

# The Uniform Innocent Owner Defense to Civil Asset Forfeiture

## *The Civil Asset Forfeiture Reform Act of 2000 Creates a Uniform Innocent Owner Defense to Most Civil Forfeiture Cases Filed by the Federal Government*

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### I. Introduction

The asset forfeiture laws allow the Government to bring a civil action to confiscate -- or “forfeit” -- any property derived from, or used to commit, a criminal offense.<sup>2</sup> Historically, because the civil action was filed *in rem*, the only issue in the forfeiture case was whether there was an adequate nexus between the property and the offense; if the property was derived from or used to commit the offense, it was subject to forfeiture regardless of who the owner of the property might have been, or whether the owner took part in, or even was aware of, the offense when it occurred.

Property owners challenged the civil forfeiture laws on the ground that they did not adequately protect the rights of innocent property owners. In *Bennis v. Michigan*,<sup>3</sup> however, the Supreme Court held that the Due Process Clause of the Constitution does not protect property owners from the forfeiture of their property by the Government, when the property was used to commit a criminal offense, even if the property owner had no knowledge of, and did not consent to, the illegal use of the property.

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<sup>2</sup> There is no general authority to forfeit property in connection with a federal crime. To the contrary, forfeiture must be authorized on a statute-by-statute basis. 18 U.S.C. § 981(a)(1)(C), however, authorizes forfeiture of the proceeds of more than 100 crimes, including all of the most common offenses. Forfeiture of “facilitating property” is authorized for a smaller but significant number of offenses, including drug trafficking and money laundering.

<sup>3</sup> 516 U.S. 442 (1996).

The *Bennis* decision meant that Congress and the State legislatures were free to enact civil forfeiture laws subjecting property to confiscation by the Government when it was used in connection with a wide variety of criminal offenses – from soliciting prostitution and driving while intoxicated to international drug trafficking and money laundering in aid of terrorism – without having to take into account the property owner’s role in the offense. Many State forfeiture provisions, like the anti-prostitution ordinance at issue in *Bennis*, did in fact authorize asset forfeiture without providing an “innocent owner defense.” On the other hand, the federal forfeiture statutes – or at least those enacted since the late 1970s – have generally contained innocent owner protections, even though they were not constitutionally required.

*Bennis*, therefore, did not have a great impact on asset forfeiture under federal law; but it spurred debate on the adequacy of the federal innocent owner defenses,<sup>4</sup> and it served to highlight what forfeiture practitioners had long known: that the federal innocent owner provisions were ambiguous in their language and scope, and inconsistent in their application to different crimes. The protection afforded property owners in drug cases, for example, was different from the protection afforded in money laundering, or alien smuggling or child pornography cases. And the language of the various statutes was so ambiguous that different courts afforded different protections to property owners in similar factual situations in cases brought under the same forfeiture statute. Moreover, *Bennis* served as a reminder that some of the older federal civil forfeiture statutes contained no innocent owner protection at all.

In 1996, the U.S. Department of Justice proposed a uniform innocent owner defense that would apply to virtually all civil forfeiture actions undertaken under federal law. After much debate and amendment, that proposal was enacted into law as part of the Civil Asset Forfeiture Reform Act of 2000 (CAFRA),<sup>5</sup> which took effect on August 23, 2000. The defense, codified at 18 U.S.C. § 983(d), applies only to federal forfeiture cases, but it is likely to serve as a model for State forfeiture statutes as well.

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<sup>4</sup> See H.R. Rep. 105-358, 105<sup>th</sup> Cong., 1<sup>st</sup> Sess., 1997 WL 677201 (1997) (“1997 House Report”) (noting that until *Bennis*, “many observers assumed that the Constitution mandated an ‘innocent owner’ defense to a civil forfeiture action”); Legislative History: Civil Asset Forfeiture Reform Act of 2000 (May 2000) (publication of the U.S. Department of Justice) at 244 [hereafter “DOJ Extract”].

<sup>5</sup> Pub. L. 106-185, 114 Stat. 202 (2000).

This article discusses the problems that troubled the courts in connection with the innocent owner defenses under pre-CAFRA law, and how the sponsors of the uniform defense thought that those problems might be resolved. It then discusses the terms of the new statute and how they are likely to be interpreted in light of the legislative history and the pre-CAFRA case law.

## II. Problems with the old law

### A. Historical background

The first federal forfeiture statutes were enacted in the late 18<sup>th</sup> Century, and new statutes were enacted periodically for the next 200 years; but until the late 1970's none of these statutes contained any exception for property belonging to innocent owners.<sup>6</sup> There were several reasons for this. One was that the early statutes provided primarily for the forfeiture of contraband or other property that it was illegal to possess. In such cases, there is no need for an innocent owner defense, because the Government has an obvious interest in removing the items from circulation, however blameless or unknowing the property owner may be.<sup>7</sup>

The early statutes were also directed at ships that engaged in piracy on the high seas, in the slave trade, or in smuggling goods into the United States.<sup>8</sup> In such cases, it was considered appropriate to presume, under ancient maritime law, that the owner of the ship was aware (or should have been aware) of the way in which his property was being used. Thus, in a series of 19th Century cases, the Supreme Court adopted the principle that property, such as a ship, could be confiscated without regard to the owner's participation in, or knowledge of, the illegal act that the ship had been used to commit.<sup>9</sup>

It is one thing to apply a principle of strict liability to pirates, slave traders and smugglers, and quite another to apply it to the owners of less exotic property

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<sup>6</sup> The historical background on the innocent owner defense, and the need for federal legislation to create a uniform statute, were discussed in detail at a symposium on civil forfeiture reform at Notre Dame Law School in 1995. See Cassella, "Forfeiture Reform: A View From the Justice Department," *Journal of Legislation*, Notre Dame Law School, Vol. 21:211-28 (1995).

<sup>7</sup> *Bennis v. Michigan*, 516 U.S. at 459 (Stevens, J., dissenting). See Cassella, *supra* note 6, at 213.

<sup>8</sup> *Bennis*, *supra*, 516 U.S. at 460.

<sup>9</sup> *Id.*, 516 U.S. at 461.

used to commit more mundane offenses. Nevertheless, in the 20<sup>th</sup> Century, during the Prohibition era, Congress enacted forfeiture statutes authorizing the confiscation of equipment and vehicles used for the manufacture and transportation of alcoholic beverages -- including vehicles that belonged to an innocent owner and, in all likelihood, were used the majority of the time for a legitimate purpose. In other words, the Government could confiscate a car filled with bottles of moonshine, even if the bootlegger driving the car was not the owner, and the owner knew nothing about the illegal use of his car on this particular occasion. Based on the earlier precedents, the courts upheld the forfeiture of the vehicles in such cases on the ground that the use of the property was so undesirable that an owner allowed his property to be used by another at his peril.<sup>10</sup>

What had evolved was the notion that the forfeiture laws could be used not only for a remedial purpose – to take contraband or property used to commit illegal acts out of circulation – but also for a deterrent purpose: to encourage property owners to be vigilant in how they allowed their property to be used. In essence, the courts held that property owners will take greater care, when they allow their property to be used by another, if they know that they risk the loss of the property, through forfeiture, if the third party uses the property to commit a crime. It was precisely that principle that the Supreme Court reaffirmed in *Bennis*, when it held that a car used by Mr. Bennis to pick up a prostitute could be forfeited by the State of Michigan even though the car belonged to Mrs. Bennis – an innocent owner who, all parties agreed, did not consent to this particular use of her property.<sup>11</sup>

Using the forfeiture laws to encourage property owners to take greater care in how they allow their property to be used by others has considerable appeal as a public policy. But as the *Bennis* case illustrates, it can have harsh results. Indeed, even the Supreme Court considered, however fleetingly, that there might be a constitutional limit on the use of forfeiture as means of encouraging greater vigilance on the part of property owners. In 1974, in *dicta* in the Supreme Court's decision in *Calero-Toledo v. Pearson Yacht Leasing Co.*,<sup>12</sup> Justice Brennan said that "it would be difficult to reject the constitutional claim of ... an owner who proved not only that he was uninvolved in and unaware of the wrongful activity,

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<sup>10</sup> *Bennis, supra*, 516 U.S. at 448, quoting *Van Oster v. Kansas*, 272 U.S. 465, 467-68 (1926); see 516 U.S. at 462 & n.7 (Stevens, J., dissenting).

<sup>11</sup> 516 U.S. at 452.

<sup>12</sup> 416 U.S. 663 (1974).

but also that he had done all that reasonably could be expected to prevent the proscribed use of his property."<sup>13</sup>

The *dicta* in *Calero-Toledo* never became part of constitutional doctrine,<sup>14</sup> but by the late 1970's, when the first modern forfeiture statutes for drug offenses were enacted, the sentiment expressed by Justice Brennan began to find its way into federal law. More than anything else, the reason for this was that the scope of the forfeiture statutes had changed. Laws that were previously directed at slave traders and bootleggers were being applied in the 1970's to property – like cars, homes, businesses and bank accounts – that most citizens own, and that are used the majority of the time for legitimate purposes. In those circumstances, the public policy considerations that favor putting the burden on property owners to supervise the way their property is used by others had to give way, to some extent, to the desire to protect the interests of the truly innocent owner who had no reason to suspect that his home or his car was being used by someone else to commit a crime.<sup>15</sup>

So it was that, beginning in 1978, Congress generally included some degree of protection for innocent owners whenever it enacted a new forfeiture statute.

## **B. Inconsistencies and ambiguities in the statutory defenses**

It is one thing to accept the notion that the rights of innocent owners should be protected in some circumstances, and another to find the language that strikes the proper balance. Too much protection for property owners undermines the historically recognized public policy goal of preventing property owners from allowing their property to be used by others to commit a criminal offense. Too little protection results in property owners' bearing the weight of the national campaign against crime in circumstances where they are truly powerless to prevent the illegal act. Unfortunately, Congress' first attempts at drafting innocent

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<sup>13</sup> 416 U.S. at 689.

<sup>14</sup> See *Bennis*, 516 U.S. at 449-50 (describing the quoted passage from *Calero-Toledo* as *dicta*, and refusing to follow it).

<sup>15</sup> See Cassella, *supra* note 6, at 213.

owner statutes proved ambiguous, inconsistent, and filled with loopholes that frustrated the enforcement of the forfeiture laws for no good purpose.<sup>16</sup>

### *1. Inconsistent language*

First, the innocent owner provisions in the most commonly used civil forfeiture statutes -- the ones pertaining to drug and money laundering offenses -- were inconsistent with each other. For example, 21 U.S.C. § 881(a)(4), authorizing the forfeiture of vehicles, vessels and aircraft used to transport drugs, protected an owner whose property was used without his "knowledge, consent or willful blindness." Sections 881(a)(6) (drug proceeds) and 881(a)(7) (real property facilitating drug offenses), on the other hand, contained no willful blindness requirement; they protected those who demonstrated lack of "knowledge or consent." And 18 U.S.C. § 981(a)(2) (property involved in money laundering), required only a showing of lack of "knowledge."<sup>17</sup> As will be seen, this led to the development of different innocent owner standards depending on which forfeiture statute the Government happened to employ.

Moreover, the statutory defenses for drug and money laundering cases were inconsistent with other innocent owner protections elsewhere in the U.S. Code. Whereas, for example, the defenses in drug and money laundering cases applied to all categories of "owners," the innocent owner provision applicable to alien smuggling in 8 U.S.C. S 1324(b) applied only to common carriers (airlines, bus companies, etc.), and owners deprived of property in violation of the law. Thus, a person whose car was stolen from him and used to smuggle illegal aliens was considered an innocent owner, but a person who loaned his car to his brother, not knowing that the brother was going to use it for such an unlawful purpose, was not.

Of course, the greatest inconsistency was that most of the of the recently-enacted civil forfeiture provisions had at least some form of innocent owner defense, but the older statutes -- such as the gambling forfeiture provision at 18 U.S.C. § 1955(d), or the smuggling provision at 18 U.S.C. § 545 -- contained no

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<sup>16</sup> *Id.* at 213-19 (listing problems in the existing innocent owner statutes and related case law).

<sup>17</sup> For a general discussion of the ambiguities and inconsistencies in the pre-CAFRA innocent owner statutes, see Testimony of Stefan D. Cassella before the House Judiciary Committee in hearings on H.R. 1916, the Civil Asset Forfeiture Reform Act, No. 94, 104th Congress, 2nd Session (July 22, 1996) [hereafter "1996 Hearing"] at 222-26 [hereafter "Cassella Testimony"]; DOJ Extract at 114-16.

protection for innocent owners at all. In light of *Bennis*, courts were required to hold that claimants in cases brought under the older statutes had no right to assert an innocent owner defense.<sup>18</sup>

## 2. Disjunctive or conjunctive?

There was also a healthy measure of inconsistency introduced by the case law. As mentioned, the innocent owner defense under some of the drug forfeiture statutes required the owner to establish that the illegal use of his property took place "without the knowledge or consent" of the owner.<sup>19</sup> But were the terms "knowledge" and "consent" intended to be disjunctive or conjunctive requirements?

The Ninth Circuit interpreted "knowledge or consent" to mean that a person had to prove that he or she did not have knowledge of the criminal offense *and* did not consent to the use of the property to commit that offense.<sup>20</sup> Thus, in the Ninth Circuit, a wife who knew that her husband was using her property to commit a criminal offense could not defeat the forfeiture of that property by showing that she did not consent to the illegal use, or that she tried to stop it. Her failure to establish lack of knowledge, by itself, was fatal to her innocent owner claim. Similarly, a claimant in the Ninth Circuit who did not know that her property was being used illegally nevertheless also had to show that she did not consent in

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<sup>18</sup> See *United States v. An Antique Platter of Gold*, 184 F.3d 131 (2d Cir. 1999) (there is no innocent owner defense for violations of section 545; applying *Bennis*); *United States v. Various Ukranian Artifacts*, 1997 WL 793093 (E.D.N.Y. 1997) (there is no innocent owner defense under 19 U.S.C. § 1497); *United States v. \$83,132.00 in United States Currency*, 1996 WL 599725 (E.D.N.Y. 1996) (under *Bennis*, there is no innocent owner defense in forfeiture cases involving unreported currency brought under 31 U.S.C. § 5317).

<sup>19</sup> 21 U.S.C. §§ 881(a)(6) & (7).

<sup>20</sup> See *United States v. One Parcel of Land Known as Lot 111-B*, 902 F.2d 1443, 1445 (9th Cir. 1990) ("knowledge" and "consent" are conjunctive terms, and claimant must prove lack of both); Franze, "Note: Casualties of War?: Drugs, Civil Forfeiture, and the Plight of the 'Innocent Owner,'" *The Notre Dame Law Review*, Vol. 70, Issue 2 (1994) 369-413. The Eighth Circuit apparently also followed the conjunctive approach. See *United States v. One 1989 Jeep Wagoneer*, 976 F.2d 1172 (8th Cir. 1992) (claimant who could show lack of knowledge and lack of consent still had to show he was not willfully blind).

advance to the illegal use.<sup>21</sup> Failure to show lack of consent was also fatal to the claim.<sup>22</sup>

But the Second and Third Circuits, interpreting the statute disjunctively, held that a person could establish an innocent owner defense by showing either lack of knowledge *or* lack of consent. Thus, a person who had knowledge that his property was being used for an illegal purpose could avoid forfeiture by showing that he did not consent to that use of his property.<sup>23</sup> And a person who did not know that the property was being used illegally was automatically deemed an innocent owner on the ground that a person could not consent to what he did not know.<sup>24</sup>

A difference in the statutory language resulted in an entirely different rule for money laundering and bank fraud cases, however. As mentioned, the forfeiture provision for those offenses, 18 U.S.C. § 981(a)(2), lacked a "consent" requirement: the claimant was required only to establish that the criminal offense was committed without his knowledge. This made it easier for a claimant to establish an innocent owner defense in the Ninth Circuit, because a claimant who

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<sup>21</sup> See *United States v. Property Titled in the Names of Ponce*, 751 F. Supp. 1436, 1440 n.3 (D. Haw. 1990) (claimant must show that he did not consent in advance to the illegal use of his property, even if he proves that he did not actually know whether such use ever occurred).

<sup>22</sup> See also *United States v. One Parcel ... 7079 Chilton County Road*, \_\_\_ F. Supp.2d \_\_\_, 2000 WL 1785026 (M.D. Ala. Nov. 27, 2000) (district courts in the 11<sup>th</sup> Circuit must apply the conjunctive test because when there is an intra-circuit split, the earlier appellate decision controls; therefore, claimant must show lack of knowledge *and*, even if he lacked knowledge, that he took all reasonable steps to prevent illegal use of the property); compare *United States v. One Parcel . . . Germantown Road*, 963 F.2d 1496, 1500 (11<sup>th</sup> Cir. 1992) (claimant may show lack of knowledge or lack of consent); with *United States v. 15603 85<sup>th</sup> Ave. North*, 933 F.2d 976, 981 (11<sup>th</sup> Cir. 1991) (claimant must prove both that she had no knowledge of the illegal act and that she did not consent to the illegal activities).

<sup>23</sup> See *United States v. 141st Street Corp.*, 911 F.2d 870, 877-78 (2nd Cir. 1990) (landlord who knew building was being used for drug trafficking had opportunity to show he did not consent to such use); *United States v. Parcel of Real Property Known as 6109 Grubb Road*, 886 F.2d 618, 626 (3rd Cir. 1989) (wife who knew of husband's use of residence for drug trafficking had opportunity to show she did not consent to such use); *United States v. One 1973 Rolls Royce*, 43 F.3d 794, 816-17 (3<sup>rd</sup> Cir. 1994) (following *Grubb Road*; collecting cases). The Eleventh Circuit issued seemingly contradictory opinions on this point; see Note 22, *supra*; see also *United States v. Lot 9, Block 2 of Donnybrook Place*, 919 F.2d 994, 1000 (5<sup>th</sup> Cir. 1990) (reserving judgment on this issue).

<sup>24</sup> *141st Street Corp.*, 991 F.2d at 878; *United States v. One Parcel . . . 7426 Highway 45 North*, 965 F.2d 311, 315 (7<sup>th</sup> Cir. 1992).

established a lack of knowledge had no additional burden of showing lack of consent.<sup>25</sup> But in the "disjunctive" circuits, a claimant who knew his property was involved in a money laundering or bank fraud offense was out of luck: there was no opportunity under Section 981(a)(2) to show that the claimant nevertheless did not consent to the illegal activity.<sup>26</sup>

### 3. Property acquired after the offense

The most serious difficulties with the pre-CAFRA innocent owner provisions were the result of the statutes' failure to distinguish between property interests that existed at the time of the criminal offense (*i.e.*, interests that existed before the property became subject to forfeiture), and interests that were not acquired until *after* the crime was committed (*i.e.*, interests that did not exist until the property was already subject to forfeiture). All of the legislative history and early case law suggests that the innocent owner statutes were drafted with only pre-existing ownership interests in mind. The typical scenario involved a spouse or other third party who had an interest in a car or house that was being used to facilitate a criminal offense such as drug trafficking. Little or no attention was paid to issues that might arise if the wrongdoer transferred property he had used to commit a criminal offense to a third party *after* the crime was complete.

The reason for this is probably that everyone assumed, when the innocent owner statutes were drafted, that the relation-back doctrine, codified at 21 U.S.C. § 881(h), would void any post-illegal act transfer of forfeitable property to a third party, making any innocent owner defense in such cases unnecessary.<sup>27</sup> Section 881(h) provides that all right, title and interest in property subject to forfeiture vests in the United States "upon commission of the act giving rise to [the] forfeiture." In the Government's view, that meant that at the moment he used, or

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<sup>25</sup> See *United States v. Real Property 874 Gartel Drive*, 79 F.3d 918 (9th Cir. 1996) (requirement that claimant take all reasonable steps to prevent the illegal use of his property is part of the "consent" prong of the innocent owner defense; because section 981(a)(2) lacks a consent prong, requirement does not apply); *United States v. \$1,646,000 in Cashiers Checks and Currency*, \_\_\_ F. Supp.2d \_\_\_, 2000 WL 1658278 (N.D. Cal. Nov. 2, 2000) (same; following *Gartel Drive*); *United States v. Various Computers*, 82 F.3d 582 (3<sup>rd</sup> Cir. 1996) (proof of having taken all reasonable steps to prevent the illegal use of the property not required unless the statutory innocent owner defense contains a "consent" prong); *United States v. \$705,270.00 in U.S. Currency*, 820 F. Supp. 1398, 1402 (S.D. Fla. 1993) (same).

<sup>26</sup> See *United States v. Eleven Vehicles*, 836 F. Supp. 1147, 1160 n.16 (E.D. Pa. 1993) (lack of consent is not available as a defense under § 981(a)(2)).

<sup>27</sup> *1973 Rolls Royce, supra*, 43 F.3d at 817.

allowed his property to be used, to commit a crime, the property owner was divested of his interest in the property, with title passing to the Government.

When property is transferred from one person to another, of course, the receiver can obtain no better title than the transferor has to give. So if the owner of property subject to forfeiture had already been divested of his title upon the commission of the illegal act, he had no title that he could pass on to a third party, and the third party had no interest that she could assert in the forfeiture proceeding. Thus, it was the prevailing view that the post-illegal act receiver of forfeitable property lacked standing to assert an innocent owner defense when the property was forfeited.<sup>28</sup>

All of that changed with the Supreme Court's decision in *United States v. A Parcel of Land (92 Buena Vista Ave.)*.<sup>29</sup> In that case, a drug dealer made a gift of \$240,000 in drug proceeds to his girlfriend, who used the money to buy the defendant real property. The Government, invoking the relation-back theory, argued that the drug dealer lacked title to the illicitly-derived funds, and thus had no title he could pass on to his girlfriend. For that reason, according to the Government, the girlfriend, who was the claimant in the forfeiture case, had no interest in the defendant property and could not assert an innocent owner defense under the applicable statute.<sup>30</sup> But the Supreme Court held that the relation back doctrine is not self-executing and thus does not divest a wrongdoer of title to his property until a court enters a judgment of forfeiture to that effect.<sup>31</sup> For that reason, the Government could not use the relation-back doctrine to prevent persons with an after-acquired interest in property from contesting the forfeiture. Such persons were "owners" within the meaning of the statute, and could file claims to the property and assert an innocent owner defense.

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<sup>28</sup> See *United States v. One 1985 Nissan 300ZX*, 889 F.2d 1317 (4th Cir. 1989) (holding that no one can acquire title to property after the illegal act takes place because the wrongdoer lacks good title to pass on to a third party; "unless a claimant has a claim to the property forfeited which existed prior to the time the acts take place which bring on forfeiture, then the innocent owner provision of the statute [§ 881(a)(6)] has no application.")

<sup>29</sup> 507 U.S. 111, 113 S. Ct. 1126 (1993).

<sup>30</sup> The *Buena Vista* case is discussed in detail in Franze, *supra* note 20.

<sup>31</sup> See *United States v. Spahi*, 177 F.3d 748 (9th Cir. 1999) (because the relation back doctrine is not self-executing, title to property sought to be forfeited does not vest automatically in the Government upon commission of the act giving rise to forfeiture; rather, the Government must take some legal step to assert its right to the property).

Moreover, the Court held that because the civil forfeiture statutes did not limit the innocent owner defense to persons who *purchase* the property in good faith, the defense could be asserted by an innocent donee. Justice Kennedy, in a dissenting opinion, noted that this allowed drug dealers to shield their property from forfeiture through transfers to relatives or other innocent persons. The ruling, Justice Kennedy said, "rips out the most effective enforcement provisions in all of the drug forfeiture laws,"<sup>32</sup> and "leaves the forfeiture scheme that is the centerpiece of the Nation's drug enforcement laws in quite a mess."<sup>33</sup> Justice Stevens, however, writing for the plurality, said that the Court was bound by the statutory language enacted by Congress. "That a statutory provision contains 'puzzling' language, or seems unwise," he said, "is not an appropriate reason for simply ignoring the text."<sup>34</sup>

The holding in *92 Buena Vista* produced a number of troubling results. For one thing, as Justice Kennedy predicted, it became routine for drug dealers and other criminals to pass on their forfeitable property to family members, girlfriends and other innocent third parties, knowing that the Government could not use the civil forfeiture statutes to recover it.<sup>35</sup> In response, the Government made it a standard part of its forfeiture training to instruct federal prosecutors that in cases where a defendant had transferred forfeitable property to an innocent third party, such as a minor child, the Government had to rely on the *criminal* forfeiture statutes (which do contain a bona fide purchaser requirement) to void the transfer and confiscate the property.<sup>36</sup>

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<sup>32</sup> 113 S. Ct. at 1146.

<sup>33</sup> 113 S. Ct. at 1145.

<sup>34</sup> 113 S. Ct. at 1135, n.20.

<sup>35</sup> See *United States v. Real Property ... 221 Dana Ave.*, 81 F. Supp. 2d 182, 188 (D. Mass. 2000) (innocent heir who acquires interest upon death of drug dealer could prevail under *92 Buena Vista*; pre-*Buena Vista* cases to the contrary, like *United States v. One 1985 Nissan 300ZX*, 889 F.2d 1317 (4th Cir. 1989), are probably no longer good law); cf. *In re Seizure of \$82,000 More or Less*, 2000 WL 1707495 (W.D. Mo. 2000) (claimant who acquired interest in abandoned property by operation of law became owner before Government's interest vested under relation-back doctrine).

<sup>36</sup> In criminal forfeiture cases, the relation-back doctrine is codified at 21 U.S.C. 853(c), which provides that all right, title and interest in property subject to forfeiture vests in the United States upon the commission of the act giving rise to the forfeiture, and subsequent transfers to third parties are therefore void, "unless the transferee establishes . . . that he is a bona fide purchaser for value . . ." It is this provision that allows the court to void a post-illegal act transfer of forfeitable property in a criminal case, where the transferee, like the claimant in

Even more troubling, from the Government's perspective, were the consequences of an issue left unresolved in *92 Buena Vista*: whether a claimant's state of mind – for purposes of the innocent owner defense – should be determined at the time the crime was committed or at the time the claimant acquired his or her interest in the forfeitable property.<sup>37</sup> Predictably, the courts split on this issue.

The Eleventh Circuit held that, for purposes of the innocent owner defense, the claimant's state of mind had to be determined as of the time the person acquired his or her interest in the forfeitable property. A person who acquires property knowing that it was used to commit an illegal act, the court held, is not an innocent owner.<sup>38</sup> Thus, in that circuit, even though a person with an after-acquired interest in the property could contest a forfeiture under *92 Buena Vista*, the claimant still had to establish her innocence by showing that she did not know the property was subject to forfeiture *at the time she acquired it*. The majority of courts followed this rule.<sup>39</sup> But in the Third Circuit, the rule was the opposite: In

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*92 Buena Vista*, is a mere donee; and it was the absence of such a provision that allowed innocent donees to defeat forfeiture actions in civil cases. See *United States v. Hooper*, 229 F.3d 818 (9<sup>th</sup> Cir. 2000) (*92 Buena Vista* does not apply to criminal forfeiture cases; nor does it apply any longer to civil cases under CAFRA); *United States v. BCCI Holdings (Luxembourg) S.A. (Petition of American Express Bank II)*, 961 F. Supp. 287 (D.D.C. 1997) (sections 1963(l)(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).

<sup>37</sup> 507 U.S. at 129-30, 113 S. Ct. at 1137-38.

<sup>38</sup> See *United States v. One Parcel of Real Estate Located at 6640 SW 48th Street*, 41 F.3d 1448 (11<sup>th</sup> Cir. 1995) (lawyer who acquires interest in forfeitable property as his fee is not an innocent owner).

<sup>39</sup> See *United States v. Real Property ... 221 Dana Ave.*, 81 F. Supp. 2d 182, 189 (D. Mass. 2000) (heir who knew property was used for drug trafficking at the time she acquired her interest is not an innocent owner; following *SW 48th Street* and rejecting *1973 Rolls Royce*); *United States v. One Parcel Known as 352 Northup St.*, 40 F. Supp. 2d 74, 82 (D.R.I. 1999) (father who received money he knew to be proceeds of son's drug trafficking, and used it to buy land, is not innocent owner of the land); *United States v. 3 Parcels in La Plata County*, 919 F. Supp. 1449, 1457 (D. Nev. 1995) (claimant must show he is the holder of an ownership interest who was, at the time of acquiring the interest, ignorant of the illegal conduct giving rise to the forfeiture action); *United States v. Funds in the Amount of \$228,390*, 1996 WL 284943, \*3 (N.D. Ill. 1996) ("if a post-illegal act transferee knows of illegal activity which would subject property to forfeiture at the time he takes his interest, he cannot assert the innocent owner defense"); see also *United States v. 10936 Oak Run Circle*, 9 F.3d 74, 76 (9<sup>th</sup> Cir. 1993) (holding that the

*United States v. One 1973 Rolls Royce*,<sup>40</sup> the court held that the claimant's state of mind had to be evaluated *as of the time the property became subject to forfeiture – i.e.*, when the criminal act took place. In the case of after-acquired property, this meant that the claimant was automatically entitled to be considered an innocent owner, because she could not have consented to the illegal use of the property before she owned it.<sup>41</sup>

The holding in *Rolls Royce* rendered the civil forfeiture statutes useless in the Third Circuit in cases involving after-acquired interests in property.<sup>42</sup> But the panel said that if its decision left the innocent owner statute in "a mess," the problem "originated in Congress when it failed to draft a statute that takes into account the substantial differences between those owners who own the property during the improper use and some of those who acquire it afterwards." The court concluded, "Congress should redraft the statute if it desires a different result."<sup>43</sup>

### **C. The Justice Department's Proposal**

In 1996, the Department of Justice submitted to Congress a proposed revision of the innocent owner statutes that addressed all of these concerns.<sup>44</sup>

First, the proposal replaced the various inconsistent innocent owner provisions with a uniform defense that would apply to most federal civil forfeiture

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statute bars an owner with knowledge of the origin of the property in drug proceeds from asserting "the innocent owner defense," and noting that such person has a duty to inquire at the time of the transfer).

<sup>40</sup> 43 F.3d 794 (3d Cir. 1994).

<sup>41</sup> *Id.*, 43 F.3d at 817 ("a post-illegal-act transferee who did not know of the illegal act at the time it occurred will always be able to make out the innocent owner defense, regardless of whether he or she knew about the taint at the time of the transfer").

<sup>42</sup> *See United States v. 1993 Bentley Coupe*, 986 F. Supp. 893 (D.N.J. 1997) (applying *Rolls Royce*; claimant who bought property in tax sale after being notified it was subject to pending federal forfeiture action was nevertheless an innocent owner).

<sup>43</sup> 43 F.3d at 820.

<sup>44</sup> The text of the 1996 proposal appears in the 1996 Hearing, *supra* note 17, at 137-41, DOJ Extract at 71-73. A legal analysis appears, *id.*, at 61-66 (DOJ Extract at 33-36). *See also* Cassella Testimony, *supra* note 17, at 225-27, DOJ Extract at 115-16. For a full discussion of the legislative history of CAFRA, see Cassella, "The Civil Asset Forfeiture Reform Act of 2000," *Journal of Legislation*, Notre Dame Law School (January 2001).

statutes. Thus, there would no longer be different defenses when forfeiture was sought in connection with different crimes, and there would no longer be no defense at all for the older forfeiture provisions enacted before the late 1970's.<sup>45</sup>

Second, using the criminal forfeiture statutes as a model,<sup>46</sup> the proposal created separate defenses for property interests that existed at the time of the illegal act, and interests that were acquired afterward. In the first category, the proposal adopted the "disjunctive" rule so that property owners would be able to defeat forfeiture by showing either 1) that they lacked knowledge of the offense, or 2) that upon learning of the illegal use of the property, they "did all that reasonably could be expected to terminate such use of the property."<sup>47</sup> This was intended to allow a spouse, or other third party, to challenge the forfeiture of her property, even if she knew that it was being used illegally, by showing that she did

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<sup>45</sup> See Cassella Testimony at 215, DOJ Extract at 110 ("The Supreme Court held this Term that the Constitution does not prohibit the Government from forfeiting property of an innocent person. Maybe so, but Congress by statute can provide more protection than Constitution requires, and we think it should.").

<sup>46</sup> See 21 U.S.C. 853(n)(6)(A) & (B). The criminal forfeiture statute served as a model for the new uniform innocent owner defense in the sense that it created separate defenses for persons who had a pre-existing interest in the property when it became subject to forfeiture, and persons with an after-acquired interest. Also, as discussed in the text, *infra*, the provision relating to *after-acquired* interests is modeled closely on Section 853(n)(6)(B). But note that the defense for *pre-existing* interests in civil cases is quite different from the corresponding defense in criminal cases. In civil cases, the claimant has to be "innocent," whereas in criminal cases, the claimant need only show that she had a "superior" interest in the property. 21 U.S.C. § 853(n)(6)(A). In other words, a non-innocent third party can prevail under Section 853(n)(6)(A) in a criminal case, because criminal forfeitures are limited to the interests of the defendant. See *United States v. Lester*, 85 F.3d 1409 (9th Cir. 1996) (noting, *in dicta*, that defendant could have challenged forfeiture on the grounds that property was held by a corporation, not by the defendant, and that unless corporate form could be ignored, defendant's only forfeitable interest was his stock in the corporation); *United States v. Riley*, 78 F.3d 367 (8th Cir. 1996) (if corporation used by defendant to commit offense is not a defendant, only defendant's interest in the corporation may be forfeited, not the corporation itself or its assets); *United States v. BCCI Holdings (Luxembourg) S.A. (Petition of Chawla)*, 46 F.3d 1185, 1190 (D.C. Cir. 1995) ("only the property of the defendant—including property held by a third party pursuant to a voidable transaction—can be confiscated in a RICO proceeding"); *United States v. Jimerson*, 5 F.3d 1453 (11th Cir. 1993) (the Government may not use the ancillary proceeding in a criminal forfeiture case to forfeit the interests of third parties). But a non-innocent third-party *cannot* prevail in a civil case. This is the reason the Government must resort to civil forfeiture when the defendant uses property belonging to a third party (with the third party's knowledge) to commit a crime.

<sup>47</sup> 1996 Hearing at 138, DOJ Extract at 72.

everything that a reasonable person in her circumstances would have done to prevent the illegal use.<sup>48</sup> The "all that reasonably could be expected" test was derived from the *dicta* in *Calero-Toledo* and was consistent with the way the courts had defined the term "consent" under the existing statutes.<sup>49</sup> The Department's proposal also assumed that "knowledge," under the first prong of the test, would include "willful blindness," as many courts had decided under the old law.<sup>50</sup>

For the second category of cases – those involving property acquired *after* the offense giving rise to the forfeiture – the Department proposed language modeled on 21 U.S.C. § 853(n)(6)(B), the statute governing after-acquired third-party interests in criminal forfeiture cases. Under the proposal, a person would be considered an innocent owner if he established that he acquired the property as a bona fide purchaser for value who at the time of the purchase did not know and was reasonably without cause to believe that the property was subject to forfeiture.<sup>51</sup> At the 1996 Hearing, the Department's witness noted that this provision would be of particular importance in cases involving the acquisition of drug dollars on the black market in South America. In such cases, wealthy persons assist in the laundering of the drug money by purchasing U.S. dollars, or dollar-denominated instruments, while maintaining ignorance of their source. The new statute, the Department suggested, would put the burden on such individuals to show that they took all reasonable steps to ensure that they were not acquiring drug proceeds.<sup>52</sup>

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<sup>48</sup> Cassella Testimony at 225, DOJ Extract at 115.

<sup>49</sup> 1996 Hearing at 65, DOJ Extract at 35 ("Thus, as the majority of courts now hold, under the second defense a spouse could defeat forfeiture of her property, even if she knew that it was being used illegally, by showing that she did everything that a reasonable person in her circumstances would have done to prevent the illegal use."); see Analysis of 1999 Department of Justice proposal, Senate Hearing on H.R. 1658 (July 21, 1999) ("1999 Hearing"), DOJ Extract at 368. See also cases at note 104, *infra*, and accompanying text.

<sup>50</sup> 1996 Hearing at 65, DOJ Extract at 35 ("[A] showing of lack of knowledge would be a complete defense to forfeiture. But to show lack of knowledge, the owner would have to show that he was not willfully blind to the illegal use of the property."); see Cassella Testimony at 225, DOJ Extract at 115; 1999 Hearing, DOJ Extract at 368. See also cases at note 97, *infra*, and accompanying text.

<sup>51</sup> 1996 Hearing at 139, DOJ Extract at 72.

<sup>52</sup> *Id.*

The Department's proposal addressed two other recurring issues: the definition of "owner," and the authority of the court to sever the defendant property in the event that the property was owned, in part, by an innocent owner. The proposal defined "owner" to include lienholders and others with secured interests in the subject property, but to exclude general creditors, bailees and nominees. And it authorized the district court to take any of three alternative actions to dispose of property jointly owned by a guilty person and an innocent owner: sever the property; liquidate the property and order the return a portion of the proceeds to the innocent party; or allow the innocent party to remain in possession of the property, subject to a lien in favor of the government to the extent of the guilty party's interest.<sup>53</sup>

### **III. REQUIREMENTS OF § 983(d)**

#### **A. Uniform affirmative defense**

The innocent owner defense ultimately enacted by Congress as part of CAFRA is essentially the Justice Department's 1996 proposal with a few additions and amendments. The remainder of this article discusses the elements of the defense as it is now codified at 18 U.S.C. § 983(d).

Section 983(d)(1) sets out the basic principle that "An innocent owner's interest in property shall not be forfeited under any civil forfeiture statute." Thus, all federal civil forfeiture statutes are now subject to an innocent owner defense, and the defense is the same regardless of the statute under which the forfeiture action is brought. The only exception concerns the forfeiture statutes that are specifically exempted from the definition of "civil forfeiture statute" by

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<sup>53</sup> *Id.*

Section 983(i).<sup>54</sup> For forfeitures under those statutes, there is still no innocent owner defense.

A conforming amendment in Section 2(c) of CAFRA repeals the pre-existing innocent owner provisions in 18 U.S.C. § 981(a)(2), 21 U.S.C. §§ 881(a)(4),(6) & (7), 18 U.S.C. § 2254(a), and 8 U.S.C. § 1324(b). Moreover, It is evident from the legislative history that Congress expressly intended that CAFRA override any inconsistent provisions found in the “old law,” except where the specific exemption in Section 983(i) applied.<sup>55</sup> Thus, if Congress inadvertently failed to repeal the innocent owner provision in any federal forfeiture statute when it drafted CAFRA, forfeitures under that statute will nevertheless be governed by Section 983(d).

Section 983(d)(1) goes on to provide that “The claimant shall have the burden of proving that the claimant is an innocent owner by a preponderance of the evidence.” This provision was included in the bill to make clear that “innocent ownership” remains an affirmative defense, as it was under all of the previously enacted statutes,<sup>56</sup> notwithstanding CAFRA’s placing of the burden on the

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<sup>54</sup> Section 983(i) provides as follows:

(i) CIVIL FORFEITURE STATUTE DEFINED- In this section, the term 'civil forfeiture statute'--

(1) means any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense; and

(2) does not include--

(A) the Tariff Act of 1930 or any other provision of law codified in title 19;

(B) the Internal Revenue Code of 1986;

(C) the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 et seq.);

(D) the Trading with the Enemy Act (50 U.S.C. App. 1 et seq.); or

(E) section 1 of title VI of the Act of June 15, 1917 (40 Stat. 233; 22 U.S.C. 401).

<sup>55</sup> See H.Rep. 106-192, 106<sup>th</sup> Cong. (1999) (“1999 House Report”) at 21; DOJ Extract at 283 (“To the extent that these procedures are inconsistent with any preexisting federal law, these procedures apply and supercede preexisting law.”).

<sup>56</sup> See, e.g., *United States v. Land, Property Recorded in Name of Neff*, 960 F.2d 561 (5th Cir. 1992) (once the Government establishes probable cause, burden shifts to claimant to establish affirmative defense by preponderance of the evidence); *United States v. One Parcel ... 194 Quaker Farms Road*, 85 F.3d 985 (2d Cir. 1996) (burden shifting where one party has superior access to evidence is not unconstitutional).

Government to prove the nexus between the property and the underlying offense as part of its case-in-chief.<sup>57</sup>

## **B. Pre-existing owners**

Section 983(d) adopts the Justice Department's proposed division of the innocent owner defense into two parts, so that pre-existing ownership interests and after-acquired interests are treated differently. Pre-existing interests are governed by Section 983(d)(2), and after-acquired interests are governed by Section 983(d)(3).

Regarding pre-existing interests, Section 983(d)(2)(A) provides as follows:

“with respect to a property interest in existence at the time the illegal conduct giving rise to forfeiture took place, the term 'innocent owner' means an owner who

(i) did not know of the conduct giving rise to forfeiture; or

(ii) upon learning of the conduct giving rise to the forfeiture, did all that reasonably could be expected under the circumstances to terminate such use of the property.”

### *1. Distinguishing “ownership” and “standing”*

The first thing to notice about this statute is that the claimant must establish, as part of his affirmative defense, that he is an “owner” of the defendant property. If the claimant cannot establish that he has the required ownership interest, his innocence is irrelevant.<sup>58</sup>

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<sup>57</sup> See 18 U.S.C. 983(c). The House version of CAFRA was unclear as to whether, under the new law, the claimant would retain the burden of proof as to the affirmative defense, and during the House debate in 1999, several Members of Congress erroneously assumed that because the bill shifted the burden of proof to the Government regarding the forfeitability of the property, it was also intended to place the burden on the Government to disprove the innocent owner defense. DOJ Extract at 292, *et seq.* The explicit statement regarding the burden of proof in Section 983(d)(1) was necessary to negate any contrary inference that might otherwise have been drawn from the legislative history.

<sup>58</sup> See *In re Seizure of \$82,000 More or Less*, 2000 WL 1707495 (W.D. Mo. 2000) (Government concedes claimants are innocent, but they still must prove they are owners under state law); *United States v. One Parcel of Property Located at 1512 Lark Drive*, 978 F. Supp. 935, 940 (D.S.D. 1997) (if, as a matter of state law, the wife is not an owner or a lienholder of the property, her knowledge of the illegal activity is irrelevant); *United States v. All Funds in*

The requirement that the claimant establish an ownership interest in the defendant property is part of his affirmative defense, and is separate and distinct from his duty to establish that he has standing to contest the forfeiture. In every civil forfeiture case, of course, the claimant must establish that he has standing to litigate his claim.<sup>59</sup> But to establish standing, a claimant need only show that he has a “facially colorable interest in the proceedings sufficient to satisfy the case-or-controversy requirement” under Article III of the Constitution.<sup>60</sup> A “facially colorable interest,” however, is not the same thing as ownership, and a person may thus establish standing without being an owner of the property.<sup>61</sup>

Indeed, courts have granted standing to persons with a mere possessory interest in the property,<sup>62</sup> or to a person whose name appears on the title to the

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“*The Anaya Trust*” Account, 1997 WL 578662 (N.D. Cal. 1997) (innocent owner defense has two elements: claimant must be an owner, and must be innocent—as defined by statute).

<sup>59</sup> See, e.g., *United States v. \$9,041,598.68*, 163 F.3d 238, 245 (5th Cir. 1998); *United States v. \$515,060.42 in U.S. Currency*, 152 F.3d 491, 497 (6th Cir. 1998).

<sup>60</sup> *\$9,041,598.68*, 163 F.3d at 245. See *United States v. U.S. Currency, \$81,000.00*, 189 F.3d 28, 35 (1st Cir. 1999) (“Courts generally do not deny standing to a claimant who is either the colorable owner of the *res* or who has any colorable possessory interest in it.”).

<sup>61</sup> See *In re Seizure of \$82,000 More or Less*, 2000 WL 1707495 (W.D. Mo. 2000) (titled owner and purchaser of vehicle both have colorable interest sufficient for standing, but must prove ownership as part of innocent owner defense on the merits).

<sup>62</sup> See *United States v. 1982 Sanger 24' Spectra Boat*, 738 F.2d 1043, 1046 (9th Cir. 1984). Simple possession of the property, standing alone, is not sufficient to establish standing in most courts, but simple possession is sufficient if it is “accompanied by factual allegations regarding how the claimant came to possess the property, the nature of the claimant's relationship to the property, and/or the story behind the claimant's control of the property.” *United States v. \$515,060.42 in U.S. Currency*, 152 F.3d at 498. See also *United States v. \$1,646,000 in Cashiers Checks and Currency*, \_\_\_ F. Supp.2d \_\_\_, 2000 WL 1658278 (N.D. Cal. Nov. 2, 2000) (possession plus assertion of ownership is sufficient to establish standing to contest forfeiture of cashiers checks and cash); *United States v. \$271,070.00 in U.S. Currency*, 1997 WL 94722 (N.D. Ill. 1997) (claimant need not assert an ownership interest; possessory interest is sufficient for standing; but bald assertions of possessory or ownership interest without evidentiary support will not be sufficient); *United States v. 47 West 644 Route 38*, 962 F. Supp. 1081, 1085 (N.D. Ill. 1997) (simple possession is enough to establish standing, but claimant must be more than an “unknowing custodian”); *Olivo v. United States*, 1997 WL 23181 (S.D.N.Y. 1997) (person's conscious possession of the property seized was sufficient for standing to contest its forfeiture, despite his lack of ownership).

property, even though the person is merely a nominee.<sup>63</sup> One court recently held that a person with no legal interest in real property, but who would be rendered homeless if the property were forfeited to the Government, had standing to contest the forfeiture.<sup>64</sup>

Such persons, however, are not “owners” of the property within the meaning of Section 983(d)(2)(A). To be an “owner” of the property, the claimant must show that he has a legal interest in the property in accordance with state property law,<sup>65</sup> and must exercise dominion and control over the property.<sup>66</sup>

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<sup>63</sup> See *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 is another matter).

<sup>64</sup> See *United States v. 8402 W. 132<sup>nd</sup> Street*, 2000 WL 294094 (N.D. Ill. 2000) (non-owner resident who would be left homeless if property is forfeited has standing to contest forfeiture of father’s real property); see also *United States v. 5 S.351 Tuthill Road*, \_\_\_ F.3d \_\_\_, 2000 WL 1779182 (7<sup>th</sup> Cir. Dec. 5, 2000) (failure to exercise dominion and control does not negate standing if claimant is a beneficiary of a land trust who would be injured if the property were forfeited); but see *United States v. Antonelli*, 1998 WL 775055 (N.D.N.Y. Nov. 2, 1998) (defendant’s minor children have no legal interest in real property held exclusively in the defendant’s name, and therefore have no basis for challenging a criminal forfeiture order, even though the property is their residence).

<sup>65</sup> See *\$81,000*, 189 F.3d at 33 (state law determines person’s ownership interest in a joint bank account); *United States v. 1989 Lear Jet*, 25 F.3d 793, 797 (9<sup>th</sup> Cir. 1994) (state law determines existence and extent of lienholder’s interest under section 981(a)(2)); *United States v. Real Property ... 221 Dana Ave.*, 81 F. Supp. 2d at 187 (under Massachusetts law, wife has no legal interest in husband’s real property until marriage ends); *United States v. Eleven Vehicles*, 836 F. Supp. at 1160 (state law controls question whether claimant is an owner or not); *1512 Lark Drive*, 978 F. Supp. at 940 (state law determines whether wife has an interest in property held in husband’s name); *United States v. Premises Known as 2930 Greenleaf Street*, 920 F. Supp. 639, 645 (E.D. Pa. 1996) (state law determines if claimant became owner of real property when she recorded deed after *lis pendens* was filed).

<sup>66</sup> See *\$81,000*, 189 F.3d at 35 (claimant with legal title to joint bank account still must show he was not a “nominal or straw owner”); *United States v. Premises and Real Property ... 500 Delaware Street*, 113 F.3d 310 (2<sup>d</sup> Cir. 1997) (father who acquired real property from his son for \$1 in admitted attempt to avoid forfeiture was mere straw who exercised no dominion or control over the property); *United States v. One 1990 Chevrolet Corvette*, 37 F.3d 421, 422 (8<sup>th</sup> Cir. 1994) (titled owner did not exercise dominion or control); *2930 Greenleaf St.*, 920 F. Supp. at 646 (legal title insufficient to establish ownership if claimant did not exercise dominion and control); *United States v. Funds in the Amount of \$228,390*, 1996 WL 284943 (N.D. Ill. 1996) (corporation was straw owner); *United States v. One 1988 Prevost Liberty Motor Home*, 952 F. Supp. 1180, 1203 (S.D. Tex. 1996) (court must look beyond formal title to determine whether the record owner is the real owner or merely a strawman who does not exercise dominion and

Thus, it is entirely possible, and not uncommon, for a person to have standing to contest a forfeiture yet fail to establish that he has the requisite ownership interest to prevail at trial.<sup>67</sup>

This issue has become confused in the case law by the unfortunate tendency of some courts to use the term “standing” to refer to both the threshold Article III requirement, and the ultimate determination of ownership on the merits. For example, in *United States v. \$9,041,598.68 in U.S. Currency*,<sup>68</sup> the district court found, at the outset of the case, that a claimant who controlled a family bank account had standing to contest the forfeiture of the defendant funds. After a trial on the merits, however, the court reversed itself, finding that the claimant had not established the requisite ownership interest in the property and therefore did not have standing.<sup>69</sup> On appeal, the Fifth Circuit affirmed the district court, but noted that the court’s initial determination of standing was correct, and should not have been reconsidered in light of what took place at trial. The district court’s later determination that the claimant had no ownership interest in the defendant property, the panel said, went to the merits of the affirmative defense, not to the claimant’s standing to litigate his claim.<sup>70</sup>

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<sup>67</sup> See *\$9,041,598.68*, 163 F.3d at 245 (claimant had standing to contest the forfeiture, but ultimately jury determined, on the merits, that claimant was not an owner of the property). The same rule applies in criminal forfeiture cases. See *United States v. Hooper*, 229 F.3d 818, \_\_\_ n.4 (9<sup>th</sup> 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 did not have the legal interest necessary to prevail on the merits); *United States v. Alcaraz-Garcia*, 79 F.3d 769, 774 n.10 (9<sup>th</sup> Cir. 1996) (allegation of ownership is sufficient to establish standing under 853(n)(2), but may not satisfy “superior interest” requirements of (n)(6)(A)); *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 ownership interest under section 1963(l)(6)(A) or (B), even though claimant had standing); *Ida, supra* note 63.

<sup>68</sup> 976 F. Supp. 640, 648 (S.D. Tex. 1997).

<sup>69</sup> *Id.* (control over a “family” bank account may be sufficient to satisfy threshold standing requirements at the onset of trial, but the claimant still must prove his ownership interest by a preponderance of the evidence).

<sup>70</sup> 163 F.3d at 245 (“we consider Judge Atlas’ post-verdict discussion of standing as no more than a recognition of the fact that the jury verdict defeated all possible claims of Massieu on the merits, and we find the trial court’s earlier determinations that Massieu had standing to be dispositive of that issue”).

Similarly, in *United States v. Hooper*,<sup>71</sup> the district court in a criminal forfeiture case held that the defendants' wives lacked standing to contest the forfeiture of certain property that they alleged to be part of their respective marital estates. On appeal, however, the Ninth Circuit held that there was "no dispute that Claimants had Article III standing to file their petitions and challenge the forfeitures on the asserted grounds." What the district court meant in concluding that the claimants lacked "standing," the panel said, was "simply another way of stating that Claimants had failed to establish on the merits a property interest entitling them to relief."<sup>72</sup>

To avoid such confusion, the better practice would be to refer to the threshold Article III or case-or-controversy requirement as one that requires the claimant to show that he has standing to litigate his claim, and to refer to the ultimate question of ownership as part of the claimant's affirmative defense. That would make clear what, in any case, has always been the rule: A person with a "colorable interest" in the defendant property is allowed in the courthouse door to litigate his claim, but once in the door, the claimant is required to show that he satisfies all of the indicia of ownership as part of his affirmative defense. As the outcome in *\$9,041,598.68* illustrates, there will be claimants who are able to establish standing to contest a forfeiture at the outset of the proceeding by showing that they have a colorable interest in the property -- e.g., by showing that their name is on the title to the property, or that they have possession of it; yet they will be unable to establish the requisite ownership interest under Section 983(d)(2)(A) at trial.

## 2. State v. Federal law

The ownership of property is a matter traditionally governed by State property law.<sup>73</sup> In forfeiture cases, however, the claimant must not only show that

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<sup>71</sup> 229 F.3d 818 (9<sup>th</sup> Cir. 2000).

<sup>72</sup> 229 F.3d at \_\_\_ n.4, citing *\$9,041,598.68*, *supra*. See also *United States v. 5 S.351 Tuthill Road*, \_\_\_ F.3d \_\_\_, 2000 WL 1779182 (7<sup>th</sup> Cir. Dec. 5, 2000) (conflating standing with ownership, court holds that beneficiary of a land trust who would be injured if the property were forfeited, had standing, even though he failed to exercise dominion or control, and that therefore the only remaining issue was claimant's innocence).

<sup>73</sup> See *United States v. Eleven Vehicles*, 836 F. Supp. 1147, 1160 (E.D. Pa. 1993) (state law controls question whether claimant is an owner or not); *United States v. 1989 Lear Jet*, 25 F.3d 793 (9<sup>th</sup> Cir. 1994) (state law determines existence and extent of lienholder's interest under section 981(a)(2); lienholder entitled to recover interest and costs as well as principal of loan); *United States v. \$9,041,598.68*, 976 F. Supp. 633 (S.D. Tex. 1997) (whether

he has an interest in the property under State law, but also that his interest is protected from forfeiture under federal law.<sup>74</sup> Stated differently, State law is used to determine what interest, if any, a claimant has in the forfeitable property, while federal law determines whether that interest, whatever it is, is sufficient to defeat the Government's interest in the property under the federal forfeiture statute.<sup>75</sup>

For example, State law will be used to determine if the victim of a crime is the owner of the subject property, or is only an unsecured creditor with a generalized claim against the wrongdoer's estate. Federal law will then be used to determine whether all categories of victims, including general unsecured creditors, or only owner-victims, are able to defeat the Government's interest.<sup>76</sup>

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claimant was "owner" of property received as gift from family members depends on the definition of "gift" under state law; no "gift" where donor intended to retain access to the property if he needed it), *aff'd*, 163 F.3d 238 (5th Cir. 1998); *United States v. Real Property ... 221 Dana Ave.*, 81 F. Supp. 2d 182 (D. Mass. 2000) (under Massachusetts law, wife has no legal interest in husband's real property until marriage ends); *In re Seizure of \$82,000 More or Less*, 2000 WL 1707495 (W.D. Mo. 2000) (state law used to determine if finder of abandoned property is an "owner").

<sup>74</sup> See *\$81,000*, 189 F.3d at 33 ("State law determines [the claimant's] ownership interest in the joint account, but then federal law determines the effect of his ownership interest on his right to bring a claim."); *United States v. 5 S.351 Tuthill Road*, \_\_\_ F.3d \_\_\_, 2000 WL 1779182 (7<sup>th</sup> Cir. Dec. 5, 2000) (State law defines and classifies property interests for purposes of the forfeiture statutes, while federal law determines the effect of the property interest on the claimant's standing). The same rule applies in criminal forfeiture cases. See *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 (11th Cir. 2000) (same); *United States v. BCCI 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).

<sup>75</sup> *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 . . . is a matter of federal law.").

<sup>76</sup> See *id.*, 69 F. Supp. 2d at \_\_\_ (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).

The consequence of this two-part inquiry is that a third-party claim could fail for either of two reasons: because the claimant is unable to establish any interest in the property at all as a matter of State law,<sup>77</sup> or because the interest in question is not the kind of interest that Congress intended to protect. As will be discussed *infra*, claimants with interests defined by State property law frequently find that the interest is insufficient because it does not satisfy the temporal requirements, or bona fide purchaser provisions, of the federal forfeiture statute.<sup>78</sup> But claimants may also find that their State law property interests are simply excluded from the ambit of the innocent owner defense by the way in which the term “owner” is defined in Section 983. The most common examples of this include unsecured creditors and persons with nominal title to the defendant property who cannot show that they ever exercised dominion or control over it.<sup>79</sup>

Again, this is made clear by the definition of “owner” in Section 983(d)(6). Section 983(d)(6)(A) provides that an “owner” is “a person with an ownership interest in the specific property sought to be forfeited [*i.e.*, an ownership interest in the specific property under State law], including a leasehold, lien, mortgage,

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<sup>77</sup> See *United States v. Dempsey*, 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. Toma*, 1997 WL 467280 (N.D. Ill. 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. 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 so could not challenge the forfeiture); *United States v. 47 West 644 Route 38*, 962 F. Supp. 1081 (N.D. Ill. 1997) (spouse who has no ownership interest in other spouse’s property under state law has no standing); *United States v. 2930 Greenleaf St.*, 920 F. Supp. 639 (E.D. Pa. 1996) (claimant who failed to record interest in the property before the Government filed *lis pendens* providing claimant with constructive notice of the forfeiture was not an “owner” under state law); *United States v. Antonelli*, 1998 WL 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).

<sup>78</sup> See Parts B(3) and C, *infra*.

<sup>79</sup> See *United States v. Morgan*, \_\_\_ F.3d \_\_\_, 2000 WL 1161692 (4<sup>th</sup> Cir. Aug. 17, 2000) (if third-party claimant in a criminal forfeiture case exercises no dominion or control over a joint bank account, court may ignore the claimant’s State law interest in the property and deny his claim for failure to establish legal right title or interest under federal law); see also cases cited at note 66, *supra*.

recorded security interest, or valid assignment of an ownership interest." But Section 983(d)(6)(B) provides that the term "owner" *does not* include –

(i) a person with only a general unsecured interest in, or claim against, the property or estate of another;

(ii) a bailee unless the bailor is identified and the bailee shows a colorable legitimate interest in the property seized; or

(iii) a nominee who exercises no dominion or control over the property.<sup>80</sup>

Thus, whatever status a creditor, bailee, or nominee might otherwise be accorded under State law, it will be insufficient to establish an ownership interest as part of the affirmative defense under Section 983(d).

Note that the exclusion of three categories of persons from the definition of “owner” in § 983(d)(6) tracks or codifies the majority rule in the pre-CAFRA case law on all three points. Under the old law, courts in both civil and criminal forfeiture cases held that victims and other unsecured creditors are not owners of the forfeited property within the meaning of the federal forfeiture statute.<sup>81</sup> Courts

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<sup>80</sup> 18 U.S.C. § 983(d)(6).

<sup>81</sup> See *United States v. Cambio Exacto, S.A.*, 166 F.3d 522 (2d Cir. 1999) (person to whom a money transmitter owes money lacks standing as a general creditor to contest forfeiture of money transmitter’s account); *United States v. \$20,193.39 U.S. Currency*, 16 F.3d 344 (9th Cir. 1994) (general unsecured creditors lack standing under section 981); *United States v. \$3,000 in Cash*, 906 F. Supp. 1061 (E.D. Va. 1995) (even though claimant/victim could trace his money to seized bank account, title passed to perpetrator making claimant an unsecured creditor without standing); *United States v. \$15,060 in U.S. Currency*, 1999 WL 166847 (D. Or. 1999) (claimant who allegedly loaned money to defendant, not knowing defendant intended to use it to facilitate drug trafficking, was an unsecured creditor with no legal standing to contest the forfeiture of the seized funds); see also *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 defendant’s assets is irrelevant; therefore, victims who transferred their property to the defendant are merely unsecured creditors, not owners of the forfeited property); *United States v. BCCI Holdings (Luxembourg) S.A. (Petition of Chawla)*, 46 F.3d 1185 (D.C. Cir. 1995) (unsecured creditors are not owners); *United States v. Schwimmer*, 968 F.2d 1570, 1581 (2d Cir. 1992) (same); *United States v. Campos*, 859 F.2d 1233 (6th Cir. 1988) (same); *United States v. 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. Strube*, 58 F. Supp. 2d 576 (M.D. Pa. 1999) (family members who obtained a judgment lien against defendant

also held, based on the Supplemental Rules for Certain Admiralty and Maritime Claims, which are applicable to civil forfeiture proceedings, that bailees lack standing as “owners” unless they identify the bailor.<sup>82</sup> And courts held that mere title is insufficient to establish an ownership interest if the claimant did not exercise dominion and control over the property.<sup>83</sup> Thus, the pre-CAFRA case law will be applicable to determining whether the claimant has established an ownership interest in the defendant property as part of his affirmative defense.

### 3. *The temporal requirement*

Next, note that the claimant not only must establish that he has an ownership interest in the property within the meaning of both State law and the federal statute, but also that his interest was “in existence at the time the illegal conduct giving rise to forfeiture took place.” This temporal requirement is entirely new to civil forfeiture law, and reflects the distinction now being drawn between claimants with pre-existing interests in the property, and those with after-acquired interests. In other words, to qualify for relief under § 982(d)(2), the claimant must satisfy this temporal requirement; otherwise he must recover as a bona fide purchaser under § 983(d)(3).

The temporal requirement, of course, was drawn from the criminal forfeiture statute, which, since its inception, has always created separate grounds for relief for claimants whose property interest was in existence at the time the crime giving rise to the forfeiture took place, and those who acquired their interest afterwards.<sup>84</sup> Thus, the case law interpreting the temporal requirement in criminal

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personally were general creditors, and not owners of any interest in an specific parcel of property); *United States v. BCCI Holdings (Luxembourg) S.A. (Petition of OAS)*, 73 F.3d 403 (D.C. Cir. 1996) (bank depositor was only a general creditor of the defendant bank; therefore it was the defendant’s property, not the claimant’s, that was forfeited).

<sup>82</sup> See *United States v. \$205,991.00 in United States Currency*, 1997 WL 669839 (S.D.N.Y. 1997) (bailee’s failure to identify bailor is grounds for dismissal of claim for failure to comply with Rule C(6)); *United States v. \$557,933.89 in U.S. Funds*, 1998 WL 817651 (E.D.N.Y. 1998) (no statutory standing under Rule C(6) where bailee failed to identify the bailor).

<sup>83</sup> See note 66, *supra*.

<sup>84</sup> See 21 U.S.C. § 853(n)(6)(A) & (B).

cases will apply to the parallel requirement in § 983(d)(2).<sup>85</sup> In fact, the Ninth Circuit has already observed that CAFRA has eliminated any distinction between the criminal and civil forfeiture statutes on this point.<sup>86</sup>

The courts interpreting the temporal requirement in criminal forfeiture cases have noted that it gives force and effect to the relation-back doctrine by precluding recovery by third parties who did not acquire any interest in the property until after the Government's interest vested.<sup>87</sup> Hence, only bona fide purchasers, who are covered by § 983(d)(3), can prevail in a forfeiture action involving property in which the claimant had no interest until after the crime giving rise to the forfeiture took place. This cures the problem created by the Supreme Court's decision in *92 Buena Vista*, and reestablishes the predominance of the relation back doctrine over the innocent owner defense as Congress originally intended.<sup>88</sup>

The criminal cases provide numerous examples of instances where a third-party claim failed because the claimant did not acquire his interest in the forfeited property until after the crime giving rise to the forfeiture took place. These include banks that did not exercise a right of set-off against a customer's account until the

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<sup>85</sup> See *United States v. Hooper*, 229 F.3d 818 (9<sup>th</sup> Cir. 2000) (Section 983(d) divides claimants into the same two categories as does the criminal forfeiture statute, § 853(n)(6); thus, under § 983(d), claimant who did not have an interest in the property at the time of the offense must be a bona fide purchaser).

<sup>86</sup> *Id.*; 229 F.3d at \_\_\_\_.

<sup>87</sup> *Id.*; 229 F.3d at \_\_\_\_ (the temporal requirement in § 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 §§ 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).

<sup>88</sup> See *United States v. Hooper*, 229 F.3d at \_\_\_\_ (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 that limits recovery to persons with pre-existing interests and to bona fide purchasers).

funds in the account were subject to forfeiture,<sup>89</sup> entities that did not exercise an option to buy property until it was subject to forfeiture,<sup>90</sup> and judgment creditors who did not file a lien on the property until after it was subject to forfeiture.<sup>91</sup>

Most recently, the temporal requirement has been invoked to dispose of third-party claims arising out of alleged marital interests in criminal proceeds. For example, in *United States v. Hooper*,<sup>92</sup> the defendant's wife claimed a community property interest in the proceeds the defendant had earned from selling drugs. The Ninth Circuit held that even if the claimant had a valid property interest under State law, her claim failed under federal law because a property interest in criminal proceeds can only come into existence after the crime giving rise to the forfeiture occurs, and thus is precluded by the temporal requirement.<sup>93</sup> Indeed,

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<sup>89</sup> See *United States v. BCCI Holdings (Luxembourg) S.A. (Petition of American Express Bank II)*, 961 F. Supp. 287 (D.D.C. 1997) (bank that did not exercise right of setoff against defendant's assets until after property was subject to forfeiture could not prevail under section 1963(l)(6)(A), regardless of when order of forfeiture was issued).

<sup>90</sup> See *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).

<sup>91</sup> See *United States v. McClung*, 6 F. Supp. 2d 548 (W.D. 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. Meister*, 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)).

<sup>92</sup> *Supra*, note 71.

<sup>93</sup> *United States v. Hooper*, 229 F.3d at \_\_\_\_ (to prevail under § 853(n)(6)(A), the claimant must have a pre-existing interest in the forfeited property; because proceeds do not exist before the commission of the underlying offense, § 853(n)(6)(A) can never be used to challenge the forfeiture of proceeds); see *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 (5<sup>th</sup> 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. Kennedy*, 201 F.3d 1324 (11<sup>th</sup> Cir. 2000) (wife does not have a superior interest under section 853(n)(6)(A) in property acquired as tenants by the entirety 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).

the panel noted the temporal requirement in the forfeiture statute meant that, in all likelihood, no person could ever assert an interest as a pre-existing owner in criminal proceeds.<sup>94</sup>

#### 4. *Alternative grounds for establishing innocence*

The next thing to notice about Section 983(d)(2) is that it is clearly disjunctive: a claimant can establish the innocent owner defense by establishing either that he did not know that his property was involved in criminal activity, *or* that he did all that reasonably could be expected under the circumstances to terminate such use of the property once he found out about it. This, of course, codifies the approach adopted by the majority of courts under the old law.<sup>95</sup>

#### 5. *Knowledge and willful blindness*

The knowledge prong of Section 983(d)(2)(A)(i) is the same as it was under the old innocent owner defenses; thus it is likely that the pre-CAFRA case law defining “knowledge” will apply to the new statute.

Under pre-CAFRA law, the courts were divided over whether “knowledge” meant actual knowledge or constructive knowledge;<sup>96</sup> by the time CAFRA was enacted, however, a large number of courts – including courts in the “actual knowledge” jurisdictions -- had held that knowledge includes the concept of

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<sup>94</sup> 229 F.3d at \_\_\_ (“It is true, as the government points out, that this interpretation of § 853(n)(6)(A) leads inevitably to the conclusion that § 853(n)(6)(A) is likely never to apply to proceeds of the crime. Section 853(n)(6)(A) is far better designed to deal with instrumentalities of the crime. If a husband, for example, uses the family car for drug trafficking, his spouse may qualify under § 853(n)(6)(A) by showing that she had an interest in that car that preceded the crime. Proceeds of crime, however, do not precede the crime.”). An exception to this rule is necessary, however, in cases involving stolen property, where the victim’s legal interest in the property did in fact “precede the crime,” and the victim never intended to transfer title to the property to the thief.

<sup>95</sup> See notes 19 through 24, *supra*, and accompanying text.

<sup>96</sup> See *United States v. Property Identified as 1813 15th Street, N.W.*, 956 F. Supp. 1029, 1035 (D.D.C. 1997) (noting that the circuits were split on whether “actual” or “constructive” knowledge test applies). Compare *United States v. Four Million, Two Hundred Fifty-Five Thousand*, 762 F.2d 895, 906 (11th Cir.1985) (holding that the innocent owner defense hinges upon the claimant's actual, not constructive, knowledge) with *One Parcel of Property, Located at 755 Forest Road*, 985 F.2d 70, 72 (2<sup>nd</sup> Cir. 1993) (“Where an owner has engaged in willful blindness as to activities occurring on her property, her ignorance will not entitle her to avoid forfeiture.”).

“willful blindness.”<sup>97</sup> So, although Section 983(d) does not use the term “willful blindness,” is it likely that the courts will, just as they did under pre-CAFRA law, find that a person who willfully blinds himself to the use of his property to commit a criminal offense is not an innocent owner.<sup>98</sup>

Courts have expressed the concept of willful blindness in different ways. In criminal cases, a person who willfully blinds himself to the facts has the same state of mind as a person with actual knowledge of those facts.<sup>99</sup> In a leading case, the Seventh Circuit stated that a person is willfully blind if he is aware of suspicious circumstances and takes affirmative steps to assure he does not acquire full knowledge.<sup>100</sup>

In civil forfeiture cases, the Eleventh Circuit adopted an objective due care standard of willful blindness based upon the all reasonable steps test set forth in

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<sup>97</sup> See *755 Forest Road, supra*; *United States v. Real Property 874 Gartel Drive*, 79 F.3d 918 (9th Cir. 1996) (claimant must prove lack of knowledge of the illegal transactions; willful blindness equates with “knowledge”); *United States v. 3814 Thurman Street*, 164 F.3d 1191 (9th Cir. 1999) (following *Gartel Drive*: owner who is willfully blind to false statements made on loan application is not an innocent owner under section 981(a)(1)(C) and (a)(2)); *United States v. \$1,646,000 in Cashiers Checks and Currency*, \_\_\_ F. Supp.2d \_\_\_, 2000 WL 1658278 (N.D. Cal. Nov. 2, 2000) (following *Gartel Drive*; willful blindness equates with knowledge); *United States v. 3775 Redcoat Way*, 98-00124 CV WBH (N.D. Ga.), aff’d without opinion, No. 99-12309 (11<sup>th</sup> Cir., April 10, 2000) (a claimant’s deliberate ignorance of, or “willful blindness” to, the source of monies alleged illegally obtained, is considered the equivalent of knowledge of the source of the monies); *United States v. One Parcel of Real Estate Located at 1948 Martin Luther King Drive*, 91 F. Supp. 2d 1228 (C.D. Ill. 2000) (family members who are willfully blind to drug dealers source of income cannot be innocent owners of property he titles in their names); *United States v. \$705,270.00 in U.S. Currency*, 820 F. Supp. 1398 (S.D. Fla. 1993) (deliberate ignorance is equated with knowledge of the illegal activity); see also *United States v. 1977 Porsche Carrera 911*, 748 F. Supp. 1180, 1185 (W.D. Tex. 1990) (even if claimant lacked actual knowledge, he was not an innocent owner under § 881(a)(4) if he was willfully blind). As noted in the text, Section 881(a)(4) was amended in 1988 to include an explicit reference to willful blindness.

<sup>98</sup> See Franze, *supra* note 20 at \_\_\_ & n. 108 (noting that “actual knowledge incorporates the concept of willful blindness,” and that under pre-CAFRA law, willful blindness applied to all forfeitures under section 881 even though only section 881(a)(4) (forfeiture of conveyances) made explicit reference to willful blindness in its innocent owner provision).

<sup>99</sup> *Id.* at n.106, citing *United States v. Jewell*, 532 F.2d 697, 700-03 (9th Cir. 1976).

<sup>100</sup> *United States v. Giovanetti*, 919 F.2d 1223 (7th Cir. 1990) (person is willfully blind if he is aware of suspicious circumstances and affirmatively avoids acquiring full or exact knowledge).

*Calero-Toledo*. Under this standard, a person would be deemed willfully blind if he failed to exercise due care to ensure that his property had not been used in illegal activity.<sup>101</sup> The Third Circuit, however, rejected the objective due care standard and adopted a subjective standard whereby a person is willfully blind if he is personally aware of a high probability of illegal use of the property and does not take affirmative steps to investigate.<sup>102</sup>

It is more difficult for the Government to rebut an innocent owner defense under a subjective standard than it is under an objective standard, because the former requires the Government to adduce circumstantial evidence of a claimant's knowledge of suspicious circumstances regarding the use of his property, whereas the objective standard would be satisfied by demonstrating what a reasonable person would have known. However, the Third Circuit's subjective standard is more favorable to the Government in some respects than the standards adopted by other circuits. For example, in contrast to the Seventh Circuit's rule, the Third Circuit places the burden on the person aware of the suspicious circumstances to take affirmative steps to investigate; a person who fails to do so is willfully blind. In the Seventh Circuit, a person has no affirmative duty to investigate; he is willfully blind only if he takes affirmative steps to avoid acquiring guilty knowledge.

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<sup>101</sup> See *United States v. One 1980 Bertram 58' Motor Yacht*, 876 F.2d 884 (11th Cir. 1989); see also *United States v. All Monies*, 754 F. Supp. 1467, 1478 (D. Haw. 1991) (claimant must prove that "he did not know of the illegal activity, did not willfully blind himself from the illegal activity, and did all that reasonably could be expected to prevent the illegal use" of his property).

<sup>102</sup> *United States v. One 1973 Rolls Royce*, 43 F.3d 794, 808 (3d Cir. 1994) (willful blindness involves a state of mind of much greater culpability than simple negligence and more akin to knowledge); see also *United States v. 1989 Jeep Wagoneer*, 976 F.3d 1172 (8th Cir. 1992) ("Willful blindness involves an owner who deliberately closes his eyes to what otherwise would have been obvious and whose acts of omissions show a conscious purpose to avoid knowing the truth. This standard is a way of inferring knowledge, whereas the *Calero-Toledo* standard is more nearly a negligence standard."); *United States v. \$1,646,000 in Cashiers Checks and Currency*, \_\_\_ F. Supp.2d \_\_\_, 2000 WL 1658278 (N.D. Cal. Nov. 2, 2000) (following *Rolls Royce*; "willful blindness results when one is aware of a high probability of a fact and consciously avoids seeking truth because he desires to remain ignorant"; it is more than mere negligence); *United States v. All Monies (\$477,048.62)*, 754 F. Supp. 1467, 1477 (D. Haw. 1991) (claimant who "sticks his head in the sand" is willfully blind); *United States v. 1977 Porsche Carrera 911*, 748 F. Supp. 1180, 1186-87 (W.D. Tex. 1990) (lawyer whose fee was paid with drug proceeds was "willfully blind" if he failed to take the basic investigatory steps necessary to determine that his fees were not being satisfied with a major instrumentality of the crime charged against his client).

Because the innocent owner statute contains no definition of willful blindness, it seems likely that this debate will continue as courts attempt to apply the "knowledge" prong of Section 983(d)(2)(A).

6. "All reasonable steps"

The second part of Section 983(d)(2)(A) replaces the old "consent" prong of the innocent owner defense with language that essentially codifies the *dicta* in the Supreme Court's decision in *Calero-Toledo*.<sup>103</sup> This is a welcome clarification of the law, but it is not altogether new.

Under pre-CAFRA law, most courts interpreted the consent prong of the innocent owner statute to mean that in order to prove "lack of consent," the owner had to show that she took all reasonable steps to prevent the illegal use of the property.<sup>104</sup> In the circuits that read the innocent owner provisions disjunctively, an owner who could make such a showing was considered innocent, even if she

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<sup>103</sup> 416 U.S. at 689. See note 12, *supra*, and accompanying text.

<sup>104</sup> See *United States v. One Parcel of Real Estate (1012 Germantown Road)*, 963 F.2d 1496 (11th Cir. 1992) (proof of lack of consent requires claimant to show that he "took all reasonable steps to prevent illegal use of his property"); *United States v. One Parcel ... 7079 Chilton County Road*, \_\_\_ F. Supp.2d \_\_\_, 2000 WL 1785026 (M.D. Ala. Nov. 27, 2000) (same; following *Germantown Road*); *United States v. Two Parcels (19 and 25 Castle Street)*, 31 F.3d 35, 40 (2d Cir. 1994) (parent of adult child consented to illegal use of his property when he did not take every reasonable step to prevent such use); *Yskamp v. DEA*, 163 F.3d 767 (3d Cir. 1998) (charter aircraft operator, and its insurance company, were not innocent owners where neither took reasonable steps to ensure that the aircraft was not used for an unlawful purpose); *United States v. 141<sup>st</sup> Street Corporation*, 911 F.2d 870, 879 (2<sup>nd</sup> Cir. 1990) (landlord must show he did all that reasonably could be expected to prevent the illegal activity once he learned of it; collecting cases); *United States v. One Parcel . . . 121 Allen Place*, 75 F.3d 118, 121 (2<sup>nd</sup> Cir. 1996) (same); *United States v. Property Identified as 1813 15th Street, N.W.*, 956 F. Supp. 1029 (D.D.C. 1997) (taking "some" steps to bar drug dealers from property not sufficient; landlady must take *all* reasonable steps, such as evicting tenants convicted of drug offenses); *United States v. 152 Char-Nor Manor Blvd.*, 922 F. Supp. 1064 (D. Md. 1996) (claimant who fails to take "affirmative steps to prevent the property's illegal use" cannot show lack of consent; where property was used for marijuana grow, claimant could have cut down the crop, forbidden boyfriend from using the property, or changed the locks on her house); *United States v. 5.382 Acres*, 871 F. Supp. 880, 884 (W.D. Va. 1994) ("Property owners are required to meet a significant burden in proving lack of consent for they must remain accountable for the use of their property: Unless an owner with knowledge can prove every action, reasonable under the circumstances, was taken to curtail drug-related activity, consent is inferred and the property is subject to forfeiture."); *United States v. One Parcel Property at Lot 22*, 1996 WL 695404 (D. Kan. 1996) (same).

knew that her property was being used for an unlawful purpose.<sup>105</sup> Section 983(d)(2)(A)(ii) adopts that concept: a person is an innocent owner, even if she knew of the illegal use of her property, if “upon learning of the conduct giving rise to the forfeiture, [she] did all that reasonably could be expected under the circumstances to terminate such use of the property.” 18 U.S.C. § 983(d)(2)(A)(ii).

Because the “all reasonable steps” test was drawn from *Calero-Toledo* and the cases that applied it to the consent prong of the pre-CAFRA innocent owner defenses, the pre-CAFRA case law will be directly applicable to Section 983(d)(2)(A)(ii). Note that under those cases, it was not sufficient for the claimant to show that she took just *some* reasonable steps; she was required to take “every action, reasonable under the circumstances,” to curtail the illegal use of her property.<sup>106</sup> In particular, courts held that it was not sufficient for a landlord, motel owner, or other person who leased his premises to third parties, to show that she had called the police when she learned that someone was committing a criminal offense on her premises. To the contrary, a landlord, motel owner, or other such person is required not only to call the police, but to institute procedures that are likely to be effective in preventing continued criminal activity. Such procedures might include installing locks and other security devices, restricting access to the property to registered motel guests or tenants, restricting access to non-public areas (such as the rear part of a motel site), and evicting persons who are convicted of a criminal offense.<sup>107</sup>

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<sup>105</sup> See note 23, *supra*.

<sup>106</sup> *United States v. 5.382 Acres*, *supra*, 871 F. Supp. at 884.

<sup>107</sup> See *United States v. Property Identified as 1813 15th Street, N.W.*, 956 F. Supp. 1029 (D.D.C. 1997) (landlady who called the police but did not evict the tenants or install locks and security devices, did not do all that reasonably could be expected); *United States v. Lot Numbered One (1) of the Lavaland Annex*, No. CIV 98-0295 LH/JHG (D.N.M. Feb. 22, 2000) (motel owners must take “all reasonable steps” to prevent the illegal use of his property; calling the police, by itself, is not sufficient; owner could have erected a barrier to prevent vehicles from gaining access to the rear of the motel property, hired a security guard, and restricted occupancy at the motel to actual customers).

In Section 983(d)(2)(B),<sup>108</sup> Congress attempted to flesh out this concept by providing an illustration of what an owner might do to satisfy the “all reasonable steps” test. Under that provision, the finder of fact is permitted<sup>109</sup> to find that the

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<sup>108</sup> Section 983(d)(2)(B) provides as follows:

“(B)(i) For the purposes of this paragraph, ways in which a person may show that such person did all that reasonably could be expected may include demonstrating that such person, to the extent permitted by law—

“(I) gave timely notice to an appropriate law enforcement agency of information that led the person to know the conduct giving rise to a forfeiture would occur or has occurred; and

“(II) in a timely fashion revoked or made a good faith attempt to revoke permission for those engaging in such conduct to use the property or took reasonable actions in consultation with a law enforcement agency to discourage or prevent the illegal use of the property.

“(ii) A person is not required by this subparagraph to take steps that the person reasonably believes would be likely to subject any person (other than the person whose conduct gave rise to the forfeiture) to physical danger.”

<sup>109</sup> Reliance on the illustration is clearly permissive, not mandatory. The language in the statute, as enacted, contrasts with an earlier version of the same provision, which created a “rebuttable presumption” that a person who took the steps set forth in the statute was an innocent owner. That section provided as follows:

“There is a rebuttable presumption that a property owner took all the steps that a reasonable person would take if the property owner-

“(A) gave timely notice to an appropriate law enforcement agency of information that led to the claimant to know the conduct giving rise to a forfeiture would occur or has occurred; and

“(B) in a timely fashion, revoked permission for those engaging in such conduct to use the property or took reasonable steps in consultation with a law enforcement agency to discourage or prevent the illegal use of the property.

“The person is not required to take extraordinary steps that the person reasonably believes would be likely to subject the person to physical danger.”

See 1997 House Report at 4; DOJ Extract at 221; see *id.* at 31; DOJ Extract at 245 (“The rebuttable presumption signifies the Committee’s belief that-absent unusual circumstances-an owner has taken all steps that a reasonable person would take if he has met the terms of the presumption.”).

person satisfied the requirements of Section 983(d)(2)(A)(ii) if she 1) called the police; *and* 2) in a timely fashion, revoked (or made a good faith attempt to revoke) permission for the wrongdoer to use the property, *or* took other reasonable actions to discourage or prevent the illegal use.

This statutory provision is entirely consistent with the pre-CAFRA case law holding that it is *not* sufficient for a person merely to alert the police to the occurrence of some unlawful activity on her premises.<sup>110</sup> Because Section 983(d)(2)(B) uses the conjunction “and” between clauses (i)(I) and (II), it is clear that in addition to “calling the cops,” the property owner must evict or attempt to evict the non-law abiding tenants or guests (or deny permission for the non-law abiding boyfriend or family member to continue to use the property),<sup>111</sup> or must take “other reasonable actions,” such as changing or installing locks and other security devices, restricting access to the property, and so forth.

Moreover, such actions must be “timely” and “in good faith.” A drug dealer’s girlfriend cannot avail herself of the innocent owner defense under Section 983(d)(2) by showing that she “called the cops” after law enforcement was already aware of the drug dealer’s activities. Nor would it be sufficient to revoke permission for the drug dealer to use her car, house or other property after the crime was complete. Finally, it would not be sufficient for the claimant simply to state that she told the wrongdoer to stop whatever it was he was doing. The requirement that the attempt to revoke permission be made in “good faith” means that the property owner must do all that a person in her situation could have done

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The decision to drop the rebuttable presumption in favor of language stating that the ways in which a person could satisfy the “all reasonable steps” test *may include* the two-part test in Section 983(d)(2)(B) signifies that whether a person took all reasonable steps remains a question for the finder of fact, based on all of the attendant circumstances of the case.

<sup>110</sup> See Note 107, *supra*. Similarly, if the claimant is advised by the police that the illegal activity is taking place, the claimant must take affirmative steps to stop the illegal activity, and may not rely on the notion that the police are aware of the wrongdoing and that therefore the matter is out of the claimant’s hands. See *United States v. One Parcel ... 7079 Chilton County Road*, \_\_\_ F. Supp.2d \_\_\_, 2000 WL 1785026 (M.D. Ala. Nov. 27, 2000) (claimant who takes no steps to stop family members from engaging in drug sales after being apprized of situation by police is not an innocent owner).

<sup>111</sup> *152 Char-Nor Manor Blvd.*, *supra* (claimant could have forbidden her boyfriend from using her property for a marijuana grow operation); *19 and 25 Castle Street*, *supra* (parents of adult children could have prevented drug sales from premises); *1813 15<sup>th</sup> Street*, *supra* (landlady could have evicted drug-dealing tenants).

to prevent the illegal use of the property. Whether the claimant did enough will, of course, be a matter for the finder of fact to decide.

The last sentence in Section 983(d)(2)(B)(ii) provides that a property owner is not required to take steps that the person “reasonably believes” would expose the property owner (or someone else) to “physical danger.” This, of course, is merely a restatement of the general requirement in Section 983(a)(2)(A)(ii) that the property owner do “all that reasonably could be expected under the circumstances” to prevent the illegal use of her property. No one could be reasonably expected to tell a Colombian drug lord holding an automatic weapon that he could not use his car, if it appeared that the drug lord was prepared to use force to have his way.<sup>112</sup> But the standard is nevertheless an objective one: the belief that physical danger must be reasonable from the point of view of the finder of fact, regardless of what the property owner subjectively believed to be a risk of real danger.

### **C. Persons with “after-acquired” interests**

#### *1. Bona fide purchasers*

Section 983(d)(3) deals with claimants whose alleged interest in the property “was acquired after the conduct giving rise to the forfeiture has taken place.” As stated earlier, having the innocent owner defense for civil forfeiture specifically address “after-acquired” interests represents a major change in the law, and a major improvement for law enforcement.

As discussed *supra*, the Supreme Court’s decision in *United States v. A Parcel of Land (92 Buena Vista)*<sup>113</sup> allowed criminals to insulate their property from civil forfeiture simply by transferring it to a minor child, girlfriend, or other innocent owner. That worked because, unlike the provision protecting third-party rights in criminal forfeiture cases,<sup>114</sup> the civil innocent owner statutes protected any “owner”

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<sup>112</sup> See *United States v. One Parcel ... 7079 Chilton County Road*, \_\_\_ F. Supp.2d \_\_\_, 2000 WL 1785026 (M.D. Ala. Nov. 27, 2000) (whether claimant has done “everything that he could reasonably be expected to do” must be viewed in light of claimant’s circumstances, but claimant who takes no steps to stop family members from engaging in drug sales after being apprized of situation by police is not an innocent owner).

<sup>113</sup> See note 29, *supra*, and accompanying text.

<sup>114</sup> 21 U.S.C. § 853(n)(6)(B).

and were not limited to “bona fide purchasers for value.” Thus, an innocent donee could file a successful claim.

Moreover, as interpreted by the Third Circuit in the *Rolls Royce* case, the state of mind of the claimant was evaluated as of the time the crime occurred, not the time the claimant became the owner of the property. Thus, all post-illegal act transferees in that circuit were considered innocent owners *per se*.<sup>115</sup> Elsewhere, of course, the courts held that claimant’s state of mind must be determined as of the time the property was transferred to the claimant.<sup>116</sup>

Section 983(d)(3)(A) redresses both of these problems by adopting the language of the bona fide purchaser provision in the criminal forfeiture statute and making it applicable to after-acquired interests in civil forfeiture cases. Under Section 983(d)(3)(A), a post-illegal act transferee is an innocent owner if, *at the time that person acquired an interest in the property*, the person –

- (i) was a bona fide purchaser or seller for value (including a purchaser or seller of goods or services for value); and
- (ii) did not know and was reasonably without cause to believe that the property was subject to forfeiture.

Notice first that the state of mind of the innocent owner is evaluated *at the time that person acquired an interest in the property*. This disposes of the *Rolls Royce* problem, and follows the majority rule on this issue.

Second, because the bona fide purchaser requirement is virtually identical to the requirement in the criminal statute, § 853(n)(6)(B),<sup>117</sup> the case law interpreting the BFP requirement in criminal forfeiture cases will be applicable to the new statute. In criminal forfeiture cases, the courts have interpreted the bona

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<sup>115</sup> See note 40, *supra*, and accompanying text.

<sup>116</sup> See notes 38 and 39, *supra*.

<sup>117</sup> Section 853(n)(6)(B) provides that a third party may challenge a criminal forfeiture order if –

“(B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section.”

fide purchaser provision to have the meaning it would have in commercial law.<sup>118</sup> That is, to be a “purchaser,” the claimant must give something of value in exchange for the property interest.<sup>119</sup> Obviously, this excludes donees who receive the property without giving anything in return,<sup>120</sup> and spouses who obtain an interest in the property through the operation of marital property law or a divorce or separation agreement.<sup>121</sup> It also excludes heirs and others who inherit

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<sup>118</sup> See 1997 House Report at 32, DOJ Extract at 245 (“the term ‘bona fide purchaser’ is derived from commercial law. It includes any person who gives money, goods or services in exchange for the property subject to forfeiture, but it does not include general creditors who acquire only a debt.”); *United States v. BCCI Holdings (In re Petitions of Trade Creditors)*, 833 F. Supp. 22, 28 (D.D.C.1993), aff'd, 48 F.3d 551 (D.C. Cir. 1995) (the bona fide purchaser provision “does not apply to all arms' lengths transactions, but only to those transactions involving the purchase of tangible property”). See generally Cassella, “Third Party Rights in Criminal Forfeiture Cases,” *Criminal Law Bulletin* (November/December 1996), Vol. 32, No. 6 at 499, 528-30.

<sup>119</sup> See 1997 House Report, *supra*, DOJ Extract at 245 (“a ‘bona fide purchaser’ must give something of value in exchange for the property”); *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. Hentz*, 1996 WL 355327 (E.D. Pa. 1996) (defendant’s mother, who gave no value for property held in her name, and who understood the currency reporting requirements that defendant violated, was not a bona fide purchaser); *United States v. BCCI Holdings (Luxembourg) S.A. (Petition of American Express Bank II)*, 961 F. Supp. 287 (D.D.C. 1997) (bank’s exercise of a right of setoff 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. BCCI Holdings (Luxembourg) S.A. (Petitions of Trade Creditors)*, 833 F. Supp. 22, 28 (D.D.C. 1993) (creditor is not a “purchaser” because creditor gives nothing in exchange for a specific interest in tangible property).

<sup>120</sup> See *Infelise, supra*.

<sup>121</sup> See *United States v. Brooks*, 112 F. Supp.2d 1035 (D. Haw. 2000) (wife cannot assert a BFP interest in husband’s criminal proceeds on the ground that she contributed uncompensated services that increased the value of the marital estate); *Sokolow, supra*.

the property from a decedent, and creditors,<sup>122</sup> including judgment creditors who obtain an interest in the property by filing a lien against it,<sup>123</sup> or banks that obtain an interest in a depositor's assets by exercising a statutory right to take a set-off against the customer's account.<sup>124</sup>

In the case of judgment creditors, banks taking set-offs, and others whose claim against the defendant property is based on an antecedent debt, it makes no difference how the debt arose, or that it arose from an arms-length business transaction. Whatever the nature of that business transaction may have been, all the creditor received in exchange for whatever he gave the debtor was a debt – a cause of action to sue for breach of contract; he did not receive any interest in the specific property subject to forfeiture. That interest, if it exists at all, arose later when the creditor obtained a judgment lien or exercised a right of set-off against the particular asset that is now subject to forfeiture. But placing a judgment lien on a piece of property, or taking a set-off against a bank account, is not a new purchase; and a person who acquires his interest in property in that fashion is therefore not a bona fide purchaser for value under Section 983(d)(3)(A).<sup>125</sup>

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<sup>122</sup> Section 983(d)(6)(B) specifically excludes creditors from the definition of owner. This codifies the pre-CAFRA case law holding that creditors are not bona fide purchasers. See *United States v. Campos*, 859 F.2d 1233, 1238 (6th Cir. 1988) (trade creditor is not a bona fide purchaser); *United States v. BCCI Holdings (Luxembourg) S.A. (Petition of American Express Bank II)*, 961 F. Supp. 287 (D.D.C. 1997) (same); *United States v. BCCI Holdings (Luxembourg) S.A. (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. Ribadeneira*, 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. 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).

<sup>123</sup> See *BCCI (Final Order of Forfeiture and Disbursement)*, *supra*.

<sup>124</sup> See *BCCI (American Express Bank II)*, *supra*; *BCCI (Petition of Capital Bank)*, *supra*.

<sup>125</sup> See *BCCI (American Express Bank II)*, 961 F. Supp. at 295 (bank's exercise of set-off against defendant's account not a "purchase" even though bank was attempting to satisfy debt incurred when it sold property to defendant as part of a foreign exchange transaction); *BCCI (Final Order of Forfeiture and Disbursement)*, 69 F. Supp. 2d at 62 ("A creditor who attempts to satisfy the debt by obtaining a judgment lien, or exercising a right of set-off, against specific property is not a bona fide purchaser of that property because he has given nothing of value in exchange for the property interest. This is so irrespective of how the

The third thing to notice about Section 983(d)(3)(A) is that the bona fide purchaser requirement has two parts. Not only must the claimant be a “purchaser” in the commercial sense, but he must also show that at the time of the purchase he “did not know and was reasonably without cause to believe that the property was subject to forfeiture.” This provision is also taken directly from the criminal forfeiture statute.<sup>126</sup>

In criminal forfeiture cases, a third party who acquires an interest in the forfeited property after the act giving rise to the forfeiture must show that he had no reason to know that the property was involved in a crime committed by another person. Thus, if the third party knows, at the time he acquires his interest in the property, that the previous owner of the property used it to commit a crime, or was *accused* of having used the property to commit a crime, the third party cannot challenge the forfeiture as a bona fide purchaser.<sup>127</sup> It is immaterial whether the third party became aware of the taint on the property from first-hand knowledge, from reports in the media, or because the property was named in an indictment, *lis pendens*, restraining order, or some other action by the government. If the information available to the third party would have put a reasonable person on notice that the property was subject to forfeiture, he cannot claim to be a bona fide purchaser.<sup>128</sup>

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antecedent debt came into existence”); *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).

<sup>126</sup> See 21 U.S.C. § 853(n)(6)(B), note 117, *supra*.

<sup>127</sup> See *United States v. Sokolow*, 1996 WL 32113 (E.D. Pa. 1996) (daughter is not a bona fide purchaser because she received property as a gift knowing father had been indicted); *United States v. Hentz*, 1996 WL 355327 (E.D. Pa. 1996) (defendant’s mother, who understood the currency reporting requirements that defendant violated, was not a bona fide purchaser).

<sup>128</sup> See *In Re: Moffitt, Zwerling & Kemler*, 846 F. Supp. 463 (E.D. Va. 1994) (*Moffitt I*) (claim that third party was without cause to believe property was subject to forfeiture must be “objectively reasonable”), *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. Register*, 182 F.3d 820, \_\_\_ (11th Cir. 1999) (*dicta*) (if property is named in an indictment as subject to forfeiture, person aware of the indictment cannot be a bona fide purchaser); *id.*, 182 F.3d at \_\_\_ (Government may use a *lis pendens* to preserve its interest in property subject to forfeiture pending trial, because *lis pendens* puts potential purchaser on notice that the property is subject to forfeiture, citing *United States v. James Daniel Good Real Property*, 510 U.S. 43, 58 (1993); *but see United States v. Real Property at 2659 Roundhill*

For example, in the case involving the Bank of Credit and Commerce International (BCCI),<sup>129</sup> a court held that a U.S. bank that continued to do business with BCCI, and thereby acquired an interest in BCCI's property, after the widespread publicity regarding BCCI's fraudulent banking practices came to light in newspapers in the United States, was not a bona fide purchaser of the property subsequently forfeited by BCCI in a criminal case.<sup>130</sup>

Similarly, a defense attorney cannot assert an innocent owner defense under Section 983(d)(3)(A) to the forfeiture of the fee paid to him by his client, if the attorney was aware at the time he accepted his fee that the client was accused of a crime that generated a sum of money as proceeds, and that those proceeds were the likely source of the fee.<sup>131</sup>

The same rule will apply in civil forfeiture cases under Section 983(d)(3)(A).<sup>132</sup> The only difference is that because civil forfeitures are broader in scope than criminal forfeitures (they are not limited to the defendant's property), what the third party has to show to establish an innocent owner defense will be correspondingly broader as well. Whereas, in a criminal case, it is arguable that the third party only has to show that he had no reason to believe that the previous owner (the criminal defendant) used the property to commit an offense, in a civil case, the claimant must show that he had no reason to believe that *anyone* had used the property to commit an offense. Again, that is because, in a civil forfeiture case, the property can be subject to forfeiture on account of the acts of any person

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*Drive*, 194 F.3d 1020 (9th Cir. 1999) (purchaser who takes property knowing it is subject to *lis pendens* may still qualify as innocent owner; *lis pendens* only puts purchaser on notice of pending lawsuit; it does not put purchaser on notice that property was used to commit a crime).

<sup>129</sup> *United States v. BCCI Holdings (Luxembourg) S.A. (Petition of American Express Bank II)*, 961 F. Supp. 287 (D.D.C. 1997).

<sup>130</sup> *Id.*, 961 F. Supp. at 300 (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).

<sup>131</sup> See *Register, supra*, 182 F.3d at \_\_\_; *Moffitt, supra*, 83 F.3d at \_\_\_; *United States v. McCorkle*, 2000 WL 133759 (M.D. Fla. 2000) (defense attorney is not a bona fide purchaser of his fee if he is aware that the funds are subject to forfeiture from the terms of an indictment or from his objective assessment of the law and the facts of the case.); *United States v. Matta-Timmins*, 81 F. Supp. 2d 193 (D. Mass. 2000) (*dicta*) (noting that if defendant pleads guilty, fee that she paid to defense counsel may be forfeited).

<sup>132</sup> See cases cited at note 39, *supra*.

who used the property to commit a crime; the act giving rise to forfeiture need not have been committed by the prior owner.

So, if a person buys a car from the sister of a notorious drug dealer, knowing at the time of the purchase that the drug dealer used the car in his drug operation, the buyer is not a bona fide purchaser under Section 983(d)(3)(A). In other words, it would be no defense for the buyer to say that the sister – the person who sold him the car – was not, to his knowledge, involved in any criminal act.

## *2. Bona fide sellers*

One peculiarity in Section 983(d)(3) is that it defines a bona fide purchaser to include a “purchaser or seller for value (including a purchaser or seller of goods or services for value).” What is the difference between a bona fide *purchaser* for value, and a bona fide *seller* for value? There is none.

For purposes of the forfeiture law, a person who pays money in exchange for goods and services can be a bona fide purchaser, but so can a vendor who *sells* goods and services in exchange for money. In the latter case, the vendor is a bona fide purchaser of the money that he received in exchange for his goods or services. In other words, if Seller sells Buyer a truck for \$10,000 in cash, and the Government tries to forfeit either the truck or the cash, Buyer can claim to be the bona fide purchaser of the truck, and Seller can claim to be the bona fide purchaser of the cash. Because each gave value in exchange for the property he received, each is protected from forfeiture, as long as he had no reason to believe that the property he acquired was subject to forfeiture.

Thus, it was not necessary to make explicit reference to “sellers” in the statute to protect innocent vendors; a simple protection for “bona fide purchasers” would have been sufficient. The reference to sellers adds nothing to the scope of the innocent owner defense. The reason the explicit reference was included in the statute was that the criminal defense lawyers wanted it made clear that they could assert a defense under Section 983(d)(3)(A) if the Government tried to forfeit their attorneys fees. Like any other vendor, a defense attorney who sells his services in exchange for a fee is considered a purchaser of the fee. Thus, defense attorneys would have been able to assert a “bona fide purchaser” defense under Section 983(d)(3)(A) whether the statute referred to “sellers” or not.

The problem defense attorneys have always had in defending against attorney-fee forfeitures in criminal forfeiture cases was not that there was a

distinction between “purchasers” and “sellers;” it was that an attorney for a criminal defendant typically is well aware that the fee he receives from his client is derived from the crime with which his client has been accused. Thus, the defense attorney cannot prove that he “did not know and was reasonably without cause to believe that the property was subject to forfeiture.”<sup>133</sup> With the inclusion of that requirement in Section 983(d)(3)(A), it will be just as difficult for an attorney to establish an innocent owner defense under CAFRA as it was under the old law.

### 3. *Black market currency cases*

As mentioned earlier, the requirement that the claimant be without any reason to believe that the property was subject to forfeiture was viewed by the drafters of the legislation as essential to the Government’s effort to combat the selling of drug proceeds on the black market in South America.<sup>134</sup> In black market cases, drug dealers sell their cash proceeds to money brokers who, in turn, sell it to South American importers or wealthy persons who need to convert local currency to U.S. dollars. In such cases, law enforcement officials typically trace the drug money into the bank accounts of these black market customers, who claim that they are only engaged in the exchange of local currency for U.S. dollars, and thus do not know or care where the dollars come from.<sup>135</sup>

In fact, it is common knowledge throughout much of Central and South America and the Caribbean that narco-trafficking is the primary – if indeed not the only – source of the cheap U.S. dollars (*i.e.*, dollars available below the official

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<sup>133</sup> See cases cited at note 131, *supra*; *cf. Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 109 S. Ct. 2646 (1989) (civil forfeiture of attorney’s fees).

<sup>134</sup> See note 52, *supra*, and accompanying text.

<sup>135</sup> *Id.* The process by which drug dollars are sold to importers and others through the Black Market Peso Exchange is described in detail in the testimony of Assistant Attorney General James Robinson before the House Subcommittee on Crime, February 10, 2000, text available at <http://www.house.gov/judiciary/robi0210.htm>. See also Cassella, “Money Laundering Through the BMPE,” *Asset Forfeiture News*, Vol.12, No. 2, March/April 2000 at 1; “FinCEN Advisory: Colombia Black Market Peso Exchange,” November, 1997; *United States v. \$57,443.00*, 42 F. Supp. 2d 1293 (S.D. Fla. 1999) (totality of the circumstances establishes that currency delivered by a known money launderer to a third party in a Black Market Peso Exchange transaction was drug proceeds, but the third party is entitled to assert an innocent owner defense at trial).

exchange rate) that are routinely purchased on the black market.<sup>136</sup> Thus, black market customers are on notice that the money they are receiving is likely to be subject to forfeiture. Under the second part of Section 983(d)(3)(A), such a person would not be considered an innocent owner, even if he could show that he gave goods or local currency in exchange for the U.S. dollars, unless he also could show that in light of the circumstances of the transaction he did all that a person would be expected to do to ensure that he was not acquiring the proceeds of drug trafficking.<sup>137</sup> The relevant circumstances would include the claimant's knowledge of the source of U.S. dollars on the local black market, the identity and background of the person from whom he obtained the dollars, and the details of the transaction, including the degree to which the dollars were available at a price below the official exchange rate, whether such transactions are legal under local law, whether the dollars were obtained in cash or in bundles of low-value personal checks or travelers checks, or whether the dollars were wired to the claimant from an unknown source.

For example, if instead of going to a bank to obtain U.S. dollars at the official exchange rate, a South American businessman goes to a money broker and buys dollars at a cheaper rate, and obtains the money in bundles of cash, or in sequentially numbered travelers checks, or in groups of small-denomination third party checks, he would be on notice that the money is likely to be subject to forfeiture, and would be able to defeat a civil forfeiture action only by showing that in light of these circumstances he did everything a reasonable person in his situation would have done to assure himself that the money broker was not selling him drug money.

South American importers who purchase dollars on the black market often do so because they need the dollars to pay for the imported goods. Frequently, the importer gives local currency to the money broker and directs the money broker to pay the exporter directly. Thus, in many cases, law enforcement agents trace the drug proceeds not to the importer's bank account, but to an exporter in

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<sup>136</sup> See *United States v. Basler-Turbo-67*, 906 F. Supp. 1332 (D. Ariz. 1995) (person who knows property was purchased with funds traceable to the black market in Colombia is not an innocent owner; that black market funds come from drug dealing is common knowledge in that country).

<sup>137</sup> See *United States v. All Monies*, 754 F. Supp. 1467, 1478 (D. Haw. 1991) (Peruvian money exchanger, who deposited drug dollars that he purchased on the black market into a U.S. bank account, had to prove "that he did not know of the illegal activity, did not willfully blind himself to the illegal activity, and did all that reasonably could be expected to prevent the illegal use" of his property); 1996 Hearing at 65, 226; DOJ Extract at 35,116.

the United States, Europe or Asia. In such cases, the *exporter* receives payment on his invoice not from his customer, but from a third party with whom the exporter has had no prior dealing. In such cases, any exporter who is at all familiar with nature of the black market would be on notice that the payment may consist of funds subject to forfeiture. Thus, if the Government brings a civil forfeiture action against the funds in the exporter's account, the exporter would be able to assert an innocent owner defense under Section 983(d)(3)(A) only if he took all reasonable steps under the circumstances to determine the source of the third-party payment. In fact, courts might consider a bright-line rule for such cases, holding that no one engaged in international trade with the drug producing countries in South America be considered an innocent owner of drug proceeds that were received from an unknown third-party payor.

#### *4. Exception to the BFP requirement for residences*

There is one substantive difference between the purchaser requirement in Section 983(d)(3) and its criminal forfeiture counterpart. The criminal statute, § 853(n)(6)(B), contains no exceptions: persons who are bona fide purchasers are able to file claims; persons who acquire the property by other means are not. The civil statute, however, contains a narrow exception for property used as a primary residence.

In the original version of the Civil Asset Forfeiture Reform Act (CAFRA) that he introduced in 1999, Rep. Henry Hyde proposed to exempt all innocent heirs of a deceased criminal from the "purchaser" requirement. The notion was that it was "fundamentally unfair" to place an innocent heir in the position of having to rebut the Government's evidence that the property was subject to forfeiture on account of past acts committed by the decedent.<sup>138</sup> Thus, the bill passed by the House in 1999 provided that an innocent owner included both bona fide purchasers *and* "person[s] who acquired an interest in property through probate or inheritance."<sup>139</sup>

In his testimony in opposition to the House-passed version of the bill, Deputy Attorney General Eric Holder told the Senate Judiciary Committee that the exception to the purchaser requirement for innocent heirs meant that if a Colombian drug trafficker were killed in a shoot-out with the police, his heirs would

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<sup>138</sup> 1999 House Report at 16; DOJ Extract at 280.

<sup>139</sup> H.R.1658, 106<sup>th</sup> Congress, § 2; 145 Cong. Rec. H4877 (June 24, 1999), 1999 WL 419758 (1999); DOJ Extract at 346.

be entitled to keep all of his drug proceeds.<sup>140</sup> The Justice Department thus offered a counter-proposal, identical to its 1996 and 1997 proposals, that contained no exception to the purchaser requirement.<sup>141</sup>

Ultimately, the Senate hit upon a compromise based on a language from a compromise bill that Mr. Hyde had introduced in 1997 and later abandoned.<sup>142</sup> That provision created an exception to the “purchaser” requirement that was limited to one narrow situation: where “the property is real property, the owner is the spouse or minor child of the person who committed the offense giving rise to forfeiture, and the owner uses the property as a primary residence.”<sup>143</sup> In such cases, the compromise language provided that “a valid innocent owner claim shall not be denied because the owner acquired the interest through the dissolution of marriage or by operation of law (in the case of a spouse) or by inheritance upon the death of a parent (in the case of a minor child).”<sup>144</sup> The 1997 House Committee Report emphasized, however, that “to be considered an innocent owner, the spouse or minor child must have been reasonably without cause to believe that the property was subject to forfeiture at the time of the acquisition of his interest in the property.”<sup>145</sup>

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<sup>140</sup> Testimony of Eric Holder, Senate Subcommittee on Criminal Justice Oversight, 1999 WL 20010421 (July 21, 1999) (“1999 Hearing”), DOJ Extract at 354 (“Under the House bill, if a criminal dies, his fortune passes directly to his heirs without fear of forfeiture, even if the money consists entirely of criminal proceeds. A major drug dealer or pornographer could amass a fortune over a lifetime of crime, and pass it on to his heirs without the government’s being able to step in and confiscate the money. The same is true if even the criminal proceeds were taken by fraud from innocent victims, thereby granting the fraud artist’s heirs priority over the victims of his crimes. The heirs of a drug lord killed in a shoot out with the police or with a rival drug gang should not be free to inherit his drug fortune. Over the past decade, we have recovered over \$70 million from the estate of the notorious drug lord Jose Gonzalo Rodriguez Gacha after he was killed by the Colombian police. Under H.R.1658, Gacha’s heirs would have been entitled to all his drug money.”).

<sup>141</sup> See 1999 Hearing, *supra* (material submitted by Dep. AG Holder); DOJ Extract at 358.

<sup>142</sup> See 1997 House Report at 4; DOJ Extract at 221.

<sup>143</sup> *Id.* at 32, DOJ Extract at 245.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

The version of the compromise adopted by the Senate in 2000, and ultimately enacted into law, is codified in Section 983(d)(3)(B). Though much more complicated in its structure, it says essentially the same thing as the 1997 compromise discussed above. It says that the claim of a person who would otherwise have a “valid claim” under paragraph (3)(A) – in other words, a person who would prevail as a bona fide purchaser – cannot be denied on the ground that the person gave nothing of value in exchange for the property, if certain criteria are established:

- (i) the property is the primary residence of the claimant;
- (ii) depriving the claimant of the property would deprive the claimant of the means to maintain reasonable shelter in the community for the claimant and all dependents residing with the claimant;
- (iii) the property is not, and is not traceable to, the proceeds of any criminal offense; and
- (iv) the claimant acquired his or her interest in the property through marriage, divorce, or legal separation, or the claimant was the spouse or legal dependent of a person whose death resulted in the transfer of the property to the claimant through inheritance or probate.

Again, the purpose of this provision is to relieve the claimant of having to satisfy the purchaser requirement: if a person otherwise satisfies all of the criteria set forth in the exception, he may be considered an innocent owner of after-acquired property even though he did not give anything of value in exchange for the property. As mentioned, heirs and spouses generally cannot satisfy the bona fide purchaser requirement because they give nothing of value in exchange for the property. Thus, the provision was intended to expand the scope of the innocent owner defense for the benefit of heirs and spouses where their primary residence is subject to forfeiture. Of course, as discussed *infra*, eliminating the purchaser requirement in such cases does not relieve the claimant of the burden of having to show, pursuant to Section 983(d)(3)(A)(ii), that he did not know, and was reasonably without cause to believe, that the property was subject to forfeiture.

There are lots of things to notice about the exception to the purchaser requirement in Section 983(d)(3)(B). First, these requirements are conjunctive: the claimant must establish all of these points.

Second, this applies only to “the primary residence of the claimant.” There is no exception to the purchaser requirement for vacation properties, second homes, land held for investment, or any other kind of real or personal property.

Third, the forfeiture would have to result in the claimants’ having no other place to live. Clearly, this is designed to avoid making the drug dealer’s wife and children homeless. If the heirs of the deceased drug lord have alternative means of “maintaining reasonable shelter in the community,” the exception to the purchaser requirement does not apply.

Fourth, the exception only applies if the residence is forfeitable because it was property used to facilitate the crime. If the theory of forfeiture is that the residence is property traceable to the *proceeds* of the crime, the exception does not apply. Forfeiture of criminal proceeds, in other words, is barred only if the claimant is a bona fide purchaser, even if the proceeds have been invested in a primary residence.

Fifth, the exception only applies to transfers that occur as a result of the death of the property owner or the transfer of property rights as a result of marriage, separation, or divorce. So if the drug dealer dies and leaves the primary residence to his innocent wife and children, and the other criteria are satisfied, the heirs can assert an innocent owner defense. Or if a woman marries a drug dealer and thereby acquires an interest in his primary residence as community property or otherwise under State law, and the other criteria are satisfied, she can assert the defense. And if the drug dealer divorces his wife, and gives her the primary residence as part of the divorce or separation, and the other criteria are satisfied, she can assert the defense. But there is no exception to the purchaser requirement for property transferred as a gift, or placed in trust, or otherwise conveyed to a family member.

Moreover, in all of the cases where the exception does apply, the heir or spouse still has to be “innocent” at the time of the transfer. That is, because the exception in paragraph (3)(B) is only an exception to the “purchaser” requirement in paragraph (3)(A)(i), the claimant still has to be “reasonably without cause to believe that the property was subject to forfeiture . . . at the time that [she] acquired the interest in the property,” as provided in paragraph (3)(A)(ii). Thus, the exception does not permit a criminal to insulate his primary residence from forfeiture by transferring it to his wife as part of a separation agreement, if she had cause to believe, *at the time of the transfer*, that the property was subject to forfeiture. Similarly, the heirs of a drug dealer do not get to keep the residence if,

at the time of his death, the heirs knew the decedent was a drug dealer who used the house to facilitate his crimes.<sup>146</sup>

Finally, even if all of these conditions are satisfied – *e.g.*, there is an innocent spouse who gets the primary residence in a divorce without having any idea that it was used in the past to facilitate drug trafficking – the court still must limit the claimant’s recovery “*to the value necessary to maintain reasonable shelter in the community for such claimant and all dependents residing with the claimant.*”<sup>147</sup> This was one last provision added by the congressional staff to make sure that no one – however innocent – was able to inherit an opulent estate that had been used to facilitate drug trafficking. In that instance, the court is apparently required to liquidate the property and give the claimant only so much as she needs to find another place in the community that affords “reasonable shelter.” The Government recovers the balance.

With all of the requirements and limitations in the statute, it is clear that Section 983(d)(3)(B)’s exception to the purchaser requirement will apply in only the narrowest and rarest circumstances. Nevertheless, the Government can avoid all of the litigation Section 983(d)(3)(B) is likely to foster simply by doing the forfeiture of a primary residence criminally whenever it is possible to do so. Nothing in Section 983(d)(3)(B), in other words, creates any exception to the purchaser requirement in Section 853(n)(6)(B).<sup>148</sup>

#### **D. Severing the Property**

Finally, Section 983(d)(5) contains a provision describing how the court might resolve issues that arise when it finds that the property is forfeitable in part to the United States, but must be returned in part to an innocent owner. This issue has caused no small amount of confusion in the case law.

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<sup>146</sup> See *United States v. Real Property ... 221 Dana Ave.*, 81 F. Supp. 2d 182, 189 (D. Mass. 2000) (heir who knew property was used for drug trafficking at the time she acquired her interest is not an innocent owner).

<sup>147</sup> 18 U.S.C. § 983(d)(3)(B).

<sup>148</sup> *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).

In the typical case, the court (or jury) might find that a drug dealer used his residence or farm to store, produce or distribute cocaine, marijuana or another controlled substance, but that the drug dealer's spouse did not know about, or took all reasonable steps to prevent, the illegal use of the property. In that case, while the property would, in general, be subject to forfeiture in its entirety on account of the drug dealer's illegal acts, see 21 U.S.C. § 881(a)(7),<sup>149</sup> the court must exempt the property from forfeiture to the extent of the interest of the innocent spouse.

This problem arises with even more frequency in criminal forfeiture cases where only the defendant's interest in the property is subject to forfeiture. Interests held by spouses or other third parties are automatically exempted from forfeiture, even if the third party was fully aware of the criminal acts and the way the property was used to facilitate them.<sup>150</sup>

How the court severs the property so as to allow the Government to realize its interest in the portion that is subject to forfeiture, while exempting the interest of the innocent third party, turns, in part, on the manner in which the property was

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<sup>149</sup> Section 881(a)(7) provides that "any real property, including an right, title, and interest . . . in the whole of any lot or tract of land . . . which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission [of a drug offense]" is subject to forfeiture. Thus, in general, a tract of land that is used to facilitate a drug offense is forfeited in its entirety, even if only a portion of the property was involved in the commission of the offense. *United States v. Real Property ... 221 Dana Ave.*, 81 F. Supp. 2d 182 (D. Mass. 2000) (court declines to sever real property even though drug trafficking was confined to first floor of two-story duplex). Issues do arise in Section 881(a)(7) cases, of course, as to whether a given parcel is in fact a single tract of land, or is really a composite of contiguous tracts. See *United States v. 817 N.E. 29th Drive, Wilton Manors*, 175 F.3d 1304 (11th Cir. 1999) (whether real property is forfeitable as a single parcel turns not on description in deed or in land records, but on character of property where criminal activity took place, and whether all of the land is of the same character; where two parcels constitute residence and front yard, both are subject to forfeiture). The division or severance of the property in such cases, if necessary, turns on the nature of the property itself, *id.*, and has nothing to do with exempting the interests of an innocent owner. It is the latter issue, which constitutes an entirely separate reason for severing the property, that is discussed in the text.

<sup>150</sup> *United States v. Kennedy*, 201 F.3d 1324 (11th Cir. 2000) (where husband and wife are tenants by the entireties, only husband's interest is forfeitable in a criminal case); *United States v. Ida*, 14 F. Supp. 2d 454 (S.D.N.Y. 1998) (the effect of a verdict of forfeiture is to put the Government in the shoes of the defendant; it succeeds to whatever interest, if any, the defendant had in the property; because third parties are not parties to the criminal case, they cannot be bound by the verdict of forfeiture); *United States v. Norman*, 1999 WL 959254 (E.D. La. 1999) (criminal forfeiture is *in personam* action that is part of defendant's sentence, so only defendant's property can be forfeited).

held. If the property owners were partners in a business, each with a fractional interest in the partnership assets, and the interest of only one of the partners is subject to forfeiture, the Government succeeds to the “guilty” partner’s interest, and finds itself in partnership with the remaining partners.<sup>151</sup> Similarly, if the property owners are tenants in common, each with an undivided fractional interest in the property, the court may order that the fraction held by the wrongdoer be forfeited to the Government, while the innocent parties retain the remaining fraction.<sup>152</sup>

In both of those situations, it is clear that the Government obtains a specified interest in the property, but it remains a co-owner with other persons – not an ideal situation in any circumstances, and awkward, to say the least, if the Government’s new partners turn out to be unsavory individuals engaged in a less-than-respectable business, like the operation of a gambling club or topless bar.

The situation is even more complicated, and awkward, if the property subject to forfeiture is held by a husband and wife as tenants by the entirety, or is subject to an undivided 100 percent interest in a community property state. Some courts hold that in those circumstances, nothing can be forfeited if either the husband or the wife is an innocent owner because the right of the innocent spouse to enjoy and alienate the property is necessarily changed by the forfeiture of the other spouse’s interest.<sup>153</sup> Others have converted the tenancy by the entirety to a co-tenancy, substituting the Government as a co-tenant.<sup>154</sup> And others have

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<sup>151</sup> See *United States v. Johnston*, 13 F. Supp. 2d 1316 (M.D. Fla. 1998) (forfeiture of defendant’s 25 percent interest in general partnership results in the Government’s obtaining 25 percent interest in partnership assets).

<sup>152</sup> See *United States v. Dethlefs*, 934 F. Supp. 475 (D. Me. 1996) (if any part of the property is used to commit an offense, defendant’s undivided one-quarter interest as tenant in common is implicated and may be forfeited if defendant is convicted), *aff’d sub nom. United States v. White*, 116 F.3d 948 (1st Cir. 1997).

<sup>153</sup> See *United States v. Christunas*, 61 F. Supp. 2d 642 (E.D. Mich. 1999) (no part of property held as tenants by the entirety can be forfeited in a criminal case unless both husband and wife are convicted or consent to the forfeiture); *cf. United States v. Lee*, \_\_\_ F.3d \_\_\_, 2000 WL 1665054 (7<sup>th</sup> Cir. Nov. 7, 2000) (Defendant’s interest in property held as tenants by the entirety cannot be forfeited as a substitute asset in a criminal case, because State law prohibits the transfer of one spouse’s interest without the other spouse’s consent; but suggesting that the federal interest would override State law if the property were directly involved in a crime).

<sup>154</sup> See *United States v. 1500 Lincoln Avenue*, 949 F.2d 73 (3<sup>rd</sup> Cir. 1991) (converting tenancy by the entirety to co-tenancy, with Government substituted as the co-tenant).

attempted to give the Government a future interest in the property that arises only if the marriage ends in such a way that the guilty spouse acquires a 100 percent interest in the property.<sup>155</sup> But those courts are split over whether the Government has the power to prevent the husband and wife from frustrating the Government's future interest by arranging to transfer the property to the "innocent" spouse during the marriage.<sup>156</sup>

In enacting Section 983(d)(5), Congress recognized that the only way to resolve these issues – when physical severance of the property was not feasible, and joint ownership of the property by the Government and other third parties was unwise – was to give the federal courts the authority, irrespective of State property law,<sup>157</sup> to order the liquidation of the property and the distribution of the proceeds of the liquidation among the Government and the property owners. Thus, Section 983(d)(5) gives the court three options:

- physically sever the property;
- liquidate the property and order the return a portion of the proceeds to the innocent party; or
- allow the innocent party to remain in possession of the property, subject to a lien in favor of the government to the extent of the guilty party's interest.

The first option obviously only works with types of property that can be physically severed, such as a multi-acre farm. The third option gives the court the

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<sup>155</sup> See *United States v. Kennedy*, 201 F.3d 1324 (11<sup>th</sup> Cir. 2000) (Government's interest in one-half of property held as tenants by the entirety cannot be realized during the marriage, but it can be realized when the marriage ends, notwithstanding the attempt of one spouse to "seamlessly" transfer his interest to the other); *United States v. Certain Real Property Located at 2525 Leroy Lane*, 972 F.2d 136 (6<sup>th</sup> Cir. 1992) (government can never realize its interest in property held as tenants by the entirety as long as the marriage continues, and it cannot defeat defendant's attempt to transfer his undivided interest to his spouse during the marriage).

<sup>156</sup> *Id.*

<sup>157</sup> Under the Supremacy Clause, the court will have the authority to impose any of these alternatives notwithstanding the innocent spouse's property rights under State marital property law. Cf. *United States v. 817 N.E. 29th Drive, Wilton Manors*, 175 F.3d 1304, 1311 n.14 (11<sup>th</sup> Cir. 1999) (federal forfeiture trumps homestead exemptions under the Supremacy Clause); *In re: Brewer*, 209 B.R. 575 (Bankr. S.D. Fla. 1996) (same); *United States v. Walters*, 89 F. Supp.2d 1206 (D. Kan. 2000).

power to transfer marital property to the innocent spouse, subject to a lien in favor of the Government. This makes clear what interest the Government has in such property, and it prevents the parties from frustrating the Government's future right to the property by transferring the property to the innocent spouse, but it leaves both the innocent spouse and the guilty one in possession of the property.

Thus, the best alternative in most cases will be to order the liquidation of the property and the distribution of the proceeds. Only by taking such action can the court simultaneously protect the interest of the innocent spouse in the value of the property, deprive the guilty spouse any right of access to the property, and allow the Government to realize its forfeitable interest.

#### **IV. CONCLUSION**

The uniform innocent owner defense represents a conscientious effort to provide protection for truly innocent property owners whose property was used by another person to commit a criminal offense. Making the defense uniform for all federal forfeiture actions, and spelling out the details of the defense as it applies to pre-existing owners, and those who acquire their interest in the property after it is derived from or used to commit the criminal offense, will make the defense much easier to apply, and will eliminate many of the ambiguities that led to much litigation and a division of judicial authority under pre-CAFRA law. No doubt, new ambiguities lurk in the statutory language, but Congress has produced a fundamentally sound structure that represents an enormous improvement over the old law.