



Part 1: Relief for Victims and Third Parties Through Asset Forfeiture

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As the recent economic crisis has shown, individuals are not the only victims of financial crimes. Corporations, hedge funds, private equity companies, pension funds, nonprofit organizations, and other entities can stand to lose millions of dollars through fraud, embezzlement, and other criminal acts. The proceeds of financial crimes are often long gone or, where they have not yet been spent, the government increasingly seeks to “forfeit” these proceeds as ill-gotten gains.

Civil litigation against the wrongdoer may be an option, but litigation is a long, costly process that is not effective when the perpetrator of a crime will be stripped of all assets as part of a criminal sentence. Restitution, whereby a person convicted of a crime is ordered to return any stolen or fraudulently obtained property to victims, is mandatory in criminal cases, but where determining restitution is too complex and burdensome, the requirement to determine and award restitution to victims may be excused. In such instances, victims of crime and innocent third parties may have a means of seeking relief through the forfeiture process. But because such relief may be subject to prosecutorial discretion, individuals or companies seeking recovery through forfeiture must be prepared to act quickly and make a compelling case.

What is Asset Forfeiture?

Forfeiture is a procedure by which a governmental entity seeks to obtain property that constitutes the proceeds of a crime or is traceable to such proceeds, or property that was involved in certain crimes. Investigative agencies can seek forfeiture of property through administrative proceed-

ings, and U.S. Department of Justice can bring forfeiture actions civilly or as part of a criminal action. State agencies can also bring forfeiture actions.

“Proceeds” of a crime simply means money or property that an individual obtained directly or indirectly through criminal conduct or that is traceable to such money or property. Proceeds are generally not limited to the net gain or profit from an offense, but include all things gained as a result of the offense. Property “involved” in a crime is broadly interpreted to mean any property that was used in or facilitated the commission of a crime.

The government uses forfeiture to deprive an individual or corporate entity of the spoils of a crime. Criminal forfeiture is conducted as part of a criminal proceeding and results only if a defendant is convicted. Forfeiture in a criminal case is independent of and not exclusive of restitution; accordingly, at sentencing, a defendant can be ordered to pay double what it gained through the commission of a crime. Civil forfeiture, on the other hand, is not tied to a criminal case and can be brought in addition to or instead of a criminal action. Though civil forfeiture actions are considered “quasi-criminal” in nature (because they seek to deprive an individual of property and therefore are a form of penalty), the government’s burden of proof is the far lower “preponderance of the evidence” standard rather than the “beyond a reasonable doubt” standard used in criminal proceedings.

In the criminal forfeiture context, the court or a jury determines whether property is subject to forfeiture, and only a defendant can challenge the government’s efforts. Unfortunately, because most criminal

defendants are more concerned with staying out of prison than preserving the alleged proceeds of a crime, the determination of a property’s forfeitability is often not vigorously challenged. This is especially true where a defendant pleads guilty. Once a property is determined to be subject to forfeiture, a third party’s claim to all or a part of the property is notably weaker. Therefore, a third party victim of a financial crime must understand and properly utilize the avenues to relief from forfeiture set forth in the law.

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