

BLOG POST

Musing upon asset forfeiture

September 29, 2014

Attention, people: The United States wants your [bears](#).

Seriously. It also wants [600 sacks of your coffee beans](#) and [328 pounds \(more or less\) of your wild American ginseng](#). Might as well throw in [a few watches \(2,164, more or less\)](#) and [things that go fast](#), while you're at it.

But only if these things are involved in or represent proceeds from criminal activity.

That's what asset forfeiture is all about. The fount of all wisdom, [Wikipedia](#), says that asset forfeiture is "a form of confiscation of assets by the state, pursuant to law." (I had a lively debate in my own head about whether the right term was *fount* or *font*. I went with [the 67 percent](#). Yeah, I'm also a hit at parties.) And that's actually about right. The *idea* behind asset forfeiture is sound and it makes intuitive sense: Remove the profits from criminal activity, and you disincentivize criminals from committing the crimes in the first place. Take away the stuff that people use to commit crimes and you make it a lot tougher for them to commit crimes. Boom.

Think about it this way: would you rather work honestly for 35 years and end up with a couple million dollars in retirement? Or commit fraud for a couple of years, maybe do a year or two in Camp Fed, and walk away with seven million dollars, free and clear? Made you think, didn't I? The latter option, the criminal retirement plan, if you will, looks a lot less grueling to some. So to make it less attractive, asset forfeiture allows the government to take those proceeds. Now the criminal retirement plan has zero benefits compared to the cost of prison time. That's not nearly as much fun for your average everyday fraudster.

Getting into the weeds a bit, the government can proceed with civil asset forfeiture (suing the property that was unlawfully acquired or possessed) or criminally (including the property in an indictment against an alleged criminal). Civil forfeiture is why you end up with a lot of weird-sounding cases in the federal system, like "[United States v. Approximately 64,695 of Shark Fins](#)" (North Carolina), "[United States v. One Partially-Assembled Drag Racer](#)" (New Jersey), or "[United States v. A Group of Islands](#)" (Puerto Rico). Either course – civil or criminal – is aiming at the same result: to remove the fruits and instrumentalities of crime. A laudable goal.

... But it's in the execution of the goal that we start to see some problems. The system can be prone to abuse, and can also lead to disproportionately costly results for innocent parties to criminal activities. There's been a lot of media coverage of the forfeiture system – mostly critical – by [NPR](#), for example, or the [Washington Post](#), or the [New Yorker](#), or the [Chicago Tribune](#). Much of the coverage focuses on state forfeiture laws that allow forfeiture

funds to flow back to police departments, leading to an alleged bounty system where police officers seize cash and pressure motorists to release the cash in exchange for freedom from charges. Anecdotes about motorists being forced to give up large amounts of cash based on fear and a lack of understanding of their rights form the basis for many of these media pieces.

The federal government tries to eliminate the incentives for a bounty program by limiting the use of forfeited funds by law enforcement. They cannot be used, for example, for salaries or bonuses. But forfeiture pressure generally comes from a different side of the equation in federal cases. In federal cases, a court that has venue and jurisdiction over the alleged crime **has authority to issue a seizure warrant** for property located *anywhere* in the United States. That means that a U.S. magistrate judge in Beaumont, Texas, has the authority to issue a warrant to seize property in, say, Montana, as long as the underlying crime or civil case can be filed in Beaumont. If you are that Montana person who has a claim to that property, you'll need to litigate it in Beaumont. I sincerely doubt that you can do that in a day trip.

What's more, the government can typically hold seized property *while* it litigates the forfeiture case. There are hardship exceptions, but they are – no pun intended – hard to come by. So you can imagine a situation in which someone whose cash has been seized is forced to litigate against the federal government without being able to use that cash to hire an attorney.

And lastly, forfeiture is a strange sort of amalgamation of civil and criminal law that poses some major traps for the unwary. There is no single uniform federal forfeiture statute. Rather, forfeiture laws are all over the place – there are separate provisions for drug cases, money laundering cases, fraud cases, child pornography cases, identity theft cases, and so on and so forth. Deadlines are usually strictly enforced (ignorance of the law being no excuse), the form of responding is strictly prescribed, and you'll never guess where the rules are located. Lawyer-friends, what are my guesses? In the Federal Rules of Criminal Procedure? In Title 18? In Title 21? Try this: **In the Supplemental Rules for Admiralty or Maritime Claims**. I'm not joking. This is how a conversation with a client will probably go:

Client: What do we do to get my money back from the feds?
Counsel: Let's check the law of the sea!
Client: You're fired.

Is this an issue for your average, everyday law-abiding citizen who isn't transacting in bears, coffee beans, or wild ginseng? Heck yes. Because the forfeiture statutes are broad and powerful tools, and catch a whole lot more than criminals. If criminals put their money into a bank, the bank is at risk for an account seizure. If criminals use their proceeds to buy real estate, the sellers and note holders are at risk for seizure. Correspondent accounts from foreign enterprises in the U.S. are at risk. *Everything* is potentially grab-worthy.

So pay attention to the folks that you are doing business with and remember that this is an enormously complicated area of law where the government holds a sizeable advantage. Because if you're not careful, then you could place all of your stuff at risk.

More or less.