *Upshaw v. U.S. Customs Service*, 153 F. Supp. 2d 46 (D. Mass. 2001) (noting that it is unclear what an agency should do under section 1607 if it concludes that a person has no interest in the property, but the person nonetheless requests direct written notice of forfeiture proceedings; issue is moot if claimant has actual notice in time to file a claim);

- *Cf. United States v. Phillips*, 185 F.3d 183 (4th Cir. 1999) (in criminal forfeiture cases, the Government does not have to send notice to persons who lack standing to contest the forfeiture);

- *United States v. BCCI Holdings (Luxembourg) S.A. (Final Order of Forfeiture and Disbursement)*, 69 F. Supp. 2d 36 (D.D.C. 1999) (the Government should be encouraged to send notice as widely as possible; sending notice therefore does not estop the Government from moving to dismiss claim for lack of standing or for lack of subject matter jurisdiction);

- Fugitives:

- *United States v. Gonzalez-Gonzalez*, 251 F.3d 31 (1st Cir. 2001) (if Government knows whereabouts of fugitive it must send him notice, and may not rely on notice sent to straw owners

or notice published in newspaper);

G. Content of notice:

- *Laconia Savings Bank v. United States*, 2000 WL 1507322 (D.N.H. 2000) (notice of administrative forfeiture need not advise claimant that the denial of a remission petition, should claimant choose to go that route, is not subject to judicial review);

- *In re Seizure of Certain Property (\$370,000)*, No. 98-CV-1026 (CBA) (E.D.N.Y. Aug. 12, 1999) (notice need not recite facts supporting probable cause);

- *United States v. Latham*, 54 Fed. Appx. 441, 2002 WL 31890914 (6th Cir. 2002) (published notice does not have to name the potential claimants);

- *Juda v. Nerney*, 149 F.3d 1190, 1998 WL 317474 (10th Cir. 1998) (unpublished) (Table) (notice need not detail the illegal acts);

H. Time for filing claim:

- For cases on time for filing claim, manner and content of claim, and Government's obligations if a claim is made, *see* judicial forfeiture cases beginning at page 50.

I. Cost bond:

- *Touros Records v. DEA*, 259 F.3d 731 (D.C. Cir. 2001) (CAFRA abolished cost bond for cases commenced on or after August 23, 2000; in pre-CAFRA case, DEA properly denied *in forma pauperis* petition on ground that shell corporation was not real party in interest, and true claimant had sufficient assets to post bond);

J. Declaration of forfeiture:

- If no claim is filed within the prescribed period of time, *see* 18 U.S.C. § 983(a)(2), the seizing agency may enter a declaration of forfeiture under 19 U.S.C. § 1609.

K. Destruction of evidence:

- Forfeited property may be destroyed unless it is needed as evidence in a criminal case:

- *United States v. Connors*, 2002 WL 24520 (N.D. Ill. 2002) (because no one realized forfeited property would be needed as evidence years later when defendant was indicted there was no due process violation in destruction of property to which defendant did not file a claim; but Government warned not to destroy property that will be needed as evidence in future criminal cases even if the forfeiture is uncontested);

L. Unilateral decision not to pursue forfeiture:

1. Quick release policy:

- *Little v. United States*, 134 F. Supp. 2d 855 (E.D. Mich. 2001) (Government has the right to "quick release" seized property to an innocent owner without conducting forfeiture proceedings; claimant who is not an innocent owner has no right to complain that his property has been released to an innocent third party lienholder), *aff'd* 2002 WL 1316396 (6th Cir. 2002) (Table);

- *United States v. Blackshear*, 2002 WL 1765603 *1 n.3 (N.D. in. 2002) (when Government seized leased computer and released it to the lessor without obtaining a forfeiture order, it was not "giving away" defendant's property, but returning it to its owner);

- *United States v. Scott*, 2003 WL 22000596 (E.D. La. 2003) (denying Rule 41(g) motion for the return of a vehicle that Customs seized and released to the lienholder once it determined that the lien exceeded the value of the vehicle);

- *But see United States v. Moloney*, 985 F. Supp. 358 (W.D.N.Y. 1997) (if the Government returns seized property to a victim as restitution without benefit of a forfeiture order, and the defendant then files a Rule 41(e) motion for the return of his property, the Government must establish by a preponderance of the evidence that the property belonged to the victim and not to the defendant);

2. Attorney's fees:

- The Government is not liable for attorney's fees under 28 U.S.C. § 2465(b) if it releases property after a claim is filed in the administrative forfeiture proceeding, but before it files a judicial complaint

- See cases on attorney's fees at page 164.

3. Storage costs:

- *Gelles-Perez v. Kelly*, 333 F.3d 313 (1st Cir. 2003) (if Customs Service releases property instead of referring the case to the U.S. Attorney, it may not assess storage costs against the claimant);

IV. Judicial Review of Administrative Forfeiture

A. Scope of review:

1. District court has jurisdiction to review administrative forfeiture for violations of due process but may not review merits:

- *United States v. Eubanks*, 169 F.3d 672 (11th Cir. 1999) ("it is inappropriate for a court to exercise equitable jurisdiction to review the merits of a forfeiture matter when the petitioner elected to forego the procedures for pursuing an adequate remedy at law"; because claimant received notice of the administrative forfeiture, the district court lacked jurisdiction to consider

his Rule 41(e) motion for the return of the forfeited property);

- *Linarez v. Department of Justice*, 2 F.3d 208, 213 (7th Cir. 1993) ("a forfeiture cannot be challenged in district court under any legal theory if the claims could have been raised in an administrative proceeding, but were not");

- *United States v. Woodall*, 12 F.3d 791, 793 (8th Cir. 1993) (court has jurisdiction to determine if the Government complied with the statutory notice provisions set forth in section 1607, and if not, to allow the claimant to file a claim in accordance with section 1608 notwithstanding the expiration of the claims period);

- *Touros Records v. DEA*, 259 F.3d 731 (D.C. Cir. 2001) (court has jurisdiction under 21 U.S.C. § 877 to review DEA's refusal to grant *in forma pauperis* waiver of cost bond, but cannot review denial of remission petition);

- *United States v. Giraldo*, 45 F.3d 509, 511 (1st Cir. 1995) (court has jurisdiction under 28 U.S.C. § 1331 to entertain due process attack on administrative forfeiture);

- *Toure v. United States*, 24 F.3d 444 (2d Cir. 1994) (court's jurisdiction is limited to reviewing the adequacy of the notice);

- *United States v. Thomas*, 319 F.3d 640 (3d Cir. 2003) (district court had jurisdiction to consider, and reject, claimant's argument that seizing agency lacked jurisdiction to conduct administrative forfeiture proceeding);

- *United States v. Schinnell*, 80 F.3d 1064 (5th Cir. 1996) (once the administrative forfeiture was completed, the district court lacked jurisdiction to review the forfeiture except for failure to comply with procedural requirements or to comport "with due process"; defendant cannot, as part of double jeopardy challenge in criminal case, contend that uncontested forfeiture was not limited to proceeds);

- *United States v. Denino*, 103 F.3d 82 (10th Cir. 1996) (court agrees that jurisdiction under Rule 41(e) or section 1331 is limited to adequacy of due process in the administrative forfeiture proceeding, but finding record insufficient to establish that forfeiture was procedurally adequate, court moves directly to reject forfeiture challenge on the merits);

- *United States v. Wade*, 230 F. Supp. 2d 1298 (M.D. Fla. 2002) (once defendant fails to file timely claim, district court lacks jurisdiction to review the merits of an administrative forfeiture; no abuse of discretion to insist on strict compliance with time limit for filing claim even though DEA freely grants extensions of time);

- *United States v. Trachsler*, 2002 WL 324295 (N.D. Tex. 2002) (court lacks jurisdiction to hear merits of claim that guns were not forfeitable under section 924(d) because claimant did not file claim in the administrative forfeiture proceeding);

- *United States v. \$70,000 in U.S. Currency*, 203 F.R.D. 308 (S.D. Ohio 2000) (claimant may not

use Rule 41(e) motion as substitute for filing timely claim if notice of time and procedure for filing claim were properly given);

- *Laconia Savings Bank v. United States*, 2000 WL 1507322 (D.N.H. 2000) (when claimant chooses to file remission petition instead of filing claim, court is without jurisdiction to review the denial of the petition on the merits or consider any constitutional claims even if denial was an abuse of discretion);

- *In re Forfeiture of \$34,905.00 in U.S. Currency*, 96 F. Supp. 2d 1116 (D. Or. 2000) (absent a legally sufficient claim, the seizing agency is obligated to forfeit the property administratively, and the court lacks jurisdiction to consider the claim on the merits);

- *United States v. Lacey*, 1998 WL 982885 (D. Kan. 1998) (following *Deninno*; court has no jurisdiction to consider motion for return of forfeited property on the merits if claimant received proper notice of the administrative forfeiture);

- *United States v. Derenak*, 27 F. Supp. 2d 1300 (M.D. Fla. 1998) (court has equitable jurisdiction to review administrative forfeiture to make sure it was procedurally adequate, but may not review agency's findings on the merits);

- *United States v. Schiavo*, 897 F. Supp. 644, 647 (D. Mass. 1995) (court could review adequacy of notice, but not Fourth Amendment objection to seizure that claimant could have raised if he had filed a claim); *Castillo v. United States*, 2001 WL 1646176 (S.D.N.Y. 2001) (same);

- *Concepcion v. United States*, 938 F. Supp. 134 (E.D.N.Y. 1996) (court lacks jurisdiction to review Eighth Amendment challenge to administrative forfeiture); *In re: Turmel*, 2003 WL 21805114 (D.N.H. 2003) (same);

- *Patino v. United States* No. 5:99-CV-189-BR(2) (E.D.N.C. Aug. 9, 1999) (DEA properly rejected claim and cost bond that was filed 9 days late; absent a timely claim, court has no jurisdiction to review the forfeiture on the merits);

- *In re Seizure of Certain Property (\$370, 000)*, No. 98-CV-1026 (CBA) (E.D.N.Y. Aug. 12, 1999) (court lacks jurisdiction to review merits of claim where claimant made conscious decision to file a Rule 41(e) motion instead of a claim and cost bond);

- *Walker v. United States Drug Enforcement Administration*, 2002 WL 1870131 (S.D.N.Y. 2002) (district court may review administrative forfeiture for procedural due process violation such as lack of notice but may not review other constitutional claims such as violations of the Fourth, Fifth [double jeopardy], and Eighth Amendments);

- *But see Gete v. INS*, 121 F.3d 1285 (9th Cir. 1997) (court may review alleged Fourth, Fifth, and Eighth Amendment violations in the administrative forfeiture if claimants were not on notice that they waived those rights by failing to file claim and cost bond);

2. Government cannot excuse lack of notice by claiming it never initiated forfeiture proceedings

at all:

- *Mantilla v. United States*, 302 F.3d 182 (3d Cir. 2002) (failure to initiate forfeiture proceedings and to give notice of the status of the seized property is the "most inadequate notice possible");

3. Court of Federal Claims has no jurisdiction over completed forfeiture cases:

- *United States v. Vereda. Ltd.*, 271 F.3d 1367 (Fed. Cir. 2001) (Court of Federal Claims lacks jurisdiction to review an administrative forfeiture because the forfeiture statutes provide for administrative and judicial review if someone files a claim, and because the court has no authority to review a declaration entered under section 1609, which has the force of a judicial order of forfeiture);

- *Ramirez v. United States*, 57 Fed. Cl. 240 (2003) (Court of Federal Claims has no jurisdiction over motion filed under section 983(e));

- *Gadd v. United States*, 55 Fed. Cl. 438 (2003) (Tucker Act does not give Court of Federal Claims jurisdiction to grant plaintiff relief from administrative forfeiture that he could have contested pursuant to the forfeiture statutes);

B. Statutory basis for review:

1. Section 983(e):

- For actions commenced on or after August 23,2000, review of a completed administrative forfeiture is governed by 18 U.S.C. § 983(e):

- *Upshaw v. U.S. Customs Service*, 153 F. Supp. 2d 46 (D. Mass. 2001) (section 983(e) is the exclusive remedy for challenging an administrative forfeiture; limiting claimants to exclusive remedy does not itself violate due process);

- *Cf. State of North Carolina ex rel. Haywood v. Barrington*, 256 F. Supp. 2d 452 (M.D.N.C. 2003) (dismissing *Bivens* action on the ground that section 983(e) gives plaintiff remedy for any due:: process violation involving lack of notice of the administrative forfeiture of her property);

- *See, generally, Outline on Judicial Review of Administrative Forfeiture Under Section 983(e)* by Leslie Westphal, available on AFML Online;

- *See* cases on application of section 983(e) to administrative forfeitures occurring prior to August 23,2000, at page 174;

2. Pre-CAFRA, motions for the return of administratively forfeited property were treated as causes of action for equitable relief:

- *Clymore v. United States*, 217 F.3d 370 (5th Cir. 2000) (motion for return of seized property under Rule 41(e) should be treated as an equitable civil action against the United States under

section 1331); *United States v. Duke*, 229 F.3d 627 (7th Cir. 2000) (same);

- *Garcia v. Meza*, 287 F.3d 287 (7th Cir. 2000) (tort action for conversion of property, filed pursuant to the FTCA but actually challenging an administrative forfeiture for lack of notice, should be treated as an action under section 1331);

- *United States v. Minor*, 228 F.3d 352 (4th Cir. 2000) (motion for return of seized property cannot be based on Rule 41(e), but should be considered an equitable action under the Fourth and Fifth Amendments);

- *United States v. Rodriguez-Aguirre*, 264 F.3d 1195 (10th Cir. 2001) (motion for return of administratively forfeited property is properly made under Rule 41(e));

- *United States v. Gonzalez-Gonzalez*, 257 F.3d 31 (1st Cir. 2001) (that claimant styled his claim as a Rule 41(e) motion is irrelevant; district court properly treated it as a complaint asserting a due process violation);

- *Polanco v. U.S. Drug Enforcement Administration*, 158 F.3d 647 (2d Cir. 1998) (in the Second Circuit, motion for return of property forfeited without proper notice is a judicially created cause of action for equitable relief to remedy due process violation);

- *United States v. McGlory*, 202 F.3d 664 (3d Cir. 2000) (court may treat Rule 41(e) motion as a cause of action for equitable relief, challenging an administrative forfeiture on due process grounds);

- *United States v. Range*, 2002 WL 31805529 (6th Cir. 2002) (Table) (district court erred in dismissing Rule 41(e) motion for not being in the proper form; court should have treated motion as a civil complaint without requiring plaintiff to refile);

- *United States v. Sims*, 128 F. Supp. 2d 1182 (N.D. in. 2002) (a post-conviction Rule 41(e) motion was treated as a civil equitable proceeding for the return of the property);

- *Gonzalez-Rodriguez v. United States*, 1996 WL 79416 (N.D. in. 1996) (court can exercise equitable jurisdiction to review adequacy of notice of administrative forfeiture, but has no jurisdiction under Rule 41 (e))

3. Claimant may not use Federal Tort Claims Act or *Bivens* action to obtain judicial review of administratively forfeited property:

- *United States v. Bazuaye*, 41 F. Supp. 2d 19 (D.D.C. 1999) (FTCA does not apply because (1) once property is forfeited, the relation back doctrine precludes claimant from asserting he had right of possession at the time of the seizure and (2) even if claimant had right of possession, forfeiture under section 1609 has *res judicata* effect, precluding claimant from relitigating the issue);

- *Berrum v. United States*, 2003 WL 21078040 (N.D. m. 2003) (*res judicata* bars defendant from

recasting a previously litigated due process challenge to administrative forfeiture as a *Bivens* action);

- *See Garcia v. Meza*, 235 F.3d 287 (7th Cir. 2000) (treating FTCA action as section 1331 challenge to administrative forfeiture);

4. Motion to dismiss due process claim:

- *United States v. Gonzalez-Gonzalez*, 257 F.3d 31 (1st Cir. 2001) (because fugitive's allegation that Government knew how to find him must be assumed to be true] district court erred in dismissing complaint *sua sponte*);

5. Time to respond to due process claim:

- *United States v. Gonzalez-Gonzalez*, 257 F.3d 31 (1st Cir. 2001) (Government has 60 days to respond to complaint that property was forfeited without proper notice);

C. Statute of limitations on due process challenge:

1. Section 983(e)(3) provides that the claimant must file the challenge to the administrative forfeiture "not later than 5 years after the date of final publication of notice of seizure of the property."

2. Pre-CAFRA, most courts held that the claimant had 6 years to file a challenge to an administrative forfeiture, but they disagreed as to when the 6 years began to run:

- *United States v. Minor*, 228 F.3d 352, 359 (4th Cir. 2000) (statute of limitations On equitable action is 6 years under 28 U.S.C. § 2401, running from the date defendant was on "reasonable inquiry notice" that his property had been forfeited; earliest date would be date Government entered declaration of administrative forfeiture);

- *United States v. Rodriguez-Aguirre*, 264 F.3d 1195 (10th Cir. 2001) (following *Minor*; where there is a parallel criminal proceeding, the date on which claimant can reasonably be expected to inquire about his property is the date the criminal case is concluded);

- *United States v. Duke*, 229 F.3d 627 (7th Cir. 2000) (6-year limitations period under section 2401 runs from date defendant should have discovered that his property was forfeited; in this case, that was when he was convicted of the crime giving rise to the forfeiture);

- *United States v. Sims*, 128 F. Supp. 2d 1182 (N.D. m. 2002) (applying *Duke*; 6-year limitations period applies to challenges to both administrative and judicial forfeiture; for challenge to judicial forfeiture, period began to run when order of forfeiture was entered; for administrative forfeiture, it began to run when declaration of forfeiture was entered);

- *Casas v. United States*, 88 F. Supp. 2d 858 (N.D. m.1999) (the Seventh Circuit has not yet ruled on statute of limitations on due process challenges, but ..the longest limitations period that

could possibly govern is the 6-year 'catch-all' for civil actions against the United States found in 28 U.S.C. § 2401"; limitation period begins to run, at the latest, when DEA denied claimant's remission petition);

- *United States v. Lace*, 1998 WL 982885 (D. Kan. 1998) (statute of limitations for motion for return of administratively forfeited property is 6 years, running from the date of the forfeiture);

- *Demma v. United States*, 1995 WL 642831 (N.D. . 1995) (applying 6-year statute of limitations to Tucker Act theory);

- *Clymore v. United States*, 217 F.3d 370 (5th Cir. 2000) (6-year limit on claimant's challenge to administrative forfeiture may be equitably toned if claimant first files his action in the wrong court);

- *United States v. Wright*, 2003 WL 1790844 (E.D. La. 2003) (dismissing Rule 41 (e) motion filed more than 6 years after date when the administrative forfeiture proceedings were complete is out of time; no grounds for equitable tolling);

3. The Second and Third Circuits hold that the 6-year period does not begin to run until the statute of limitations has run on the Government's ability to file a civil judicial forfeiture under 19 U.S.C. § 1621:

- *Ikelionwu v. United States*, 150 F.3d 233 (2d Cir. 1998) (limitations period on due process challenge to administrative forfeiture is 6 years under 28 U.S.C. § 2401);

- *Polanco v. US Drug Enforcement Administration*, 158 F.3d 647 (2d Cir. 1998) (6-year limitation period runs from date claimant discovered or had reason to discover property was forfeited, not FROM date it was seized; if claimant never received notice, 6 years runs from end of the 5-year period in which the Government could have filed a forfeiture action);

- *Mantilla v. United States*, 302 F.3d 182 (3d Cir. 2002) (applying *Polanco* to motion for return of property that the Government retained without commencing any forfeiture action at all);

- *Adames v. United States*, 171 F.3d 728 (2d Cir. 1999) (*Polanco* is unclear as to whether the cause of action for return of administratively forfeited property accrues when the 5-year limitations period has run, or at an earlier date because the initial seizure put claimant on "inquiry notice" as to the disposition of his property);

- *United States v. Morales*, 2003 WL 21511927 (S.D.N.Y. 2003) (applying *Polanco*. even applying the 11-year limitations period, claimant's Rule 41(g) motion was out of time);

- *Gonzalez v. United States*, 2003 WL 1213172 (S.D.N.Y. 2003) (applying *Polanco*, claimant's Rule 41(g) motion return of property was out of time even under the 11 year limitations period);

- *Pimentel v. DEA*, 99 F. Supp. 2d 420 (S.D.N.Y. 2000) (claimant who knew his property had

been seized had 5 years from completion of administrative forfeiture to file due process challenge); *Brown v. United States*, 2002 WL 1339102 (S.D.N.Y. 2002) (same);

- *Matura v. United States*, 1999 WL 144498 (S.D.N.Y. 1999) (claimant has 11 years from date that the Government's cause of action in forfeiture accrues to file action for return of seized property); *Amadi v. United States*, 282 F. Supp. 2d 1 (N.D.N.Y. 2003) (same);

- *Valencia-Romero v. United States*, 1998 WL 938949 (E.D.N.Y. 1998) (for purposes of motion to dismiss, court must assume prisoner's claim that he did not receive notice is true; therefore, motion for the return of forfeited property cannot be dismissed as time-barred if filed within 11 years of the seizure);

- *Mullins v. United States*, 1997 WL 55946 (S.D.N.Y. 1997) (Rule 41(e) motion filed after criminal case is complete is a new civil action that must be filed within 6 years of seizure of the property; see 28 U.S.C. § 2401);

- *Corinthian v. United States*, No. CV-96-945 (CPS) (E.D.N.Y. Mar. 17, 1998) (statute of limitations in 28 U.S.C. § 2401 (a) applies to post-judgment Rule 41(e) motion; claimant cannot plead ignorance of the statute of limitations as a defense);

4. Courts are reluctant to allow laches to bar a challenge to a completed administrative forfeiture, if it is filed within the statute of limitations:

- *Mantilla v. United States*, 302 F.3d 182 (3d Cir. 2002) (Laches does not apply if the action is filed within the statute of limitations);

- *McDaniel v. United States Drug Enforcement Administration*, 2002 WL 1485128 (4th Cir. 2002) (unpublished), *rev'g* 97 F. Supp. 2d 679 (D.S.C. 2000) (court may not bar equitable claim for return of forfeited property under the doctrine of laches if the claim was filed within the 6-year limitations period under section 2401);

- *Ikellionwu v. United States*, 150 F.3d 233 (2d Cir. 1998) (laches does not bar suit to recover forfeited property where claimant did not have notice of right to contest forfeiture; knowledge of the seizure does not equate with knowledge of the right to challenge the forfeiture action);

- *Clymore v. United States*, 217 F.3d 370 (5th Cir. 2000) (laches does not bar suit filed within 6-year limitation period unless Government suffers prejudice; that Government's forfeiture file has already been destroyed and property sold is not prejudice);

- *United States v. Rodriguez-Aguirre*, 264 F.3d 1195 (10th Cir. 2001) (same; withholding Rule 41(e) motion until statute of limitations has run on Government's filing claim does not cause prejudice because, in Tenth Circuit, property remains forfeited if it was drug proceeds; citing *United States v. Clymore*, 245 F.3d 1195 (10th Cir. 2001);

- *Foehl v. United States*, 238 F.3d 474 (3d Cir. 2001) (laches not applicable where forfeiture judgment is void for lack of notice);

- *But see Kadonsky v. United States*, 246 F.3d 681, 2001 WL 113825 (10th Cir. 2001) (laches is a valid defense to equitable action to recover property forfeited without notice; remanding to district court to consider laches defense);

- *United States v. Gonzalez-Gonzalez*, 257 F.3d 31 (1st Cir. 2001) (the Government may assert laches as a defense to a claimed due process violation, but the district court may not dismiss a complaint based on laches without first conducting an evidentiary hearing);

- *United States v. One Toshiba Color Television*, 213 F.3d 147 (3d Cir. 2000) (*en banc*) (laches never bars motion under Rule 60(b) to declare forfeiture void, but laches may bar subsequent remedy, such as return of forfeited property or compensation);

- *Little v. United States*, 35 F. Supp. 2d 538 (E.D. Mich. 1999) (2-year delay in filing challenge to administrative forfeiture unnecessary where claimant had actual notice of the seizure; claim barred by laches even though 6-year statute of limitations applies);

- *United States v. Mulligan*, 178 F.R.D. 164 (E.D. Mich. 1998) (defendant who waits until after statute of limitations bars civil forfeiture action is barred by laches from filing Rule 41(e) motion);

- *Whiting v. United States*, 29 F. Supp. 2d 25 (D. Mass. 1998) (laches bars motion for return of property if claimant waits 5 years to file claim and offers no reasonable excuse), *aff'd on other grounds*, 231 F.3d 70 (1st Cir. 2000) (finding no need to determine if Government was prejudiced, and laches applied, since Government was entitled to prevail on the merits);

D. Subject matter jurisdiction:

- *Upshaw v. U.S. Customs Service*, 153 F. Supp. 2d 46 (D. Mass. 2001) (section 983(e) applies only to completed administrative forfeitures; court has no jurisdiction to review an administrative forfeiture before a declaration of forfeiture is entered);

- *Vega v. United States*, 2001 WL 823874 (S.D.N.Y. 2001) (if Government concedes administrative forfeiture was flawed and immediately commences civil judicial forfeiture in response to Rule 41 (e) motion, court should dismiss motion and require claimant to contest the civil forfeiture);

- *Ceudroski v. United States*, 2001 U.S. Dist. LEXIS 11328 (N.D. Tex. 2001) (section 1355 does not give district court subject matter jurisdiction to review completed administrative forfeiture);

E. Burden of proof:

- *Foehl v. United States*, 2002 WL 32075774 (E.D. Tex. 2002) (suggesting that there should be a shifting burden with claimant having initial burden to show ownership and that no notice was received, Government then having burden to show what effort it made to give notice, and claimant having ultimate burden of showing Government's efforts were unreasonable);

F. Mootness:

- Destruction or disposition of property following administrative forfeiture does not render due process challenge moot:

- *United States v. Miseph*, 67 F.3d 289, 1995 WL 601352 (1st Cir. 1995) (unpublished) (Table);

G. Venue for motion for return of seized property:

- *Polanco v. U.S. Drug Enforcement Administration*, 158 F.3d 647 (2d Cir. 1998) (complaint for equitable relief from due process violation must be filed in the district where the seizure took place);

- *Clymore v. United States*, 164 F.3d 569, 574-75 (10th Cir. 1999) (*Clymore I*) (proper venue for Rule 41(e) motion for return of forfeited property is district where seizure occurred);

- *Foehl v. United States*, 238 F.3d 474 (3d Cir. 2001) (noting split in the circuits regarding venue for challenging administrative forfeiture and holding that the district court, on remand, may transfer venue to a more convenient district); *see Foehl v. United States*, 2002 WL 32075774 (E.D. Tex. 2002) (on remand) (change of venue to place where underlying offense was prosecuted granted);

H. Standing:

1. Under section 983(e), any person entitled to notice of the forfeiture proceeding has standing to challenge an administrative forfeiture for lack of notice.

2. Pre-CAFRA cases:

- *United States v. Rodriguez-Aguirre*, 264 F.3d 1195 (10th Cir. 2001) (a possessory interest in a portion of the property is sufficient to establish standing to file a Rule 41(e) motion for the return of forfeited property based on lack of notice; even on the merits, possessory interest is sufficient);

- *United States v. One Parcel...3850 S.W 126th Court*, No. 91-0096-CIV-DA VIS (S.D. Fla. Aug. 18, 1997) (claimant must demonstrate standing before court will consider claim of insufficient notice);

I. Merits of section 983(e) challenge:

- *Upshaw v. U.S. Customs Service*, 153 F. Supp. 2d 46 (D. Mass. 2001) (relief under section 983(e) denied notwithstanding agency's alleged failure to send notice where claimant had actual notice of administrative forfeiture in time to file a claim);

- *See actual notice cases at page 20.*

J. Remedy for failure to provide adequate notice:

1. Under section 983(e)(2), if the court vacates an administrative forfeiture, the Government may commence a new forfeiture proceeding, notwithstanding the expiration of the statute of limitations:

- *Kadonsky v. United States*, 246 F.3d 681, 2001 WL 113825 n.6 (10th Cir. 2001) (Table) (*dicta*) (noting that, under CAFRA., "forfeitures judicially set aside for lack of notice may now be refiled");

- *Alli-Balogun v. United States*, 281 F.3d 362 (2d Cir. 2002) (noting in *dicta* that section 983(e) applies to forfeitures commenced on or after August 23, 2002);

2. Under pre-CAFRA law, the courts generally agreed that the Government was free to file a new forfeiture action if the statute of limitations had not expired:

- *Garcia v. Meza*, 235 F.3d 287 (7th Cir. 2000) (remanding for Government to return property or file civil judicial action);

- *Barrera-Moncenegro v. United States*, 74 F.3d 657 (5th Cir. 1996) (remanding for renewed administrative proceeding unless claim is filed);

- *United States v. Volanty*, 79 F.3d 86, 88 (8th Cir. 1996) (district court did not abuse discretion in permitting the Government to correct due process violation by vacating administrative forfeiture and instituting new judicial forfeiture proceeding); *United States v. Woodall*, 12 F.3d 791, 795 (8th Cir. 1993);

- *United States v. Giraldo*, 45 F.3d 509, 512 (1st Cir. 1995) (remedy is to vacate administrative forfeiture and remand for civil judicial proceedings);

- *Chaidez v. U.S. Department of Justice*, 1998 WL 901690 (N.D. in. 1998) (instead of proceeding directly to the merits, better remedy is to allow the administrative forfeiture process to proceed);

- *United States v. \$57,960.00 in U.S. Currency*, 58 F. Supp. 2d 660 (D.S.C. 1999) (instead of proceeding directly to the merits, court should direct the Government to commence new forfeiture proceeding; declining to follow *Boero*, *infra*);

3. But the courts were divided as to what would happen if the statute of limitations barred the Government from filing a new forfeiture action:

- Some courts held that if the statute of limitations had expired, the district court could proceed directly to the merits of the claim:

- *United States v. Dusenbery*, 201 F.3d 763 (6th Cir. 2000) (if notice of the administrative

forfeiture was inadequate, the court should grant the claimant the judicial hearing on the merits to which he would have been entitled if he had received proper notice; because the Government need not refile the forfeiture action, the expiration of the 5-year statute of limitations is irrelevant) ;

- *United States v. Boero*, 111 F.3d 856 (2d Cir. 1997) (when district court finds that notice of administrative forfeiture "was inadequate, it should vacate the forfeiture and proceed directly to the merits of the claim); *United States v. Watts*, 1999 WL 493786 (E.D. Pa. 1999) (following *Boero*); but see *Alli-Balogun v. United States*, 281 F.3d 362 (2d Cir. 2002) (disavowing *Baero*);

- Others held that if the statute of limitations had expired, the district court *could not* proceed to the merits, and a new forfeiture proceeding was barred:

- *Clymore v. United States*, 164 F.3d 569 (10th Cir. 1999) (*Clymore I*) (if notice was inadequate, administrative forfeiture is void and may not be refiled if statute of limitations has expired unless statute is equitably tolled);

- *United States v. Marolf*, 173 F.3d 1213 (9th Cir. 1999) (the remedy for inadequate notice of forfeiture proceedings is to void the forfeiture even if the statute of limitations for forfeiture has expired);

- *Clymore v. United States*, 217 F.3d 370 (5th Cir. 2000) (*Clymore II*) (following *Kadonsky*; defective administrative forfeiture is void and Government is barred from filing a new case if statute of limitations has expired);

- *United States v. Babb*, 54 Fed. Appx. 772, 2003 WL 23424 (4th Cir. 2003) (Table) (expiration of statute of limitations bars filing civil forfeiture action once administrative forfeiture is vacated; no equitable tolling where reason for vacating the administrative forfeiture was the Government's own mistake in failing to send proper notice);

- See *United States v. One Toshiba Color Television*, 213 F.3d 147 (3d Cir. 2000) (*en banc*) (expressly reserving judgment on whether expiration of statute of limitations barred reinstitution of forfeiture proceedings); *United States v. Minor*, 228 F.3d 352 (4th Cir. 2000) (same);

- But see *Kadonsky v. United States*, 216 F.3d 499 (5th Cir. 2000) (administrative forfeiture is void if there was not adequate notice, and no new proceeding may be filed if the statute of limitations has expired, but the court may reach the merits and deny the return of the forfeited property if the Government files a counterclaim for "recoupment" of the forfeited funds in response to the motion for the return of that property);

4. Equitable tolling:

- Some courts held that even if the Government were barred from filing a new forfeiture action by the expiration of the statute of limitations, the limitations period was equitably tolled and thus did not expire:

- *United States v. Clymore*, 245 F.3d 1195 (10th Cir. 2001) (*Clymore III*) (equitable tolling of the statute of limitations to permit Government to refile civil forfeiture that is void for lack of notice is "not inconsistent with congressional intent"; remanding to determine if equitable tolling is appropriate where Government was alerted to claimant's due process challenge 5 months *before* statute of limitations expired);

- *United States v. \$57,960.00 in U.S. Currency*, 58 F. Supp. 2d 660 (D.S.C. 1999) (expiration of the statute of limitation is no bar to reinstituting the forfeiture action because the statute was tolled between the entry of the declaration of forfeiture and the court's order granting the motion to vacate it), *rev'd sub nom. United States v. Sabb*, 54 Fed. Appx. 772, 2003 WL 23434 (4th Cir. 2003) (Table), *supra*;

- *See Kadonsky v. United States*, 216 F.3d 499, 506 n.8 (5th Cir. 2000) (*dicta*) (Government did not argue statute of limitations should be tolled, but such an argument would be a strong one where as a consequence of withholding his challenge to an administrative forfeiture until the statute of limitations expired, defendant would recover '<funds that were clearly the product of drug transactions");

- *But see Alli-Balogun v. United States*, 281 F.3d 362 (2d Cir. 2002) (no equitable tolling if Government's failure to commence a new forfeiture action within the limitations period was not induced by trickery);

5. Even if Government cannot refile forfeiture case, return of property is not automatic; claimant must still file Rule 41(e) motion and the Government can quiet title by opposing it:

- *United States v. Clymore*, 245 F.3d 1195 (10th Cir. 2001) (*Clymore III*) (property associated with a void administrative forfeiture does not have to be returned automatically to the claimant; even if the statute of limitations has run on the filing of a new forfeiture action, claimant must file a Rule 41(e) motion for the return of the property; if the property was lawfully seized, and the Government establishes that it is subject to forfeiture, the Rule 41(e) motion will be denied unless claimant is an innocent owner);

- *Alli-Balogun v. United States*, 281 F.3d 382 (2d Cir. 2002) (following *Clymore III*; although the Government is barred from commencing a new forfeiture action if the statute of limitations has run, Government can quiet title to the property in a civil equitable proceeding brought by the claimant, but it loses the benefit of the pre-CAFRA burden shifting and must establish the forfeitability of the property);

- *Fayemi v. United States*, 2002 WL 970969 (2d Cir. 2002) (Table) (after finding that notice of the administrative forfeiture was inadequate and that the statute of limitations had expired on the filing of a new forfeiture action, the district court properly denied the defendant's motion for the return of his property because in no event could he satisfy the requirements of *Clymore III* and *Alli-Balogun*);

- *Anderson v. United States*, 2002 WL 598337 (D. Kan. 2002) (applying *Clymore III*; Government may defeat motion for return of administratively forfeited property by showing that

property was forfeitable. it was lawfully seized, and defendant was not an innocent owner);

6. Compensatory damages not available:

- *United States v. Marshall*, 338 F.3d 990 (9th Cir. 2003) (Rule 41(e) is not the proper vehicle for seeking damages against the Government for "interfering" with the use and enjoyment of property that the Government never seized, possessed, or forfeited);

- *United States v. McBean*, 147 F. Supp. 2d 820 (N.D. Ohio 2001) (Rule 41(e) is equitable in nature; compensatory damages for failure to return property that was destroyed without notice to the owner are barred by the doctrine of sovereign immunity);

- *Daniels v. United States*, 2001 WL 912382 (N.D. Tex. 2001) (compensatory damages for "wrongful forfeiture" not available under Rule 41(e)); *United States v. Daniels*, 2002 WL 66160 (N.D. Tex. 2002) (same case; claim for monetary damages under Rule 41(e) barred by sovereign immunity);

7. If the Government has already sold the property, it is required to pay the claimant the value of the property :

- *United States v. Marshall*, 338 F.3d 990 (9th Cir. 2003) (Government required to pay claimant value of the property at the time it was sold, not at the time it was seized; because the property had negative equity, claimant received no compensation);

8. Federal Government is not liable for seizures by state and local police:

- *United States v. Marshall*, 338 F.3d 990 (9th Cir. 2003) (claimant was not entitled to relief under Rule 41(e) for seizure of vehicles by local police acting independently of federal authorities in a task force operation);

V. Adoptive Forfeitures

A. Adopting a state forfeiture is proper:

- Adoptive forfeitures are specifically recognized as an exception to the seizure warrant requirement in section 981(b):

- *Madewell v. Downs*, 68 F.3d 1030, 1037 (8th Cir. 1995) (federal agencies may adopt the seizure of property seized by another agency, *see* 21 C.F.R. § 1316.91(1)) (collecting cases); *Ivester v. Lee*, 991 F. Supp. 1113, 1119 (E.D. Mo. 1998) (same, following *Madewell*).

- *United States v. One 1992 Ford Mustang GT*, 73 F. Supp. 2d 1131 (CD. Cal. 1999) (same); *United States v. One Ford Coupe Auto*, 272 U.S. 321, 325 (1926);

B. State turnover orders:

1. Some states have laws requiring local officials to seek a turnover order from a state judge before releasing the property to federal authorities for the purpose of adopting the forfeiture under federal law.

2. A federal agency may adopt the forfeiture notwithstanding a violation of state law by state authorities:

- *Madewell v. Downs*, 68 F.3d 1030, 1038 (8th Cir. 1995) (neither constitutional infirmity in transfer of seized property nor lack of authority to transfer the property taints adoption of seizure by federal agency);

- *Ivester v. Lee*, 991 F. Supp. 1113, 1119 (E.D. Mo. 1998) (following *Madewell*; Government may adopt the forfeiture even if the initial seizure by state authorities was constitutionally tainted);

3. But the federal agency must nevertheless have *in rem* jurisdiction over the property:

- *Scarabin v. DEA*, 966 F.2d 989, 993 (5th Cir. 1992) (DEA had no jurisdiction for adoptive forfeiture where state court still had exclusive jurisdiction);

- See cases on *in rem* jurisdiction in adoptive forfeiture cases at page 58.

C. Time limits on adoptive forfeitures:

1. The notice requirement in section 983(a)(1)(A) for sending notice of an administrative forfeiture is extended to 90 days in the case of an adoptive forfeiture, section 983(a)(1)(A)(iv).

2. Statute of limitations:

- *United States v. \$57,960.00 in U.S. Currency*, 58 F. Supp. 2d 660 (D.S.C. 1999) (assuming without deciding that statute of limitations under section 1621 runs from date that the Government adopts the forfeiture);

3. United States' 30-day policy on adoptions:

- *United States v. \$639,470.00 in U.S. Currency*, 919 F. Supp. 1405, 1414 (C.D. Cal 1996) (failure of state agency to process adoption within 30 days, in violation of federal adoption policy, does not undermine federal court's *in rem* jurisdiction);

D. Notice to property owner of adoption of forfeiture:

- *Madewell v. Downs*, 68 F.3d 1030 (8th Cir. 1995) (notice to the claimant that the state plans to turn the forfeiture Over to a federal agency is not required); *Ivester v. Lee*, 991 F. Supp. 1113, 1120 (B.D. Mo. 1998) (same);

- *Hawkins v. Henderson County*, 22 F. Supp. 2d 573, 579 (E.D. Tex. 1998) (transfer of

jurisdiction is not a Fifth Amendment taking; therefore no notice to the claimant that the property is being transferred is required);

VI. Seizure and Forfeiture of real Property

A. Section 985:

1. An civil forfeitures of real property commenced on or after August 23, 2000) are governed by 18 U.S.C. § 985. All such forfeitures must be judicial, *see* section 985(a):

- *See Outline on Forfeiture of real Property Under Section 985* by Lynne Klauer and Gill Beck, available in the Training Section of AFML Online.

2. Section 985(c) requires the Government to post the property and serve the owner with a copy of the complaint and notice of the deadlines for contesting the action:

- *United States v. 630 Ardmore Drive*, 178 F. Supp. 2d 572 (M.D.N.C. 2001) (section 985(c)(3) overrides the summons and arrest warrant requirements in Rule C(3)(a), but section 985(c)(1) requires that the Government serve the owner with both a copy of the complaint and notice of the filing deadlines);

3. Sanction for failure to comply with section 985(c):

- *United States v. 630 Ardmore Drive*, 178 F. Supp. 2d 572 (M.D.N.C. 2001) (complaint will be dismissed for failure to comply with service of notice requirement in section 985(c)(1)(C) only if claimant suffers prejudice; claimant who filed timely claim despite lack of notice suffered no prejudice);

B. Fifth Amendment due process:

1. The Government may not seize real property without affording the owner notice and opportunity for pre seizure hearing, *see* section 985(b)(1):

- *United States v. James Daniel Good Real Property* 510 U.S. 43 (1993); *United States v. 51 Pieces of real Property*, 17 F.3d 1306 (10th Cir. 1994) (*Good* applies to pending cases);

- *United States v. Real Property Located at Incline Village*, 958 F. Supp. 482 (D. Nev. 1997) (*Good* applies to property representing proceeds);

2. The Government may file *lis pendens* and obtain a writ of entry without notice or opportunity to be heard, *see* section 985(b)(2):

- *United States v. James Daniel Good Real Property*, 510 U.S. 43, 58 (1993);

- *United States v. Land, Winston County*, 163 F.3d 1295 (11th Cir. 1998) (filing *lis pendens* is one of several things that the Government can do to preserve its interest in real property without

triggering due process requirements);

- *United States v. Register*, 182 F.3d 820 (11th Cir. 1999) (because *lis pendens* is neither a seizure nor a restraint, it does not implicate property owner's due process rights; no post-filing hearing required to determine if *lis pendens* should be removed);

- *United States v. One Parcel of real Property Known as 16614 Cayuga Road*, 69 Fed. Appx. 915, 2003 WL 21437207 (10th Cir. 2003) (posting property under pre-CAFRA post-and-walk policy, and filing *lis pendens*, did not violate *Good*);

- *United States v. St. Pierre*, 950 F. Supp. 334 (M.D. Fla. 1996) (filing *lis pendens* is not a taking; no pre- or post-filing hearing required); *United States v. One 1997 E35 Ford Van*, 50 F. Supp. 2d 789 (N.D. m. 1999) (same);

- *United States v. Real Property...429 South Main Street*, 906 F. Supp. 1155 (S.D. Ohio 1995), *on remand from* 52 F.3d 1416 (6th Cir. 1995) (*lis pendens* and occupancy agreement had no impact on claimant's use and enjoyment of his property; therefore, no seizure occurred);

- *United States v. Properly Identified as Lot Numbered 718*, 983 F. Supp. 9 (D.D.C. 1997) (filing *lis pendens* is not a "seizure" under *Good* and does not require prior approval of the court);

- *See United States v. Twp. 17 R 4*, 970 F.2d 984 (1st Cir. 1992) (issuance of arrest warrant *in rem* without a hearing does not violate Fifth Amendment where unoccupied real property was merely posted and there was no interference with use by the owner that could be considered a seizure; court did not reach question whether filing of *lis pendens* on property would alter the result);

3. Pre-CAFRA, the Eleventh Circuit held that the issuance of an arrest warrant *in rem* violated due process requirements under *Good* even if no property was actually seized:

- *United States v. Land, Winston County*, 163 F.3d 1295 (11th Cir. 1998) (posting arrest warrant *in rem* that authorizes seizure and placing "No Trespassing" sign on property constitutes a seizure in violation of *Good* even if the Government does not take physical possession);

- *United States v. 408 Peyton Road*, 162 F.3d 644 (11th Cir. 1998) (*en bane*) (execution of seizure warrant for real property without prior notice violates due process even though the Government merely posts the property and makes no effort to assert physical control);

- *United States v. Two Parcels ...101 North Liberty Street*, 986 F. Supp. 1376 (M.D. Ala. 1997) (district court refuses even to issue arrest warrant *in rem* for real property without prior notice; all that the Government needs to give notice and to establish the court's *in rem* jurisdiction is an "order authorizing notice");

4. Under section 985(c), the Government no longer needs to obtain an arrest warrant *in rem*, but instead simply serves the owner with a notice of filing complaint and posts it on the property;

- *United States v. Land, Winston County*, 163 F.3d 1295 (11th Cir. 1998) (the proper procedure is to post the property with "a summons, a copy of the verified complaint for forfeiture, and a notice of the forfeiture action" that indicates "that a warrant of arrest *in rem* will be sought in the future");

C. Seizure of business:

1. In the absence of exigent circumstances, the Government may not seize a business *ex parte* without hearing:

- *United States v. All Assets of Statewide Autoparts, Inc.*, 971 F.2d 896 (2d Cir. 1992) (the Government should first consider less drastic alternatives such as occupancy agreements, bonds, and receiverships);

- *But see United States v. Any and All Assets of Shane Co.*, 816 F. Supp. 389 (M.D.N.C. 1991) (Government may seize business without hearing, but claimant is entitled to hearing on preliminary injunction against the Government once seizure takes place);

2. When viable business is seized, the Government may be required to make arrangements to continue business in operation:

- *United States v. Quintana-Aguayo*, 235 F.3d 682 (1st Cir. 2000) (seizure of business following *Good* hearing not subject to interlocutory appeal because seizure did not close down the business, but only evicted the owner and put USMS in his place to operate the business and conserve its assets);

- *United States v. Any and All Assets of Shane Co.*, 816 F. Supp. 389 (M.D.N.C. 1991) (considering and rejecting appointment of trustee and denying preliminary injunction against seizure because entity was a sham operation, not a viable business);

D. Personal property:

- *Good* does not apply to seizures of personal property:

- *Yskamp v. DEA*, 163 F.3d 767 (3d Cir. 1998) (*Good* does not apply to seizure of charter aircraft);

- *United States v. One Parcel... Lot 41, Berryhill Farm*, 118 F.3d 1386 (10th Cir. 1997) (*Good* does not apply to furnishings and other personal property found within residence);

- *United States v. Portrait of Wally*, 2002 WL 553532 (S.D.N.Y. 2002) (*Wally III*) (*Good* does not apply to seizure of artwork);

- *United States v. One 1988 Prevost Liberty Motor Home*, 952 F. Supp. 1180 (S.D. Tex. 1996) (*Good* does not apply to seizure of motor home used as residence);

- *United States v. Property Identified as Lot Numbered 718*, 983 F. Supp. 9 (D.D.C. 1997) (*Good* does not apply to cash proceeds of the sale of real property);

United States v. Funds in the Amount of \$228,390, 1996 WL 284943 (N.D. in. 1996) (seizure of money); *Ivester v. Lee*, 991 F. Supp. 113 (E.D. Mo. 1998) (same);

- *United States v. One 1997 E35 Ford Van*, 50 F. Supp. 2d 789 (N.D. Ill. 1999) (*Good* does not apply to seizure of bank Accounts, safe deposit boxes, and vehicle);

- *In re Indian Gaming Related Cases*, 2000 WL 1257265 (N.D. Cal. 2000) (*Good* does not apply to seizure of gambling machines);

- *United States v. Real Property Located at Incline Village*, 958 F. Supp. 482 (D. Nev. 1997) (*Good* applies only to real property); *In Re McCorkle*, 972 F. Supp. 1423 (M.D. Fla. 1997) (same);

- See also *United States v. All Assets and Equipment of West Side Building Corp.*, 188 F.3d 440 (7th Cir. 1999) (finding it unnecessary to determine whether *Good* applies to personal property because the *ex parte* seizure of inherently mobile property is justified by exigent circumstances);

- See *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 683 (1974) (upholding *ex parte* seizure of personal property);

E. Exigent circumstances:

1. No hearing is required before the court issues a warrant based on exigent circumstances see section 985(d)(1)(B)(ii):

- *United States v. Real Property Located at 1184 Drycreek Road*, 174 F.3d 720 (6th Cir. 1999) (exigent circumstances justified the seizure of real property without prior notice and hearing because the owner had a history of concealing the ownership of the property through fraudulent conveyances);

- *United States v. All Assets and Equipment of West Side Building Corp.*, 58 F.3d 1181 (7th Cir. 1995) (the Government failed to show that it even considered less restrictive measures to preserve the property for forfeiture, or that less restrictive measures would have been insufficient to preserve the availability of the property for forfeiture);

- *United States v. All Right, Title and Interest ...Kenmore Hotel*, 888 F. Supp. 580 (S.D.N.Y. 1995) (exigent circumstances justified seizure of hotel where drug activity was rampant);

- *United States v. All Right, Title and Interest in Real Property Titled in the Name of Taipei Partners*, 927 F. Supp. 1324 (D. Haw. 1996) (threat of continued drug activity at the property insufficient to establish exigent circumstances);

- *United States v. Puella*, 814 F. Supp. 1155 (E.D.N.Y. 1993) (the Government met burden of

establishing exigent circumstances requiring seizure of ongoing business by showing that business engaged in no legitimate activity and that illegal activity was continuing);

2. If property is seized under exigent circumstances without a hearing, there must be a prompt postseizure hearing, *see* section 985(e):

- *United States v. Bowman*, 341 F.3d 1228 (11th Cir. 2003) (at the section 985(e) hearing, claimant is entitled to challenge the *ex parte* seizure based on lack of probable cause, absence of exigent circumstances, or both);

- *See United States v. Real Property Located at 1184 Drycreek Road*, 174 F.3d 720 (6th Cir. 1999) (if property is seized under the exigent circumstances exception to *Good*, there must be a prompt post-seizure hearing to determine if continued control over the property by the Government is justified);

3. Remedy for seizure without exigent circumstances:

- *United States v. Bowman*, 341 F.3d 1228 (11th Cir. 2003) (*ex parte* seizure of real property without exigent circumstances is a *Good* violation; assuming Government establishes probable cause, remedy is not return of the property but only payment of rents and profits lost in the interval between the seizure and the post-seizure hearing);

4. Remedy for failure to establish probable cause at the section 985(e) hearing:

- *United States v. Bowman*, 341 F.3d 1228 (11th Cir. 2003) (if the Government fails to establish probable cause at the post-seizure hearing, it has no basis to retain the property and must release it pending trial);

F. Issues at *Good* hearing:

I. Pre-CAFRA cases: At a *Good* hearing, the only issue is whether the Government has made a showing of probable cause that supports issuance of an arrest warrant *in rem*:

- *United States v. Quintana-Aguayo*, 235 F.3d 682 (1st Cir. 2000) (seizure warrant, issued following a *Good* hearing, not subject to interlocutory appeal because the underlying issue – whether there was probable cause for the forfeiture – could be reviewed on appeal from a final judgment);

- *United States v. One Parcel of Property Located at 194 Quaker Farms Road*, 85 F.3d 985,988 (2d Cir. 1996) (at a *Good* hearing, the Government must demonstrate probable cause to believe that the property is subject to forfeiture);

- *United States v. James Daniel Good Real Property*, 510 U.S. 43,78 (1993) (O'Connor, J., concurring) ("at any hearing-adversary or not-the [G]overnment need only show probable cause that the property has been used to facilitate a drug offense in order to seize it; it will be unlikely that giving the property owner an opportunity to respond will affect the probable-cause

detennination ");

- *United States v. One Parcel... 560 West Hin Road*, 2000 WL 33381014 (D. Conn. 2000) (the only issue at a *Good* hearing is probable cause, not the innocent owner defense, and not the excessiveness of the forfeiture under the Eighth Amendment);

- *United States v. 2400 Cape Meares Loop Road*, Clv. No. 92-613-BE (D. Or. Dec. 3, 1992) (unpublished) (at *Good* hearing, court considers and rejects constitutional objections, finds that probable cause has been shown, declines to consider affinnaoe defenses, and issues an-est warrant);

2. CAFRA codified *Good* at section 985(d)(1)(B); at a preseizure *Good* hearing under the statute, the Government mllSt establish probable cause:

- *United States v. Bowman*, 341 F.3d 1228 (11 th Cir. 2003) (the statute may be silent, but the Government's burden under section 985(d)(I)(B)(i) is to establish probable cause);

G. Interlocutory appeal:

- *United States v. Quintalla-Aguayo*, 235 F.3d 682 (J st Cir. 2000) (seizure warrant issued after *Good* hearing, like any other seizure WatTant, is not subject to interlocutory appeal; rejecting analogy to an injunction appealable under section 1292 even though warrant directed USMS to seize and operate a business);

- *United States v. Bowman*, 341 F.3d 1228 (llth Cir. 2003) (because the only remedy for a *Good* violation is the return of rents and profits, not the return of the seized property, there is no right to an interlocutory appeal);

- *See* cases on appeals from issuance of seizure watTant at page 5.

H. Remedy for *Good* violation:

1. The Eighth Circuit requires dismissal of the forfeiture case:

- *United States v. One Parcel of real Property Located at 9638 Chicago Height.'I*, 27 F.3d 327 (8th Cir. 1994);

- *See also United States v. Real Property Located in El Dorado County*. 59 F.3d 974 (9th Cir. 1995) (dismissal not required in historical cases, but dismissal with prejudice is an option in future cases);

2. The majority rule is that the claimant is entitled to return of rents and profits; inegally seized evidence may be suppressed, but case need not be dismissed:

- *United States v. Real Property Located at 1184 Drycreek Road*, 174 F.3d 720, 728 (6th Cir. 1999) (remedy for a *Good* violation is return of rents and profits that would have been paid to

the owner during the period of the illegal seizure) (collecting cases);

- *United States v. 408 Peyton Road*, 162 F.3d 644 (11th Cir. 1998) (*en banc*) (reversing panel decision requiring dismissal of forfeiture action, and holding that proper remedy is return of rents);

- *United States v. Property, Parcel of Aguilar*, 337 F.3d 225 (2d Cir. 2003) (sovereign immunity bars award of damages for a *Good* violation; only remedy is equitable disgorgement of profits retained by the Government, if any);

- *United States v. Real Property...20832 Big Rock Drive*, 51 F.3d 1402 (9th Cir. 1995) (*Good* violation requires suppression of evidence illegally seized, but does not require dismissal of complaint); *but see United States v. Real Property Located in El Dorado County, supra*;

- *United States v. Real Property located at Incline Village*, 958 F. Supp. 482 (D. Nev. 1997) (*Good* violation does not require dismissal; *El Dorado's* comment regarding dismissal of future cases is *dicta* entitled to little precedential weight);

- *United States v. All Assets and Equipment of West Side Building Corp.*, 58 F.3d 1181 (7th Cir. 1995) (*West Side I*) (no dismissal of complaint for *Good* violation); *United States v. 47 West 644 Route 38*, 190 F.3d 781 (7th Cir. 1999) (same);

- *United States v. One Parcel Property...Lot 85*, 100 F.3d 740 (10th Cir. 1996), *aff'g* 894 F. Supp. 397 (D. Kan. 1995) (*Good* violation does not require dismissal of forfeiture action as long as "impermissibly obtained evidence is not used in the forfeiture proceeding"); *United States v. Real Property...429 South Main Street*, 906 F. Supp. 1155 (S.D. Ohio 1995) (same);

3. Disgorgement of rents/compensatory damages:

- *United States v. Real Property Located at 22 Santa Barbara Dr.*, 264 F.3d 860 (9th Cir. 2001) (claimant not entitled to lost rents where there is no evidence property had ever been rented; even assuming disgorgement of accrued interest on proceeds of interlocutory sale could be an appropriate remedy; no such remedy is available, in equity, when claimant's actions diminished value of property before it was sold);

- *United States v. Land, Winston County*, 221 F.3d 1194 (11th Cir. 2000) (property owner entitled to only nominal damages where property had no rental value and Government prevailed in the forfeiture action; following *Carey v. Piphus*);

- *United States v. Marsh*, 105 F.3d 927, 931 (4th Cir. 1997) (forfeiture case need not be dismissed, but the Government must account for the "profits or rent which it denied the claimant" for the period between the illegal seizure and the first adversarial hearing at which claimant was heard);

- *United States v. Real Property Located in El Dorado County*, 59 F.3d 974 (9th Cir. 1995);

- *United States v. All Assets and Equipment of West Side Building Corp. (West Side I)*, 58 F.3d 1181, 1193 (7th Cir. 1995) (the Government is responsible for lost profits); *United States v. All Assets and Equipment of West Side Building Corp. (West Side II)*, 188 F.3d 440, 443-46 (7th Cir. 1999) (affirming district court's decision, on remand, to award repayment of rents and nominal damages, but denying request for reimbursement for utility bills, mortgage, and taxes paid because such expenses would have been incurred even if the property were never seized); *see id.* at 443 n.1 (whether sovereign immunity bars award of compensatory damages is an open question);

- *United States v. 1461 W 42nd Street*, 251 F.3d 1329 (11th Cir. 2001) (property owner entitled to rents but not damages for loss of enjoyment; unlike disgorgement of rents, award of compensatory damages would violate sovereign immunity; Government may deduct costs of maintaining the property, including mortgage payments, from the rents it must disgorge, following *West Side II*; availability of remedy for due process violation does not hinge on whether property ultimately was forfeited or not);

- *United States v. Real Property Located at Incline Village*, 958 F. Supp. 482 (D. Nev. 1997) (claimant is entitled to net rent- *i.e.*, gross rent less the Government's expenses); *id.* (if defendant is only part owner, he recovers only *pro rata* share of rent);

- *United States v. One Parcel...2030-32 Main Street*, 2000 WL 1336473 (D. Conn. 2000) (remedy for *Good* violation is return of rents collected by the Government, less the amount of taxes the Government paid; nothing owed to the claimant where rents more than offset by the tax bill);

- *United States v. One 1989, 23 Foot, Wellcraft Motor Vessel*, 910 F. Supp. 46 (D.P.R. 1995) (remedy is not dismissal but disgorgement of any rents paid to the Government);

- *United States v. 18900 S.W. 50th Street*, 915 F. Supp. 1199 (N.D. Fla. 1994) (property must be returned to owner pending resolution of forfeiture case but civil action need not be dismissed);

4. Rule 60(b) motion may be used as the vehicle to recover damages resulting from *Good* violation:

- *United States v. 26 N Valencia Street*, 1998 WL 937231 (C.D. Cal. 1999) (3-year delay in filing Rule 60(b) motion to recover damages for *Good* violation unreasonable);

- *See* cases on remedy for violating section 985 (codifying *Good*), *supra*.

VII. Pretrial Restraining Orders

- 18 U.S.C. § 9830) authorizes the issuance of pretrial restraining orders in civil forfeiture cases.

- *See* pretrial restraint of assets at the request of foreign government at page 189.

VIII. Judicial Forfeiture: Claim, Complaint, and Claim & Answer

- 18 U.S.C. §§ 983(a)(2)-(4), enacted by CAFRA, and the Supplemental Rules for Certain Admiralty and Maritime Claims, govern the procedure for initiating a civil judicial forfeiture case.

See 18 U.S.C. §§ 981(b)(2) and 983(a)(3) and (4), cross-referencing the Supplemental Rules;

- *United States v. One-Sixth Share*, 326 F.3d 36 (1st Cir. 2003) ("By virtue of the roots of *in rem* jurisdiction in admiralty law, the procedures for intervention in civil forfeitures are governed by the Supplemental Rules");

- *United States v. \$8,221,877.16 in U.S. Currency*, 330 F.3d 141 (3d Cir. 2003) (explaining the relationship between the Supplemental Rules and the Fed. R. Civ. P.; the civil rules govern unless something in the Supplemental Rules is inconsistent);

- *See generally*, Cassella, "The Civil Asset Forfeiture Reform Act of 2000," 27 *Journal of Legislation* 97, 129-38, Notre Dame Law School (2001) (discussing the statutory provisions in sections 983(a)(2)-(4) in detail), available on AFML Onhne.

A. Filing a claim in the administrative forfeiture proceeding-18 U.S.C. § 983(a)(2):

1. A claim must be filed by the date specified in the written notice sent by the seizing agency, or if no notice is sent, within 30 days of the last date of publication of the notice, *see* section 983(a)(2)(B):