



## **My Money is Gone: Can Asset Forfeiture Happen to You or Your Company?**

By Manuel S. Varela

There is a popular misconception that asset forfeiture is limited to the luxury cars, private jets and speedboats of drug dealers, but many well-meaning businesses and individuals are finding themselves with their assets seized under statutes that provide U.S. authorities extremely broad powers. And these seizures often occur without any warning to, or even accusation against, the owner of the assets. Once seized it can take years to obtain recovery of perfectly legal assets. In these uncertain times, as many well-meaning people seek the relative safety of the U.S. banking system, individuals and companies in many countries may innocently use money-transfer systems that exponentially increase the risk of having their assets seized. Why does this happen and how can it be avoided?

Civil asset forfeiture is a process by which the government (federal or state) can take assets – which can be money, cars, real property, valuables, etc. – that are suspected of being involved in a crime. (Criminal forfeiture typically occurs in conjunction with, or after the conclusion of, a criminal proceeding.) The reason civil asset forfeiture is such a powerful tool is that the government need not prove that the individual who owns the assets actually committed a crime. According to one study, in 85% of civil forfeiture cases the property owner was not charged with a crime, and because of differing standards of proof, in some cases property owners have lost property even though the owner was charged but found not guilty of the suspected crime.

The government can take the property well before notifying the owner that it intends to do so. As a result, it is not uncommon for the owner of the asset to simply wake one day and find that their money is no longer in their bank account or that their property has been taken.

Civil forfeiture has its origins in British maritime law from the 1600s, but the present explosion in application of civil forfeiture has its origins in the 1980s U.S. War on Drugs. The idea was to use civil forfeiture to keep money out of the hands of drug dealers. However, it did not take long for law enforcement to begin to apply civil forfeiture laws to other types of misconduct, including drunk driving (seizing cars driven by drunk drivers) and numerous white-collar crimes.

Under the federal forfeiture scheme, pursuant to 18 U.S.C. § 983, the government may seize the property and then has 60 days to notify interested parties – the owner(s) – that it has done so. However, if a judge agrees that providing notice of the seizure would “seriously jeopardize” an investigation, the notice can be extended an unlimited number of times for additional 60-day periods. These extensions can last for years and all the while the property remains seized or frozen with the owner having no information to challenge the taking of the property.

Once notice is provided, it is the owner who must present a claim for return of the property, and, 90 days after the claim, the government must either file a complaint in court articulating its basis



for seeking forfeiture of the property or return the property to the owner. The government's complaint is filed against the property – not against the owner – resulting in case names that sometimes seem like parodies: *Nebraska v. One 1970 2-Door Sedan Rambler (Gremlin)* and *United States v. One Lucite Ball Containing Lunar Material (One Moon Rock)* and *One Ten Inch by Fourteen Inch Wooden Plaque* are both real cases. While the government can, and occasionally does, file lawsuits against unattractive small cars, more typically, the lawsuit will be against some defined amount of money that has been seized from a bank account.

Unlike in a criminal trial, where the government must prove beyond a reasonable doubt that the individual or company has committed a certain crime, in civil forfeiture the government need only show that it is more likely than not that the assets were used to facilitate a crime or were the proceeds of a crime.

Aside from the fact that civil forfeiture involves a lower burden of proof, the fact that assets “used to facilitate a crime” can be forfeited is extremely broad. According to the Department of Justice, “[p]roperty that makes a crime easier to commit or harder to detect” is a facilitating asset.<sup>1</sup> Thus, otherwise innocent funds can be forfeited if they were used by others to disguise criminal conduct.

It is here where well-meaning people and companies can fall into a years-long effort to recoup their money. Many countries have onerous currency controls or otherwise present barriers when its residents – individuals and companies alike – transfer funds outside of their borders. In order to effectuate such transfers, residents may rely on less traditional banking vehicles such as *casas de cambio* and *doleiros*. The problem is that these systems may also be favored and used by criminals for money laundering purposes. In these grey market systems, otherwise legitimate transactors may unknowingly engage in currency transactions with illicit sources of funds. In this fashion, foreign individuals and companies may innocently move their clean money through channels where their “clean money” is tainted by “dirty money.” This alone can provide a basis for the government to initiate freeze and forfeiture proceedings.

There are defenses to civil forfeiture claims. The “innocent owner” defense allows the owner who did not know of conduct that led to the forfeiture to recoup the seized funds. However, it is the burden of the property owner to demonstrate that they are innocent owners; the government need not prove otherwise. This generally involves a detailed forensic evaluation of the patrimony of the owner's wealth to prove (and document) its legitimate source. In addition, there is a proportionality defense based on constitutional guarantees against grossly disproportionate fines or penalties. This protects against circumstances where the value of the property seized is far greater than what one would expect as a fair penalty for given conduct. By way of example, most would probably agree that forfeiting a car because it was used by a teenager who had stolen a piece of fruit from a store would be disproportionate.

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<sup>1</sup> <https://www.justice.gov/usao-mdpa/divisions/asset-forfeiture>



While these defenses can be effective, and courts are sensitive to the rights of those whose property has been taken, it can take years to have these issues ultimately resolved and all the while the owner is deprived of the use of their property. The consequences can be devastating to a business and the uncertainty extraordinarily stressful for individuals.

Thus, given the risk of unknowingly falling into a civil forfeiture proceeding, well-meaning individuals and business should exercise due diligence in deciding how to transfer their funds, and should ensure that their investment and banking partners have a robust compliance program. Funds should preferably be transferred from accounts held in the owner's name through mainstream banking channels. Doing so will reduce the risk of unwittingly mixing innocent assets with those of criminals. However, if one does have their assets seized, even if it is an unattractive small car, there are ways to argue for their recovery.

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