

Civil and Criminal Forfeiture Procedure

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Part II - pages 49-99

- *United States v. Bollin*, 264 F.3d 391(4th Cir. 2001) (even minor participant who received only \$30,000 for his role in the scheme may be liable for full \$1.2 million judgment if the laundering of that amount was foreseeable to him; forfeiture of such foreseeable amount does not violate the Excessive Fines Clause);

- *United States v. Garcia-Guizar*, 160 F.3d 511 (9th Cir. 1998) (Beezer, J., dissenting) (defendants are jointly and severally liable for full amount of drug sale, even though they divided the proceeds between themselves);

- *United States v. Van Brocklin*, 115 F.3d 587 (8th Cir. 1997) (holding minor participant who reaped little personal benefit jointly and severally liable for full amount of proceeds may violate Eighth Amendment);

- *United States v. Saccoccia*, 62 F. Supp. 2d 539 (D.R.I. 1999) (if defendants are jointly and severally liable, each defendant is entitled to know how much has been forfeited by his codefendants and is entitled to credit for such amount, but defendant is not entitled to credit for amounts forfeited by unindicted coconspirators);

- *See United States v. Loren-Maltese*, 2003 WL 291910 (N.D. Ill. 2003) (noting that defendant will be entitled to credit for amounts Government recovers from jointly and severally liable codefendants);

XVI. Conspiracies

Because forfeiture is part of sentencing, forfeiture of defendant's interest may be based on illegal acts of coconspirators for which defendant is liable:

- *United States v. White*, 116 F.3d 948 (1st Cir. 1997) (although defendant did not personally use his farm to distribute marijuana, his interest was forfeitable because he was a member of a conspiracy and coconspirators did use the farm for that purpose);

XVII. Substitute Assets

A. Procedure for obtaining substitute assets:

1. The procedure for amending the order of forfeiture to include substitute assets is set forth in Rule 32.2(e):

1 Excessive fines issues are treated in detail in a separate outline, "Case Outline-Excessive Fines."

- *United States v. Candelaria-Silva*, 166 F.3d 19 (1st Cir. 1999) (forfeiture of substitute assets is solely a matter for the court; the defendant's only right is to have the jury determine the amount of the money judgment, which puts an upper limit on the amount that may be forfeited as a substitute asset);

- *United States v. Thompson*, 837 F. Supp. 585, 586 (S.D.N.Y. 1993) (court, not jury, orders forfeiture of substitute assets);

- *United States v. Hurley*, 63 F.3d 1,23 (1st Cir. 1995) ("the statute says that an order substituting assets is to be made by 'the court'");

- *United States v. Sokolow*, Cr. No. 93-394 (E.D. Pa. Jan. 4, 1999) (unpublished) (4-year delay between entry of order of forfeiture and motion to forfeit substitute assets does not violate due process; \$8,850 does not apply);

- *United States v. Bennett*, 2000 WL 1505986 (S.D.N.Y. 2000) (Government must establish that the amount of money subject to forfeiture exceeds the value of the substitute assets);

- *United States v. McCorkle*, No. 6:98-CR-52-ORL-19JGG (M.D. Fla. Jan. 8, 2001) (Rule 32.2(e) governs procedure for amending order of forfeiture to include substitute asset);

2. It is unclear what notice defendant must be given of the motion to substitute assets.

- *United States v. Pompei*, 76 Fed. Appx. 483, 2003 WL 22287409 (3d Cir. 2003) (if property was named in the forfeiture allegation in the indictment, defendant cannot complain of lack of notice when, 2 years after his conviction, Government moves to forfeit property as a substitute asset);

3. Court may amend order of forfeiture at any time to include substitute assets.

- See jurisdiction pending appeal, *infra*, page 99.

B. The criteria set forth in section 853(p) must be satisfied:

- *United States v. Loren-Maltese*, 2003 WL 291910 (N.D. Ill. 2003) (the requirements that the forfeitable property cannot be located upon the exercise of due diligence, and that the absence of the property is due to an act or omission of the defendant, are both satisfied by showing that the defendant refused to disclose what became of the forfeitable property during the presentence investigation);

- *United States v. Candelaria-Silva*, 166 F.3d 19 (1st Cir. 1999) (the Government satisfied requirements of section 853(p) by submitting motion and affidavit reciting its efforts to trace defendant's drug proceeds);

- *United States v. Sokolow*, 1995 WL 113079 at *1 (E.D. Pa. 1995) (where forfeitable property is diminished in value due to defendant's bad business investment, forfeiture of substitute assets is appropriate; investment is an "act" of the defendant), *aff'd*. 81 F.3d 397 (3d Cir. 1996);

- *United States v. Stewart*, 1998 WL 720063 (E.D. Pa. 1998) (the same fact that makes property untraceable to the money laundering offense-commingling with other property-permits forfeiture as substitute assets under section 853(p)(5)), *aff'd as modified*, 185 F.3d 112 (3d Cir. 1999);

- *United States v. Marmolejo*, 89 F.3d 1185, 1197-98 (5th Cir. 1996) (fact that the Government could not trace proceeds of defendant's crimes satisfied burden of showing that defendant had made his property unavailable by transferring it to third parties; section 1963(m)(2);

- *United States v. Cleveland*, 1997 WL 537707 at *12 (E.D. La. 1997) (money launderer who transferred criminal proceeds to third parties ordered to forfeit substitute assets);

- *But see United States v. Messino*, 122 F.3d 427 (7th Cir. 1997) (suggesting in *dicta* that order granting motion to substitute assets was defective because court did not find that section 853(p) was satisfied, or that defendant was the owner of the substitute property);

C. Order of forfeiture for substitute assets must be satisfied out of something not itself subject to forfeiture; otherwise forfeiture order would be satisfied out of something that belongs to the United States, rendering substitute assets provision meaningless:

- *United States v. Swank Corp.*, 797 F. Supp. 497, 504 (E.D. Va. 1992);

- *United States v. Henry*, 850 F. Supp. 681 (M.D. Tenn. 1994), *aff'd*, 64 F.3d 664, 1995 WL 478635 at *4 (6th Cir. 1995) (Table) ("the jury verdict indicating that the Ewing Court residence should not be forfeited does not prevent the forfeiture of the property as a substitute asset... the very nature of a substitute asset requires that it is not property which is directly forfeitable");

- *United States v. McCorkle*, No. 6:98-CR-52-0RL-19JGG (M.D. Fla. Jan. 8, 2001) (there is no bar against forfeiture-as a substitute asset--of the property the jury declined to find subject to direct forfeiture);

- No need to invoke substitute assets theory if property is directly forfeitable:

- *United States v. Candelaria-Silva*, 166 F.3d 19 (1st Cir. 1999) (that there is no nexus between the substitute asset and the offense is irrelevant; if there were a nexus, it would not be necessary to invoke the substitute assets theory);

- *United States v. Voigt*, 89 F.3d 1050, 1086 (3d Cir. 1996) ("the substitute asset provision comes into play only when forfeitable property cannot be identified as directly 'involved in' or 'traceable to' the criminal offender");

- *United States v. Stewart*, 185 F.3d 112 (3d Cir. 1999) (reversing district court's determination that \$3 million in bank account was forfeitable only as substitute asset because account

contained commingled funds);

D. Substitute assets may be forfeited to satisfy money judgment:

- *United States v. Candelaria-Silva*, 166 F.3d 19 (1st Cir. 1999) (once the Government has obtained a money judgment, it may forfeit defendant's real property in partial satisfaction of that judgment); *United States v. Baker*, 227 F.3d 955 (7th Cir. 2000) (same);

- *United States v. Carroll*, 346 F.3d 744 (7th Cir. 2003) (defendant may be ordered to forfeit "every last penny" he owns as substitute assets to satisfy a money judgment);

- *United States v. Hill*, 2002 WL 31119692 (6th Cir. 2002) (Table) (630 shares of stock could be forfeited as substitute assets to satisfy money judgment entered after property involved in money laundering scheme became unavailable);

- *United States v. Numisgroup International. Corp.*, 169 F. Supp. 2d 133 (E.D.N.Y. 2001) (Rule 32.2(e) authorizes forfeiture of substitute assets to satisfy a money judgment, including a judgment based on the value of the missing proceeds and the value of the missing facilitating property);

- *United States v. Harrison*, 2001 WL 803695 (N.D. Ill. 2001) (entry of money judgment as part of preliminary order of forfeiture gives Government opportunity later to satisfy the judgment by seeking forfeiture of substitute assets; Rule 32.2(e));

- *United States v. Davis*, 177 F. Supp. 2d 470 (E.D. Va. 2001) (if property cannot be forfeited as directly traceable to the offense, it can be forfeited as a substitute asset and used to satisfy the money judgment);

- *United States v. Swank Corp.*, 797 F. Supp. 497,503 (E.D. Va. 1992) (substitute assets restrained pretrial because they would have been subject to forfeiture to satisfy money judgment if defendant were convicted);

- *United States v. Davis*, 2001 WL 47003 (S.D.N.Y. 2001) (property seized at time of arrest need not be returned at end of criminal case if it can be forfeited as substitute assets in satisfaction of money judgment);

- *United States v. Messino*, 917 F. Supp. 1307, 1308 (N.D. Ill. 1996) (court ordered forfeiture of motorcycle as substitute asset in partial satisfaction of money judgment);

- *Cf. United States v. Maxwell*, 189 F. Supp. 2d 395 (E.D. Va. 2002) (when defendant transfers his real property to third party to prevent Government from using it to satisfy money judgment, Government may sue to void the transfer under 28 U.S.C. §§ 3304(b) and 3306(a));

E. Prosecutor can switch theories of forfeiture:

- *United States v. Candelaria-Silva*, 166 F.3d 19 (1st Cir. 1999) (there was nothing improper in

prosecutor's decision to move to strike property from the forfeiture allegation before it was submitted to the jury and later seek forfeiture of same property as a substitute asset);

- *United States v. McCorkle*, No. 6:98-CR-52-0RL-19JGG (101.0. Fla. Jan. 8, 2001) (prosecutor can drop civil forfeiture case against asset and seek forfeiture of same property as substitute asset in criminal case);

F. Post-conviction order restraining substitute assets:

- *United States v. Numisgroup Intl. Corp.*, 169 F. Supp. 2d 133 (E.D.N.Y. 2001) (substitute assets may be restrained post-conviction);

- *United States v. Neal*, Cr. No. 03-35-A (E.O. Va. Sept. 29, 2003) (substitute assets may be restrained as soon as the jury returns a special verdict for a money judgment);

G. Forfeiture of substitute asset is mandatory:

- *United States v. Bollin*, 264 F.3d 391 (4th Cir. 2001) (Congress requires forfeiture of property as a substitute asset; the forfeiture judgment that the substitute asset is used to satisfy is part of the defendant's criminal sentence; cannot insulate certain types of property from forfeiture as a substitute asset);

- *United States v. McCorkle*, No. 6:98-CR-52-0RL-19JGG (M.D. Fla. Jan. 8, 2001) (court cannot be concerned with defendant's claim that the forfeiture of jewelry as a substitute asset would do irreparable harm in the event defendant is successful in overturning conviction on appeal because forfeiture of substitute asset is mandatory once elements of section 853(P) are satisfied);

H. Third party may contest forfeiture of substitute assets in the ancillary proceeding:

- *United States v. Lester*, 85 F.3d 1409 (9th Cir. 1996); *United States v. Morgan*, 224 F.3d 339 (4th Cir. 2000) (wife challenges forfeiture of joint bank accounts as substitute assets);

- *United States v. Watkins*, 320 F.3d 1279 (11th Cir. 2003) (unsecured creditors and defendant's wife unsuccessfully challenge forfeiture of cash as substitute asset);

- *United States v. Bifeli-Je*, 938 F. Supp. 1352 (N.D. Ill. 1996) (defendant's wife and children contest forfeiture of substitute assets in ancillary proceeding);

- *United States v. Loren-Maltese*, 2003 WL 291910 (N.D. m. 2003) (granting Government's motion to forfeit substitute assets will not harm third parties because they can contest the forfeiture in the ancillary proceeding);

- See third party issues, *infra*.

L. Substitute assets in money laundering cases:

- *United States v. Bollin*, 264 F.3d 391 (4th Cir. 2001) (where defendant was jointly and severally liable for laundering \$1.2 million in fraud proceeds, and such proceeds could not be found, defendant's IRA could be forfeited as a substitute asset);

- *United States v. O'Brien*, 836 F. Supp. 438 (S.D. Ohio 1993) (where proceeds of bank fraud transferred in violation of section 1957 cannot be located, substitute property is forfeitable);

- *United States v. Bennett*, 2000 WL 1505986 (S.D.N.Y. 2000) (substitute assets may be forfeited in money laundering cases);

J. Substitute assets may be forfeited if facilitating property is unavailable:

- *United States v. Javaherpour*, 78 Fed. Appx. 452, 2003 WL 22331994 (6th Cir. 2003) (when property used to facilitate a drug deal has been sold, court may order forfeiture of substitute assets);

K. Application of the relation back doctrine to substitute assets:

- The application of the relation back doctrine to substitute assets is controversial. *See* discussion in section on the rights of third parties to contest the forfeiture of substitute assets at page 56.

L. Attorney cannot object that substitute assets are needed to pay fee:

- *United States v. Numisgroup Int'l. Corp.*, 169 F. Supp. 2d 133 (E.D.N.Y. 2001) (Supreme Court's decision in *Monsanto* applies with even greater force to post-conviction restraint of property, including property forfeitable as substitute assets);

- *United States v. Stewart*, 1998 WL 961363 (E.D. Pa. 1998) (*Cnplin & Drysdale* applies to substitute assets), *order aff'd*, 189 F.3d 465 (3d Cir. 1999); *United States v. O'Brien*, 181 F.3d 105, 1999 WL 357755 (6th Cir. 1999) (Table) (same);

- *United States v. Ziadeh*, 230 F. Supp. 2d 702 (E.D. Va. 2002) (because *Caplin & Drysdale* applies to substitute assets, defendant cannot object to pretrial restraint of substitute assets as long as the amount restrained does not exceed the amount that would be forfeited upon conviction);

- *United States v. Helms*, 2001 WL 1057751 (W.O. Va. 2001) (same; assets restrained pretrial as substitute assets are not available for attorney's fees unless there is reason to believe that they won't be forfeited);

XVIII. Property Transferred to Third Parties

A. Relation back doctrine:

- Transactions transferring forfeitable property to third parties may be voided under the

relation back doctrine:

- *See* 18 U.S.C. § 1963(c); 21 U.S.C. § 853(c);

- *United States v. Totaro*, 345 F.3d 989 (8th Cir. 2003) (defendant's attempt to insulate his criminal proceeds from forfeiture by using them to pay off the mortgage on wife's property and make improvements thereto are void under the relation back doctrine; wife is entitled to recover only what she owned before criminal proceeds were invested in her property);

- *United States v. Gilbert*, 244 F.3d 888, 902 n.38 (11th Cir. 2001) (under the relation back doctrine, Government's interest dates back to the time of the act that made the property subject to forfeiture;

Congress included the provision to prevent a defendant from attempting to transfer his property to a third party prior to his conviction; third party who objects to application of the relation back doctrine must file a claim in the ancillary proceeding);

- *United States v. Bennett*, 252 F.3d 559 (2d Cir. 2001) (the procedure for recovering criminal proceeds transferred by a defendant to a third party is codified at sections 853(c) and (n)(6)(B); the Government forfeits the property in the criminal case, subject to the third party's right to contest the forfeiture in the ancillary proceeding);

- *United States v. McCorkle*, 321 F.3d 1292 (11th Cir. 2003) (any property of the defendant that is subsequently transferred to a third party may be the subject of a special verdict of forfeiture; the district court thereafter orders the forfeiture of the property, subject to any claim made by the transferee in the ancillary proceeding);

- *United States v. Barnette*, 129 F.3d 1179 (11th Cir. 1997) (defendant remained obligated to forfeit value of stock he transferred to his wife to avoid forfeiture);

- *United States v. Johnston*, 13 F. Supp. 2d 1316 (M.D. Fla. 1998) (attempt by defendant's partners to transfer all partnership assets to third party to frustrate the Government's right to forfeit defendant's 25 percent interest was void; the Government's motion to set aside transfer granted);

- *United States v. Infelise*, 938 F. Supp. 1352 (N.D. Ill. 1996) (section 1963(c) applies even though transfer occurred in 1983, before effective date of statute);

- *But see United States v. O'Dell*, 247 F.3d 655 (6th Cir. 2001) (where defendant's only interest in the property was his right to become the owner if he maintained loan payments, his property interest evaporated when he failed to comply with that condition; there was therefore nothing left to forfeit; defendant's father, who was the superior owner, did not have to be a bona fide purchaser because he was not a transferee of defendant's forfeitable interest but a person who had been the owner all along);

- The relation back doctrine is reflected in section 853(n)(6)(B), which limits recovery to those with preexisting interests unless the claimant was a bona fide purchaser.

- See cases beginning at page 91.

B. Application of relation back doctrine to substitute assets:

1. The ancillary proceeding gives third parties the right to contest the forfeiture of substitute assets just as it allows them to contest the forfeiture of other assets;

- *United States v. O'Brien*, 181 F.3d 105, 1999 WL 357755 (6th Cir. 1999) (Table) (assuming, without deciding, that third party must assert she had an interest in the substitute asset at the time the crime occurred in order to make a claim under section 853(n)(6)(A));

- *United States v. Maxwell*, 189 F. Supp. 2d 395 (E.D. Va. 2002) (when defendant transfers his real property to third party to prevent Government from using it to satisfy money judgment, Government may sue to void the transfer under 28 U.S.C. §§ 3304(b) and 3306(a));

- *United States v. Strobe*, 58 F. Supp. 2d 576 (M.D. Pa. 1999) (ancillary proceeding statute applies equally to substitute assets; unless third party is a bona fide purchaser, he may not defeat the forfeiture of substitute assets under section 853(n)(6)(B));

2. Transfers of substitute assets to third parties may be voided under the relation back doctrine, but it is unclear when the Government's interest in substitute assets vests for purposes of determining whether the third party challenge must be under section 853(n)(6)(A) or (B):

- *United States v. McHan*, 345 F.3d 262 (4th Cir. 2003) (relation back doctrine applies to substitute assets and vests title in the Government as of the date of the offense);

- *United States v. Chavez*, 323 F.3d 1216 (9th Cir. 2003) (assuming Government's interest in substitute asset vested when the court entered the order of forfeiture, claimant could not prevail because her interest arose at the same instant);

- *United States v. Saccoccia*, 165 F. Supp. 2d 103 (D.R.I. 2001) (Government's interest in substitute asset does not vest until court determines that statutory requirements have been satisfied and enters order of forfeiture; person who acquired asset before that time did not have to show he was a bona fide purchaser), *rev'd on other grounds*, 344 F.3d 31 (1st Cir. 2003);

- *United States v. Phillips*, 185 F.3d 183 (4th Cir. 1999) (mortgagee barred from bringing foreclosure action against real property forfeited as substitute asset because under the relation back doctrine, the property belonged to the United States and foreclosure was barred by section 853(k));

- *United States v. Scardino*, 956 F. Supp. 774 (N.D. TIL 1997) (defendant's attempt to transfer property to his wife after he was named as target of grand jury investigation to avoid forfeiture of property as substitute assets is void under section 853(c));

- *United States v. Norton*, 2002 WL 31039138 at n.7 (W.D. Va. 2002) (even if Government's

interest in substitute asset does not vest at the time of the crime, "it is not unfair for it to relate back to the date of public notice of the [G]overnment's intent to obtain forfeiture"; citing Smith, *Prosecution and Defense of Forfeiture Cases*);

C. Procedure for forfeiting property in third party's name as substitute asset:

- *United States v. Bennett*, 2003 WL 22208286 (S.D.N.Y. 2003) (to forfeit property held in third party's name as a substitute asset, court first finds, by a preponderance of the evidence, that the property belongs to the defendant and amends the order of forfeiture to include the property pursuant to Rule 32.2(e) and section 853(P); then the third party in whose name the property was held contests the court's finding of ownership in the ancillary proceeding);

D. Forfeiture may include money transferred to defense counsel as his or her fee:

- *United States v. Moffitt & Zwerling*, 846 F. Supp. 463,467 (E.D. Va. 1994) (attorney's fee paid in cash in cardboard box forfeited);

- *United States v. Matta-Timmins*, 81 F. Supp. 2d 193 (D. Mass. 2000) (*dicta*) (noting that if defendant pleads guilty fee that he paid to defense counsel may be forfeited);

- *United States v. Register*, 182 F.3d 820 (11 th Cir. 1999) (*dicta*) (if defense counsel had accepted real property named in the indictment as a forfeitable asset as his fee, he would have had to surrender it to the Government when the defendant was convicted because he was not a bona fide purchaser under section 853(c), citing *Caplin & Drysdale*);

- *United States v. McCorkle*, 2000 WL 133759 (M.D. Fla. 2000) (under *Caplin & Drysdale* and *Monsanto*, criminal defendant has no right to use fraud proceeds to hire counsel; "the right to counsel of choice belongs solely to criminal defendants who possess legitimate, uncontested assets"; ...the privilege to practice law is not a license to share in the proceeds of a fraud");

- *United States v. Saccoccia*, 165 F. Supp. 2d 103 (D.R.I 2001) (relation back doctrine has no exception for attorney's fees; once Government establishes forfeitability of property, defense attorney has burden of showing he was a bona fide purchaser), *rev'd on other grounds*. 344 F.3d 31 (1st Cir. 2003);

- Cf. *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 611, 109 S. Ct. 2646 (1989) (civil forfeiture of attorney's fees);

- Cf. *Casso v. United States*, 2001 WL 1517537 (E.D.N.Y. 2001) (it is not improper for attorney to inquire if forfeitable property may be used for his or her fee, or to ask Government to waive forfeiture to permit such use);

E. The Government has option of recovering property from third party or seeking substitute assets from the defendant:

- *United States v. De Ortiz*, 910 F.2d 376, 381 (7th Cir. 1990) (third party cannot object to the

Government's use of section 853(c) to recover forfeitable property on the ground that the Government could have sought forfeiture of substitute assets from the defendant);

- *United States v. McCorkle*, 2000 WL 133759 (M.D. Fla. 2000) (forfeiting substitute assets from defendant or filing *Moffitt* lawsuit against third party are alternative remedies when forfeitable property has been transferred to third party and dissipated);

F. But the Government cannot recover substitute assets From third party:

- *United States v. Saccoccia*, 344 F.3d 31 (1 st Cir. 2003) (the Government may forfeit the fee paid to a defense attorney who is not a bona fide purchaser, but if the attorney has already spent the money, there is nothing to forfeit);

- *III Re: Moffitt, Zwerling & Kemler*, 864 F. Supp. 527 (E.D. Va. 1994) (*Moffitt If*) (the Government may recover forfeitable property from third parties to whom it has been transferred. but if third party has dissipated the property, the Government may not recover substitute assets);

- *United States v. McCorkle*, 2000 WL 133759 (M.D. Fla. 2000) (following *Moffitt*; Government cannot recover substitute assets from third party, but may recoup value of forfeited property from third party by filing a conversion action);

G. If third party has dissipated forfeitable property, the Government may forfeit other property traceable to that property:

- *United States v. Saccoccia*, 344 F.3d 31 (1 st Cir. 2003) (the Government may use its post-conviction discovery powers to trace what became of the forfeitable property transferred by the defendant to a third partyj and may forfeit that property or anything traceable to it);

- *United States v. Moffitt, Zwerling & Kemler*, 83 F.3d 660 (4th Cir. 1996) (the Government may recover property traceable to forfeitable property transferred to third party, and may conduct discovery to locate and identify such traceable property), 875 F. Supp. 1152 (E.D. Va. 1995) (*Moffitt III*) (affirmed in part and reversed in part);

- *United States v. McHan*. 345 F.3d 262 (4th Cir. 2003) (wife of defendant, who acquired defendant's property and was not a bona fide purchaser, must forfeit the proceeds of the sale of that property to a third party);

- *United States v. BCCI Holdings (Luxembourg) S.A. (petitioll of American Express Bank II)*, 961 F. Supp. 287 (D.D.C. 1997) (where claimant acquired forfeitable asset by reducing its debt to the defendant, thereby increasing its net worth, claimant could not avoid forfeiture under the relation back doctrine by claiming the asset had been dissipated as long as claimant's net worth was at all times greater than the value of the asset; distinguishing *Moffitt II*);

H. If third party has dissipated forfeitable property, the Government may file a conversion action in federal court to recover the property:

- *United States v. Saccoccia*, 344 F.3d 31 (1st Cir. 2003) (if defense counsel has spent the forfeitable property given to him as his fee, the Government may sue him for conversion of its property);

- *United States v. Swiss American Bank*, 191 F.3d 30 (1st Cir. 1999) (the United States has a cause of action in conversion and unjust enrichment against a third party who receives property subject to criminal forfeiture and converts it to his own use, and may file suit in federal court because the action arises under federal law; Rule 4(k)(2) gives the court personal jurisdiction over third parties located outside of the United States); *but see United States v. Swiss American Bank*, 274 F.3d 610 (1st Cir. 2001) (personal jurisdiction over a foreign bank cannot be based solely on the fact that the effect of the bank's conversion of forfeited funds was felt in the jurisdiction where the underlying crime took place and where the order of forfeiture giving rise to the Government's property interest was entered);

- *United States v. Moffitt, Zwerling & Kemler*, 83 F.3d 660 (4th Cir. 1996) (conversion action under Virginia tort law may be based on the Government's rightful ownership of forfeitable property under the relation back doctrine and filed in federal court), *rev'g* 875 F. Supp. 1190 (E.D. Va. 1995) (*Moffitt IV*);

- *United States v. McCorkle*, 321 F.3d 1292 (11th Cir. 2003) (Government could have sued defense COWI Sel for converting the criminal proceeds that the defendant used to pay his attorney's fee);

I. Third party may be held in contempt for aiding and abetting defendant's attempt to avoid forfeiture:

- *United States v. Saccoccia*, 344 F.3d 31 (1st Cir. 2003) (if defense counsel accepted a fee paid w/ forfeitable property when such property was subject to a pretrial restraining order, counsel may be held in civil or criminal contempt);

- *United States v. Barnette*, 129 F.3d 1179 (11th Cir. 1997) (wife held in contempt for failing to comply with order directing her to reveal location and value of forfeitable property transferred to by defendant);

- *But see United States v. Yerardi*, 192 F.3d 14 (1st Cir. 1999) (wife cannot be compelled to testify to location of assets that the Government believes defendant transferred to her if such testimony could be used to prosecute husband for tax evasion);

XIX. Right of Third Party To Object to the Forfeiture²

- "Congress has established the procedure for adjudicating third party interests in forfeited property. 21 U.S.C. § 853(n). A petitioner must follow the specified procedure, and may not commence a separate action against the United States concerning the validity of his alleged interest in the forfeited property 21 U.S.C. § 853(k)."

- *United States v. McCorkle*, 143 F. Supp. 2d 1311, 1318, 19 (M.D. Fla. 2001); *United States v.*

McCorkle. 2000 WL 133759 (M.D. Fla. 2000);

A. Third party has no right to intervene in a criminal case until after conviction under sections 1963(i) and 853(k):

- *United States v. Messillo*, 122 F.3d 427 (7th Cir. 1997) (under sections 853(k) and (n), third party must wait until the court has entered a preliminary order of forfeiture to challenge the forfeiture action);

- *United States v. Gilbert*, 244 F.3d 888, 910 n.48 (11th Cir. 2001) (ancillary proceeding is "exclusive means" for third parties to assert claims to forfeited property; once indictment is filed, third party cannot commence civil suit against the United States but must "avail himself of the ancillary proceeding"; citing legislative history);

- *United States v. Kramer*, 912 F.2d 1257, 1261 (11th Cir. 1990) (third parties must wait for final order of forfeiture before they can "hale the Government into court to adjudicate their interests in the forfeited property");

2 The following issues are discussed in detail in Cassella, "Third Party Rights in Criminal Forfeiture Cases," 32 *Criminal Law Bulletin* 499 (November/December 1996).

B. Third party cannot seek return of property seized for criminal forfeiture:

- *United States v. Patel*, 1996 WL 166949 (N.D. m. 1996) (third parties may not institute administrative actions for the return of cash and vehicles seized for criminal forfeiture; they must await the ancillary proceeding);

C. Third party cannot seek division of restrained assets prior to the ancillary proceeding:

- *United States v. Brandino*, No. 95-626-CR-RYSKAMP (S.D. Fla. June 27, 1997) (unpublished) (request by third parties to divide proceeds of restrained business pretrial rejected; business proceeds remain in escrow until the ancillary proceeding);

D. Third party may not seek dismissal of forfeiture count before order of forfeiture is entered:

- *United States v. Real Property in Waterboro*, 64 F.3d 752 (1st Cir. 1995) (third party's *res judicata* argument was nothing more than an assertion that property was vested in him instead of the defendant; argument has to be made in the ancillary proceeding following entry of order of forfeiture);

E. Third party cannot object to validity of defendant's guilty plea:

- *United States v. Ken International Co., Ltd.*, 113 F.3d 1243, 1997 WL 229114 (9th Cir. 1997) (unpublished) (third party cannot object that court failed to find factual basis for forfeiture under Rule 11(f));

F. Third party cannot object to entry of order of forfeiture:

- *United States v. BCCI Holdings (Luxembourg) S.A. (Petition of ICIC Investments)*, 795 F. Supp. 477, 479 (D.D.C. 1992) (third party lacks standing to object to entry of order of forfeiture); *United States v. BCCI Holdings (Luxembourg) S.A. (Final Order of Forfeiture and Disbursement)*, 69 F. Supp. 2d 36 (D.D.C. 1999) (same);

- *United States v. Farley*, 919 F. Supp. 276 (S.D. Ohio 1996) (third party may not move to dismiss order of forfeiture; must file petition in ancillary proceeding);

- *United States v. Bennett*, 2000 WL 1505986 (S.D.N.Y. 2000) (wife cannot object to amendment of order of forfeiture to include substitute assets except by filing claim in the ancillary proceeding);

G. Third party may not object to motion to forfeit substitute assets:

- *United States v. McHall*, 345 F.3d 262 (4th Cir. 2003) (it does not violate third party's due process rights to require that she wait to contest the forfeitability of property as a substitute asset until the ancillary proceeding);

H. Third party may not move to quash preliminary order of forfeiture:

- *United States v. Duboc (Petition of F. Lee Bailey)*! No. GCR 94-01 009-MMP (N.D. Fla. May 9, 1996) (denying motion to quash or reconsider for lack of standing) cited in *Bailey v. United States*! 46 Cl. Ct. 187 (Cl. Ct. 2000);

1. Third party cannot file any action in another court to circumvent the forfeiture procedure:

1. Mortgage foreclosure:

- *United States v. Phillips*, 185 F.3d 183, 188 (4th Cir. 1999) (third party cannot concur in foreclosure action to recover lienholder's interest in forfeited real property even though defendant has stopped paying mortgage; once the property is forfeited, it belongs to the Government under the relation back doctrine! and any attempt at foreclosure is barred by section 853(k);

- *United States v. Serendensky*, 2003 WL 21543519 (S.D.N.Y. 2003) (section 853(k) bars foreclosure on property subject to criminal forfeiture; if foreclosure goes forward, it is invalid);

- *Bank One N.A. v. Everly*, 2002 WL 31056716 (N.D. m. 2002) (Government removes state foreclosure action to federal court where criminal case is pending, and moves to dismiss foreclosure complaint as barred by section 853(k); motion granted);

- *United States v. Security Marine Credit Corporation*, 767 F. Supp. 260 (S.D. Fla. 1991) (section 853(k) bars third party from filing private civil foreclosure action to recover interest in forfeited boat);

2. Interpleaders:

- *Johnson v. United States*, 2001 WL 1064505 (N.D. m. 2001) (third party may not file interpleader action to obtain judicial determination of ownership of funds subject to criminal forfeiture case);

- *United States v. BCCI Holdings (Luxembourg) S.A. (In re Oppenheimer & Co.)*, 1992 WL 44321 (D.D.C. 1992) (third party may not file interpleader action when ordered to surrender forfeited funds to U.S. Marshal);

3. Bankruptcy:

- *In Re: Smouha*, 136 B.R. 921,926 (Bankr. S.D.N.Y. 1992) (third party may not attempt to assert interest in defendant's forfeitable assets by initiating action in bankruptcy court);

4. Other civil actions:

- *Roberts v. United States*, 141 F.3d 1468 (11th Cir. 1998) (third party may not file lawsuit against the United States claiming pretrial restraining order violated the Takings Clause; defendant's fugitive status does not render section 853(k) unconstitutional; remedy is to challenge the restraining order in the criminal case and file an interlocutory appeal if unsuccessful);

- *Cf. United States v. Vereda, Ltda.*, 271 F.3d 1367 (Fed. Cir. 2001) (holding that third party cannot contest civil forfeiture in the Court of Federal Claims because the forfeiture statutes provide a comprehensive scheme for doing so; distinguishing *Shelden v. United States*, 7 F.3d 1022 (Fed. Cir. 1993) [allowing review of criminal forfeiture in Court of Claims J, on the ground that *Shelden* applied to criminal forfeiture imposed before there were any statutory procedures in place for litigating third party claims);

- *But see* page 14, *supra*, regarding third party objections to restraining orders.

J. Third party cannot use section 2255 proceeding to contest criminal forfeiture:

- *United States v. Walters*, 2002 WL 31929249 (D. Kan. 2002) (wife, who was convicted along with husband in drug case. cannot use section 2255 petition in her case to challenge the forfeiture imposed on her husband in his case; she must file a petition pursuant to section 853(n);

K. But a third party can seek permissible to conduct an interlocutory sale:

- *United States v. Hyde*, 287 F. Supp. 2d 1095 (N.D. Cal. 2003) (section 853(k) does not bar a third party from asking the court for permission to sell property named as a substitute asset in an indictment and invest the proceeds in a new asset of greater or equal value that would remain subject to forfeiture as a substitute asset);

XX. Ancillary Hearing-Procedural Issues

A. Purpose of the ancillary proceeding:

- *United States v. McHan*, 345 F.3d 262 (4th Cir. 2003) (the ancillary proceeding is a competition over the ownership of the property; it is not a civil forfeiture proceeding in which the Government is trying to forfeit a third party's interest in property);
- *United States v. Totaro*, 345 F.3d 989 (8th Cir. 2003) (the ancillary proceeding is the forum in which the court determines what portion of the property belonged to a third party so that it may be protected from forfeiture; it is not a civil forfeiture proceeding in which any interest of a third party may be forfeited);
- *United States v. Gilbert*, 244 F.3d 888 (11th Cir. 2001) (ancillary proceeding creates an orderly procedure whereby third parties who claim their property interests have been forfeited in a criminal case can "challenge the validity of the forfeiture order and establish their legitimate ownership interests"; discussing legislative history);
- *United States v. Jimerson*, 5 F.3d 1453 (11th Cir. 1993) (the Government may not use the ancillary proceeding to forfeit the interests of third parties);
- *United States v. McCorkle*, 143 F. Supp. 2d 1311 j 1318-19 (M.D. Fla. 2001) (ancillary proceeding is the procedure for adjudicating third party rights; summarizing the procedures under section 853(n));

B. Ancillary proceeding is essentially civil in nature:

- *United States v. Alcaraz-Garcia*, 79 F.3d 769 (9th Cir. 1996) (civil appellate rules apply to appeal from denial of third party claim); *United States v. Lavin*, 942 F.2d 177 (3d Cir. 1991) (same);
- *United States v. Gilbert*, 244 F.3d 888 (11th Cir. 2001) (ancillary proceeding is civil in nature for purpose of allowing Government to appeal), following *United States v. Douglas*, 55 F.3d 584 (11th Cir. 1995) (ancillary proceeding is civil in nature for purpose of applying EAJA);
- *United States v. Boulter*, 927 F. Supp. 911 (W.D.N.C. 1996) (Fed. R. Civ. P. 60(b) is the proper means by which a third party may move to reopen an ancillary proceeding); *United States v. Ken International Co., Ltd.*, 113 F.3d 1243, 1997 WL 229114 (9th Cir. 1997) (Table) (same) (appellate court lacks jurisdiction to review denial of Rule 60(b) motion if appeal is pending);
- *United States v. BCCI Holdings (Luxembourg) SA. (Final Order of Forfeiture and Disbursement)*, 69 F. Supp. 2d 36 (D.D.C. 1999) (because the ancillary proceeding is essentially civil in nature, the court applies Fed. R. Civ. P. 12 and 56 to allow dispositive motions, permits civil discovery, and follows Rule 54(b) to allow appeals by third parties from denial of claims);
- *But see United States v. Yerardi*, 192 F.3d 14 (1st Cir. 1999) (for purposes of wife's privilege not to testify adversely to husband's interests, ancillary proceeding is criminal in nature);

C. Government cannot force third party to file claim:

- *United States v. Gilbert*, 244 F.3d 888 (11th Cir. 2001) (Government has no right to force third party to file a claim in the ancillary proceeding; nor could the Government have any reason to do so, as any rights of third party who doesn't file a claim are automatically extinguished);

D. Notice requirement under section 853(n)(1):

1. Courts are split over whether section 853(n)(1) requires direct written notice:

- *United States v. Gilbert*, 244 F.3d 888 (11th Cir. 2001) (Government's obligation to give constructive notice through publication, and preferably direct notice to known third parties, is a "vital requirement" because rights of third parties who do not file claims are automatically extinguished);

- *United States v. Phillips*, 185 F.3d 183 (4th Cir. 1999) (even if the Government is required to send direct written notice under section 853(n)(1) - which is not at all certain, given the permissive language in the statute - it does not have to send notice to persons who lack standing to contest the forfeiture);

- *United States v. Boulter*, 927 F. Supp. 911 (W.O.N.C. 1996) (even though section 853(n)(1) states that the Government "may" send direct notice to third parties, such notice is mandatory under 19 U.S.C. § 1607, which applies to criminal forfeitures);

- *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);

- *United States v. Lindow*, 98-CR-244 (N.D.N.Y. Sept. 21, 2001) (section 853(n)(1) does not require direct written notice; declining to follow *Boulter*);

2. Person with actual notice can't complain of lack of notice:

- *United States v. Lindow*, 98-CR-244 (N.D.N.Y. Sept. 21, 2001) (wife who offered to give up her right to contest criminal forfeiture if it would reduce husband's sentence had actual notice);

3. Notice of the hearing on the petition:

- *United States v. Watkins*, 320 F.3d 1279 (11th Cir. 2003) (district court's failure to give third parties notice that it was conducting a hearing on their petitions was harmless error where petitions had no merit, and court assumed an factual allegations to be true);

E. When the ancillary proceeding is commenced:

- Under Rule 32.2(b)(3), the Government is authorized to commence the ancillary

proceeding immediately after the entry of the preliminary order of forfeiture.

- *But see United States v. Gilbert*, 244 F.3d 888 (11th Cir. 2001) (prior to Rule 32(d)(2) in 1996, third party could not file claim until final order of forfeiture was entered in the criminal case and included in the judgment at sentencing);

- *United States v. Pease*, 331 F.3d 809 (11th Cir. 2003) (even under Rule 32(d)(2), the Government could not commence the ancillary proceeding until the order of forfeiture became final as to the defendant at sentencing);

F. Amendments to the preliminary order of forfeiture:

- *United States v. BCCI Holdings (Luxembourg) S.A. (Petition of Bank of California International)*, 980 F. Supp. 522 (D.D.C. 1997) (each time the court amends the preliminary order to add new property, it must conduct another ancillary hearing; but claimants may only assert interests in the property named in the amendment to the order); *United States v. BCCI Holdings (Luxembourg) S.A. (Final Order of Forfeiture and Disbursement)*, 69 F. Supp. 2d 36 (D.D.C. 1999) (same);

G. Subject matter jurisdiction:

- *United States v. BCCI Holdings (Luxembourg) S.A. (Petitions of Zamall and Bhandari)*, 977 F. Supp. 20 (D.D.C. 1997) (court must dismiss petition for lack of subject matter jurisdiction if the property claimed by the claimant was not listed among the assets forfeited from the defendant);

- *United States v. BCCI Holdings (Luxembourg) S.A. (Petition of Ahmed)*, 923 F. Supp. 264 (D.D.C. 1996) (same) (sending notice of the forfeiture to the claimant does not estop the Government from asserting the funds in which claimant has an interest were not forfeited);

- *United States v. BCCI Holdings (Luxembourg) S.A. (Petition of Bank of California International)*, 980 F. Supp. 522 (D.D.C. 1997) (court has no jurisdiction to entertain claim to property not included in forfeiture order that claimant is challenging; it makes no difference that property third party is claiming was included in earlier forfeiture order in same case if claimant did not file a timely petition challenging that order);

- *United States v. BCCI Holdings (Luxembourg) S.A. (petition of Hubei Provincial)*, 980 F. Supp. 2 (D.D.C. 1997) (to the extent that a claim exceeds the value of the asset in which the claimant is asserting an interest, it must be dismissed for lack of subject matter jurisdiction);

- *United States v. Messino*, 122 F.3d 427 (7th Cir. 1997) (court must dismiss third party's appeal from the denial of petition in the ancillary proceeding if the underlying criminal conviction has been reversed and the forfeiture vacated);

H. Application of *James Daniel Good*:

- *United States v. BGGI Holdings (Luxembourg) S.A. (Petition of American Express Bank II)*,

961 F. Supp. 287 (D.D.C. 1997) (the Government is not required to give preseizure notice to third party when it takes custody of property named in order of forfeiture);

1. Application of CAFRA to the ancillary proceeding:

- *United States v. Santiago*, 227 F.3d 902 (7th Cir. 2000) (expressing doubt that the application of preCAFRA civil forfeiture procedures to the ancillary proceeding in a criminal case was proper, but noting that neither party objected);

J. Pleading requirements under section 853(n)(3):

1. Petition must be filed under penalty of perjury:

- *United States v. BCCf Holdings (Luxembourg) S.A. (Fifth Round Petition of Liquidation Committee for BCCI (Overseas) Macau)*, 980 F. Supp. 1 (D.D.C. 1997) (petition that is not signed under penalty of perjury and fails to identify asset in which claimant is asserting an interest and nature of that interest does not comply with section 1963(1)(3));

- *United States v. BCCI Holdings (Luxembourg) S.A. (petition of BCCf Campaign Committee)*, 980 F. Supp. 16 (D.D.C. 1997) (petition dismissed because not signed under penalty of perjury; also, whether a "victim's committee" is a "person" entitled to file a claim is questionable);

- *But see United States v. Salam, Inc.*, 2001 WL 1490789 (E.D. La. 2001) (petition filed by corporation need not be under oath, but may be signed by counsel);

- *United States v. Toma*, 1997 WL 467280 (N.D. Ill. 1997) (petition signed "under oath" is the equivalent of "under penalty of perjury");

2. Claim must assert basis for the legal interest:

- *United States v. BGGf Holdings (Luxembourg) S.A. (Petition of Richard Eline)*, 916 F. Supp. 1286 (D.D.C. 1996) (claim that simply listed random legal phrases dismissed for failure to set forth nature and extent of legal interest in the forfeited property as required by section 1963(1)(3));

- *United States v. BCCf Holdings (Luxembourg) S.A. (Fourth Round Petitions of General Creditors)*, 956 F. Supp. 1 (D.D.C. 1996) (petition stating only that "the property belongs to me" was insufficient);

- *Pegg v. United States*, No. 98-961 (11th Cir. Apr. 10, 2000) (unpublished) (section 853(n) requires a third party to state his or her interest in the property with particularity; a petition that merely tracks the language of section 853(n)(6) and does not provide the details section 853(n)(3) requires is insufficient and subject to dismissal on motion of the Government);

- *United States v. Toma*, 1997 WL 467280 (N.D. Ill. 1997) (petition reciting dates and

circumstances when claimant acquired title to vehicle is sufficient; not necessary to attach title documents);

- *United States v. Lindow*, 98-CR-244 (N.D.N.Y. Sept. 21, 2001) (bare assertion of legal title not sufficient for claim under section 853(n)(3); where claimant's husband stated during guilty plea that property belonged to him, claimant must explain basis for asserting an ownership interest);

K. Time for filing claim:

- Section 853(n)(2) provides that third party petitions must be filed within 30 days of the final publication of notice, or the receipt of actual notice, whichever is earlier.

L. Third party claims may be dismissed as untimely:

- *United States v. McCorkle*, 143 F. Supp. 2d 1311 (M.D. F.Ja. 2001) (where third party received notice of the criminal forfeiture yet failed to file a claim for 8 months, claim may be dismissed as untimely);

- *United States v. BCCI Holdings (Luxembourg) S.A. (Petitions of B. Gray Gibbs et al.)*, 916 F. Supp. 1270 (D.D.C. 1996) (court may dismiss claim as untimely under section 1963(1)(2));

- *United States v. BCCI Holdings (Luxembourg) SA. (Petition of Bank of California International)*, 980 F. Supp. 522 (D.D.C. 1997) (claim filed more than 30 days after notice is untimely; claimant cannot wait until court enters second order of forfeiture in same case to file claim to property included in first order);

- *United States V. Strube*, 58 F. Supp. 2d 576 (M.D. Pa. 1999) (to the extent that claimant amended her claim to add a constructive trust theory after the 30-day period for filing a claim had expired, it was untimely, and the court was free to ignore the additional ground for relief);

- *But see United States v. BCCI Holdings (Luxembourg) S.A. (petition of Indosuez Balik)*, 916 F. Supp. 1276 (D.D.C. 1996) (court may "equitably toll" time for filing claim if claimant demonstrates due diligence); *United States v. BGCf Holdings (Luxembourg) S.A. (Petition of Delph is Bank)*, 1992 WL 753228 (D.D.C. 1992) (where the Government sends two notices to claimant at different addresses, and claimant reasonably believed it had 30 days from second notice to file claim, court may waive statutory requirement);

M. Interlocutory sale during ancillary proceeding:

- *United States v. Pelullo*, 178 F.3d 196 (3d Cir. 1999) (district court may order interlocutory sale of property while ancillary proceeding is pending so that the Government does not accrue additional tax and interest liabilities);

- *United States v. BCCI Holdings (Luxembourg) SA. (Final Order of Forfeiture and Disbursement)*, 69 F. Supp. 2d 36 (D.D.C. 1999) (property subject to third party claim can be sold during ancillary proceeding if court issues order to show cause why sale should not go

forward and no party objects to the sale);

N. Hearing to be held within 30 days where practicable:

- *United States v. BCCI Holdings (Luxembourg) S.A. (Final Order of Forfeiture and Disbursement)*, 69 F. Supp. 2d 36 (D.D.C. 1999) (where there are multiple third party claims and resolving them all in 30 days is impractical, court orders the Government to group claims into categories and file dispositive motions against categories of claims addressing issues common to most claims first and leaving esoteric issues to later);

- *United States v. Rutgard*, Cr. No. 94-0408GT (S.D. Cat. Mar. 7, 1996) (claimant cannot use court's failure to hold hearing within 30 days as reason why claim should be granted);

- *But see United States v. Kramer*, 912 F.2d 1257, 1260 (11th Cir. 1990) (holding it was error for district court not to hold hearing within 30 days or a reasonable time thereafter);

O. Corporation must be represented by counsel:

- *United States v. BCCI Holdings (Luxembourg) S.A. (Final Order of Forfeiture and Disbursement)*, 69 F. Supp. 2d 36 (D.D.C. 1999) (court may *sua sponte* dismiss claim filed by corporation not represented by counsel after giving corporation notice and opportunity to retain counsel);

p.- No hearing is necessary where court can dismiss claim on the pleadings for lack of standing or failure to state a claim:

- *United States v. Dempsey*, 55 F. Supp. 2d 990 (E.D. Mo. 1998) (claim may be dismissed without a hearing if the claimant lacks standing);

- *United States v. BCCI Holdings (Luxembourg) S.A. (Petitions of General Creditors)*, 919 F. Supp. 31 (D.D.C. 1996) (If a third party fails to allege in its petition all elements necessary for recovery, including those relating to standing, the court may dismiss the petition without providing a hearing"); *United States v. BCCI Holdings (Luxembourg) S.A. (Final Order of Forfeiture and Disbursement)*, 69 F. Supp. 2d 36 (D.D.C. 1999) (same);

- *United States v. Rutgard*, Crim. No. 94-0408GT (S.D. Cat. Mar. 7, 1996) (where there was no factual dispute, court could determine whether claimant had a legal interest as a matter of law);

- *United States v. BCCI Holdings (Luxembourg) S.A. (Petition of Banque Indosuez)*, 961 F. Supp. 282 (D.D.C. 1997) (in resolving motion to dismiss court assumes facts pled by third party petitioner

to be true applying Rule 12(b)(6) and denying the Government's motion because whether claimant had superior title turned on factual dispute);

- *United States v. Serendensky*, 2003 WL 21543519 (S.D.N.Y. 2003) (court dismisses claim for failure to state a claim on which relief could be granted under section 853(n)(6)(A) or (B), even if all allegations in the claim were true);

Q. Motion for summary judgment:

- *United States v. Martinez*, 228 F.3d 587 (5th Cir. 2000) (ancillary hearing is necessary only where there are facts in dispute that must be resolved; if petitioner's claim lacks merit as a matter of law, it can be disposed of on a motion for summary judgment);

- *United States v. BCCF Holdings (Luxembourg) S.A. (Petition of Ban que Indosuez)*, 961 F. Supp. 282 (D.D.C. 1997) (applying Fed. R. Civ. P. 56(1), court denies claimant's motion for summary judgment because the Government has not yet had opportunity to conduct discovery);

- *United States v. BCG! Holdings (Luxembourg) S.A. (Petitions of People's Republic of Bangladesh and Bangladesh Bank)*, 977 F. Supp. 1 (D.D.C. 1997) (the Government is entitled to summary judgment if it demonstrates that, under undisputed facts, claimant cannot show that it had a legal right, title, or interest in the property at the time the crime occurred);

R. Court can consider the record in the criminal case-section 853(n)(5):

- *United States v. Morgall*, 224 F.3d 339 (4th Cir. 2000) (in conducting the ancillary proceeding, district court properly considered the evidence and testimony presented in the criminal trial and the jury's verdict, as well as the petition filed in the ancillary proceeding, the Government's response, and the evidence presented in the hearing);

- *United States v. Messino*, 917 F. Supp. 1303 (N.D. Ill. 1996), *appeal dismissed*, 122 F.3d 427 (7th Cir. 1997) (court, in rejecting third party petitions, takes into account that jury heard evidence contradicting the Government's claim that defendant owned the property, yet returned special verdict anyway);

- *But see United States v. Farley*, 919 F. Supp. 276 (S.D. Ohio 1996) (court is not bound in the ancillary proceeding to the factual basis for the forfeiture that was asserted in the criminal case; section 853(n)(5) requires only that the court "consider" the record);

S. No right to a jury trial:

- *United States v. McHan*, 345 F.3d 262 (4th Cir. 2003) (there is no Seventh Amendment right to a jury trial in the ancillary proceeding; the ancillary proceeding is part of sentencing where there is no jury

right, and it is really an equitable action to quiet title, not a civil forfeiture action against a third party's property);

- *United States v. Messino*, 122 F.3d 427 (7th Cir. 1997) (citing unpublished decisions and summarizing the Government's argument, but not deciding the Seventh Amendment issue);

- *United States v. Holmes*, 133 F.3d 918, 1998 WL 13538 (4th Cir. 1998) (Table) (because, under *Libretti*, criminal forfeiture is an *in personam* punishment of defendant, third party property rights are not implicated and there is no right to a jury trial to protect them; third party's right to make sure his property is not forfeited is adequately protected by hearing provisions of section 853(n) where he can establish his superior ownership);

- *United States v. Duboc (Petition of F. Lee Bailey)*, No. GCR 94-01 009-MMP (N.D. Fla. May 9, 1996) (because the ancillary proceeding amounts to a proceeding against the United States and is essentially an action to quiet title, which is equitable in nature, there is no constitutional right to a jury trial); *United States v. Henry*, 64 F.3d 664, 1995 WL 478635 (6th Cir. 1995) (Table) (same);

- *But see United States v. Martinez*, 228 F.3d 587 (5th Cir. 2000) (noting that it is an open question whether a third party has a Seventh Amendment right to a jury trial-not on the question *whether* the third party has an interest, but as to the *value* of the property in which it is conceded that the third party does have an interest);

- *Cf United States v. Gilbert*, 244 F.3d 888 (11th Cir. 2001) (the "ancillary proceeding is essentially a quiet title proceeding");

T. Burden of proof in the ancillary proceeding:

- *United States v. Saccoccia*, 344 F.3d 31 (1st Cir. 2003) (Government does not have to prove third party knew that the property he received from the defendant was tainted; the burden of proof is on the third party);

- *United States v. Gilbert*, 244 F.3d 888 (11th Cir. 2001) (third party, not Government, bears burden of proving one of the "limited grounds" for recovery by a preponderance of the evidence);

U. Other constitutional challenges:

- *United States v. BCCI Holdings (Luxembourg) S.A. (petition of American Express Bank II)*, 961 F. Supp. 287 (D.D.C. 1997) (ancillary proceeding provides third party with all that due process requires);

V. Rights of third parties to contest forfeiture of substitute assets:

- Rule 32.2(e)(2)(B) provides that each time the court amends an order of forfeiture to include substitute assets, it must conduct an ancillary proceeding.

- *United States v. Lestert* 85 F.3d 1409 (9th Cir. 1996) (ancillary proceeding applies equally to property forfeited as substitute assets);

W. Successful claimant may be entitled to EAJA fees:

- *United States v. Douglas*, 55 F.3d 584 (11 th Cir. 1995) (the Government's position in obtaining preliminary order of forfeiture not substantially justified where the Government failed to take notice that property had been awarded to third party in action enforcing civil judgment);

- *United States v. McAllister*, 1998 WL 855498 (E.D. Pa. 1998) (following *Douglas*; third party who files claim is a "prevailing party" even though the Government released property back to defendant; but forfeiture of property from a convicted drug dealer, attempt to settle with third party, and eventual release for lack of equity within few months shows forfeiture was substantially justified);

- *Cf. United States v. Chan*, 22 F. Supp. 2d 1123 (D. Haw. 1998) (third party who foregoes filing claim in a criminal case in reliance on prosecutor's promise that it will receive forfeited funds as restitution is entitled to specific performance, EAJA fees, and prejudgment interest);

X. Remedy for lack of notice:

- *Chmtullas v. United States*, 61 F. Supp. 2d 642 (E.D. Mich. 1999) (wife who did not get notice of the forfeiture of property she held 'with defendant as tenants by the entireties entitled to return of the value of the forfeited property 3 years after the forfeiture was final);

v. Rule 11 sanctions:

- *United States v. BCCf Holdings (Luxembourg) S.A. (Petition of Scarfone)*, 176 F.R.D. 1 CD.D.C. 1997) (claimant's attorney may be liable to Rule 11 sanctions for filing repetitive, meritless claims, but the Government must give attorney proper warning that it will seek sanctions);

XXI. Choice of Law

A. Federal law is used to determine the meaning of terms in federal forfeiture statute:

- *United States v. BCCI Holdings (Luxembourg) SA. (petitions of Foreign Branches)*, 48 F.3d 551 (D.C. Cir. 1995) (whether third party was "defendant" within the meaning of 18 U.S.C. § 1963(1)(2) and therefore lacked standing to file a claim is a matter of federal law);

B. Federal law is used to determine whether a legal interest is the kind of interest Congress intended to protect:

- *United States v. Lester*, 85 F.3d 1409 (9th Cir. 1996) (when claim is filed in the ancillary proceeding, court looks to state law to see what interest the claimant has in the property, and looks to the federal statute to see if that interest is subject to forfeiture); *United States v. Kennedy*, 201 F.3d 1324 (11 th Cir. 2000) (same);

- *United States v. Hooper*, 229 F.3d 818 (9th Cir. 2000) (even if claimant had an interest in the

defendant's drug proceeds as a matter of state law, she cannot prevail unless she qualifies for relief under one of the two prongs of section 853(n)(6));

- *United States v. BCCf Holdings (Luxembourg) S.A. (Petition of American Express Bank II)*, 961 F. Supp. 287 (D.D.C. 1997) (what interest claimant has in the property is a matter of state law; consequences of that interest-i.e., whether that interest results in judgment in favor of claimant in the ancillary proceeding-is question of federal law);

- *United States v. BCCI Holdings (Luxembourg) S.A. (Final Order of Forfeiture and Disbursement)*, 69 F. Supp. 2d 36 (D.D.C. 1999) (the nature of the claimant's interest is determined by reference to applicable state property law, but the determination of whether such an interest defeats the United States' claim to the property under section 1963(1) is a matter of federal law");

- *United States v. Davis*, 2001 WL 47003 (S.D.N.Y. 2001) (wife's interest in seized property defined by state law, but federal law will determine if that property interest is sufficient to void the forfeiture);

- *Cf United States v. Craft*, 122 U.S. 1414 (2002) (state law determines what interest a person has in property held in tenancy by the entirety; federal law determines whether that property is subject to a federal tax lien);

c. Court must look to state property law to determine nature of defendants' and claimants' legal interests:

- *United States v. Totaro*, 345 F.3d 989 (8th Cir. 2003) (court looks to state law to determine what interest a third party has in the forfeited property, "so long as doing so does not frustrate a federal interest"; thus, court must apply state divorce law to determine what interest wife had in marital property before husband began using criminal proceeds to pay the mortgage and make improvements);

- *United States v. Schechter*, 251 F.3d 490 (4th Cir. 2001) (state law determines what interest the seller retains in land sold on an installment contract; under Maryland law, seller retains only a lien to the extent of the unpaid balance);

- *United States v. O'Dell*, 247 F.3d 655 (6th Cir. 2001) (using state law to determine if defendant or his father was owner of property subject to agreement permitting defendant to become owner if he maintained loan payments);

- *United States v. Harris*, 246 F.3d 566 (6th Cir. 2001) (state law determines nature of the property interest involved in the ancillary proceeding; state law allows mortgagee, as bona fide purchaser of lien on forfeited property to recover prepayment premiums);

- *United States v. Lester*, 85 F.3d 1409 (9th Cir. 1996), *supra*;

- *United States v. BCCI Holdings (Luxembourg) S.A. (Final Order of Forfeiture and*

Disbursement), 69 F. Supp. 2d 36 (D.D.C. 1999) (state law determines if a creditor has a secured or an unsecured interest; federal law determines that only secured creditors can recover in the ancillary proceeding);

- *United States v. Dempsev*, 55 F. Supp. 2d 990 (E.D. Mo. 1998) (under state law, claimant who was owed child support payments by defendant had no lien on defendant's property until she levied on it);

- *United States v. Wyly*, 193 F.3d 289 (5th Cir. 1999) (whether stockholder has a legal interest in corporate assets turns on state law);

- *United States v. McClung*, 6 F. Supp. 2d 548 (W.D. Va. 1998) (state law determines whether holder of judgment lien acquired any legal interest in defendant's property); *United States v. Frykholm*, 2002 WL 31526560 (N.D. m. 2002) (same);

- *United States v. Infelise*, 938 F. Supp. 1352 (N.D. Ill. 1996) (state law determines whether defendant's children have superior interest based on express oral trust);

- *United States v. Henry*, 850 F. Supp. 681 (M.D. Tenn. 1994) (defendant's spouse had standing to contest forfeiture of marital residence in which she had a legal interest under state law);

- *United States v. Toma*, 1997 WL 467280 (N.D. m. 1997) (wife lacks standing because under state law, she has no legal interest in marital property held in husband's name; distinguishing cases from community property states);

- *United States v. Weaver*, Cr. No. 94-293-MA (D. Or. Oct. 4, 1995) (because spouse did not have a perfected interest in the forfeited property under state law, her petition was dismissed for failure to state a claim on which relief could be granted); *United States v. Strube*, 58 F. Supp. 2d 576 (M.D. Pa. 1999) (under state law, wife had no interest in real or personal property titled in husband's name);

- *United States v. Herbawi*, 972 F. Supp. 171 (W.D.N.Y. 1997) (court must look to state law of constructive trusts to see if claimant is true equitable owner of property held in defendant's name);

- *United States v. Alcaraz-Garcia*, 79 F.3d 769 (9th Cir. 1996) (under California law, defendant who was carrying claimants' property to Mexico was a bailee and not the owner of the property);

- *United States v. BCCI Holdings (Luxembourg) S.A. (Petition of American Express Bank I)*, 941 F. Supp. 180 (D.D.C. 1996) (court looks to New York banking law to determine that claimant bank has legal interest in defendant-depositor's property by virtue of set off);

- *United States v. BCCI Holdings (Luxembourg) S.A. (Petition of Pacific Bank)*, 956 F. Supp. 5 (D.D.C. 1997) (article 4A of VCC, as enacted by state legislature, determines whether defendant became the owner of funds transferred by wire when the payment was accepted by defendant's bank);

- *United States v. Antonelli*, 1998 Wi 775055 (N.D.N.Y. 1998) (using state law to determine if defendant's minor children had a legal interest in real property held exclusively in defendant's name);

- *United States v. O'Brien*, 181 F.3d 105, 1999 WL 357755 (6th Cir. 1999) (Table) (because claimant did not hold certificate of title to forfeited automobile. she lacked any legal interest as a matter of state law and could not challenge the forfeiture);

- *See also United States v. BCCI Holdings (Luxembourg) S.A. (Petitions of People's Republic of Bangladesh and Bangladesh Bank)*. 977 F. Supp. 1 (D.D.C. 1997) (where contacts between defendant and claimant took place in foreign country, court looks to foreign law to determine claimant's interest);

- *But see United States v. Morgan*, 224 F.3d 339 (4th Cir. 2000) (if claimant exercises no dominion or control over joint bank account, court may ignore state law interest in the property and deny claim for failure to establish legal right, title, or interest under federal law-section 853(n)(6)(A);

D. Effect of state court ruling:

- *United States v. Kelmedv.* 201 F.3d 1324 (11 th Cir. 2000) (state divorce decree transferring property in its entirety to defendant's wife could not defeat federal forfeiture of husband's one-half interest unless wife could satisfy requirements of section 853(n)(6)(A) or (B);

- *United States v. Weeks*, 2001 WL 1688891 (D. Mass. 2001) (because state law determines whether claimants have a property interest, but federal law determines whether that interest can be forfeited, there is no reason to enjoin claimants from having state court determine their interests; federal court will retain the right to determine if that interest can be forfeited in the ancillary proceeding);

- *United States v. BCG! Holdings (Luxembourg) S.A. (Petition of Bank of New York)*, 980 F. Supp. 522 (D.D.C. 1997) (state court order releasing property from state restraint not dispositive on question of ownership and does not undermine federal court's finding that property belonged to defendant as a

matter of state law; state court cannot limit or preempt a federal forfeiture order by making findings that are inconsistent with a federal court's determination of a state law issue);

- *United States v. BCCI Holdings (Luxembourg) S.A. {Petition of Madero}* , 977 F. Supp. 33 (D.D.C. 1997) (federal court will not grant collateral review to state court order transferring title to property from third party to defendant in foreclosure action; state court ruling that third party had no interest in the party is therefore dispositive ofms petition in the ancillary proceeding);

- *United States v. Serendensky*. 2003 WL 21543519 (S.D.N.Y. 2003) (state foreclosure action on forfeited real property was invalid as a matter of federal law because it was barred by section 853(k)j it doesn't matter that it was valid under New York law);

- *Cf United States v. One-Sixth Share*, 326 F.3d 36 (1st Cir. 2003) (civil forfeiture case: state court has no jurisdiction to enter lien on property that has already been forfeited to the United States);

XXII. Standing Under Sections 853(n)(2) and 1963(1)(2)

A. In general:

- *United States v. BCCI Holdings (Luxembourg) S.A. (Petition of Pacific Bank)*, 956 F. Supp. 5 (D.D.C. 1997) (the only purpose of the ancillary proceeding is to ensure that the forfeited property belongs to the defendant; it does not attempt to divide the defendant's estate among competing creditors; therefore, claimants must have an ownership or possessory interest in the forfeited property);

- *United States v. Sokolow*, 1996 WL 32113 (E.D. Pa. 1996) (bare legal title without exercise of dominion and control is insufficient to establish standing); *United States v. Rogers*, 1996 WL 252659 (N.D.N.Y. 1996) (same) (nominee's name on title to car ..was a sham to protect true Owner From forfeiture);

- *United States v. AICflraz-Garcia*, 79 F.3d 769, 774 n.10 (9th Cir. 1996) (allegation of ownership is sufficient to establish standing under section 853(n)(2), but may not satisfy "superior interest" requirements of section 853(n)(6)(A);

- See standing cases in Civil Forfeiture Outline.

B. Defendant may not file a claim:

- *United States v. Pelullo*, 178 F.3d 196 (3d Cir. 1999) (defendant lacks standing to file a claim in the ancillary proceeding because by that time he no longer has any interest in the property);

- *United States v. BCa Holdings (Luxembourg) S.A. (Petitions of Foreign Branches)*, 48 F.3d 551 (D.C. Cir. 1995) (branches of defendant bank are "defendant");

- *United States v. Christunas*, 126 F.3d 765 (6th Cir. 1997) (defendant lacks standing to assert wife's third party claim);

- *United States v. Bennett*, 147 F.3d 912 (9th Cir. 1998) (defendant who is not the custodial parent and has not been made legal guardian under state law may not file claim on behalf of his minor child);

- *United States v. Libretti*, 161 F.3d 18, 1998 WL 644265 (10th Cir. 1998) (fable)(defendant may not appeal from final order of forfeiture on the ground that third party claims should have been granted);

- *United States v. Brunson*, 89 F.3d 851, 1996 WL 306438 (10th Cir. 1996) (Table) (defendant who disclaims ownership of the forfeited property must appeal order of forfeiture; he lacks

standing to appeal from denial of *wife's* claim in the ancillary proceeding)

- *United States v. Stewart*, 1999 WL 551891 (E.D. Pa. 1999) (defendant lacks standing to object to sale of property pending appeal because his interest in the property has been extinguished. citing section 1963(1)(2»);

- *Cf United States v. Mosavi*, 138 F.3d 1365 (11th Cir. 1998) (if defendant objects to order directing codefendant to forfeit property that defendant thinks really belongs to him, his remedy is direct appeal from the forfeiture order);

C. Right of codefendant to challenge forfeiture as a third party:

I. Pre-Rule 32.2 law:

- *United States v. Gilbert*, 244 F.3d 888 (11th Cir. 2001) (defendant whose property has been forfeited cannot contest forfeiture in the ancillary proceeding, but codefendant, whose property was not forfeited, is a third party for purposes of the ancillary proceeding) (pre-Rule 32.2 case);

- *United States v. Real Property in Waterboro*, 64 F.3d 752 (1st Cir. 1995) (if court determines that defendant A is the owner of the property, defendant B may challenge the forfeiture in the ancillary proceeding);

2. Under Rule 32.2, the district court orders forfeiture of each defendant's interest in the property without regard to what that interest may be; hence it no longer matters which defendant was the owner of the property, and no codefendant has standing to contest the forfeiture in the ancillary proceeding:

- *See* committee note (noting that Rule 32.2 resolves the "difficulties" presented under the old rule when codefendants were permitted to file claims as third parties in the ancillary proceeding);

D. Alter ego may contest decision to ignore the corporate form; but if the challenge is rejected, the claim will be dismissed for lack of standing:

- *United States v. BCCI Holdings (Luxembourg) S.A. (Petition of Banco Central Del Uruguay*, 977 F. Supp. 27 (D.D.C. 1997) (alter ego must allege facts sufficient, if true, to require the court to reverse its preliminary determination to ignore the corporate form; alleging that alter ego was separately incorporated is not enough; claim dismissed for lack of standing);

E. Person in bankruptcy may not file a claim:

- *United States v. Kell International Co., Ltd.*, 113 F.3d 1243, 1997 WL 229114 (9th Cir. 1997) (unpublished) (bankrupt person, whose interest in the forfeited property was transferred to the bankruptcy estate, lacks standing to contest criminal forfeiture; only the estate would have standing);

F. No standing to contest forfeiture of proceeds:

- *United States v. Sokolow*, 1996 WL 32113 (E.D. Pa. 1996) (one cannot have a legal interest in criminal proceeds);

- *See* cases under section 853(n)(6)(A) denying claims to property acquired with proceeds.

G. General creditors do not have legal interest

- *United States v. BCCI Holdings (Luxembourg) S.A. (Petition of Chawla)*, 46 F.3d 1185 (D.C. Cir. 1995) (bank depositors do not have legal interest in funds in bank's correspondent accounts); *United States v. Schwimmer*, 968 F.2d 1570, 1581 (2d Cir. 1992) (unsecured creditors); *United States v. Campos*, 859 F.2d 1233 (6th Cir. 1988) (trade creditors);

- *United States Y, Ribadeneira*, 105 F.3d 833 (2d Cir. 1997) (person holding check drawn on defendant's forfeited bank account is a general unsecured creditor with no interest in specific funds);

- *United States v. McCorkle*, 143 F. Supp. 2d 1311, 1319-20 (M.D. Fla. 2001) ("a general creditor has no vested or superior interest in particular assets forfeited unless he not only has secured a judgment against the debtor, but also has perfected a lien against a particular item"; «Reckmeyer is wrong»; following *BCCI Holdings* and *Ribadeneira*);

- *United States v. Strobe*, 58 F. Supp. 2d 576 (M.D. Pa. 1999) (family members who obtained a judgment lien against defendant personally were general creditors and not bona fide purchasers of any interest in a specific parcel of property);

- *United States v. BCGf Holdings (Luxembourg) S.A. (Petition of OAS)*, 73 F.3d 403 (D.C. Cir. 1996) (depositor, Organization of American States, was entitled to no special status in the ancillary proceeding despite treaty obligations of the United States respecting its property because it was only

a general creditor and therefore, it was the defendant's property-not the claimant's-that was forfeited);

- *United States v. BCCI Holdings (Luxembourg) S.A. (petition of Banca Nazionale Del Lavoro)*, 977 F. Supp. 449 (D.D.C. 1997) C'nostro" account of another bank is a general deposit entitled to no special status in the ancillary proceeding; depositor is a general creditor);

- *United States v. BCCI Holdings (Luxembourg) S.A. (Petitions of General Creditors)*, 919 F. Supp. 31 (D.D.C. 1996) (rejecting for lack of standing claims based on breach of contract, letter of credit, bank deposit, and employer/employee relationship); *id.* 814 F. Supp. 106 (D.D.C. 1993) (bank depositors); *id.* 833 F. Supp. 17 (D.D.C. 1993) (same); *[d.* 833 F. Supp. 9 (D.D.C. 1993) (depositors' class action); *id.* 833 F. Supp. 22 (D.D.C. 1993) (trade creditors); *id.* (*Petition of Scaifone*), 841 F. Supp. I (D.D.C. 1993) (breach of contract).

- *United States v. BCCI Holdings (Luxembourg) S.A. (Petition of Pacific Bank)*, 956 F. Supp. 5 (D.D.C. 1997) (person who mistakenly transferred funds to defendant's bank account after account was frozen by the Government is merely a general creditor with cause of action against defendant for return of its money); *id. (Petitions of Balik Austria)*, 1997 WL 695668 (D. D.C. 1997) (same); *id. (Petition of Bank of New York)*, 980 F. Supp. 522 (D.D.C. 1997) (same); *id. (Mistaken Wire Transfer Petitioners)*, 1994 WL 914460 *5 (D.D.C. 1994) (same; transfer to defendant's account occurred *before* account was restrained);

- *United States v. BCGI Holdings (Luxembourg) S.A. (Petition of Banca Monte dei Paschi di Siena)*, 977 F. Supp. 443 (D.D.C. 1997) (intended beneficiary of incomplete wire transfer has only a cause of action against sender to whom funds were returned);

- *United States v. BCCf Holdings (Luxembourg) S.A. (Petition of State Trading Organization)*, 977 F. Supp. 12 (D.D.C. 1997) (intended beneficiary of incomplete wire transfer has no interest in funds that defendant/intermediary bank improperly retained; at most, sender of the funds is an unsecured creditor of the intermediary bank); *id. (Petitions of Zaman and Bhamiari)* 977 F. Supp. 20 (D.D.C. 1997) (originator and beneficiary of incomplete wire transfer are both general creditors of defendant bank that unlawfully retained the money);

- *United States v. Hill*) No. I:01-00010-09 (M.D. Tenn. Aug. 9. 2002) (unpublished) (woman to whom defendant owed child support payments lacked legal interest required to contest criminal forfeiture);

- *Cf United States v. \$3,000 in Cash*, 906 F. Supp. 1061 (E.D. Va. 1995) (same for civil forfeiture);

- *But see United States v. Reckmeyer*, 836 F.2d 200 (4th Cir. 1987) (general creditors have a legal interest in forfeited property if defendant's entire estate is forfeited); *United States v. Schechter*, 251 F.3d 490 (4th Cir. 2001) (limiting *Reckmeyer*, unsecured creditor has no legal interest where less than debtor's entire estate is forfeited);

H. Ability to trace assets to defendant is irrelevant:

- *United States v. BCCI Holdings (Luxembourg) S.A. (Final Order of Forfeiture and Disbursement)*, 69 F. Supp. 2d 36 (D.D.C. 1999) (a person who voluntarily transfers his property to the defendant is no longer the owner of that property; his ability to trace his property to the defendant's assets is irrelevant; therefore, victims who transferred their property to the defendant have no greater standing to contest the forfeiture order than other unsecured creditors);

- *United States v. BCGI Holdings (Luxembourg) S.A. (Petitions of Bank Austria)*, 1997 WL 695668 (D.D.C. 1997) (ability of claimant to trace funds into defendant's account is *necessary* to contest forfeiture but not *sufficient* if title to funds passed to defendant and claimant became a general creditor);

- *See* cases in civil forfeiture outline on same point.

1.

Stockholders do not have standing to challenge forfeiture of corporate assets:

- *United States v. Wyly*, 193 F.3d 289 (5th Cir. 1999) (because stockholders, as a matter of state law, do not have a legal interest in corporate assets, they cannot challenge the forfeiture of those assets when the corporation is convicted);

- *United States v. Taylor*, 2000 WL 715916 (D. Or. 2000) (shareholders lack standing to challenge forfeiture of corporate assets);

J. Tort victims do not have a legal interest:

- *United States v. Lavin*, 942 F.2d 177 (3d Cir. 1991);

- *United States v. BCGI Holdings (Luxembourg) S.A. (petition of BCCI Campaign Committee)*, 980 F. Supp. 16 (D.D.C. 1997) (fraud victims-employees claiming defendant misappropriated their pension fund-lack standing to contest forfeiture of defendant's assets);

- *United States v. BCCf Holdings (Luxembourg) S.A. (Petition of Central Bank a/Peru)*, 814 F. Supp.

111 (D.D.C. 1993) (victim of tortious interference with honest services of employees bribed by the defendant may not recover damages);

- *United States v. BCCf Holdings (Luxembourg) S.A. (Petition of Republic of Panama)*, 833 F. Supp. 29 (D.D.C. 1993) (victim of embezzlement may not recover in ancillary proceeding unless it can trace its property to forfeited funds);

K. Judgment creditors:

- *United States v. Douglas*, 55 F.3d 584 (11 th Cir. 1995) (third party who has reduced his claim to a judgment lien on the forfeited property may file a claim);

- *United States v. Dempsey*, 55 F. Supp. 2d 990 (E.D. Mo. 1998) (person who had obtained judgment against defendant for child support payments but did not execute the judgment against the defendant's property was an unsecured creditor without standing to challenge forfeiture of defendant's drug money);

- *United States v. McCorkle*, 143 F. Supp. 2d 1311, 1322-23 (M.D. Fla. 2001) (Judgment creditor, who did not reduce judgment to a lien on any specific asset, was simply an unsecured creditor);

- *United States v. Meister*, No. 4-97-CR-120-G (N.D. Tex. May 18, 1999) (Judgment creditor who recorded lien against individual defendant's personal property had no legal interest in corporate defendant's property);

L. Right of set off:

- *United States v. BCCI Holdings (Luxembourg) S.A. (petition of American Express Bank I)*, 941 F. Supp. 180 (D.D.C. 1996) (bank that has exercised right of set off against defendant's account has standing to contest forfeiture);

- *United States v. BCCI Holdings (Luxembourg) S.A. (Petition of Capital Bank)*, 980 F. Supp. 10 (D.D.C. 1997) (bank that has unexercised, inchoate right of set off against defendant's account *does not* have standing to contest forfeiture);

M. Person whose title is invalid does not have standing:

- *United States v. Serendensky*, 2003 WL 21543519 (S.D.N.Y. 2003) (claimant did not have valid title because the person from whom she purchased the property did not have valid title; therefore claimant lacked standing to contest the forfeiture);

N. Courts are divided over whether bare legal title is sufficient for standing:

- *United States v. Gomez*, 2000 WL 34029288 (N.D. Iowa 2000) ("possession of mere legal title by one who does not exercise dominion and control over the property is insufficient even to establish standing to challenge a forfeiture");

- *United States v. Ida*, 14 F. Supp. 2d 454 (S.D.N.Y. 1998) (titled owner of real property, who used his own money to purchase the property, has standing to file a claim even if he is a mere straw; whether he will prevail on the merits under section 853(n)(6) is another matter);

XXIII. Grounds for Recovery In Ancillary Proceeding

A. The only grounds on which a third party can prevail in the ancillary proceeding are those set forth in sections 853(n)(6)(A) and (B):

- *United States v. Schechter*, 251 F.3d 490 (4th Cir. 2001) (forfeiture is effective at the time of the commission of the illegal act; to succeed with a third party claim., a third party must have had an interest in the property at that time, or must have acquired it later as a bona fide purchaser);

- *United States v. Hooper*, 229 F.3d 818 (9th Cir. 2000) (given the clear direction in section 853(n)(6) limiting recovery to two categories of claimants, the courts are not at liberty to create additional grounds for relief);

- *United States v. Kennedy*, 201 F.3d 1324 (11th Cir. 2000) (the alternative grounds set forth in sections 853(n)(6)(A) and (B) are the only grounds for recovery in the ancillary proceeding, and one of them "is emphatically not that the criminal defendant gave the third party a gift"); *United States v. Watdlil*, 320 F.3d 1279 (11th Cir. 2003) (section 853(n)(6) protects only two classes of petitioners);

- *United States v. BCCI Holdings (Luxembourg) S.A. (Final Order of Forfeiture and*

Disbursement), 69 F. Supp. 2d 36 (D.D.C. 1999) ("The only grounds on which a third party can prevail in the ancillary proceeding are those set forth in sections 1963(l)(6)(A) and (B). That is, the claimant must establish either that he had a superior right, title or interest in the property at the time the crime occurred, or that he acquired the property as a bona fide purchaser for value without cause to know that the property was subject to forfeiture. If the claimant fails to establish facts supporting his claim under one or the other of these theories, he is not entitled to any relief in the ancillary proceeding.");

- *United States v. BCCI Holdings (Luxembourg) S.A. (Petition of American Express Bank II)*, 961 F. Supp. 287 (D.D.C. 1997) (claimant cannot prevail simply by asserting that he owns the property; must establish that his interest falls within the two categories set forth in sections 1963(l)(6)(A) and (B));

- *United States v. BCCI Holdings (Luxembourg) S.A. (Petition of Capital Bank)*, 980 F. Supp. 10 (D.D.C. 1997) (the ancillary proceeding is not a liquidation proceeding in which defendant's assets are divided among competing parties - the only issue is ownership; if claimant cannot satisfy the requirements of section 1963(l)(6)(A) or (B), he has no ground to object that the forfeiture order "unjustly enriches" the Government at the expense of the victims);

- *United States v. Salam, Inc.*, 2001 WL 1490789 (E.D. La. 2001) (the right to contest a criminal forfeiture is limited to "two narrow categories of third parties");

- *Bailey v. United States*, 54 Fed. Cl. 459 (Fed. Cl. 2002) (given the "circumscribed ambit" of section 853(n), a third party is limited to arguing that he had an interest in the forfeited property before it became subject to forfeiture, or that "he was an innocent purchaser for value");

- *United States v. Serendensky*, 2003 WL 21543519 (S.D.N.Y. 2003) (following *Hooper*, because there are only two valid grounds for contesting a forfeiture under section 853(n)(6), the court is not free to create new ones; in particular, the court cannot grant equitable relief to a sympathetic claimant who does not satisfy either section 853(n)(6)(A) or (B));

B. Just because a third party has standing under section 853(n)(2) does not necessarily mean he or she will prevail under section 853(n)(6):

- *United States v. Hooper*, 229 F.3d 818, 819 n.4 (9th Cir. 2000) (a spouse in a community property state has a colorable interest in the defendant's property sufficient to establish article III standing, but the spouse may not have the legal interest necessary to challenge the forfeiture on the merits);

- *United States v. Alcaraz-Garcia*, 79 F.3d 769, 774 n.10 (9th Cir. 1996) (allegation of ownership is sufficient to establish standing under section 853(n)(2), but may not satisfy superior interest requirements of section 853(n)(6)(A));

- *United States v. Salam, Inc.*, 2001 WL 1490789 (E.D. La. 2001) (if claimant turns out to be only a general unsecured creditor, its claim will fail on the merits under section 853(n)(6)(A); but because claimant alleged facts supporting its claim that it had a secured interest in the

forfeited property, and that the property was the corpus of a trust of which claimant was the beneficiary, claimant has a facially colorable interest sufficient to establish standing);

- *United States v. BCCI Holdings (Luxembourg) S.A. (Petition of American Express Bank II)*, 961 F. Supp. 287 (D.D.C. 1997) (granting motion for summary judgment for failure to establish interest under section 1963(1)(6)(A) or (B), even though claimant had standing as matter of state law);

- *United States v. BCCI Holdings (Luxembourg) S.A. (Final Order of Forfeiture and Disbursement)*, 69 F. Supp. 2d 36 (D.D.C. 1999) (third party may have a present ownership interest sufficient to establish standing yet may not have had an interest at the time of the offense, which he must have to prevail under paragraph (6)(A), and may not be a bona fide purchaser, which he must be to prevail under paragraph (6)(B));

- *United States v. feW*, 14 F. Supp. 2d 454 (S.D.N.Y. 1998) (titled owner of real property had standing, but he was a mere straw and therefore did not have a superior interest under subsection (n)(6)(A));

C. In general, third parties cannot challenge the forfeitability of the property:

- *United States v. Strube*, 58 F. Supp. 2d 576 (M.D. Pa. 1999) (third party cannot challenge the propriety of the forfeiture; thus, claimant could not challenge forfeiture on the ground that the preliminary order was inconsistent with the jury's special verdict);

- *United States v. Salwlow*, 1996 WL 32113 (E.D. Pa. 1996) (third party may not relitigate propriety of the special verdict form, legality of a forfeiture count, or whether court properly ordered forfeiture of substitute assets);

- *United States v. O'Brien*, 181 F.3d 105, 1999 WL 357755 (6th Cir. 1999) (Table) (third party lacks standing to challenge whether automobile was forfeitable as a substitute asset);

- *United States v. Serelldelsky*, 2003 WL 21543519 (S.D.N.Y. 2003) (third party has no right to raise challenges to the forfeitability of the property such as the defendant might have raised);

- *United States v. Duboc (Petition of F. Lee Bailey)*, No. OCR 94-01009-MMP (N.D. Fla. May 9, 1996) (third party cannot dispute defendant's admission that property was purchased with drug proceeds), quoted in *Bailey v. United States*. 46 Cl. Ct. 187 (Cl. Ct. 2000);

- *United States v. Ken International Co., Ltd.*, 113 F.3d 1243, 1997 WL 229114 (9th Cir. 1997) (unpublished) (third party cannot object that court failed to find factual basis for forfeiture under Rule 11(f));

- *United States v. Pegg*. Crim. No. 97-CR-30 (HL) (M.D. Ga. Dec. 9, 1998) (unpublished) ("the third party cannot attack the underlying theory of forfeiture, for that truly is not the third party's concern");

- See also *United States v. Totaro*, 345 F.3d 989 (8th Cir. 2003) (because only the defendant's interest can be forfeited in a criminal case, the third party's interests are not at risk; therefore the third party may be limited to asserting a superior ownership defense without raising other constitutional issues);

D. But in some circumstances, the source of the property may be intertwined with the claimant's assertion that the property was vested in him or her, not the defendant

- *United States v. Farley*, 919 F. Supp. 276 (S.D. Ohio 1996) (where the Government moves to dismiss claim for lack of standing on ground that no one has standing to object to the forfeiture of proceeds, claimant has right to contest finding that the property constituted proceeds);

- *United States v. Ralph*, No. CV-497-BTM (S.D. Cal. Feb. 18, 1999) (unpublished) (where wife would have no legal interest in the forfeited property by virtue of state community property law if it was purchased with criminal proceeds, the source of the property is relevant to the claim; wife has burden of showing that the property was derived from a legitimate source);

- *United States v. Santiago*, 221 F.3d 902 (7th Cir. 2000) (where claimants' assertion that they were the true owners of funds in a bank account turned on whether the money was traceable to their legitimate income and not to defendant's drug trafficking, they could attempt to refute the finding, based on defendant's guilty plea, that the money was subject to forfeiture);

- *United States v. Brooks*, 112 F. Supp. 2d 1035 (D. Haw. 2000) (where wife's marital interest in community property turns on whether it was purchased with drug money or legitimate marital assets, wife may refute jury's finding that the property was purchased with proceeds);

- *United States v. BCa Holdings (Luxembourg) S.A., (Petition of Bank Austria)*, 994 F. Supp. 18 (D.D.C. 1998) (where claimant correctly asserts that property was not subject to forfeiture, remedy is to amend the preliminary order and direct the Government to return the property to defendant; if the property was not subject to forfeiture, court has no jurisdiction to determine merits of claimant's assertion of ownership interest and should not give claimant, who may have no interest in the property, a windfall; claimant must assert his claims against defendant in private action);

E. Third party cannot assert rights that other third parties might have asserted:

- *United States v. Serendensley*, 2003 WL 21543519 (S.D.N.Y. 2003) (claimant cannot raise objections to the forfeiture that defendant's wife might have raised, such as the assertion of a one-half marital interest in the property);

F. Application of 92 *Buena Vista* to criminal forfeiture:

- *United States v. Hooper*, 229 F.3d 818 (9th Cir. 2000) (in *Buena Vista*, the Supreme Court was interpreting a statute that allowed a third party to recover irrespective of when or how the third party acquired her interest in the property; it does not apply to a statute like section 853(n)(6) that limits recovery to persons with preexisting interests and to bona fide purchasers);

- *United States v. BCCI Holdings (Luxembourg) S.A. (Petition of American Express Bank II)*, 961 F. Supp. 287 (O.D.C. 1997) (sections 1963(1)(6)(A) and (B) embody the relation back doctrine; because there is no ambiguity in those statutes as there was in the civil forfeiture statutes at issue in 92 *Buena Vista* regarding the interplay of the doctrine with the third party's defenses, that case does not expand the claimant's right to recover on grounds outside of what subparagraphs (A) and (B) authorize);

- *United States v. Martinez*, 228 F.3d 587 (5th Cir. 2000) (without citing 92 *Buena Vista*, court holds that relation back doctrine vests title to criminal proceeds in the Government at the time the crime occurs, precluding the defendant's wife from ever acquiring an interest under community property law);

XXIV. Superior Legal Interest Under Section 853(n)(6) (A)

A. Paragraph (6)(A) embodies the relation back doctrine:

- *United States v. Hooper*, 229 F.3d 818 (9th Cir. 2000) (the temporal requirement in section 853(n)(6)(A) requiring the claimant to show that the property interest was vested at the time the acts giving rise to the forfeiture were committed is the complement to sections 853(c) and (n)(6)(B),

which prevent the defendant from transferring the forfeitable property to anyone other than a bona fide purchaser);

- *United States v. McClung*, 6 F. Supp. 2d 548 (W.D. Va. 1998) (under the relation back doctrine, the Government's interest in property involved in a drug conspiracy vests when the conspiracy begins; therefore, to prevail under paragraph (6)(A), claimant must show that his interest was superior at that time);

- *United States v. BCCI Holdings (Luxembourg) S.A. (Final Order of Forfeiture and Disbursement)*, 69 F. Supp. 2d 36 (D.D.C. 1999) (subparagraphs (A) and (B) are the procedural complements to the relation back doctrine);

B. Legal interest must exist at the time of the crime giving rise to forfeiture:

- *United States v. Hooper*, 229 F.3d 818 (9th Cir. 2000) (to prevail under section 853(n)(6)(A), the claimant must have a preexisting interest in the forfeited property; because proceeds do not exist before the commission of the underlying offense, section 853(n)(6)(A) can never be used to challenge the forfeiture of proceeds);

- *United States v. Totaro*, 345 F.3d 989 (8th Cir. 2003) (under section 1963(1)(6)(A), defendant's wife may only recover what interest she had in the marital property as a matter of state law before defendant committed the offense and began using criminal proceeds to pay off the mortgage and make improvements);

- *United States v. Chavez*, 323 F.3d 1216 (9th Cir. 2003) (following *Hooper*; claimant must have

a preexisting interest in order to prevail under section 853(n)(6)(A); an interest that arises under a contingency agreement at precisely the moment that the property becomes subject to forfeiture is not sufficient);

- *United States v. Lagrotteria*, 2003 WL 751013 (D. Mass. 2003) (following *Hooper*; because third party cannot have a preexisting interest in criminal proceeds, seller of a house cannot contest forfeiture of deposit made with drug proceeds under section 853(n)(6)(A));

- *United States v. Brooks*, 112 F. Supp. 2d 1035 (D. Haw. 2000) (spouse cannot assert marital interest under section 853(n)(6)(A) in property acquired with criminal proceeds because such property was necessarily acquired after the commission of the act giving rise to the forfeiture); *Rashid v. United States*, 1996 WL 421855 (E.D. Pa. 1996) (same);

- *United States v. Martinez*, 228 F.3d 587 (5th Cir. 2000) (spouse cannot assert marital interest under section 853(n)(6)(A) in property acquired with criminal proceeds because the relation back doctrine bars the wife from ever acquiring an interest in criminal proceeds);

- *United States v. Schechter*, 251 F.3d 490 (4th Cir. 2001) (seller who retained lien on property sold to defendant had preexisting interest to the extent of the lien; but any additional interest acquired, or reacquired, when defendant defaulted on installment contract was not an interest in existence at the time of the offense, and so could not be recovered under section 853(n)(6)(A));

- *United States v. BCCI Holdings (Luxembourg) S.A. (Petition of American Express Bank IJ)*, 961 F. Supp. 287 (D.D.C. 1997) (bank that did not exercise right of set off against defendant's assets until after property was subject to forfeiture could not prevail under section 1963(1)(6)(A), regardless of when order of forfeiture was issued);

- *United States v. McCorkle*, 143 F. Supp. 2d 1311 (M.D. Fla. 2001) (bank that had right of set off against depositor's funds could not assert an interest under section 853(n)(6)(A) in criminal proceeds because by time the right of set off came into existence, the proceeds were already forfeitable to the Government);

- *United States v. BCCI Holdings (Luxembourg) S.A. (Petitions of People's Republic of Bangladesh and Bangladesh Bank)*, 977 F. Supp. 1 (D.D.C. 1997) (holder of an option to buy defendant's property has no legal interest until the option is exercised);

- *United States v. McClung*, 6 F. Supp. 2d 548 (W.O. Va. 1998) (judgment creditor who filed a lien against defendant's property but had not yet levied against it had not acquired a superior interest in the property at the time it became subject to forfeiture);

- *United States v. Norton*, 2002 WL 31039138 (W.D. Va. 2002) (wife who acquired interest via divorce decree in substitute asset after Government's interest vested could not recover under section 853(n)(6)(A));

- *United States v. Frykholm*, 2002 WL 31526560 (N.D. m. 2002) (creditor who had a valid judgment against defendant, but who had not yet acquired a valid lien, under state law, before

the Government's interest vested, could not recover under section 853(n)(6)(A));

- *United States v. BCCI Holdings (Luxembourg) S.A. (petition of Amjad A wall)*, 3 F. Supp. 2d 31 (D.D.C. 1998) (person who obtained loan from defendant's bank account after defendant engaged in racketeering activity, subjecting all of defendant's assets to forfeiture, could not state a claim under subsection (l)(6)(A), but could state a claim under subsection (1)(6)(B));

- *United States v. O'Brien*, 181 F.3d 105, 1999 WL 357755 (6th Cir. 1999) (Table) (claimant who lacked legal interest at the time the crime occurred must assert claim under subparagraph (B) or not at all);

- *United States v. Serendensky*, 2003 WL 21543519 (S.D.N. V. 2003) (person who purchased property, at mortgage sale long after the crime giving rise to the forfeiture could not recover under section 853{n}(6)(A));

- *United States v. Sokolow*, 1996 WL 32113 * 17 (E.D. Pa. 1996) (wife and daughter who acquired property From the defendant after crime occurred could not state a claim under section 853(n)(6)(A));

- *United States v. Kennedy*, 20 I F.3d 1324 (11 th Cir. 2000) (wife does not have a superior interest under section 853(n)(6)(A) in property acquired as tenancy by the entireties with fraud proceeds because the property was subject to forfeiture-as property involved in a money laundering offense-before the wife's interest came into existence);

- *United States v. Antonelli*, 1998 WL 775055 (N.D.N.Y. 1998) (defendant's minor children-even though they may be his prospective heirs-had no legal interest in the residence defendant used to commit his drug offense);

- *United States v. Mei\$ter*, No. 4.97-CR-120-G (N.D. Tex. May 18, 1999) (victim who did not obtain judgment lien against defendant's property until after it was used to commit the offense could not recover under section 853(n)(6)(A));

- *But see United States v. McCorkle*, 143 F. Supp. 2d 1311 (M.D. Fla. 200 I) (lienholder who acquired interest after the underlying fraud, but before the money laundering offense, can recover as a preexisting O'WTler because the money laundering offense was alleged as the basis for the forfeiture);

- *United States v. Schoenauer*, 237 F. Supp. 2d 1094 (S.D. Iowa 2002) (lender whose lien predated event giving rise to the forfeiture will prevail in the ancillary proceeding under section 853 (n)(6)(A));

C. «Innocence" is not required:

- *United States v. Totaro*, 345 F.3d 989 (8th Cir. 2003) (an innocent owner defense would be

superfluous in a criminal case; as only the defendant's property may be forfeited, a third party need only show superior ownership, not innocent ownership);

- *United States v. Lester*, 85 F.3d 1409 (9th Cir. 1996) (section 853(n)(6) is not an innocent owner statute; it requires only a showing of superior ownership; because only defendant's interest is forfeitable in a criminal case, an innocent owner defense is unnecessary); *United States v. Kennedy*, 201 F.3d 1324, 1332 n.14 (11th Cir. 2000) (same);

D. Nominal ownership not sufficient:

- *United States v. Morgan*, 224 F.3d 339 (4th Cir. 2000) (notwithstanding joint ownership of bank account, claimant who exercises no dominion and control over bank account is a mere nominee lacking the requisite legal interest to prevail under section 853(n)(6)(A));

- *United States v. Bankston*, 182 F.3d 296 (5th Cir. 1999) (claimant was not the true owner of a forfeited business even though her name appeared on a partnership agreement duly recorded under state law; the agreement was a sham and claimant was a mere straw);

- *United States v. Totaro*, 345 F.3d 989 (8th Cir. 2003) (bare legal title is not sufficient to recover in the ancillary proceeding; but wife was able to show that she occupied and raised her family on the forfeited property, and thus was not a straw or nominal owner);

- *United States v. McCorkle*, 143 F. Supp. 2d 1311 (M.D. Fla. 2001) (a nominee cannot recover under section 853(n)(6)(A); nor can a person who acquired the property as a result of a sham transaction);

- *United States v. Messino*, 917 F. Supp. 1303 (N.D. Ill. 1996), *appeal dismissed*, 122 F.3d 427 (7th Cir. 1997) (defendant's father fails to establish that he was true owner of property purchased in his name but over which he exercised no control);

- *United States v. Infelise*, 938 F. Supp. 1352 (N.D. m. 1996) (defendant's wife and mother-in-law were straw owners unable to establish superior legal interest under section 853(n)(6)(A));

- *United States v. Ida*, 14 F. Supp. 2d 454 (S.D.N.Y. 1998) (person who ostensibly used his own money to buy property and titled it in his own name was nevertheless a straw owner; all evidence showed that property was purchased for use of the defendant);

- *United States v. Norman*, 1999 WL 959254 (E.D. La. 1999) (defendant's father fails to establish that he is true owner of car defendant used for drug trafficking even though father was titled owner; son paid for car in cash, drove car, and kept it at home he shared with his father);

E. Traceable ownership interest:

- *United States v. Sokolow*, 1996 WL 32113 (E.D. Pa. 1996) (to the extent any portion of the property is traceable to the investment of legitimate funds by a third party, the interest may be recovered under section 853(n)(6)(A); but the Government may apply *Banco Cafetero* analysis

to rebut tracing);

F. Bailor retains legal interest in bailed property:

- *United States v. Alcaraz-Garcia*, 79 F.3d 769 (9th Cir. 1996) (property given to defendant as bailee-to carry to claimants' relatives in Mexico--could not be forfeited where bailors retained the right to terminate the bailment at any time);

G. Marital property:

- *United States v. Lester*, 85 F.3d 1409 (9th Cir. 1996) (wife's community property interest was sufficient legal interest under section 853(n)(6)(A));

- *United States v. Strube*, 58 F. Supp. 2d 576 (M.D. Pa. 1999) (there is no community property law in Pennsylvania; therefore, wife had no interest in real or personal property titled exclusively in husband's name);

- *United States v. Martinez*, 228 F.3d 587 (5th Cir. 2000) (community property law does not give a Spouse a "vested interest" in the defendant's criminal proceeds sufficient to challenge a criminal forfeiture in the ancillary proceeding);

- *United States v. Hooper*, 229 F.3d 818 (9th Cir. 2000) (wife cannot assert community property interest in criminal proceeds because her interest, if it exists at all, came into existence only after the commission of the offense; only bona fide purchasers can challenge a forfeiture based on an afteracquired interest);

- *United States v. Morgan*, 2002 WL 922107 (E.D. Pa. 2002) (wife who cosigned husband's loan knowing that the money would be held in his name for his exclusive use did not acquire any legal interest in the loan proceeds even though she was liable to repay the loan; wife therefore had no basis to contest forfeiture of the money when husband used it to engage in drug trafficking);

- *United States v. Watkins*, 320 F.3d 1279 (11th Cir. 2003) (wife's argument that she held tenancy by the entirety interests in husband's cash being forfeited as substitute asset not sufficient to show superior interest under section 853(n)(6)(A));

- *United States v. Bennett*, 2003 WL 22208286 (S.D.N.Y. 2003) (wife claims that the property forfeited as a substitute asset really belonged to her. but court finds she committed perjury and denies the claim);

H. Constructive trusts:

- *United States v. BCCI Holdings (Luxembourg) S.A. (Petition of Chawla)*, 46 F.3d 1185 (D.C. Cir. 1995) (constructive trusts are "legal interests," but they do not exist until they are imposed by the court, and so cannot support a claim under section 1963(1)(6)(A)); *United States v. Strube*, 58 F.

Supp. 2d 576 (M.D. Pa. 1999) (same) (following *BCCI*);

- *United States v. Schwimmer*, 968 F.2d 1570, 1583-84 (2d Cir. 1992) (constructive trust is a legal interest, but tracing is required to show property held in constructive trust is the property being forfeited); *County of Oakland v. Vista Disposal*, 826 F. Supp. 218 (E.D. Mich. 1993) (same);

- *United States v. Ribadeneira*, 105 F.3d 833 (2d Cir. 1997) (constructive trust was not imposed because claimant did not satisfy elements of constructive trust under state law and the opportunity to file a remission petition with the Attorney General gave claimant adequate remedy at law);

- *United States v. All Funds On Deposit... in the Name of Kahn*, 129 F.3d 114, 1997 WL 701366 (2d Cir. 1997) (Table) (constructive trust requires a confidential relationship and thus is usually imposed in family law cases, not commercial cases; moreover, claimant had an adequate remedy at law in the remission process);

- *United States v. Marx*, 844 F.2d 1303 (7th Cir. 1988) (constructive trust requires confidential relationship; trust imposed in favor of wife of convicted defendant);

- *United States v. BCCI Holdings (Luxembourg) S.A. (Petition of BCCI Depositors)*, 833 F. Supp. 9, 14 (D.D.C. 1993) (court should not impose a constructive trust even if all elements are otherwise satisfied if to do so would disrupt liquidation proceedings designed to distribute forfeited property equitably and provide an advantage to some victims at the expense of others);

- *United States v. Sokolow*, 1996 WL 32113 (E.D. Pa. 1996) (constructive trust should not be imposed if result would be to deprive victims of funds that the Government plans to distribute equitably once forfeiture is final);

- *United States v. Coluccio*, 51 F.3d 337 (2d Cir. 1995) (mother who gave son money with expectation that it be returned is beneficiary of constructive trust and has standing to contest forfeiture);

- *United States v. \$3,000 in Cash*, 906 F. Supp. 1061 (E.D. Va. 1995) (constructive trust not imposed even though claimant could trace assets because claimant did not have "clean hands");

- *United States v. Herbawi*, 972 F. Supp. 171 (W.D.N.Y. 1997) (where defendant is mere nominee and claimant is the true equitable Owner of the real property, claimant's interest as beneficiary of a constructive trust will be recognized in the ancillary proceeding even though the property was titled in defendant's name);

- *See also United States v. Durham*, 86 F.3d 70 (5th Cir. 1996) (in fashioning restitution order, court may distribute property *pro rata* to all victims and need not impose constructive trust for the benefit of "tracert!");

A. Court does not reach bona fide purchaser claim if claimant does not first establish a legal right, title. Or interest:

- *United States v. O'Brien*, 181 F.3d 105, 1999 WL 357755 (6th Cir. 1999) (Table) (because claimant had no legal interest in the property as a matter of state law, court need not reach bona fide purchaser claim);

B. Bona fide purchaser provision comes from state commercial law:

- *United States v. Harris*, 246 F.3d 566 (6th Cir. 2001) (bona fide purchaser provision comes from "hornbook commercial law"); *United States v. Lavin*, 942 F.2d 177, 185-86 (3d Cir. 1991) (same);

- *United States v. McCorkle*, 143 F. Supp. 2d 1311 (N.D. Fla. 2001) (the bona fide purchaser provision in section 853(n)(6)(B) is a codification of the protection for bona fide purchasers in section 2-403 of the UCC);

- *United States v. Serendensky*, 2003 WL 21543519 (S.D.N.Y. 2003) (whether claimant was a bona fide purchaser turned on New York law regarding notice of competing liens);

C. Donees/family members are not bona fide purchasers:

- *United States v. McCorkle*, 143 F. Supp. 2d 1311, 1321 (M.D. Fla. 2001) (animal welfare organization could not contest forfeiture of Lexus automobile allegedly donated as a gift by the defendant);

- *United States v. McHall*, 345 F.3d 262 (4th Cir. 2003) (wife who acquired property from husbanddefendant in less than arm's-length transaction was not a bona fide purchaser);

D.. Creditors and victims are not bona fide purchasers:

- *United States v. Campos*, 859 F.2d 1233, 1238 (6th Cir. 1988) (trade creditor is not a bona fide purchaser); *United States v. BCCf Holdings (Luxembourg) S.A. (Petition of American Express Bank II)*, 961 F. Supp. 287 (D.D.C. 1997) (same); *id. (Petitions of Trade Creditors)*, 833 F. Supp. 22, 28 (D.D.C. 1993) (same);

- *United States v. BCCI Holdings (Luxembourg) S.A. (Petition of Chawla)*, 46 F.3d 1185 (D.C. Cir. 1995) (general creditors are not bona fide purchasers);

- *United States v. Lavin*, 942 F.2d 177, 185-87 (3d Cir. 1991) (tort victims are not bona fide purchasers);

- *United States v. Ribadelleira*, 105 F.3d 833 (2d Cir. 1997) (person holding check drawn on defendant's forfeited bank account is not a bona fide purchaser of any specific assets);

- *United States v. Watkins*, 320 F.3d 12792003 (11th Cir. 2003) (following *BCCI Holdings* and

Campos; unsecured creditor, who gave defendant money to buy him a car, is not a bona fide purchaser of the cash the Government is forfeiting as a substitute asset);

- *United States v. McClung*, 6 F. Supp. 2d 548 (W.D. Va. 1998) (hospital that provided medical services to defendant was a general unsecured creditor and not a purchaser of defendant's property even though the provision of services did constitute: giving value);

- *United States v. Lagrotteria*, 2003 WL 751013 (D. Mass. 2003) (seller of house may have cause of action against defendant for breach of contract of sale when defendant's deposit is forfeited as drug proceeds, but he is not a bona fide purchaser of the deposit money);

- *United States v. Meister*, No. 4-97-CR-120-G (N.D. Tex. May 18j 1999) (innocent victims who record judgment liens are not bona fide purchasers; remedy is to file remission petitions; following *McClung* and *Lavin*);

- *United States v. Schechter*, 251 F.3d 490 (4th Cir. 2001) (volunteer who improves defendant's property is at most an unsecured creditor and not a bona fide purchaser; limiting *United States v. Reckmeyer*, 836 F.2d 200 (4th Cir. 1987), to cases where defendant's entire estate is forfeited);

- *United States v. McCorkle*, 143 F. Supp. 2d 1311, 1320-21 (M.D. Fla. 2001) (an unsecured creditor is not a bona fide purchaser even if the defendant's entire estate is forfeited; following *BCCI Holdings* and rejecting *Reckmeyer*);

E. Claimant must be reasonably without cause to believe property was subject to forfeiture:

- *United States v. Cuartes*, 155 F. Supp. 2d 1338, 1343-44 (S.D. Fla. 2001) (the test for the reasonableness of claimant's belief is objective, not subjective; a genuinely held belief that the property is not subject to forfeiture is unavailing if it is not objectively reasonable; Colombian businessman who bought dollars from a broker without concern for the source of the money, under circumstances that would have alerted him to serious questions about the legitimacy of the transaction, was not a bona fide purchaser; "blind reliance" on the broker is not objectively reasonable);

- *United States v. BCCI Holdings (Luxembourg) S.A. (Petition of American Express Bank II)*, 961 F. Supp. 287, 296 (D.D.C. 1997) (given extensive public record of defendant's misconduct, claimant knew or should have known that defendant's assets were subject to forfeiture; standard is objective reasonableness);

- *United States v. McCorkle*, 143 F. Supp. 2d 1311, 1328-31 (MD. Fla. 2001) (bank that exercises due diligence, knows that its customer is engaged in fraud and is under investigation by law enforcement, and knows that customer's account at the bank has been seized, yet proceeds to acquire an interest in the customer's property, is not "without cause to believe" that the property was subject to forfeiture);

- *United States v. BCCI Holdings (Luxembourg) S.A. (Petition of Amjad Awan)*, 3 F. Supp. 2d 31 (D.D.C. 1998) (defendant's employee, who was convicted in related case, has right to attempt to

establish that he purchased defendant's property without reason to know it was subject to forfeiture; the Government's motion to dismiss claim as a matter of law denied);

- *United States v. Serendensky*, 2003 WL 21543519 (S.D.N.Y. 2003) (the "reasonably without notice" provision is a separate requirement in addition to the bona fide purchaser requirement; person who has constructive notice of a *lis pendens* is not "reasonably without notice");

F. Claimant must give something of value:

- *United States v. BCCI Holdings (Luxembourg) S.A. (Final Order of Forfeiture and Disbursement)*, 69 F. Supp. 2d 36 (D.D.C. 1999) (judgment creditor who obtains a lien on defendant's property is not a bona fide purchaser because he gave nothing of value in exchange for the lien, irrespective of how the antecedent debt came into existence);

- *United States v. Infelise*, 938 F. Supp. 1352 (N.D. Ill. 1996) (wife is not a bona fide purchaser of property husband placed in her name because she gave nothing of value in exchange for the property);

- *United States v. Sokolow*, 1996 WL 32113 (E.D. Pa. 1996) (wife is not a bona fide purchaser if she gave no value for the property; separation agreement is not giving value); *id.* (daughter is not a bona fide purchaser because she received property as a gift knowing father had been indicted);

- *United States v. Norton*, 2002 WL 31039138 (W.D. Va. 2002) (wife acquired no interest in husband's property by virtue of divorce decree);

- *United States v. Brooks*, 112 F. Supp. 2d 1035 (D. Haw. 2000) (wife cannot assert a bona fide purchaser interest in husband's criminal proceeds on the ground that she contributed uncompensated services that increased the value of the marital estate);

- *United States v. Hentz*, 1996 WL 355327 (E.D. Pa. 1996) (defendant's mother, who gave no value for property held in her name and understood the currency reporting requirements that defendant violated, was not a bona fide purchaser);

- *United States v. BCCI Holdings (Luxembourg) S.A. (Petition of Security Pacific International Bank)*, No. 91-0655(JMG) (D.D.C. Jan. 17. 1997) (unpublished) (subsection (l)(6)(B) does not apply to all arm's length transactions, but only to those involving the purchase of tangible property; inchoate right of set off is not a purchase of tangible property);

- *United States v. BCCI Holdings (Luxembourg) SA. (Petition of American Express Bank II)*, 961 F. Supp. 287 (D.D.C. 1997) (bank's exercise of a right of set off against defendant's account is not a purchase); *United States v. BCCI Holdings (Luxembourg) S.A. (Petition of Capital Bank)*, 980 F. Supp. 10 (D.D.C. 1997) (same);

- *United States v. Morgan*, 2002 WL 922107 (E.D. Pa. 2002) (wife who cosigned husband's loan did not thereby become bona fide purchaser of loan proceeds even though she became obligated to repay the loan);

- *United States v. Meisler*, No. 4-97-CR-120-G (N.D. Tex. May 18, 1999) (being innocent is not enough for recovery under section 853(n)(6)(B); distinguishing civil forfeiture cases where there is no bona fide purchaser requirement);

- *But see United States v. O'Dell*, 247 F.3d 655 (6th Cir. 2001) (defendant's father, who asserted ownership interest after defendant failed to satisfy conditions of conveyance of property, did not have to be a bona fide purchaser because he was not asserting a newly acquired interest, but an interest he had held all along);

G. Defense attorneys:

- *United States v. Saccoccia*, 165 F. Supp. 2d 103 (D.R.I. 2001) (defense attorney is a bona fide purchaser if fee represents "reasonable fee for legal services," and attorney was without reason to believe defendant would be convicted and his property forfeited; before conviction, defense attorney had reason to believe, based on AUSA's statements, that some of defendant's assets were legal, but after conviction attorney had no such basis for belief; held: post-conviction fees forfeited, preconviction fees not forfeited). *rev'd on other grounds*, 344 F.3d 31 (1st Cir. 2003);

- *In Re: Moffitt, Zwerling & Kemler*, 846 F. Supp. 463, 475 (E.D. Va. 1994) (*Moffitt J*) (claim that third party was without cause to believe property was subject to forfeiture must be "objectively reasonable"; the issue in the ancillary proceeding is not whether the claimant believed that the Government would institute a forfeiture action, or knew that it had done so, but whether the claimant knew the property was "subject to forfeiture"). *aff'd*, *United States v. Moffitt, Zwerling & Kemler*, 83 F.3d 660 (4th Cir. 1996) (law firm had reason to know that the fee it received was subject to forfeiture);

- *United States v. McCorkle*, 2000 WL 133759 (M.D. Fla. 2000) (defense attorney was not bona fide purchaser where he knew from his own investigation that client's funds were fraud proceeds; it is unlikely that an attorney will ever achieve the status of a bona fide purchaser for value under 21 U.S.C. § 853(n)(6)(B) because he is the person most likely to appreciate the forfeitability of his client's assets"); adopted by the district, 2000 WL 33725124 *3 (M.D. Fla. 2000); *aff'd* *United States v. McCorkle*, 321 F.3d 1292 (11th Cir. 2003) (defense attorney can assert bona fide purchaser defense only to fees he has actually earned before he loses his bona fide purchaser status, such as by learning that his client has been indicted);

- *Bailey v. United States*, 54 Fed. Cl. 459 (Fed. Cl. 2002) (defense attorney who reads his client's indictment, and therefore knows that the Government is seeking forfeiture of the property listed in the forfeiture allegation, cannot be a bona fide purchaser);

H. Estoppel:

- *United States v. McCorkle*, 321 F.3d 1292 (11th Cir. 2003) (assuming *arguendo* that estoppel is available to a third party in the ancillary proceeding, the Government's failure to obtain a pretrial restraining order or to warn defense counsel that it would forfeit his fee does not estop the Government from doing so; even an affirmative statement that the Government would not forfeit the fee would not create an estoppel);

- *United States v. Saccoccio*, 165 F. Supp. 2d 103 (D.R.I. 2001) (statement of AUSA that Government would not seek forfeiture of attorney's fee does not estop Government where AUSA lacked authority to make such statement), *rev'd on other grounds*, 344 F.3d 31 (1st Cir. 2003);

- *Bailey v. United States*, 54 Fed. Cl. 459 (Fed. Cl. 2002) (agreement not to seek forfeiture of attorney's fees must be approved by the Assistant Attorney General; U.S. Attorney and line AUSA's have no authority to make such promises on their own);

I. Mortgagees and lienholders:

- *United States v. Harris*, 246 F.3d 566 (6th Cir. 2001) (mortgagee is a purchaser for value of the lien on the property; mortgagee's right under state law to recover prepayment premiums may be recovered in the ancillary proceeding when the property is forfeited to the United States);

- *United States v. Bouska*, 2001 WL 34024288 (N.D. Iowa 2001) (lienholder who acquires lien in exchange for loan without knowing property is being used illegally is a bona fide purchaser under section 853(n)(6)(B));

- *United States v. McCorkle*, 143 F. Supp. 2d 1311 (M.D. Fla. 2001) (lienholder who acquires an interest for value after the property becomes subject to forfeiture is a bona fide purchaser, and is entitled to recover under section 853(n)(6)(B) even if the property in which he has an interest was taken fraudulently by the defendant from an innocent victim);

- *United States v. Frykholm*, 2002 WL 31526558 (N.D. 111. 2002) (mortgagee who acquired interest in defendant's property before defendant was indicted - and who could not have discovered that the property was purchased with criminal proceeds with reasonable diligence, entitled to recover value of lien under section 853(n)(6)(B));

- *See In Re Metmor Fin. Inc.*, 819 F.2d 446, 448 (4th Cir. 1987) (innocent lienholder entitled to recover interest and attorney's fees under mortgage contract);

1. Joint ownership of property:

- *United States v. Kennedy*, 201 F.3d 1324 (11th Cir. 2000) (when husband and wife use husband's fraud proceeds to buy real property to be held as tenants by the entirety and assume a mortgage, the wife is a bona fide purchaser of *her* interest in the property but not of her husband's one-half interest unless she subsequently purchases the husband's interest from him);

K. Person who acquires the property from the defendant and then sells it is not a bona fide purchaser:

- *United States v. McHan*, 345 F.3d 262 (4th Cir. 2003) (when wife acquires husband's property and then sells it to a bona fide purchaser, the bona fide purchaser is protected by section 853(n)(6)(B), but the wife must still forfeit the property traceable to the sale);

XXVI. Discovery in the Ancillary Proceeding

A. Rule 32.2(c)(1)(B) states that the court may permit the parties to conduct discovery in the ancillary proceeding in accordance with the Federal Rules of Civil Procedure, "if the court determines that discovery is necessary or desirable to resolve factual issues."

- *United States v. Porcelli*, 1992 WL 355584 (E.D.N.Y. 1992) (court may use inherent powers to permit third party to obtain discovery from defendant in accordance with civil rules);

- *United States v. BCCI Holdings (Luxembourg) S.A. (Petition of Department of Private Affairs)*, 1993 WL 760232 (D.D.C. 1993) (the Government may take discovery from claimant);

- *United States v. Duboc*, No. GCR 94-01 009-MMP (N.D. Fla. May 9, 1996) (third party may obtain discovery from the Government but discovery is limited to the narrow issues of ownership to be adjudicated in the ancillary proceeding);

- *United States v. Infelise*, 938 F. Supp. 1352 (N.D. Ill. 1996) (noting, without discussion, that the parties "engaged in extensive discovery" in the ancillary proceeding);

B. The Government may withhold discovery requests until the court rules on a motion to dismiss; see Rule 32.2(c)(1)(B):

- *United States v. BCCI Holdings (Luxembourg) S.A. (Petition of Banque Indosuez)*, 961 F. Supp. 282 (D.D.C. 1997) (the Government acted reasonably in not making any discovery requests in the ancillary proceeding until court ruled on its motion to dismiss);

C. Sanctions for failure to comply with discovery:

- *United States v. Reyes*, 307 F.3d 451 (6th Cir. 2002) (under Rule 37) district court has authority to dismiss third party's claim for failure to comply with discovery 'without first issuing an order compelling compliance and without considering other sanctions; failure to provide requested documents prejudices Government by preventing it from conducting depositions and other discovery);

- *United States v. BCCI Holdings (Luxembourg) S.A. (petition of IBCP)*, 169 F.R.D. 220 (D.D.C. 1996) (court dismisses third party claim for failure to comply with the Government's discovery requests; "because the failure to produce discovery blocks the United States' ability to litigate the merits of [the claim], a less severe sanction would not be effective");

XXVII. Clear Title to Forfeited Property

- *United States v. Gilbert*, 244 F.3d 888, 910 (11th Cir. 2001) ("if a third party does not file a petition in the ancillary proceeding with 30 days of receipt or publication of notice, his rights in the defendant's property are automatically extinguished and the Government obtains clear title");

- *Id.* at 913 ("the Government.. may request an order from the court declaring that the Government has met all of the statutory notice requirements, that no meritorious third party claims were filed, and that Government has clear title to the property");

- *United States v. Hentz*, 1996 Wi 355327 (E.D. Pa. 1996) (once third party fails to file a claim in the ancillary proceeding, the Government has clear title under section 853(n)(7) and can market the property notwithstanding third party's name on the deed);

- *United States v. BCCI Holdings (Luxembourg) S.A. (Final Order of Forfeiture and Disbursement)*, 69 F. Supp. 2d 36 (D.D.C. 1999) (once ancillary proceeding is complete, the Government has clear title to the forfeited property);

XXVIII. Appeals

A. Government appeals:

- *United States v. Corrado*, 227 F.3d 543 (6th Cir. 2000) (*Corrado I*) (the Government may appeal from district court's refusal to enter forfeiture judgment; because forfeiture is mandatory, such refusal constitutes a sentence imposed in violation of law for which appeal is authorized under section 3742(b)); *United States v. Corrado*, 286 F.3d 934 (6th Cir. 2002) (*Corrado II*) (same); *United States v. O'Dell*, 247 F.3d 655 (6th Cir. 2001) (same); *United States v. Investment Enterprises, Inc.*, 10 F.3d 263 - 264 (5th Cir. 1993) (same);

B. Procedure:

- *United States v. Apampa*, 179 F.3d 555 (7th Cir. 1999) (because criminal forfeiture is part of sentencing, the appellate rules governing criminal appeals, not those governing civil appeals, apply to appeals from the forfeiture judgment by the defendant);

- *United States v. Alcaraz-Garcia*, 79 F.3d 769 (9th Cir. 1996) (civil appellate rules apply to appeal from denial of third party claim); *United States v. Lavin*, 942 F.2d 177 (3d Cir. 1991) (same);

- *United States v. Dennon*, 211 F.3d 175, 182 n.9 (1st Cir. 2000) (*dicta*) (if the forfeiture is entered *after* sentencing, "the time for appeal runs from the date of the post-sentencing order");

- *See* cases at page 40 regarding appealability of preliminary order of forfeiture.

C. Ripeness:

- *United States v. Wilson*, 244 F.3d 1208 (10th Cir. 2001) (defendant has no right to appeal from a forfeiture order consisting only of a money judgment; because a money judgment does not immediately deprive a defendant of any property, an appeal would be premature);

- *United States v. Covey*, 232 F.3d 641 (8th Cir. 2000) (dissenting opinion) (defendant's claim that Government cannot multiply the amount subject to forfeiture by requiring each codefendant to forfeit property involved in two-way transaction not ripe for appeal until Government actually collects such funds);

- *See* cases on when defendant must appeal from the preliminary order of forfeiture at page 40.

D. Stay pending appeal:

- *United States v. Riedl*, 214 F. Supp. 2d 1079 (D. Haw. 2001) (notwithstanding 21 U.S.C. § 853(h), defendant has standing pursuant to Rule 32.2(d) to seek stay of forfeiture pending appeal; but authority to grant stay is discretionary and stay may be denied on equitable grounds, including wasting of property and burden on U.S. Marshals Service);

XXIX. Jurisdiction Pending Appeal

A. Substitute assets:

- *United States v. Hurley*, 63 F.3d 1 (1st Cir. 1995) (court retains authority to order forfeiture of substitute assets after appeal is filed);

- *United States v. Voigt*, 89 F.3d 1050 (3d Cir. 1996) (following *Hurley*; court may amend order of forfeiture at any time to include substitute assets); *United States v. Norton*, 2002 WL 31039138 (W.D. Va. 2002) (same; following *Hurley*);

- *United States v. Saccoccia*, 62 F. Supp. 2d 539 (D.R.I. 1999) (if district court retains jurisdiction to order forfeiture of substitute assets even though an appeal is filed, *see Hurley*, it follows that