

Federal *Forfeiture* Guide

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District Court Highlights:

California district court denies, for lack of jurisdiction, motion for release of funds to pay for counsel because issues were decided against defendant in civil case, which was now on appeal.

Washington district court denies summary judgment to claimant because no restriction exists for the federal government to seek forfeiture under Contraband Cigarette Trafficking Act on Indian property.

Kansas district court denies government's motion to set aside sale of NASA lunar bag used in Apollo 11 mission because buyer was bonafide purchaser at auction.

Sixth Amendment Right to Counsel

California district court denies, for lack of jurisdiction, motion for release of funds to pay for counsel because issues were decided against defendant in civil case, which was now on appeal.

(695) Defendant was indicted on numerous fraud counts in a criminal case, which the court declined to formally relate to a SEC civil fraud action against him. In the criminal case the defendant filed a motion for release of \$200,000 from a fund that was set aside to reimburse him for legal fees in the event that he prevailed in the civil case. The court first found that a defendant has no Sixth Amendment right to spend another person's money for services rendered by an attorney, even if those funds are the only way that defendant will be able to retain the attorney of his choice. Thus, the government does not violate the Sixth Amendment if it seizes robbery proceeds and refuses to permit the defendant to use them to pay for his defense. The government can freeze assets under forfeiture statutes without violating the Sixth Amendment at the start of a criminal case if the government provides probable cause that the assets were unlawfully obtained. Even with a showing of probable cause, the government can seize assets only that are "fairly traceable" to the

criminal activity, and not other assets that the defendant owns "free and clear." In the SEC civil case, the defendant attempted to obtain the release of the frozen assets because, he alleged, he owned a portion of funds held in receivership not associated with fraud, and he should be indemnified for legal costs under an indemnification provision. The SEC court found that unless it was determined he had not committed fraud, he would have no ownership interest in the funds and no right to indemnification, and ordered \$200,000 set aside for reimbursement if the he prevailed in the civil case. The civil court eventually granted summary judgment in favor of the SEC on all of the fraud claims and approved the Receiver's plan to subordinate the defendant's claims to the assets to those of the other investors. Since the judgment in that case was that he had committed civil fraud, however, the issue in the criminal case was whether the pending appeal in the civil case divested the court of jurisdiction, and whether the court could alter the final judgment of another district court. The defendant argued that despite the civil judgment finding fraud, the Sixth Amendment required the release of assets because the criminal case was not pending at the time of the civil proceedings, and because the Sixth Amendment issue was never considered in the civil case. The court, however, that due to the pendency of the defendant's appeals, the district courts were divested of jurisdiction to reconsider whether he owned the assets in the receivership or whether they were covered by the indemnification agreement, because both issues were decided by the civil court before final judgment. Since he had only a potential Sixth Amendment right to the assets, and the issues were resolved against him in the civil case in a final judgment, the court did not have jurisdiction to decide that issue. Otherwise, criminal proceedings would become a forum, under the guise of the Sixth Amendment, to relitigate any civil judgment against the defendant that disposed of the defendant's assets.

Therefore, the motion for release of funds was denied. *United States v. Feathers*, 2016 WL 7337518 (N.D. Cal. Dec. 19, 2016).

Summary Judgment

Washington district court denies summary judgment to claimant because no restriction exists for the federal government to seek forfeiture under Contraband Cigarette

Trafficking Act on Indian property. (390) In a civil forfeiture action, the claimants moved for summary judgment and to strike affidavits submitted by the government in opposition. As for the latter motion, the claimants argued warrant affidavits contained statements made without personal knowledge. The court held, however, that while numerous statements were not admissible for the truth of the matter asserted, it nonetheless could consider the affidavits for the limited purpose of establishing that the assets were lawfully seized under the circumstances described by the government in its complaint and in an agent's declaration. Thus, the motion to strike was denied. As for the summary judgment motion, the claimants, in violation of local rules, provided no argument in support of their motion for summary judgment in the motion itself, but instead simply listed numerous documents, including previous motions to dismiss and responses, and argued that the information contained in these documents entitled them to summary judgment. Because the claimants stated that the grounds for their motion was their prior response to the government's motion to strike claims, the court considered only the argument contained in that filing. The Estate claimant argued for summary judgment on the grounds that 1) the Contraband Cigarette Trafficking Act ("CCTA") did not allow for the forfeiture of Indian property, 2) the seized unstamped cigarettes were not contraband, 3) the claimants did not commit money laundering, 4) the allotment was not subject to the state cigarette tax, and 5) the Claimants did not aid, abet, nor conspire in the interstate transport of contraband. First, while 18 U.S.C. §2346(b)(1) of the CCTA prohibits local state governments from enforcing the CCTA against an Indian tribe or an Indian in Indian

Country, no such restriction exists for the United States government. The federal government has authority to enforce the CCTA when Indians transport unstamped cigarettes without satisfying the pre-notification requirements under Washington law, or possess and sell unstamped cigarettes in violation of Washington law. Second, the Estate argued that compacts between Washington State and some tribal governments, whereby a tribal tax is substituted for payment of the State excise tax, somehow rendered lawful the approximately 1,784,000 unstamped cigarettes that the Estate seeks to have returned. No such compact existed, however, in relation to the unstamped cigarettes the Estate claimed. Third, the government's primary theory for forfeiture was that the subject funds constituted proceeds of trafficking contraband cigarettes in violation of 18 U.S.C. §2342(a), therefore subject to forfeiture under 18 U.S.C. §981(a)(1)(C). Since the available evidence showed that the massive quantity of unstamped cigarettes was contraband, it also suggested that the funds derived from the Indian Country Smoke Shop were proceeds of trafficking in contraband cigarettes. The government's alternative theory for forfeiture of funds contends that cash deposits into the Bank of America account were structured to avoid reporting requirement, not money laundering, so it also was a viable theory. Fourth, the Estate claimed that because the cigarettes were possessed by an Indian retailer on an allotment, then Washington State lacked jurisdiction over the property, and its cigarette excise tax was inapplicable. The jurisdiction of Washington State, however, was irrelevant to the present federal forfeiture action filed for alleged violations of federal law. Finally, the Estate failed to offer any substantive analysis for its "innocent owner defense" under 18 U.S.C. §983(d), i.e., the specific innocent ownership requirements or whether §983(d)(4) is applicable to the contraband cigarettes. Moreover, there is adequate evidence (much submitted by the Estate itself) to suggest that the Estate was not an innocent owner. The court also noted the Estate had yet to file an answer as required under Supplemental Rule G(5)(b). Thus, summary judgment was denied. *United States v. Approximately one Million Seven Hundred Eighty Four Thousand (1,784,000)*

Contraband Cigarettes of Assorted Brands from the Indian Country Smoke Shop Main Store, 2016 WL 7387094 (W.D. Wash. Dec. 21, 2016).

Distribution of Forfeiture Proceeds, Generally

Kansas district court denies government's motion to set aside sale of NASA lunar bag used in Apollo 11 mission because buyer was bonafide purchaser at auction. (880)

Defendant Ary was the President and Chief Executive Officer of the Kansas Cosmosphere and Space Center, a space museum in Hutchinson, Kansas. The Cosmosphere is home to a significant collection of space artifacts, including many that are on loan from NASA. Ary resigned from the Cosmosphere in 2002 and moved to Oklahoma City. After Ary left, museum personnel discovered that artifacts on loan from NASA were missing. Investigation revealed that some items had been sold at auction in California, although the museum never received payment for them. In or around 1999, Ary had established two accounts with the auction house, one of which was in the Cosmosphere's name and was used to sell items on its behalf. The other was a personal account in Ary's name. When the Cosmosphere contacted the auction house, it learned that some of the missing items had been sold through Ary's personal account and the proceeds had been mailed to him rather than to the Cosmosphere. An investigation ultimately showed that, over the course of several years, Ary had sold numerous artifacts belonging to the Cosmosphere and to the United States. A search of Ary's residence turned up numerous additional artifacts from NASA, and Ary's attorney turned over still more items that had been in Ary's possession. Ary was subsequently convicted by a jury on multiple counts of mail and wire fraud, theft of government property, transportation of stolen property, and money laundering. The court also ordered criminal forfeiture of \$124,140. Over three years later, the United States moved for an order authorizing the FBI to turn over property that was seized from Ary to the U.S. Marshal for advertisement and sale, with the proceeds to be applied to any outstanding

restitution balance, including a "lunar sample return bag." Almost two years later, the court signed an amended order so that the property could be forfeited as substitute assets and sold in specialty auctions. Two years after that, the government filed a motion to set aside the sale of the lunar bag, alleging a mix up in inventory lists and item numbers – apparently no one realized at the time of forfeiture that this bag was used on Apollo 11 and was an historically important item – and alleged NASA was the owner of the bag but was not given notice of the forfeiture or the sale of the bag. The bag was not sold at the initial auction in 2014 because no bids for it were received, but in a second online auction in 2015 Nancy Carlson was the successful high bidder at \$995, which included a mesh cushion. An initial analysis indicated that dust from the bag was lunar. After additional research, NASA determined the bag had flown on Apollo 11 in July 1969, the first manned mission to the moon, and that it was used as the outer decontamination bag for the first lunar samples ever collected. The government thus contended NASA owned the bag and the lunar material and never transferred ownership of these items; that NASA loaned the bag to the Cosmosphere pursuant to an agreement; that NASA's policy and practice is not to transfer ownership of lunar material to any private individual; and that NASA would have asserted its ownership in the Apollo 11 bag had the agency been notified about the forfeiture and had the bag been accurately identified before it was forfeited and sold. Over Carlson's opposition, the court concluded forfeiture of the Lunar Sample Return bag was a product of mistake or error, NASA was the legal owner of the bag prior to forfeiture, not Ary, and that NASA was not given and did not receive actual notice of the forfeiture. Nor was there any indication that NASA ever consented to the sale of the bag. Although Carlson argued NASA should be treated like any other person, and should be held to have received notice because other federal agencies or representatives knew of the forfeiture (and indeed were directing it), or because notice was published on a government website, the notice was constitutionally deficient. Where there is an ascertainable owner of property whose whereabouts

are known, due process in the context of judicial forfeiture requires notice that is reasonably calculated to reach the owner. The United States knew or should have known of NASA's ownership interest and could have easily provided it with actual notice of the forfeiture. Under the circumstances, publication on a government website was an inadequate means of notice. The fact that federal agencies such as the FBI or the U.S. Marshal's Service were aware of the forfeiture is not constructively imputed to NASA, nor can the knowledge of the U.S. Attorney seeking the forfeiture be attributed to a federal agency that was not involved in the forfeiture. An additional hurdle, however, was a showing that the court had authority to rescind the subsequent sale of the bag to Carlson. The government did not suggest Carlson was anything other than a bona fide purchaser, and cited no authority showing that legal title to the bag did not pass to her. Nevertheless, the government requested rescission of the sale, an equitable remedy, to restore the bag to NASA. The standards governing equitable remedies, however, supported the view that Carlson took the lunar bag free of any equitable claims to it that NASA might assert. A transferee who qualifies as a bona fide purchaser has an affirmative defense to a rescission claim. Thus, the court found no authority for granting the relief sought by the United States. *United States v. Ary*, 2016 WL 7229277 (D. Kan. Dec. 14, 2016).

This Issue

390, 695, 880

Table of Cases

United States v. Approximately one Million Seven Hundred Eighty Four Thousand (1,784,000) Contraband Cigarettes of Assorted Brands from the Indian Country Smoke Shop Main Store, 2016 WL 7387094 (W.D. Wash. Dec. 21, 2016)

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