ASSET FORFEITURE AND THIRD PARTY RIGHTS: THE NEED FOR FURTHER LAW REFORM

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INTRODUCTION

Asset forfeiture has become an important weapon in the fight against narcotics trafficking and racketeering. Seeking a way to disgorge profits from criminal enterprises,¹ in 1970 Congress enacted the Racketeer Influenced and Corrupt Organizations Act (RICO)² and the Continuing Criminal Enterprise Act (CCE).³ By authorizing forfeiture as a criminal sanction to be applied directly against the perpetrator, these statutes went well beyond traditional forfeiture laws which merely allowed civil proceedings against contraband or property used during the commission of a crime.⁴

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1. See, e.g., *Russello v. United States*, 464 U.S. 16, 26-27 (1983) ("The RICO statute was intended to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots."); *United States v. 526 Liscum Drive*, Dayton, Montgomery County, Ohio, 866 F.2d 213, 216 (6th Cir. 1989) ("The intent of the forfeiture provision of the Controlled Substances Act is to deprive criminals of the tools by which they conduct their illegal activities."); S. REP. NO. 617, 91st Cong., 1st Sess. 78 (1969). The Senate Report states in part:

What is needed . . . are new approaches that will deal not only with individuals, but also with the economic base through which those individuals constitute such a serious threat to the economic well-being of the Nation. In short, an attack must be made on their source of economic power itself, and the attack must take place on all available fronts. . . .

The use of criminal forfeiture . . . represents an innovative attempt to call on our common law heritage to meet an essentially modern problem.

Id. at 79.

2. 18 U.S.C. §§ 1961-1968 (1988).

3. 21 U.S.C. § 848 (1988).

4. Examples of traditional civil forfeiture under federal law include the following: 8 U.S.C. § 1324 (1988) (conveyances harboring illegal aliens); 15 U.S.C. § 1265 (1988) (any misbranded or hazardous substance); 18 U.S.C. § 492 (1988) (counterfeiting paraphernalia); *id.* § 1465 (any ob-

In 1978, Congress expanded civil forfeiture to reach proceeds derived from narcotics trafficking.⁵ Congress amended 21 U.S.C. Section 881(a)(6) to extend the type of property subject to seizure and, for the first time, gave prosecutors an effective civil mechanism for striking at the profits of narcotics trafficking.⁶ State enactment of comparable provisions soon followed.⁷ Together with subsequent amendments, forfeiture legislation has been used to confiscate millions of dollars in cash, real estate, vehicles, vessels, airplanes, and even businesses.⁸

Legislators nationwide have enacted forfeiture laws to combat criminal activities such as narcotics trafficking and racketeering, which generate billions of dollars annually.⁹ Forfeiture laws are one of the few

scene material after conviction); *id.* § 2513 (any communication interception devices); 19 U.S.C. § 1305 (immoral articles); *id.* § 1497 (any article not properly declared at customs); *id.* § 1588 (merchandise in attempt to evade customs laws); *id.* § 1595 (merchandise for which duties are unpaid); 21 U.S.C.A. § 334 (West Supp. 1989) (any adulterated food, drug, or cosmetic); *id.* § 881 (assets traced to narcotics trafficking); 22 U.S.C. § 401 (1982) (illegal exportation of war materials); 26 U.S.C. §§ 5607-5671 (1982 & Supp. V 1987) (distilled spirits and equipment); 26 U.S.C. § 5685 (1982) (explosives and firearms under liquor laws); *id.* § 5763 (Supp. V 1987) (equipment connected with illegally produced tobacco); *id.* §§ 7301-7303 (1982) (property used in violation of internal revenue laws); 33 U.S.C. § 384 (1982) (any vessel used in piracy); 46 U.S.C. § 325 (Supp. V 1987) (vessels transporting unstamped commerce); 49 U.S.C.A. § 782 (West Supp. 1989) (any conveyance used for contraband).

For a discussion of the distinction between criminal and civil forfeiture, see *infra* note 24.

5. 21 U.S.C. § 881(a)(6) (1982) (all proceeds traceable to an exchange for a controlled substance are forfeitable).

6. When introducing the statute in the United States House of Representatives, Congressman Rogers, a Democrat from Florida, stated: "The purpose of Title III of the Senate amendment is to provide Federal drug enforcement officials with the ability to strike at the profits of illicit trafficking in abusable controlled substances." 124 CONG. REC. H12790 (Oct. 13, 1978). Congressman Carter, a Republican from Kentucky, echoed this purpose stating: "[T]he Senate amendment expands section 511 of the Controlled Substances Act to require the forfeiture of all moneys or other things of value which are substantially connected to a criminal violation of our drug control laws. In other words, Mr. Speaker, the Senate amendment simply requires the drug pusher to give up his ill-gotten gains." *Id.* at H12,793. For an excellent review of the role of forfeiture in federal crime control efforts, see D. SMITH, PROSECUTION AND DEFENSE OF FORFEITURE CASES ¶ 1.01-.02 (1985).

7. For a discussion of state forfeiture laws, see *infra* text accompanying notes 153-80.

8. See, e.g., *United States v. A Single Family Residence*, 803 F.2d 625 (11th Cir. 1986) (condominium); *One Blue 1977 AMC Jeep v. United States*, 783 F.2d 759 (8th Cir. 1986) (automobile); *United States v. \$5,644,540*, 799 F.2d 1357 (9th Cir. 1986) (currency); *United States v. 1966 Beechcraft Aircraft*, 777 F.2d 947 (4th Cir. 1985) (plane); *United States v. \$4,250,000*, 762 F.2d 895 (11th Cir. 1985) (currency), *cert. denied*, 474 U.S. 1056 (1986); *United States v. "Monkey," a Fishing Vessel*, 725 F.2d 1007 (5th Cir. 1984) (vessel); *United States v. D.K.G. Appaloosas, Inc.*, 630 F. Supp. 1540 (E.D. Tex. 1986) (business), *aff'd*, 829 F.2d 532 (5th Cir. 1987), *cert. denied*, 485 U.S. 976 (1988); *United States v. Certain Real Estate Property*, 612 F. Supp. 1492 (S.D. Fla. 1985) (hotel).

9. In 1987, for example, the narcotics trade alone amounted to an estimated \$130 billion in gross sales. *Forfeiture Portions of the Comprehensive Crime Bill and the Anti-Drug Abuse Act of 1986: Hearing Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 100th Cong., 1st Sess. 4 (1987) (statement of Representative William J. Hughes, Chairman). It also was estimated that another \$100 billion is lost in the costs attending the narcotics trade—lost wages, crime preven-

effective ways to combat narcotics racketeers. Driven by enormous potential profits, drug dealers are not deterred by traditional criminal sanctions such as fines and incarceration: "[T]he conviction of individual racketeers and drug dealers [is] of only limited effectiveness if the economic power bases of criminal organizations or enterprises [are] left intact."¹⁰ Forfeiture laws supplement traditional criminal remedies by attacking the economic foundation of criminal activity—confiscating illicit profits and assets. Moreover, forfeiture is triggered at the time of the illegal event, thereby tainting the property so that its owner may not pass good title to third parties.¹¹ Since money related to illegal activities may be vulnerable even in the hands of a transferee, forfeiture laws encourage third parties to be extremely cautious when dealing with suspected criminals.¹²

By preventing narcotics traffickers and racketeers from passing good title to third parties, Congress intended to make such criminals economic pariahs.¹³ Forfeiture laws, however, often operate to the detriment of

tion, loss of life and health, etc. *Id.* This is a sharp increase from the estimated \$60 billion that narcotics trafficking generated in 1981. GENERAL ACCOUNTING OFFICE, ASSET FORFEITURE—A SELDOM USED TOOL IN COMBATTING DRUG TRAFFICKING 1 (Apr. 1981). "For example, a 1980 study conducted by the National Narcotics Intelligence Consumers Committee estimated that the retail value of narcotics supplied to the illicit U.S. market during 1979 ranged between \$55 and \$73 billion." *Id.* at 1-2.

10. S. REP. NO. 225, 98th Cong., 2d Sess. 191 (1984), *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3374. The legislative history continues:

Today, few in the Congress or the law enforcement community fail to recognize that the traditional criminal sanctions of fine and imprisonment are inadequate to deter or punish the enormously profitable trade in dangerous drugs which, with its inevitable attendant violence, is plaguing the country. Clearly, if law enforcement efforts to combat racketeering and drug trafficking are to be successful, they must include an attack on the economic aspects of these crimes. Forfeiture is the mechanism through which such an attack may be made.

Id.

11. For a discussion of the relation back doctrine, see *infra* note 30 and accompanying text.

12. Both civil and criminal forfeiture provide for the forfeiture of proceeds. See 21 U.S.C. § 881(a)(6) (1982) (civil forfeiture); 21 U.S.C. § 853(a) (Supp. V 1987) (criminal forfeiture); 18 U.S.C. § 1963(a) (1988) (same).

13. For a discussion of the purpose underlying forfeiture laws, see *supra* notes 3-12 and accompanying text. Courts have accepted this purpose behind forfeiture. See *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 688 (1974) ("confiscation may have had the desirable effect of inducing [owners] to exercise greater care in transferring possession of their property"); *United States v. Certain Real Property Known as Gulfstream West*, 710 F. Supp. 792, 794 (S.D. Fla. 1989) (purpose of statute is to "remove the incentive in the drug trade and deny narcotics dealers . . . their ill-gotten gains"); *United States v. Benevento*, 663 F. Supp. 1115, 1118 (S.D.N.Y. 1987) (statute enacted to prevent defendant from transferring or concealing assets before conviction); *United States v. 2639 Meetinghouse Rd.*, 633 F. Supp. 979, 994 (E.D. Pa. 1986) (statute's "purposes include removing the incentive to engage in the drug trade"); *United States v. Reckmeyer*, 631 F. Supp. 1191, 1196 (E.D. Va. 1986) ("The purpose of the criminal forfeiture statute is to strip racketeers and drug dealers of their 'economic bases' . . ."), *aff'd*, 814 F.2d 905 (4th Cir. 1987); *People v. One 1948 Chevrolet Convertible Coupe*, 45 Cal. 2d 613, 618, 290 P.2d 538, 541 (1955) ("The purpose of the

innocent third persons whose property may be subject to forfeiture because it was either used in, or derived from, a drug transaction.¹⁴ Innocent third parties include owners, lienholders, unsecured creditors, bona fide purchasers, business partners, corporate shareholders, joint tenants, and many others. For example, a person who lends his car to a friend may forfeit the car if his friend uses the car to transport narcotics.¹⁵ Forfeiture also affects commercial third party interests: A bank that lends a drug dealer money, secured by an interest in property, may forfeit its security interest if the property is involved in narcotics trafficking.¹⁶ The government also may require the bank to forfeit money already paid on the loan if that money constitutes narcotics proceeds.¹⁷ Despite the bank's lack of involvement in narcotics trafficking, its money and property may be forfeited.

Though these results seem unfair, forfeiture of third party interests sometimes may be necessary to prevent criminals from circumventing forfeiture laws.¹⁸ Moreover, third parties are not always wholly innocent.¹⁹ For instance, major financial institutions knowingly have pro-

statutes is to curb the narcotic traffic, and '[t]he public interest to be protected against the drug and its victims outweighs the loss suffered by those whose confidence in others proves to be misplaced.'" (quoting *People v. One 1941 Ford 8 Stake Truck*, 26 Cal. 2d 503, 508, 159 P.2d 641, 643 (1945)).

14. See generally Strafer, *Civil Forfeitures: Protecting the Innocent Owner*, 37 U. FLA. L. REV. 841 (1985) (suggesting that prompt post-seizure hearings are the only way to reconcile the government's power under forfeiture statutes and regulations with due process); Comment, *Civil Forfeiture and Innocent Third Parties*, 1983 N. ILL. L. REV. 323, 325 (recommending that civil forfeiture apply only to contraband per se; all other forfeitures would be "criminal in nature, imposing a requirement of mens rea or scienter on the part of the owner"); Note, *Federal Civil Forfeiture: An Ill-Conceived Scheme Unfairly Deprives an Innocent Party of Its Property Interest*, 62 U. DET. L. REV. 87 (1984) (recommending congressional action to change the federal scheme of forfeiture to be similar to the Uniform Act followed by a majority of states). These articles, however, were written prior to the 1988 reform of 21 U.S.C. § 881(a)(4). For a discussion of this reform, see *infra* notes 64-66, 88-94 and accompanying text.

15. See *United States v. One 1986 Mercedes-Benz*, 846 F.2d 2 (2d Cir. 1988). In this case, the claimant argued that forfeiture of such a valuable car "could not be predicated on the transportation of such a small quantity of marijuana, since under New York law the possession of less than 25 grams of marijuana has been decriminalized." *Id.* at 4. The court found no merit with this argument, holding that the "the transportation of any quantity of drugs however minute is . . . sufficient to merit the forfeiture of the vehicle." *Id.* at 4 (quoting *United States v. One 1974 Cadillac Eldorado Sedan*, 548 F.2d 421, 425 (2d Cir. 1977)).

16. See, e.g., *United States v. One 1969 Plymouth Fury*, 476 F.2d 960 (5th Cir. 1973) (bank forfeits security interest under federal law), *cert. denied*, 423 U.S. 838 (1975); *Commonwealth v. One 1978 Ford Van*, 11 Mass. App. Ct. 760, 419 N.E.2d 1060 (1981) (bank forfeits security interest under state law).

17. Such proceeds are forfeitable both criminally and civilly. See 18 U.S.C. § 1963(a) (1988) (RICO) (criminal forfeiture); 21 U.S.C. § 853(a) (Supp. V 1987) (criminal forfeiture); *id.* § 881(a)(6) (1982) (civil forfeiture).

18. See *infra* notes 55, 83-85 and accompanying text.

19. See *infra* notes 20, 81-84 and accompanying text.

moted large scale money laundering by narcotics dealers.²⁰ Forfeiture of third party interests certainly serves important law enforcement interests, but the demands of criminal justice must be balanced better with the interests of innocent third parties.

To a degree, Congress has recognized the need for reform of criminal and civil forfeiture laws. In 1984, Congress amended RICO and CCE to provide explicit third party protections.²¹ In 1988, Congress also amended the narcotics civil forfeiture law, 21 U.S.C. § 881(a), to confer

20. See *Pilla v. United States*, 861 F.2d 1078 (8th Cir. 1988) (bank); *United States v. Hawley*, 855 F.2d 595, 603 (8th Cir. 1988) (private bank), *cert. denied*, 109 S. Ct. 1141 (1989); *United States v. Cuevas*, 847 F.2d 1417, 1430 (9th Cir. 1988) (foreign bank), *cert. denied*, 109 S. Ct. 1122 (1989); *United States v. Inco Bank & Trust Corp.*, 845 F.2d 919, 920 (11th Cir. 1988) (foreign bank with no offices in the United States); *United States v. Bank of New England*, 821 F.2d 844, 859 (1st Cir.) (bank), *cert. denied*, 484 U.S. 973 (1987); *United States v. Hernando Ospina*, 798 F.2d 1570, 1583 (11th Cir. 1986) (travel agency); *United States v. Browning*, 723 F.2d 1544, 1549 (11th Cir. 1984) (investment counseling firm); see also 18 U.S.C. §§ 1956-1957 (1988) (money laundering statutes). See generally PRESIDENT'S COMMISSION ON ORGANIZED CRIME, THE CASH CONNECTION: ORGANIZED CRIME, FINANCIAL INSTITUTIONS, AND MONEY LAUNDERING (Interim Report, Oct. 1984). The President's Commission Report states:

The existence of modern, sophisticated, often international services of financial institutions has contributed to the frightening financial successes of organized crime in recent years, particularly in the narcotics trade. Without the means to launder money, thereby making cash generated by criminal enterprise appear to come from a legitimate source, organized crime could not flourish as it now does. The need to launder money has led organized crime to avail itself of the full range of banking services normally associated with legitimate, multinational businesses. Indeed, a new lexicon—including phrases like wire transfer, bank-to-bank transfer, CTR, CMIR, shell corporation, margin account, and letter of credit—has moved from Wall Street to the back street.

Id. at 3.

21. See *infra* notes 124-31 and accompanying text; see also Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988). For a brief summary of how the Anti-Drug Abuse Act of 1988 will affect financial institutions, see 1 MONEY LAUNDERING ALERT (Alert Pub. Inc.) 5 (July 1989) [hereinafter ALERT].

The banking industry, in particular, is concerned about the new reporting requirements and penalties contained in the money laundering laws. Because of the new laws, "banks are spending more time and money to police their ranks." Trigaux, *Banks That Do Not Police Their Ranks May Find Themselves Wrung Out by Vigilant Regulators*, AM. BANKER, July 24, 1989, at 7. Since 1985, the Treasury Department has imposed over \$20.5 million in civil penalties against banks and other financial institutions for failure to file CTR forms. See ALERT, *supra*, at 9. The Anti-Drug Abuse Act of 1988 increases the civil penalties from \$1000 to \$10,000 for each violation. See 12 U.S.C. §§ 1730d, 1730d(b)(1), 1955(a) (1988). Moreover, the Act also increases criminal penalties. See 18 U.S.C. § 1956(a) (1988) (\$500,000 fine and 20-year imprisonment).

Apart from the stiff civil and criminal fines, financial institutions also face possible civil and criminal forfeiture under the money laundering laws. 18 U.S.C. §§ 981-982 (1988). Section 981 protects third-party interests with a provision similar to those found in 21 U.S.C.A. § 881 (West Supp. 1989) (using a knowledge standard). Thus, the discussion of civil forfeiture under section 881 is equally applicable to forfeiture under section 981. For a discussion of civil forfeiture under 21 U.S.C. § 881, see *infra* notes 60-123 and accompanying text.

The money laundering laws also provide for criminal forfeiture under 18 U.S.C. § 982 (1988). Section 982 incorporates the forfeiture provisions of the CCE statute and therefore has a provision protecting third party interests identical to both CCE and RICO. Thus, the discussion of CCE and RICO, see *infra* notes 124-52 and accompanying text, is equally applicable to section 982.

new rights upon innocent third parties.²² Neither of these reforms, however, adequately protects third party interests. Moreover, a countervailing trend may soon appear in state law, for the National Conference of Commissioners on Uniform State Laws has proposed amendments to the Uniform Controlled Substances Act that would reduce third party protections.²³

The use of forfeiture is likely to increase, and the conflict between effective law enforcement and third party interests must be resolved expeditiously. This Article seeks to provide a workable solution by explaining the legal and policy bases for the forfeiture of third party interests in property. The Article then examines the limited extent to which constitutional, statutory, and administrative principles temper the harshness of forfeiture, and proposes new judicial and legislative approaches for protecting third party interests.

This Article consists of four sections. Section I reviews federal legislation providing for asset forfeiture of narcotics-related assets, and section II considers the constitutionality of such legislation. Section III examines pertinent federal and state forfeiture procedures and defenses. Finally, section IV proposes legislative reform of forfeiture laws.

I. FEDERAL LEGISLATION

Federal narcotics laws authorize two types of forfeitures: civil and criminal.²⁴ Civil forfeiture is directed toward the property sought to be

22. See *infra* notes 65-66, 86-91 and accompanying text.

23. See *infra* notes 169-70 and accompanying text.

24. Although criminal and civil forfeiture have the same outcome—effecting the forfeiture of property—their underlying rationale is quite different. Civil forfeiture is brought *in rem* whereas criminal forfeiture is brought *in personam*. See *The Palmyra*, 25 U.S. (12 Wheat.) 1 (1827).

It is well known, that at the common law, in many cases of felonies, the party forfeited his goods and chattels to the crown. The forfeiture did not, strictly speaking, attach *in rem*; but it was a part, or at least a consequence, of the judgment of conviction. . . . [T]he [crown's] right [to the goods and chattels] attached only by the conviction of the offender. . . . But this doctrine never was applied to seizures and forfeitures, created by statute, *in rem*, cognizable on the revenue side of the Exchequer. The thing is here primarily considered as the offender, or rather the offense is attached primarily to the thing; and this, whether the offence be *malum prohibitum*, or *malum in se*. . . . [T]he practice has been, and so this Court understand [sic] the law to be, that the proceeding *in rem* stands independent of, and wholly unaffected by any criminal proceeding *in personam*.

Id. at 14-15. The distinction between rights *in rem* and rights *in personam* is superficial at best. As one commentator noted:

All proceedings, like *all rights*, are really against persons. . . . What is here insisted on,—i.e., that all rights *in rem* are against persons—is not to be regarded merely as a matter of taste or preference for one out of several equally possible forms of statement or definition. Logical consistency seems to demand such a conception, and nothing less than that.

Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710, 721-23 (1917) (quoting *Tyler v. Court of Registration*, 175 Mass. 71, 76, 55 N.E. 812, 816 (1900)). Though the distinction between *in rem* and *in personam* forfeiture may be illogical, it is nonetheless well recognized. See *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974) (noting that

forfeited.²⁵ Criminal forfeiture operates directly against the defendant in a criminal prosecution, rather than his property, and any property he has illegally acquired or maintained is subject to forfeiture.²⁶ The underlying theory behind civil forfeiture, which has ancient historical roots,²⁷ is that

seizure permitted Puerto Rico to assert *in rem*, as opposed to *in personam*, jurisdiction over the property in dispute in order to conduct forfeiture proceedings); *J.W. Goldsmith, Jr.-Grant Co. v. United States*, 254 U.S. 505, 511 (1921) ("[W]hether the reason for [the forfeiture] be artificial or real, it is too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced.").

25. See *supra* note 24. Section 881(d) incorporates by reference the forfeiture procedures established under the Tariff Act of 1930. The applicable procedures are found in 19 U.S.C. §§ 1602-1618 (1988) and 21 C.F.R. § 1316.71-.81 (1989).

Procedurally, the government institutes civil forfeiture by seizing the asset and filing a claim against it. Once the asset is seized it is appraised. If the asset is a conveyance or if its value is \$100,000 or less, and if no party posts a bond requiring a judicial proceeding, then the property is subject to administrative forfeiture. The prerequisites for an administrative forfeiture are set forth in 21 C.F.R. § 1316.75-.77. Section 1316.75 provides:

- (a) If the appraised value does not exceed \$100,000, or if a conveyance used to import, export or otherwise transport or store any controlled substance is involved, . . . notice of the seizure and of the intention to forfeit and sell or otherwise dispose of the property [shall] be published once a week for at least 3 successive weeks in a newspaper of general circulation in the judicial district in which the processing for forfeiture is brought.
- (b) The notice shall: (1) Describe the property seized and show the motor and serial numbers, if any; (2) state the time, cause, and place of seizure; and (3) state that any person desiring to claim the property may, within 20 days from the date of first publication of the notice, file with the custodian or DEA Asset Forfeiture Unit a claim to the property and a bond with satisfactory sureties in the sum of \$5,000 or ten percent of the value of the claimed property whichever is lower, but not less than \$250.

21 C.F.R. § 1316.75 (1989). If the value of the asset is greater than \$100,000, a judicial forfeiture proceeding always is required. *Id.* § 1316.78.

26. See, e.g., *Russello v. United States*, 464 U.S. 16, 18 (1983) (after RICO conviction petitioner forfeited his interest in the enterprise acquired in violation of the statute); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680-86 (1974) (history of forfeiture); *United States v. Schmalfeldt*, 657 F. Supp. 385, 387 (W.D. Mich. 1987) ("[t]he distinguishing characteristic of criminal forfeiture is that, . . . the personal guilt of a defendant is at issue"); Reed, *Criminal Forfeiture Under the Comprehensive Forfeiture Act of 1984: Raising the Stakes*, 22 AM. CRIM. L. REV. 744, 748 (1985).

27. Civil forfeiture has its origins in biblical times and has been recognized throughout history. The Old Testament states: "If an ox gore a man or a woman, and they die, he shall be stoned: and his flesh shall not be eaten; but the owner of the ox shall be quit." *Exodus* 21:28. Roman law provided similarly for forfeiture stating: "If a quadruped causes injury to anyone, let the owner tender him the estimated amount of the damage; and if he is unwilling to accept it, the owner shall . . . surrender the animal that caused the injury." 7 Twelve Tables 1, translated in 1 SCOTT, *THE CIVIL LAW* 69 (1932). The common law even recognized civil forfeiture. See O.W. HOLMES, *THE COMMON LAW* 208 (1881) (recognizing that a man may maintain possession of his property until he is put out of his possession by an action brought by another). In fact, "[l]ong before the adoption of the Constitution the common law courts in the Colonies . . . were exercising jurisdiction *in rem* in the enforcement of forfeiture statutes." *C.J. Hendry Co. v. Moore*, 318 U.S. 133, 139 (1943).

For a more thorough examination of the history of forfeiture, see Clark, *Civil and Criminal Penalties and Forfeitures: A Framework for Constitutional Analysis*, 60 MINN. L. REV. 379 (1976) (analyzing the Supreme Court's treatment of cases involving civil, money penalties, forfeitures of property, and the punitive imposition of various disabilities as "quasi-criminal"); Note, *Bane of American Forfeiture Law—Banished at Last?*, 62 CORNELL L. REV. 768 (1977) (analyzing the his-

property involved in illicit conduct is itself tainted by the wrongdoing.²⁸ Thus, an action is brought directly against the property rather than against its owner.²⁹ Moreover, because of a legal fiction known as the relation back doctrine, the law considers forfeiture to have occurred at the time of the illegality, thereby cutting off subsequent transfers to third parties. Under this doctrine, the ensuing civil proceeding merely perfects the state's property interest.³⁰

In a civil forfeiture action, the government must only establish probable cause³¹ linking the property to narcotics trafficking.³² Furthermore, the prosecution does not need to provide direct evidence since "[c]ircumstantial evidence and inferences therefrom are good grounds for a finding of probable cause in a forfeiture proceeding."³³ Once the prosecution establishes probable cause, any claimant to the property

tory of forfeiture in both England and the United States and attempting to reconcile the divergent views on the effects of the 1972 Federal Rules amendments). See also *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680-86 (1974) (discussion of the history of forfeiture).

28. See *supra* note 24.

29. See, e.g., *Pearson*, 416 U.S. at 683-86; D. SMITH, *supra* note 6, § 2.01.

30. Section 881(h) states: "All right, title, and interest in property [subject to forfeiture] shall vest in the United States upon commission of the act giving rise to forfeiture . . ." 21 U.S.C. § 881(h) (Supp. V 1987); see, e.g., *Simons v. United States*, 541 F.2d 1351, 1352 (9th Cir. 1976) ("The forfeiture statute takes effect immediately upon the commission of the illegal act. At that moment the right to the property vests in the United States, and when forfeiture is sought, the condemnation when obtained relates back to that time and avoids all intermediate sales and alienation, even as to purchasers in good faith.").

As amended, RICO and CCE now have an explicit relation back provision. See 18 U.S.C. § 1963(c) (1988); 21 U.S.C. § 853(c) (Supp. V 1987); see also *Reed*, *supra* note 26, at 747, 756-60 (1985) (discussing effect of the relation back doctrine); Note, *supra* note 27, at 773 n.37 (explaining historical operation of relation back doctrine on real estate); see also *infra* text accompanying note 139.

31. The probable cause standard requires only a "reasonable ground for belief . . . [that the property constitutes proceeds of narcotics trafficking], supported by less than prima facie proof but more than mere suspicion." *United States v. One 1978 Chevrolet Impala*, 614 F.2d 983, 984 (5th Cir. 1980); *United States v. \$250,000*, 808 F.2d 895, 897 (1st Cir. 1987) (quoting *One 1978 Chevrolet Impala*); *United States v. A Single Family Residence*, 803 F.2d 625, 628 (11th Cir. 1986) (same); see also *United States v. Dickerson*, 857 F.2d 1241, 1244 (9th Cir.) ("To pass the point of mere suspicion and to reach probable cause, it is necessary to demonstrate by some *credible evidence* the probability that the plane was in fact used to transport a controlled substance."), *amended and superseded by*, 873 F.2d 1187 (9th Cir. 1988). The probable cause standard does not require the prosecution to make any showing by a preponderance of the evidence. Such an advantage is enormous, as many cases turn on the burden of proof.

32. A prosecutor need not trace the proceeds to a particular narcotics transaction; he need only link the proceeds to narcotics trafficking generally. See, e.g., *United States v. \$4,255,000*, 762 F.2d 895, 904 (11th Cir. 1985) ("[N]othing in the statute requires evidence of a particular narcotics transaction, and we decline to impose such a requirement here."), *cert. denied*, 474 U.S. 1056 (1986); *United States v. \$250,000*, 808 F.2d 895, 899-900 (1st Cir. 1987) ("The government need not, however, produce any evidence linking the money to any particular drug transaction.").

33. *United States v. Brock*, 747 F.2d 761, 763 (D.C. Cir. 1984). In *Brock* the government sought to forfeit \$120,000 worth of jewelry found in claimant's attic. Relying solely on circumstantial evidence, the court found probable cause:

must disprove the allegations by a preponderance of the evidence.³⁴ Alternatively, the claimant must sustain this burden in connection with any of the exemptions that have been established to protect third party interests. These exemptions vary, depending upon which forfeiture provision is being used by the government.³⁵ Civil forfeiture not only requires a lower burden of proof than that required to support forfeiture in a criminal prosecution, but it also provides prosecutors with an opportunity for

The circumstances were sufficient to warrant a conclusion that there was no other way Brock could have acquired the jewelry than . . . by proceeds of the alleged narcotics violations The jewelry was found secreted in the same house as the narcotics and paraphernalia for distribution of narcotics. In addition, a large quantity of cash and a loaded revolver, further suggestive of ongoing narcotics activity, were seized at the house. These circumstances fairly lead to an inference that the jewelry was the proceeds of narcotics activity. . . . The conclusion to forfeit the property was justified . . . [especially] given the evidence that the claimant had no source of legitimate income for several years preceding the seizure.

Id. at 762-63. Other courts also have found circumstantial evidence sufficient to show probable cause. *See, e.g.,* *United States v. \$4,225,000*, 762 F.2d 895, 904 (11th Cir. 1985) ("circumstantial evidence can suffice to support a finding of probable cause"), *cert. denied*, 474 U.S. 1056 (1986); *United States v. \$93,685.61*, 730 F.2d 571, 572 (9th Cir.) ("The [extremely large amount of] money, in combination with other persuasive circumstantial evidence, particularly the presence of the drug paraphernalia is sufficient here to establish probable cause."), *cert. denied*, 469 U.S. 837 (1984); *see also* M. GOLDSMITH, *CIVIL FORFEITURE: TRACING THE PROCEEDS OF NARCOTICS TRAFFICKING ASSET FORFEITURE* 3-4 (U.S. Department of Justice, Office of Justice Programs) (Nov. 1988).

34. *See, e.g.,* *United States v. A Single Family Residence*, 803 F.2d 625, 629 (11th Cir. 1986) ("Once the government demonstrates that probable cause exists, the burden of proof in a civil forfeiture proceeding shifts to the claimant to establish by a preponderance of the evidence that the property is not subject to forfeiture."); *One Blue 1977 AMC Jeep CJ-5 v. United States*, 783 F.2d 759, 761 (8th Cir. 1986) ("Once the government shows that probable cause exists, the burden shifts to the claimant to demonstrate by a preponderance of the evidence that the property is not subject to forfeiture"); *United States v. \$4,255,000*, 762 F.2d 895, 904 (11th Cir. 1985) (citing extensive authority), *cert. denied*, 474 U.S. 1056 (1986); *United States v. \$84,000*, 717 F.2d 1090, 1101 (7th Cir. 1983) ("The government's burden was only to show probable cause for the forfeiture proceedings . . . [t]he burden then shift[s] to . . . claimants to show by a preponderance of the evidence that the property was not subject to forfeiture."), *cert. denied*, 469 U.S. 836 (1984).

35. *See infra* notes 60-123 and accompanying text.

discovery³⁶ and numerous other advantages.³⁷ Given this favorable climate, civil forfeitures predictably have flourished.³⁸

A criminal forfeiture action, on the other hand, is part of the criminal trial itself.³⁹ Because innocent third parties are not involved in this trial, they may not assert their claims to the defendant's forfeited interest

36. D. SMITH, *supra* note 6, at ¶ 10.01.

For example, prosecutors may resort to the discovery process to obtain information pertinent to tracing. The claimant may be deposed and disclosure of his records compelled. Perjury and contempt sanctions are potentially available against untruthful or recalcitrant witnesses. And, while the Fifth Amendment may still be asserted, a civil claimant risks an adverse factual finding by doing so. This possibility places the claimant in a particular bind if criminal charges against him are still pending. Asserting the Fifth Amendment may result in an adverse factual determination, while answering questions may have incriminating consequences in the criminal proceedings. And, regardless of whether criminal charges are pending, discovery is likely to provide useful information for impeachment if the claimant testifies at the forfeiture proceeding. Such testimony will often be necessary because, once the government's evidentiary burden has been sustained, failure to provide responsive proof will result in an adverse judgment. Often times, however, such testimony proves counterproductive because it is presented in an evasive or inconsistent manner.

M. GOLDSMITH, *supra* note 33, at 2, (citations omitted).

37. For example, a claimant must establish standing to contest the forfeiture. Frequently, legal title to the property will be in someone's name other than the real party at interest. Most courts will not permit forfeitures to be contested by such so-called straw men:

[P]ossession of bare legal title by one who does not exercise dominion or control over property may be insufficient to establish standing to challenge a forfeiture. The intent of the forfeiture provision of the Controlled Substances Act is to deprive criminals of the tools by which they conduct their illegal activities. A failure to look beyond bare legal title would foster manipulation of nominal ownership to frustrate this intent . . .

[Once] the government establishes probable cause to believe that a claimant is merely a nominal or straw owner, . . . a claimant cannot meet its burden of establishing standing to challenge a forfeiture by presenting proof of legal title alone. The claimant must also present evidence of dominion and control or other indicia of true ownership.

United States v. Premises Known as 528 Liscum Drive, 866 F.2d 213, 217 (6th Cir. 1989) (citations omitted). See also United States v. A Single Family Residence, 803 F.2d 625, 630 (11th Cir. 1986) (standing requires proof of dominion and control beyond mere legal title).

Other advantages to civil forfeiture include: enforcement officials have a lower burden of proof—preponderance of the evidence rather than beyond a reasonable doubt, *see, e.g.*, United States v. Regan, 232 U.S. 37, 50 (1914); under federal law the burden of proof is placed on the claimant instead of the government, *see* United States v. Sandini, 816 F.2d 869, 872 (3rd Cir. 1987); eighth amendment proportionality protections are not applicable to civil forfeiture, *see* United States v. Tax Lot 1500, 861 F.2d 232 (9th Cir. 1988), *cert. denied*, 110 S. Ct. 364 (1989); civil forfeiture actions under \$100,000 are handled administratively in the federal system, rather than judicially, thereby being simpler, quicker, and less expensive, *see* Warrant to Seize One 1988 Chevrolet Monte Carlo v. United States, 861 F.2d 307, 310 (1st Cir. 1988); a jury verdict in a criminal trial is not binding on the court in a civil forfeiture proceeding, *see* United States v. Kim, 870 F.2d 81 (2nd Cir. 1989); but while notice of civil forfeiture can be given when a proceeding is initiated, notice of criminal forfeiture cannot be given until after a criminal conviction, *see* United States v. Tit's Cocktail Lounge, 873 F.2d 141 (7th Cir. 1989).

38. For example, the Department of Justice processed more than 20,000 civil and administrative forfeitures in 1989. Telephone interview with Judith Friedman, Asset Forfeiture. Department of Justice Feb. 14, 1990.

39. Congress has given only limited direction on the procedures to be followed in criminal forfeiture. The indictment or information must describe all property potentially subject to forfeiture. *See* FED. R. CRIM. P. 7(c)(2). If the defendant is found guilty, then the jury must return a special verdict specifying the property to be forfeited. *See id.* 31(e).

until the trial has been completed.⁴⁰ At that point, as their civil counterparts, these criminal claimants operate under the relation back doctrine and carry the burden of proof as to any third party exemption.⁴¹

Criminal forfeiture poses special problems to property holders. Although the relation back doctrine makes sense from a law enforcement standpoint, it may affect the RICO or CCE defendant unfairly. Once indicted, a defendant often will not be able to negotiate his property until the case has been resolved; because of the complexity of such cases, the litigation may consume several years. During this period, both the defendant and third parties doing business with him may be forced to a standstill.⁴²

To further appreciate the impact of forfeiture laws on third party interests, actual applications of the laws must be considered. The Supreme Court's 1974 decision in *Calero-Toledo v. Pearson Yacht Leasing Company (Pearson)*⁴³ which endorsed the constitutionality of civil forfeiture, provides an appropriate framework for an analysis of the impact on third party interests.

II. CONSTITUTIONALITY: THE PEARSON DOCTRINE

Pearson addressed the constitutionality of Puerto Rico's civil forfeiture statute. In this case, the forfeiture of a yacht that the Pearson Yacht Leasing Company (Pearson Yacht) had rented to two Puerto Rican residents was at issue. After finding a marijuana cigarette on the vessel, Puerto Rican authorities seized the yacht without giving prior notice to the

Prior to conviction, a court may take action to preserve the availability of the potentially forfeitable property including issuing a restraining order or requiring the execution of a performance bond. 18 U.S.C. § 1963(d) (1988). For a discussion of pre-conviction restraints, see *infra* notes 142-52 and accompanying text.

40. See *infra* notes 131-33 and accompanying text.

41. 18 U.S.C. § 1963(c) (1988); 21 U.S.C. § 853(c) (Supp. 1987). 18 U.S.C. § 1963(c) states:

All right, title, and interest in property [subject to forfeiture] vests in the United States upon the commission of the act giving rise to forfeiture Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing . . . that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture

18 U.S.C. § 1963(c). The legislative history of 18 U.S.C. § 1963(c) states:

Under this theory, forfeiture relates back to the time of the acts which gave rise to the forfeiture. The interest of the United States in the property is to vest at that time, and is not necessarily extinguished simply because the defendant subsequently transfers his interest to another. Absent application of this principle a defendant could attempt to avoid criminal forfeiture by transferring his property to another person prior to conviction.

S. REP. NO. 225, *supra* note 10 reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS, *supra* note 10, at 3383.

42. See *infra* note 142 and accompanying text.

43. 416 U.S. 663 (1974).

renters or Pearson Yacht. The authorities confiscated the vessel pursuant to civil statutes that subjected to forfeiture any conveyance used to transport or facilitate the transportation of controlled substances.⁴⁴ Pearson Yacht, however, was innocent of a narcotics activity. Indeed, the company did not even learn of the yacht's forfeiture until it attempted to recover possession after the lessee defaulted on the rental contract.⁴⁵

The forfeiture in *Pearson* raised two constitutional issues: (1) the propriety of seizing property without prior notice or hearing, and (2) the constitutional ramifications of taking an innocent party's property without just compensation. The innocent third party lost on both issues. The Supreme Court justified seizure of the yacht without notice or hearing by stressing the public's interest "in preventing continued illicit use of the property" and the risk that advance notice would facilitate the vessel's concealment or even its removal from the jurisdiction.⁴⁶ The Court concluded that these circumstances presented "an 'extraordinary' situation in which postponement of notice and hearing until after seizure did not deny due process."⁴⁷

The *Pearson* Court justified forfeiture of the vessel without any compensation on historical and policy grounds that reflect the unique nature of civil forfeiture. Forfeitures without compensation had been a well-established aspect of English law and also were recognized in America "long before the adoption of the Constitution . . ."⁴⁸ Since civil forfeitures operated *in rem*—directly against the offending property—the possible innocence of the property owner was never a pertinent consideration.⁴⁹ In other words, "[t]he vessel [theoretically] was 'treated as the offender,' without regard to the owner's conduct . . ."⁵⁰ As the

44. *Id.* at 665-68.

45. *Id.* at 668.

46. *Id.* at 679; see Comment, *Criminal Forfeiture: Attacking the Economic Dimension of Organized Narcotics Trafficking*, 32 AM. U.L. REV. 227, 231 (1982) ("After receiving notice, the defendant moves quickly to transfer his property or to remove it from the jurisdiction of the United States to avoid divestiture.").

47. *Pearson*, 416 U.S. at 680. Ordinarily, the owner would have received notice shortly after seizure. In this case, however, the lessor did not receive such notice because the vessel had not been registered with Puerto Rican authorities by the lessor. *Id.* at 668 n.3.

48. *Id.* at 683 (quoting *J. Hendry Co. v. Moore*, 318 U.S. 133, 139 (1943)). For a brief discussion of the history of forfeiture, see *supra* note 27.

49. For a discussion of *in rem* and *in personam* forfeiture, see *supra* note 24.

50. *Pearson*, 416 U.S. at 684 (citing, among others, *General Motors Acceptance Corp. v. United States*, 286 U.S. 49 (1932); *Van Oster v. Kansas*, 272 U.S. 465 (1926); *United States v. One Ford Coupe Automobile*, 272 U.S. 321 (1926); *Dobbin's Distillery v. United States*, 96 U.S. 395 (1878)).

opinion demonstrated, a long line of precedent had adopted this viewpoint,⁵¹ and the Supreme Court showed no inclination to abandon it.⁵²

Surprisingly, Justice Brennan's majority opinion made little effort to provide a policy justification for forfeiture without compensation. He properly could have stressed that an innocent owner defense might not protect against collusion or might create other major loopholes for narcotics traffickers who seek to avoid forfeiture. Rather than use their own property to conduct illegal transactions, drug dealers could escape forfeiture simply by using conveyances belonging to third parties.⁵³ Justice Brennan did not address this concern explicitly, however, and instead he offered the following statement:

Forfeiture of conveyances that have been used—and may be used again—in violation of the narcotics laws fosters the purposes served by the underlying criminal statutes, both by preventing further illicit use of the conveyance and by imposing an economic penalty, thereby rendering illegal behavior unprofitable To the extent . . . that such forfeiture provisions are applied to lessors, bailors, or secured creditors who are innocent of any wrongdoing, confiscation may have the desirable effect of inducing them to exercise greater care in transferring possession of their property.⁵⁴

Justice Brennan did conclude, though, that under certain circumstances constitutional protections might be triggered by the application of forfeiture provisions to innocent third parties:

[I]t would be difficult to reject the constitutional claim of an owner whose property subjected to forfeiture had been taken from him without his privity or consent. . . . Similarly, the same might be said of an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property⁵⁵

In the Court's final analysis, constitutional protections were not triggered in *Pearson*. Justice Brennan observed that *Pearson Yacht* voluntarily entrusted the vessel to the lessees and that "no allegation [had] been made or proof offered that the company did all that it reasonably could to avoid having its property put to an unlawful use."⁵⁶ Consequently, *Pearson Yacht*'s only available remedies were to sue the lessee whose actions

51. *Id.*

52. *See id.*

53. *See infra* notes 81-83 and accompanying text.

54. *Pearson*, 416 U.S. at 686-88.

55. *Id.* at 689.

56. *Id.* at 690. Of course, the lessor had not made this argument because no prior Supreme Court decision had recognized this principle.

had caused the forfeiture or to rely on the possibility of an administrative remission procedure.⁵⁷

Pearson established the principles that due process does not require pre-seizure forfeiture hearings and that innocence is not a constitutionally mandated defense in the civil context. The Court's willingness to tolerate such harsh repercussions on third party interests also potentially applies to criminal forfeiture cases because, after entry of a criminal forfeiture judgment, any third party interests in the forfeited property are litigated in a subsequent civil proceeding.⁵⁸

Since the *Pearson* decision, however, many courts have focused on whether that decision created a limited defense in civil actions for third party claimants who took all reasonable precautions to prevent illegal use of their property.⁵⁹ The ramifications of a constitutionally mandated, reasonable precaution defense are among other defenses best treated by examining pertinent forfeiture procedures and the defenses applicable to third party interests.

III. PROCEDURES AND DEFENSES

Pearson's impact on federal and state forfeiture procedures and defenses has varied depending on the procedural context in which forfeiture was sought. To facilitate the analysis, this discussion of procedures and defenses consists of four parts: Part A examines federal civil forfeiture; Part B analyzes federal criminal forfeiture; Part C discusses state forfeiture laws; and Part D covers remission procedures.

A. Federal Civil Forfeiture

Section 881 authorizes civil forfeiture in narcotics cases.⁶⁰ In pertinent part, this law authorizes the following forfeitures:

57. For a discussion of administrative remission procedures, see *infra* notes 181-86 and accompanying text.

58. Although *Pearson* has not been directly applied to criminal forfeiture under RICO or CCE, the constitutionality of criminal forfeiture is well established. See, e.g., *Russello v. United States*, 464 U.S. 16, 27 (1983) (implicitly accepting the constitutionality of criminal forfeiture). As originally enacted, RICO failed to provide comprehensive protections for third party interests. See *infra* notes 129-30 and accompanying text. Moreover, a 1984 amendment, designed to enhance third party protections, has also failed to achieve the desired effect. See *infra* notes 131-42 and accompanying text.

59. *United States v. One 1974 Mercury Cougar XR 7*, 397 F. Supp. 1325, 1329 (C.D. Cal. 1975) (court finds "expressions by the Supreme Court in *Pearson* . . . [that] authorize a much fairer treatment of innocent owner-claimants"); see also *United States v. One 1984 Mercedes-Benz Model No. 380SE*, 836 F.2d 268, 270 (10th Cir. 1988); *United States v. One 1976 Lincoln Mark IV*, 462 F. Supp. 1383, 1390 (W.D. Pa. 1979).

60. 21 U.S.C.A. § 881(a) (West Supp. 1989).

(a)(4)—All conveyances . . . used, or . . . intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of [a controlled substance] . . . ;⁶¹

. . . .
(a)(6)—All moneys, . . . or other things of value furnished or intended to be furnished . . . in exchange for a controlled substance . . . [and] all proceeds traceable to such an exchange . . . ;⁶² and (a)(7)—All real property . . . which is used, or intended to be used . . . to commit, or to facilitate the commission of a [designated] violation of this title⁶³

Prior to November 1988, different third party exemptions governed each of these provisions. Subsections (a)(6) and (a)(7) exempted an owner's interests in proceeds and real property from forfeiture if he did not consent to or know of the illegality giving rise to forfeiture.⁶⁴ Subsection (a)(4), however, did not provide a comparable innocent owner exception for conveyances.⁶⁵ In November 1988, as part of the Anti-Drug Abuse Act of 1988, Congress amended subsection (a)(4) to provide a new third party defense similar to that found in subsections (a)(6) and (a)(7). The new law states that "no conveyance shall be forfeited . . . by reason of any act or omission established by that owner to have been committed or omitted without [his] knowledge, consent, or willful blindness."⁶⁶

The November 1988 amendment was apparently a direct response to the inadequacies of *Pearson*. Its potential effect can best be understood in light of three factors: (1) the pre-reform case law under *Pearson*; (2) the origins of reform; and (3) the relationship between subsection (a)(4) and subsections (a)(6) and (a)(7).

1. *Former Section 881(a)(4) Under Pearson*. Section 881(a)(4) authorizes forfeiture of conveyances that have been used to facilitate nar-

61. *Id.* § 881(a)(4).

62. 21 U.S.C. § 881(a)(6) (1982).

63. 21 U.S.C. § 881(a)(7) (Supp. V 1987).

64. *See* 21 U.S.C. § 881(a)(6) (1982); 21 U.S.C. § 881(a)(7) (West Supp. 1989). Each of these sections states that "no property shall be forfeited . . . to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner." *Id.*

65. *See* 21 U.S.C. § 881(a)(4) (1982) (pre-amendment version). This section originally provided as follows:

(A) no conveyance used by any person as a common carrier in the transaction of business as a common carrier shall be forfeited under the provision of this section unless it shall appear that the owner or other person in charge of such conveyance was a consenting party or privy to a [designated] violation . . . ; and

(B) no conveyance shall be forfeited under the provisions of this section by reason of any act or omission established by the owner thereof to have been committed or omitted by any person other than such owner while such conveyance was unlawfully in the possession of a person other than the owner in violation of the criminal laws of the United States, or of any State.

Id. (emphasis added).

66. 21 U.S.C.A. § 881(a)(4)(c) (West Supp. 1989).

cotics trafficking.⁶⁷ Before the November 1988 reform, this provision only exempted conveyances that were common carriers or had been obtained unlawfully without the owner's consent.⁶⁸ Typical third party claimants usually resorted to the *Pearson* defense because these two exemptions ordinarily would not apply.

A threshold question at the outset was the scope of the defense suggested in *Pearson*. Who had standing to assert it? For example, would a reasonable precautions defense be available to a bona fide purchaser who paid full value for a conveyance and neither knew, nor had reason to know, of any prior illegal use? Similarly, would the defense be available to a lienholder acting reasonably without knowledge of any impropriety? Such third party claimants seem to deserve more protection than an owner because they generally lack any opportunity to prevent illegal use of the conveyance. Unfortunately, however, courts did not address the standing issue carefully. Because most third party claimants relied on an administrative remission process for relief,⁶⁹ the question rarely was raised. The few decisions to consider the point did so obliquely and failed to generate a consensus.⁷⁰

Most often, only claimants with a direct ownership interest in the conveyance raised *Pearson* claims under subsection 881(a)(4). They litigated these claims with mixed results. As of 1986, a treatise on forfeiture law stated that the judiciary had not yet decided whether *Pearson* established a constitutionally mandated defense when a claimant has taken all reasonable measures to avoid illegal use of his property.⁷¹ Although most courts recognized a potential constitutional defense, they usually found *Pearson* inapplicable under the particular facts⁷² because the third party claimant was simply unable to establish his innocence. This burden was difficult to meet because the claimant had to prove a negative—the absence of guilty knowledge—by a preponderance of the evidence—and also that all reasonable precautions had been taken.⁷³

The courts however, have identified factors to consider in assessing the reasonableness of the claimant's precautionary measures. The most

67. 21 U.S.C. § 881(a)(4) (1982).

68. For the text of these exemptions, see *supra* note 64.

69. See *infra* notes 181-86 and accompanying text.

70. See *United States v. One 56-Foot Motor Yacht Named The Tahuna*, 702 F.2d 1276, 1279 (9th Cir. 1983) (implying no protection for bona fide buyers); *United States v. All That Tract and Parcel of Land*, 602 F. Supp. 307, 311 n.8 (N.D. Ga. 1985) (citing decisions implying no lienholder protection); *United States v. 1984 Chrysler LeBaron No. 4-84-1371*, slip op. at 1 (D. Minn. Apr. 9, 1986) (1986 WL 6103) (protecting lienholder); *United States v. One 1976 Chevrolet Corvette*, 477 F. Supp. 32, 34-35 (E.D. Pa. 1979) (protecting bona fide buyer).

71. D. SMITH, *supra* note 6, ¶ 12.04[3], at 12-62 (1985 & Supp. June 1989).

72. *Id.* at 12-70.

73. See *supra* note 55 and accompanying text.

important consideration appears to be whether the conveyance had been obtained from the owner by commercial means or through some kind of personal relationship. Typically, courts imposed more stringent standards on commercial third parties than on family members or friends who allow their property to be borrowed by narcotics traffickers. This distinction reflected the belief that commercial third parties—usually rental companies—could be expected to protect themselves by following careful business practices and investigating suspicious borrowers. A recent decision summarized the prior prevailing law for commercial third parties as follows:

In determining the standards for failure to do "all that reasonably could be expected to prevent the proscribed use of his property," courts have given weight to such factors as failure to determine where the claimant's property was to be taken, . . . failure to require a written contract when renting, . . . failure to obtain a clear understanding as to when property would be returned, . . . failure to require money from a renter prior to turning over possession of property, . . . and failure to carry insurance on the property Additionally, . . . it is significant if the subject property is being used in the South Florida area, since this is an "area of the country that is well known for drug related activities."⁷⁴

By contrast, courts generally have not been as demanding of third parties in non-commercial settings. For example, in *United States v. 1985 Chevrolet Camaro*, the trial court declined to order forfeiture of a car that had been loaned to a close family friend. Absent any reason to suspect the borrower's conduct, the court concluded that the claimant "did all he reasonably could . . . to prevent the proscribed use of his property."⁷⁵ The court specifically distinguished commercial third parties by holding them to a higher standard of care.⁷⁶

The higher standard for commercial claimants appears misplaced. Since those claimants usually have no reason to anticipate illegal use of their property, they lack sufficient motivation to investigate potential bailees. Moreover, the costs of such an investigation often are prohibi-

74. *United States v. One Blue Lobster Vessel Named Tony, Jr.*, 639 F. Supp. 865, 872 (S.D. Fla. 1986) (citing extensive authority); *see also* *United States v. One 1966 Beechcraft Aircraft*, 777 F.2d 947, 951-52 (4th Cir. 1985) (applying above factors); *United States v. One 1981 Datsun 280ZX*, 644 F. Supp. 1280, 1287 (E.D. Pa. 1986) (noting that commercial lenders are expected to take more precautions); *United States v. One Defender Lobster Vessel, Named Betty II*, 606 F. Supp. 32, 36 (S.D. Fla. 1984) (applying above factors).

75. *United States v. 1985 Chevrolet Camaro Z-28*, No. CV 85-6348-ER, slip op. at 1 (C.D. Cal. Sept. 11, 1986) (1986 WL 10820).

76. *Id.*; *see also* *United States v. One 1983 Homemade Vessel Named Barracuda*, 625 F. Supp. 893, 899 (S.D. Fla. 1986) (Although legitimate government interests are served when forfeiture statutes are applied to commercial third parties, the statutes "are not designed" to propel human beings beyond the parameters of reasonable behavior.").

tive.⁷⁷ By comparison, friends and family members who lend their conveyances are usually in a better position to suspect criminality and make reasonable inquiry. Perhaps for this reason, despite the articulation of different standards of care, non-commercial claimants have fared only slightly better than their commercial counterparts. Courts were extremely reluctant to find that non-commercial third parties had taken all reasonable precautions to avoid unlawful use of their property.⁷⁸ Indeed, judges occasionally stretched to suggest preventive measures that claimants might have taken to preclude unlawful use of their conveyances. For example, in *United States v. One 1977 36 Foot Cigarette Ocean Racer*, the court erroneously suggested that the *Pearson* defense requires claimants to establish that all reasonable measures were taken to prevent the theft of a conveyance subsequently used to transact narcotics.⁷⁹ In another case, an out-of-town owner who had left his Mercedes in the care of an acquaintance lost with a *Pearson* defense ostensibly because garaging the car would have been a more reasonable means of preventing its illegal use.⁸⁰

Although the familial or personal entrustment cases, like the ones mentioned above led to harsh results, they reflected both well-founded judicial skepticism regarding third party claims of innocence and the need to avoid creating a large loophole in the forfeiture process. A survey of the cases reveals that many claimants were not as innocent as they maintained.⁸¹ Indeed, they often were "strawmen" holding title on behalf of a drug dealer.⁸² This fact encouraged courts to pierce the veil of fictitious ownership in order to reveal the real criminal interests at stake,⁸³ and it motivated judges to apply the *Pearson* defense narrowly.

77. See generally D. SMITH, *supra* note 6, at ¶ 12.04[5] (1985 & Supp. 1989).

78. See *United States v. One Brown 1978 Mercedes-Benz*, 657 F. Supp. 316, 319 (E.D. Mo. 1987) (no proof that claimant had done all that reasonably could be expected to prevent the proscribed use of the vehicle), *aff'd*, 837 F.2d 479 (8th Cir. 1987); *United States v. One 1982 Datsun*, 627 F. Supp. 62, 63 (W.D. Pa. 1985) (burden of proving "innocent owner" defense on claimant).

79. 624 F. Supp. 290, 296 (S.D. Fla. 1985).

80. *United States v. One Mercedes-Benz*, 604 F. Supp. 1307, 1317 (S.D.N.Y. 1984), *aff'd*, 762 F.2d 991 (2d Cir. 1985).

81. See *One Blue 1977 AMC Jeep CJ-5 v. United States*, 783 F.2d 759, 762 (8th Cir. 1986) (property was used with the owner's consent); *United States v. One 1986 Chevrolet Corvette*, No. 86 C-750, slip op. at 1 (N.D. Ill. Dec. 5, 1986) (1986 WL 14135) (owner pled guilty to possession of cocaine at earlier criminal trial); *United States v. 1984 Chrysler LeBaron*, No. 4-84-1371, slip op. at 1 (D. Minn. Apr. 9, 1986) (1986 WL 6103) (evidence suggests owner knew drugs were present in her car).

82. See, e.g., *United States v. A Fee Simple*, 650 F. Supp. 1534, 1537-39 (E.D. La. 1987); *United States v. \$285,505*, 655 F. Supp. 1487, 1492-96, 1501-03 (S.D. Fla. 1986); *United States v. \$501,958*, 633 F. Supp. 1300, 1300-02 (N.D. Ill. 1986).

83. See *United States v. A Single Family Residence*, 803 F.2d 625, 629-30 (11th Cir. 1986) (overwhelming evidence supported district court's finding that claimant was a "strawman"); *Ramaria Familienstiftung v. United States*, 643 F. Supp. 139, 140-45 (S.D. Fla. 1986) (plaintiff cor-

Any other judicial response would have permitted drug dealers to avoid the impact of forfeiture by using conveyances belonging to third parties. The *Pearson* defense thus rarely succeeded under section 881(a)(4).

Notwithstanding the considerable criticism of the provision,⁸⁴ subsection (a)(4) might have remained intact if the Justice Department had not embarked on its policy of "zero tolerance." Under "zero tolerance" the government made clear its intent to seize *any* conveyance containing illegal drugs, no matter how small the quantity of drugs or how valuable the conveyance.⁸⁵ When taken to such extremes, "zero tolerance" eventually triggered a reform backlash.

2. *Origins of Section 881(a)(4) Reform.* Congress amended subsection (a)(4) as part of the Anti-Drug Abuse Act of 1988 to provide an innocent owner defense.⁸⁶ Surprisingly, no documented legislative history explains the forfeiture reform. The impetus for change, however, apparently came from two sectors: (a) the public's outrage over the potential hardship of "zero tolerance" on innocent third parties, and (b) the Justice Department's perceived need to enact reforms rather than risk restrictive rulings by judges angered by the "zero tolerance" policy.⁸⁷

poration was the "alter ego, formed and controlled exclusively by" a convicted felon whose property had been forfeited by previous criminal trial); *United States v. One 1977 36 Foot Cigarette Ocean Racer*, 624 F. Supp. 290, 292-93 (S.D. Fla. 1985) (noting use of strawmen as frequent technique).

84. See Valukas & Walsh, *Forfeitures: When Uncle Sam Says You Can't Take It with You*, 14 LITIGATION 31, 31-32 (1988) (Under section 881(a)(4) "[t]he government need show only that the vehicle was 'intended to be used' in violation of a statute. . . . [This makes] simply *thinking* about committing a sin . . . tantamount to committing it."); Note, *supra* note 14, at 108 ("the current federal civil forfeiture scheme, in which the conveyance used in unlawful activity is considered to be the offender, is unjustifiably unfair to innocent interest holders in the conveyance").

85. See Savage & Fritsch, *U.S. Eases Rule on Drug Linked Ship Seizures*, L.A. Times, May 21, 1988, § 2, at 3, col. 1.

86. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 418. The Act also amended 21 U.S.C. § 881(a)(7) and added 21 U.S.C. § 881-1 entitled, "Expedited procedures for seized conveyances." Section 881(a)(7)'s list of forfeitable property was amended to include, "any leasehold interest." 21 U.S.C.A. § 881(a)(7) (West Supp. 1989). Congress enacted section 881-1 to expedite the return of seized property and reduce the damage caused by prolonged asset deprivation. Section 881-1 provides in part:

(1) The owner of a conveyance may petition the Attorney General for an expedited decision with respect to the conveyance, if the conveyance is seized for a drug-related offense and the owner has filed the requisite claim and cost bond in the manner provided in section 1608 of Title 19. The Attorney General shall make a determination on a petition under this section expeditiously, including a determination of any rights or defenses available to the petitioner. If the Attorney General does not grant or deny a petition under this section within 20 days after the date on which the petition is filed, the conveyance shall be returned to the owner pending further forfeiture proceedings.

Id. § 881-1(a)(1). This section also requires the Attorney General to promulgate regulations to carry out this directive. *Id.* For proposed rules, see 54 Fed. Reg. 14,246 (1989) (to be codified at 21 C.F.R. pts. 162, 171) (proposed Apr. 10, 1989).

87. Telephone interview with Patrick Walsh, Deputy Director of the Asset Forfeiture Office of the United States Department of Justice (May 1, 1989) [hereinafter Walsh Interview].

Public dissatisfaction with the lack of third party protections initially stemmed from "zero tolerance," which too often subjected valuable assets to forfeiture when only minute amounts of drugs had been found.⁸⁸ For example, the seizure of the \$80 million dollar research vessel *Atlantis II*, based on a small amount of marijuana found in a crewman's belongings, evoked widespread adverse publicity.⁸⁹ This type of action led to "an angry petition drive among Gulf of Mexico boaters and stiff criticism from national civil liberties groups," in addition to general resentment from other constituents.⁹⁰

Law enforcement agencies, fearing a judicial backlash to "zero tolerance," also supported the reform.⁹¹ Because of the severity of the policy, the agencies speculated that judges might create broad new doctrines to protect third parties. For example, the agencies feared that courts could start requiring that an owner consent to or ratify the illegal act as a prerequisite to forfeiture. To avoid such judicial expansions, enforcement agencies sought compromise by tacitly supporting the 1988 amendment.

Ultimately, the amendment to subsection (a)(4) made good sense because it brought the provision into conformity with subsections (a)(6) and (a)(7) of section 881.⁹² When subsections (a)(6) and (a)(7) were originally added as forfeiture tools for narcotics proceeds and real property, Congress provided a broad innocent owner defense but failed to incorporate similar language in subsection (a)(4).⁹³ No apparent policy explained this distinction. As a result, innocent owners under subsection (a)(4) suffered the vicissitudes of *Pearson*, whereas subsections (a)(6) and

88. *Id.*

89. *Id.*

For example, the *Los Angeles Times* reported that "[c]ustoms agents had seized the vessel, the premier ship in the U.S. oceanographic research fleet, after a drug-sniffing dog found less than one-hundredth of an ounce of marijuana in a crewman's shaving kit." Savage & Fritsch, *supra* note 85, at 1, col. 3. Officials finally agreed to return the vessel to its owner, the Woods Hole Oceanographic Institution, because the Institution had no knowledge that the drugs were on board. *Id.* Constituents were also angered by the highly-publicized seizure of the yacht *Monkey Business* under similar circumstances. The *Los Angeles Times* reported:

[T]he luxury yacht *Monkey Business*, which former presidential candidate Gary Hart once used for a trip to the Bahamas with model Donna Rice, . . . was confiscated by Coast Guard officers who found 1/28th of an ounce of marijuana aboard.

. . . The *Monkey Business* was boarded 22 miles northwest of Bimini for a routine search and was escorted back to a Coast Guard base in Miami Beach. In a later dock side search, eight more grams of marijuana was [sic] found . . . in a garment hanging in a closet.

Id. at 12, col. 4. Authorities also released the *Monkey Business* because the owner had nothing to do with the marijuana being on board. *Id.*

90. *Id.*

91. Walsh Interview, *supra* note 87.

92. *Id.*

93. For the text of the innocent owner defense contained in sections (a)(6) and (a)(7), see *supra* note 64.

(a)(7) were much more forgiving to third parties. The 1988 amendment corrects this problem.

The amendment to (a)(4) likely will be interpreted in light of analogous case law under (a)(6) and (a)(7).⁹⁴ For the amendment to be effective, however, courts must not be allowed to interpret (a)(4) as restrictively as some of the case law under (a)(6) and (a)(7). The effect of *Pearson* on these subsections now must be considered.

3. *The Relationship Between Subsection (a)(4) and Subsections (a)(6) and (a)(7).* Enacted in 1978, section 881(a)(6) subjects all proceeds of narcotics trafficking to civil forfeiture.⁹⁵ By reaching narcotics proceeds, Congress sought to expand the impact of forfeiture.⁹⁶ As a result, civil forfeiture no longer is limited to property used to facilitate narcotics transactions; now money, real estate, or personal property con-

94. See *infra* notes 95-112 and accompanying text (effect of *Pearson* doctrine, standing doctrine, and relation back doctrine).

95. 21 U.S.C. § 881(a)(6) provides that the following are subject to forfeiture:

(6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

21 U.S.C. § 881(a)(6) (1982). The legislative history to section 881(a)(6) reiterates the need for tracing the property to be forfeited back to the illegal act:

Due to the penal nature of forfeiture statutes, it is the intent of these provisions that property would be forfeited only if there is a substantial connection between the property and the underlying criminal activity which the statute seeks to prevent. Specifically, the Senate amendment provides for the forfeiture of property exchanged or intended to be exchanged in an illegal drug transaction. In addition it provides for forfeiture of property which is the proceeds of an illegal drug transaction only if there is a traceable connection [between] such property and the illegal exchange of controlled substances. Thus if such proceeds were, for example, comingled with other assets, involved in intervening legitimate transactions, or otherwise changed in form, they would still be subject to forfeiture, but only to the extent that it could be shown that a traceable connection to an illegal transaction in controlled substances existed. Similarly, any moneys, negotiable instruments, or securities that were used or intended to be used to facilitate any violation of the Controlled Substances Act would be forfeitable only if they had some substantial connection to, or were instrumental in, the commission of the underlying criminal activity which the state seeks to prevent.

Joint Explanatory Statement of Titles II and III, Psychotropic Substances Act, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 9518, 9522.

96. Joint Explanatory Statement of Titles II and III, Psychotropic Substances Act, *supra* note 95, at 9522. As a result, for example, cash narcotics proceeds obtained by banks and other businesses may be subject to forfeiture. See *United States v. Banco Cafetero Panama*, 797 F.2d 1154 (2d Cir. 1986). In *Banco Cafetero*, the government attempted to forfeit approximately \$3 million in bank accounts as proceeds traceable to narcotics transactions. The court held that a bank's account at a corresponding bank is forfeitable as proceeds from drug transactions, and due process of law does not require a probable cause hearing immediately after the initiation of forfeiture proceedings but merely a reasonable time after. *Id.*; see also *supra* notes 5-6 and accompanying text.

stituting narcotics proceeds—whether direct or indirect—may be forfeited.⁹⁷

Although the expansion of section 881(a)(6) in 1978 made more property subject to forfeiture, Congress tempered the law in 1987 by providing an explicit innocent owner defense to subsection (a)(6) forfeitures.⁹⁸ The law states that “no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.”⁹⁹

Courts interpreting the language of this innocent owner defense have raised three important issues: (1) Does the statutory language expand upon the *Pearson* defense, or does *Pearson* instead serve to limit the statutory defense? (2) Who qualifies as an “owner” entitled to raise this defense? (3) Is the defense limited by a 1984 amendment to section 881, which provides that “[a]ll right, title, and interest in property . . . [subject to forfeiture] shall vest in the United States upon commission of the act giving rise to forfeiture”?¹⁰⁰

Although the new defense appears to expand the *Pearson* exemption—it precludes forfeiture unless the owner knows of, or consents to, the illegal act—the government has occasionally argued that a *Pearson* defense must be denied to negligent claimants who should have known that people using their property were doing so for illegal purposes.¹⁰¹ Section 881(a)(6), however, imposes no “reason to know” standard. The statutory defense is available to anyone who, at the time his interest is acquired, lacks *actual* knowledge of the underlying criminal transac-

97. See, e.g., *United States v. A Single Family Residence*, 803 F.2d 625, 630 (11th Cir. 1986) (residence); *United States v. \$5,644,540*, 799 F.2d 1357, 1363 (9th Cir. 1986) (cash, gold coins, and platinum ingots discovered in the trunk of a rented car were forfeited.)

98. See *In re Metmor Fin., Inc.*, 819 F.2d 446, 449 (4th Cir. 1987) (citing legislative history regarding expansion of protections for innocent parties); *United States v. One 18th Century Columbian Monstrance*, 797 F.2d 1370, 1376 (5th Cir. 1986), *cert. denied*, 481 U.S. 1014 (1987).

99. 21 U.S.C. § 881(a)(6) (1982). The legislative history to section 881(a)(6) provides:

Specifically the property would not be subject to forfeiture unless the owner of such property knew or consented to the fact that:

- (1) the property was furnished or intended to be furnished in exchange for a controlled substance in violation of law,
- (2) the property was proceeds traceable to such an illegal exchange, or
- (3) the property was used or intended to be used to facilitate any violation of Federal illicit drug laws.

Joint Explanatory Statement of Titles II and III, Psychotropic Substances Act, *supra* note 95, at 9522-23. Lack of consent is a specific defense for forfeiture under subsection (a)(6) although it rarely, if ever, has been used successfully in this context. For cases acknowledging lack of consent as a defense to forfeiture under subsection (a)(7) see *infra* note 113.

100. 21 U.S.C. § 881(h) (Supp. V 1987); see also 18 U.S.C. § 1963(c) (Supp. 1987).

101. See *United States v. \$4,255,000*, 762 F.2d 895, 906 n.24 (11th Cir. 1985), *cert. denied*, 474 U.S. 1056 (1986).

tion.¹⁰² Section 881(a)(6) seems to liberalize the defense, moreover, by not imposing any requirement that the claimant have "done all that reasonably could be expected to prevent the proscribed use of his property."¹⁰³ Thus, the 1984 amendment eases the burden faced by third party claimants who raise the innocent owner defense.¹⁰⁴

Despite the relatively clear language of section 881(a)(6), some prosecutors have argued that this provision is somehow limited by the *Pearson* doctrine. The specific contention is that, *in addition* to the statutory defense, *Pearson's* requirements must be satisfied by the claimant.¹⁰⁵ Although appealing to prosecutors, this view is illogical. *Pearson* acknowledged that due process minimally required an innocent person defense that included certain elements.¹⁰⁶ The legislature, however, may liberalize this defense. Congress was aware of *Pearson*, yet chose not to codify its requirements. Congress's choice of language in section 881(a)(6) obviously rejects this option.¹⁰⁷ And because subsection (a)(4), as amended, reflects the same legislative policy, it likewise should not be limited by *Pearson*.

Another critical consideration under subsection (a)(6) has been who qualifies as an "owner" under that subsection. Generally, ownership includes the title holder. But do lienholders, unsecured creditors, and subsequent purchasers also qualify? The legislative history to section 881(a)(6) provides a relatively clear answer to this question. It states that

102. See *United States v. \$10,694*, 828 F.2d 233, 234-35 (4th Cir. 1987) (adopting the Eleventh Circuit's holding), *overruled by*, *Case of One 1985 Nissan, 300ZX*, 889 F.2d 1317 (4th Cir. 1989); *United States v. \$4,255,000*, 762 F.2d at 906 n.24.

103. See *supra* text accompanying note 55. The First Circuit recently held in *United States v. One Urban Lot*, 865 F.2d 427 (1st Cir. 1989), that the *Pearson* doctrine does not limit the innocent owner exemption under section 881(a)(6). The court stated:

[Section 881(a)(6)] does not in any way limit innocent owners to those who have done "all that reasonably could be expected to prevent the proscribed use of the property." In fact, the statute specifically refers to the knowledge and consent of the owner as the appropriate considerations in determining who is excepted.

Id. at 430 (citations omitted).

104. See *id.*

105. See *United States v. \$47,875*, 746 F.2d 291, 292 u.1 (5th Cir. 1984) (noting issue); *United States v. \$44,000*, 596 F. Supp. 1308, 1310 (E.D. Mo. 1984) (implicitly accepting argument). See also *United States v. Certain Real Property*, 724 F. Supp. 908, 914 (S.D. Fla. 1989) (rejecting the government's claim that the claimant, in a subsection (a)(7) context, must prove that he did all that reasonably could be expected to prevent the proscribed activity); *United States v. Parcel of Real Property Known as 6109 Grubb Road* 890 F.2d 659, 664 (3d Cir. 1989) (dissenting opinion) (asserting that in a subsection (a)(7) context, in addition to lack of knowledge or consent, the claimant must also prove that he did all that reasonably could be expected to prevent the proscribed activity).

106. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 677, 680 (1974).

107. See *United States v. Premises Known as 2639 Meetinghouse Rd.*, 633 F. Supp. 979, 992-93 (E.D. Pa. 1986) ("Congress in enacting an innocent owner defense with regard to forfeiture of drug proceeds may have determined to give more legal protection to claimants than the Constitution requires."). Likewise, the language of new subsection (a)(4) obviously rejects this restriction.

“[t]he term ‘owner’ should be broadly interpreted to include any person with a recognizable legal or equitable interest in the property seized.”¹⁰⁸ Because of this directive, lienholders and subsequent purchasers have been permitted to rely on section 881(a)(6).¹⁰⁹ On the other hand, courts have held that unsecured creditors lack the requisite legal or equitable interest.¹¹⁰ Presumably, subsection (a)(4) will be interpreted the same way, notwithstanding its lack of legislative history.

A further complication in applying subsection (a)(6) results from the relation back doctrine, codified in a 1984 amendment to section 881, which may cut off the rights of lienholders and subsequent purchasers.¹¹¹

108. See *United States v. One 18th Century Columbian Monstrance*, 797 F.2d 1370, 1376 (5th Cir. 1986) (citing legislative history), *cert. denied*, 481 U.S. 1014 (1987); see also *supra* note 93. It is unclear, however, whether this expansive definition of “owner” also applies to the term “owner” in section 881(a)(4). At least one court has held that the term “owner” in new section 881(a)(4) is more limited than in subsection (a)(6). See *United States v. One 1982 Oldsmobile Cutlass*, 709 F. Supp. 1542, 1548-49 (W.D. Okla. 1989).

109. *In re Metmor Fin. Inc.*, 819 F.2d 446 (4th Cir. 1987) (protecting lienholder and subsequent purchaser); *United States v. All That Tract*, 602 F. Supp. 307, 312 (N.D. Ga. 1985) (protecting lienholder); *United States v. \$10,000* (N.D. Ill. Feb. 26, 1987) (No. 85 C6689) slip op. at 2 (1987 WL 7487) (protecting bona fide purchaser). A critical issue that has developed is whether lienholders are entitled to receive interest payments for the entire post-seizure period. Since this period may be lengthy, the amount involved may be quite high. *Metmor* examines this issue in depth and cites all pertinent case law. The court held that the government is not entitled to increase its equity in forfeited property at the expense of an innocent lienholder. This is the better view of the issue. See *In re Metmor*, 819 F.2d at 450-51; see also *United States v. Real Property Known as 708-710 West 9th Street, Erie, Pa.*, 715 F. Supp. 1323 (W.D. Pa. 1989) (lienholder entitled to interest on loan but not to attorneys’ fees or to institution of foreclosure proceedings), *order vacated in part*, 836 F.2d 618 (3d Cir. 1989).

In *United States v. Real Property Known as 6 Patricia Dr.*, 705 F. Supp. 710 (D.R.I. 1989), the court allowed a drug dealer’s parents (record owners of property) to contest the sufficiency of the forfeiture complaint, and held that the complaint was “inadequate to meet Rule E(2) particularity requirements as to the whole property.” *Id.* at 720. “Procedurally, civil forfeitures under 21 U.S.C. § 881 are governed by the Supplemental Rules for Admiralty and Maritime Claims,” of which Rule E(2) is a part. *Id.* at 714. The district court in this case relied directly on the First Circuit test in *United States v. Pole No. 3172, Hopkinton*, 852 F.2d 636 (1st Cir. 1988), which adopted verbatim the Eleventh Circuit standard that “a section 881(a) forfeiture complaint must allege sufficient facts to provide a reasonable belief that the property is subject to forfeiture.” *6 Patricia Dr.*, 705 F. Supp. at 715 (citing *Hopkinton* 852 F.2d at 638; *United States v. \$38,000*, 816 F.2d 1538, 1548 (11th Cir. 1987)). Hence, rather than protecting the parents as possible “innocent owners” under section 881(a)(6), the court chose to allow the violator’s parents to contest the validity of the forfeiture itself.

110. See *United States v. \$4,255,000*, 762 F.2d 895, 907 (11th Cir. 1985) (check holders lack legal or equitable interest), *cert. denied*, 474 U.S. 1056 (1986); *United States v. \$500,000*, 730 F.2d 1437, 1440 (11th Cir. 1984).

111. 18 U.S.C. § 1963(c) (1988); 21 U.S.C. §§ 853(c), 881(h) (1982 & Supp. V. 1987); see *supra* note 30 and accompanying text. A recent federal case dealt with the claimed “innocent owner” status of attorney mortgages, and judgment creditor claims, on real property forfeited under section 881(a)(6). In *United States v. Real Property on Lake Forrest Circle*, 870 F.2d 586 (11th Cir. 1989), the Eleventh Circuit disallowed the attorneys’ and judgment creditors’ claims. The court concluded that “the attorneys fail[ed] to meet the preconditions for innocent-owner status under section 881” and that the “attorneys [had] no rights in the defendant property under the sixth amendment.” *Id.*

One commentator has observed that the relation back amendment is inconsistent with the defense recognized in section 881(a)(6). After examining the legislative history, he concluded: "[T]he report of the Senate Judiciary Committee does not indicate any awareness of the inconsistency . . . or any intent to limit the scope of the innocent owner defense. In these circumstances, the relation back doctrine should not be applied to cut off the rights of the innocent owner."¹¹² This interpretation makes sense and also ought to govern subsection (a)(4). Thus far, however, no decision has addressed the potential inconsistency between section 881(a)(6) and the relation back doctrine.

Despite these issues, section 881(a)(6) fundamentally expanded the protections afforded to innocent third parties. Comparable results were achieved by section 881(a)(7), which Congress enacted in 1984 to forfeit real property that has been used to facilitate narcotics trafficking. Because the (a)(7) amendment contains an innocent owner defense virtually identical to subsection (a)(6), it has raised the same issues discussed in connection with (a)(6).¹¹³

at 592-93. Moreover, the court found that "a simple ordering of priorities in the defendant property establishes the superior right of the United States," since the judgment creditor "did not acquire rights in the defendant property until after it had notice that the property was the proceeds of illegal narcotics transactions." *Id.* at 593-94.

This holding is consistent with the Supreme Court's recent decision in *Caplin & Drysdale v. United States*, 109 S. Ct. 2646 (1989), and its companion case, *United States v. Monsanto*, 109 S. Ct. 2657 (1989), involving criminal forfeiture. For a further discussion of attorney fee forfeiture under RICO and CCE, see *infra* note 142.

112. D. SMITH, *supra* note 6, at ¶ 4.03[C], at 4-35-36 n.47.

113. The legislative history to section 881(a)(7) provides:

[Section 881(a)(7)] add[s] to the list of property subject to civil forfeiture set out in section 881(a) real property which is used or intended to be used in a felony violation of the Drug Abuse Prevention and Control Act. This provision would also include an "innocent owner" exception like that now included in those provisions permitting the civil forfeiture of certain vehicles and moneys or securities.

S. REP. NO. 225, *supra* note 10 reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS, *supra* note 10, at 3398.

Under subsection (a)(7) a property owner apparently can assert an innocent owner defense even though he had knowledge of drug trafficking on property, if he can show that he did not consent to such activity. *United States v. Premises Known as 171-02 Liberty Ave.*, 710 F. Supp. 46 (E.D.N.Y. 1989). In its decision, the *Liberty Avenue* court emphasized that (a)(7)'s innocent owner defense includes lack of "knowledge or consent." 710 F. Supp. at 49. See also *United States v. Real Property Known as 19026 Oakmont South Drive*, 715 F. Supp. 233, 237, n.3 (N.D. Ind. 1989) (acknowledging lack of consent as defense); *United States v. Parcel of Real Property Known as 6109 Grubb Road*, 886 F.2d 618 (3d Cir. 1989) (noting lack of knowledge as a defense to forfeiture under Subsection (a)(7)); *United States v. Sixty (60) Acres, More or Less With Improvements, Located in Etowah County, Alabama*, 1990 WL 1099 (N.D. Ala. 1990) (same).

Lack of consent is also a defense under subsection (a)(6) although it may be more difficult to prove given the type of property involved in such forfeitures. See *supra* note 99 and accompanying text.

At least one district court improperly held that cases interpreting former section 881(a)(4) were applicable to cases brought under section 881(a)(7). *United States v. Real Property Located at 2011*

As amended, subsection (a)(4) raises additional questions beyond those raised in relation to sections 881(a)(6) and 881(a)(7).¹¹⁴ Although the language of (a)(4) is similar to subsections (a)(6) and (a)(7), it goes

Calumet, 699 F. Supp. 108, 110 (S.D. Tex. 1988) (citing *United States v. One Boeing 707 Aircraft*, 750 F.2d 1280 (5th Cir.), *cert. denied*, 471 U.S. 1126 (1985)). As a result, the court required the third party petitioner to use the *Pearson* defense instead of the defense provided in the statute: "[T]he innocent owner defense applies only to owners who can show that they did not know and had no reason to know of the illegal use; were uninvolved in the illegal use; and did all that could reasonably be expected to preclude or discover the illegal use." *Id.* at 110. This holding ignores the plain language of the statute and, especially in light of the amendment to subsection (a)(4), should not be followed in the future.

A number of recent federal cases have raised the issue of third party rights under section 881(a)(7). Three of these cases deal with how property held as tenants by the entirety is affected by a subsection (a)(7) forfeiture. Two of these cases, *United States v. Marks*, 703 F. Supp. 623 (E.D. Mich. 1988), and *United States v. One Single Family Residence*, 699 F. Supp. 1531 (S.D. Fla. 1988), concluded that an innocent spouse should be protected by the entireties principle, which states that neither husband nor wife acting alone can alienate any interest in the property. However, the third case, *United States v. 6109 Grubb Rd., Millcreek Township, Erie County*, 708 F. Supp. 698 (W.D. Pa. 1989), *order vacated in part*, 886 F.2d 618 (3d Cir. 1989), determined that the tenants by the entirety concept does not protect a spouse who is not really innocent from a subsection (a)(7) forfeiture. The court found that even though no narcotics offenses had occurred in the presence of the wife, the husband had stored large quantities of cocaine at the residence and distributed cocaine from the residence for more than four years. Hence, the court concluded that the wife "either knew of her husband's involvement in the sale of cocaine, or else deliberately blinded herself to it." *Id.* at 703. The court further held that the minor children present in the case were not "innocent owners" under the section 881(a)(7) exception. The court noted, "If some further exemption is to be carved out of § 881 for the benefit of minor children, it must be done by Congress." *Id.* at 704. For a contrary result where the court protected the interests of children under a separation agreement, see *United States v. Santoro*, 866 F.2d 1538 (4th Cir. 1989) (§ 881(a)(7) forfeiture).

A technical pleading issue also has arisen as to when a summary judgment for the government is appropriate as applied to the innocent owner exception in section 881(a)(7). The cases essentially hold that if a drug violator is the party claiming innocence, then summary judgment for the government is proper. However, if third parties are involved, then summary judgment generally is not appropriate, and the matter must go to trial. In *United States v. All Right Title and Interest In Property Known as 303 W. 116th St., N.Y.*, 710 F. Supp. 502, 505 (S.D.N.Y. 1989), the district court granted summary judgment, holding that the property owner was collaterally estopped from asserting his innocence or lack of knowledge of drug violations on his property in March of 1988 because of his own conviction for sale of narcotics while on the property in April 1987.

Conversely, in *United States v. Lots 12, 13, 14, and 15, Keeton Heights*, 869 F.2d 942 (6th Cir. 1989), a wife sought to rely on the "innocent owner" exception in section 881(a)(7) for judgment of forfeiture. The court of appeals held that since "the government [had] not suggested the absence of a genuine factual issue as to the wife's innocence, . . . summary judgment [could] not be entered . . ." *Id.* at 943. Similarly in *United States v. Certain Real Property & Premises Known as 171-02 Liberty Ave., Queens, N.Y.*, 710 F. Supp. 46 (E.D.N.Y. 1989), the court concluded that the government was not entitled to summary judgment of forfeiture, even though a property owner acknowledged that he was aware of drug trafficking on his property, because he also claimed that he did not consent to such trafficking. Since the issue of consent still existed, the matter had to be set for trial.

114. The Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, also added a new provision for violations of section 881(a)(4), (a)(6), and (a)(7) involving the possession of "personal use quantities" of a controlled substance. The new provision, codified as a note after 21 U.S.C. § 881, requires the Attorney General and the Secretary of the Treasury to promulgate regulations for expedited administrative procedures for property seizures involving personal use quantities of narcotics. The purpose behind these regulations is to "minimize the adverse impact on those entitled to legal or equitable

beyond these subsections by requiring that "no conveyance shall be forfeited under this paragraph to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge, consent, *or willful blindness* of the owner."¹¹⁵ Thus, third parties must show a lack of willful blindness, in addition to the absence of knowledge.¹¹⁶ Without legislative history, the precise effect of this change is uncertain, although two interpretations of willful blindness appear possible. Willful blindness may constitute part of the knowledge standard, or serve as an independent recklessness standard.

For example, the willful blindness language could have been intended to codify the Model Penal Code's definition of knowledge. The Model Penal Code provides that the knowledge element may be satisfied by proof of willful blindness, unless the defendant actually believed that the fact did not exist.¹¹⁷ Thus, when faced with evidence establishing a high probability that criminal activity is afoot, a person ordinarily may

relief occasioned by the prolonged detention of property subject to forfeiture due to violations of law involving personal use quantities of controlled substances" 54 Fed. Reg. 37,610 (1989).

The Department of Justice in conjunction with the Secretary of the Treasury and the Secretary of Transportation recently issued final regulations on September 11, 1989. Under the regulations, the petitioner is entitled to an expedited release of seized property where the violation of section 881(a)(4), (a)(6), or (a)(7) involved personal use quantities of a controlled substance, and petitioner can establish that:

- (i) The petitioner has a valid, good faith interest in the seized property as owner or otherwise;
- (ii) The petitioner reasonably attempted to ascertain the use of the property in a normal and customary manner; and
- (iii) The petitioner did not know or consent to the illegal use of the property or, in the event that the petitioner knew or should have known of the illegal use, the petitioner did what reasonably could be expected to prevent the violation.

54 Fed. Reg. at 37, 612. If the petitioner is entitled to have the seized property returned under these regulations, the seizing authority must release the property immediately.

115. 21 U.S.C. § 881 (a)(4)(C) (Supp. 1989) (emphasis added).

116. 21 U.S.C.A. § 881(a)(4) (West Supp. 1989). In other words, the absence of knowledge will not forestall a forfeiture if the owner has been willfully blind to illicit activity.

117. MODEL PENAL CODE § 2.02(7) (proposed) states: "[W]hen knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist." *Id.* The comment to this provision reveals that the drafters intended this section to deal with the case of willful blindness. See MODEL PENAL CODE 129-30 (Tent. Draft No. 4 1955). Comment 9 states: "Paragraph (7) deals with the situation British commentators have denominated 'willful blindness' or 'connivance,' the case of the actor who is aware of the probable existence of a material fact but does not satisfy himself that it does not in fact exist." *Id.*

Professors LaFave and Scott also recognize this definition of knowledge:

Although the foregoing provisions [of the Model Penal Code] contemplate that one "knows" of present (as opposed to future) events only if he is actually aware of them, an important exception is recognized elsewhere in the Code. This exception has to do with what is commonly termed "willful blindness," "where it can almost be said that the de-

not avoid knowledge by closing his eyes to obvious illegality.¹¹⁸ Although this formulation of the knowledge element has been accepted by the federal courts,¹¹⁹ interpreting subsection (a)(4) in this manner renders the term "willful blindness" redundant. For willful blindness to gain independent significance in subsection (a)(4), it must be interpreted as establishing a different standard—that of recklessness—for third parties.¹²⁰

The distinction between recklessness and willful blindness under the Model Penal Code is "subtle but important."¹²¹ It turns on whether the absence of *actual knowledge* would preclude liability. Under the willful blindness standard, the actor may not be held liable if he actually believes the pertinent fact does not exist. In contrast, the recklessness standard imposes liability on an actor regardless of actual knowledge

of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.¹²²

Usually, this distinction between the two standards is without practical significance because proof of willful blindness will prompt a jury to find

fendant actually knew," as when a person "has his suspicion aroused but then deliberately omits to make further inquiries, because he wishes to remain in ignorance."

W. LAFAVE & A. SCOTT, CRIMINAL LAW 219 (2d ed. 1986) (quoting G. WILLIAMS, CRIMINAL LAW: THE GENERAL PART 157, 159 (2d ed. 1961)); see also Edwards, *The Criminal Degrees of Knowledge*, 17 MOD. L. REV. 294, 298 (1954) (The rationale is "that a person who deliberately shuts his eyes to an obvious means of knowledge has sufficient *mens rea* for an offence based on . . . [knowledge].").

118. See *United States v. Jewell*, 532 F.2d 697, 700-01 (9th Cir.) (party has criminal knowledge if his suspicion is aroused, but he deliberately avoids any inquiry.), *cert. denied*, 426 U.S. 951 (1976).

119. See, e.g., *United States v. Krown*, 809 F.2d 144, 148 (1st Cir. 1987) (explaining *Jewell*: "Willful blindness instructions be given only where the defendant has an 'awareness of the high probability of the existence of the fact in question.'"); *United States v. Hanlon*, 548 F.2d 1096, 1101 (2d Cir. 1977) ("It is settled law that a finding of guilty knowledge may not be avoided by a showing that the defendant closed his eyes to what was going on about him; 'see no evil' is not a maxim in which the criminal defendant should take any comfort."); *Jewell*, 532 F.2d at 700 (awareness of the high probability of fact in question with conspicuous purpose of avoiding the truth can satisfy knowledge requirement).

120. This appears to be a more logical interpretation because Congress apparently intended to place a greater burden on vehicle owners than on transferees of proceeds. Walsh Interview, *supra* note 87. The rationale is that automobile owners are able to prevent the illegal use of their car by limiting those with access to it while transferees of proceeds have no control over how assets were previously used. Congress, however, by increasing the standard to recklessness, may have made third party protections under (a)(4) too broad in a non-commercial setting. See *infra* notes 192-97 and accompanying text.

121. See W. LAFAVE & A. SCOTT, *supra* note 117, at 219.

122. MODEL PENAL CODE § 2.02(c) (Official Draft 1962).

actual knowledge. Nevertheless, in the relatively rare case in which an actor lacks actual knowledge, notwithstanding his reckless indifference to the truth, the recklessness standard furthers important legislative goals.

Subsection (a)(4) probably reflects this distinction. Congress no doubt realized that conveyance forfeitures often involve situations of reckless indifference to the truth—especially in situations involving familial or other personal relationships. Thus, to prevent abuse, the legislature imposed a recklessness standard.

Accordingly, a recklessness standard makes sense. Whether an even more demanding standard should be imposed upon the family members and friends of alleged drug dealers requires separate consideration.¹²³ Congress has imposed a more stringent standard of care under the criminal forfeiture laws, which authorize forfeiture against third parties who have failed to exercise reasonable diligence. An examination of these criminal statutes is now in order.

B. *Federal Criminal Forfeiture*

In 1970 Congress provided for criminal forfeiture in the newly enacted CCE and RICO statutes. CCE authorized forfeiture of assets linked to drug trafficking,¹²⁴ and RICO extended asset forfeiture beyond

123. See *infra* notes 189-97 and accompanying text.

124. Section 853, CCE's forfeiture provision, in part provides:

Any person convicted of a violation of [CCE] . . . shall forfeit . . . —

(1) any property constituting, or derived from, any proceeds the person obtained directly or indirectly, as the result of such violation;

(2) any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation; and

(3) in the case of a person convicted of engaging in a continuing criminal enterprise in violation of section 848 of this title, the person shall forfeit, in addition to any property described in paragraph (1) and (2), any of his interest in claims against, and property or contractual rights affording a source of control over, the continuing criminal enterprise.

21 U.S.C. § 853 (1982 & Supp. V 1987).

Section 848, CCE's substantive provision, punishes "[a]ny person who engages in a continuing criminal enterprise." 21 U.S.C. § 848(a) (1989). A person engages in a "continuing criminal enterprise" if he leads five or more other persons in committing a continuing series of federal drug felonies which produce substantial income. 21 U.S.C. § 848(c) (1988). Section 848(c) provides:

[A] person is engaged in a continuing criminal enterprise if—

(1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter—

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

Id.

narcotics trafficking to other racketeering activities¹²⁵ as defined in the statute.¹²⁶ Because these statutes apply the forfeiture sanction directly against the offender, rather than merely against his property,¹²⁷ prosecutors, instead of bringing separate civil actions wherever forfeitable property happens to be located, may consolidate the forfeiture action in one criminal proceeding.¹²⁸

As enacted, neither RICO nor CCE provided explicit standards to protect third party interests. Instead, the original laws merely stated that "[t]he United States shall dispose of all such property as soon as commercially feasible, making due provision for the rights of innocent persons."¹²⁹ Predictably, "confusion reigned."¹³⁰

125. The term "racketeering activity" as defined under RICO includes the following: labor racketeering, official corruption, theft and fraud, and provision of illicit goods and services. 18 U.S.C. § 1961(1) (1988).

126. RICO section 1963(a) provides that any person who:

violates any provision of section 1962 . . . shall forfeit . . . —

(1) any interest the person has acquired or maintained in violation of section 1962;

(2) any

(A) interest in;

(B) security of;

(C) claim against; or

(D) property or contractual right of any kind affording a source of influence over;

any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962; and

(3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962.

18 U.S.C. § 1963(a) (1988).

Section 1962, RICO's substantive provision, prohibits four types of conduct. First, section 1962(a) prohibits anyone from investing racketeering proceeds in an interstate enterprise. *Id.* § 1962(a). Second, section 1962(b) makes it unlawful for a person to acquire or maintain an interest in an interstate enterprise through a pattern of racketeering activity. *Id.* § 1962(b). Third, section 1962(c) makes it unlawful for a person to conduct the affairs of an interstate enterprise through a pattern of racketeering activity. *Id.* § 1962(c). Finally, section 1962(d) forbids anyone from conspiring to violate any of the preceding sections. *Id.* § 1962(d).

127. See *supra* notes 39-41 and accompanying text; see also Reed & Gill, *RICO Forfeitures, Forfeitable "Interests," and Procedural Due Process*, 62 N.C.L. REV. 57, 60-61, 69-71 (1983).

128. See S. REP. NO. 225, *supra* note 10, at 196-97, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS, *supra* note 10, at 3379-80. The report states:

The problem with civil forfeiture is that even if the same facts that are at issue in a criminal trial are also dispositive of the forfeiture issue, it is still necessary for the government, in addition to the criminal case, to file a separate civil suit. And where the property of a defendant, or defendants, in the criminal case is located in more than one judicial district, a separate civil forfeiture suit must be filed in each of these districts.

A more efficient method of obtaining the forfeiture of assets of drug defendants would be to permit prosecutors the option of pursuing a criminal forfeiture in which the forfeiture action can be consolidated with the prosecution of the offense giving rise to forfeiture. In cases where this alternative could be pursued, valuable judicial and law enforcement resources could be saved.

Id.

129. Pub. L. No. 91-513, §§ 408, 511, 84 Stat. 1236, 1265-66, 1276-78 (1970); Pub. L. No. 91-452, § 901(a), 84 Stat. 922, 941-47 (1970).

To remedy this situation, Congress amended both RICO and CCE in 1984 to provide expressly for third party interests. An accompanying Senate Report summarizes the new ancillary hearing procedure designed to address third party concerns:

Under the new ancillary hearing procedure, the government, following the entry of an order of forfeiture, is to publish notice of the order of forfeiture and its intent to dispose of the property. Direct written notice to interested third parties may serve as a substitute for published notice. Within thirty days after publication of notice or the receipt of direct notice, any third party asserting a legal interest in the property . . . may petition the court . . . for a hearing to adjudicate the validity of his alleged interest. The hearing is to be held before the court alone.

If possible, the hearing is to be held within thirty days of the filing of the petition, and the court may hold a consolidated hearing to resolve all or several petitions arising out of a single case. At the hearing, both the petitioner and the United States may present evidence In addition . . . , the court may consider relevant portions of the record of the criminal case. This will allow the court to quickly dispense with claims that have already been considered at trial, as for example, where the jury has already determined that the third party held the property only as a nominee of the defendant or that a transfer to the third party was a sham transaction.

[The amendment] . . . provides that a third party will prevail if his claim falls into one of two categories: first, where the petitioner had a legal interest in the property that, at the time of the commission of the acts giving rise to the forfeiture, was vested in him rather than the defendant or was superior to the interest of the defendant; or second, where the petitioner acquired his legal interest after the acts giving rise to the forfeiture but did so in the context of a *bona fide* purchase for value and had no reason to believe that the property was subject to forfeiture. Since the United States will have already proven its forfeiture allegations in the criminal case beyond a reasonable doubt, the burden of proof at the hearing will be on the third party . . . to a preponderance of the evidence

A third party who fails to obtain relief under the new ancillary hearing provision or who does not file a petition for a hearing may seek equitable relief from the Attorney General by filing a petition for remission or mitigation of forfeiture. The Attorney General's decision on such petition shall not be subject to judicial review¹³¹

130. D. SMITH, *supra* note 6, at ¶ 14.08[2], at 14-48. Without guidance as to third party rights, courts "were forced to resort to varying ad hoc procedures when third party rights were asserted." *Id.* Some courts took the position that third parties had no rights except to petition the Attorney General for remission or mitigation. Other courts fashioned different procedures for third party claims. *Id.*

131. S. REP. NO. 225, *supra* note 10, at 208-09, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS, *supra* note 10, at 3391-92.

Thus far, few pertinent cases have been litigated under the 1984 amendments.¹³² The effect of reform may best be understood by a comparison the reform with civil forfeiture standards and procedures. Initially, it is apparent that third party claimants will experience greater delays in criminal forfeiture than in civil proceedings. This delay stems from the denial of any opportunity to litigate the forfeiture, pending resolution of the criminal trial. In effect, third party claims may not be litigated until several years after seizure of the property. Comparable delays are not experienced civilly because a forfeiture hearing usually occurs shortly after seizure; it is not necessary to await completion of a criminal trial.¹³³

A second issue the reform raises is the extent to which judges may decide forfeiture cases based on evidence presented at the criminal trial. Courts should not be required to relitigate issues that already have been resolved in another context. Since the third party claimant is not a party to the criminal case, however, it is not proper to allow evidence presented in that proceeding to have conclusive effect at the forfeiture hearing.¹³⁴ In civil forfeiture proceedings all the relevant issues are litigated solely in the forfeiture proceeding.

Third, it is apparent that the defenses afforded third party claimants are somewhat narrower in criminal than in civil forfeiture proceedings. A successful defense to criminal forfeiture requires the claimant to establish either (1) a legal right to the property that is superior to the criminal

132. See, e.g., *United States v. Campos*, 859 F.2d 1233 (6th Cir. 1988) (unsecured third party creditor was not a bona fide purchaser); *United States v. Reckmeyer*, 836 F.2d 200 (4th Cir. 1987) (unsecured creditor qualified as third party claimant). Most of the recent cases deal with the question of attorney fee forfeiture rather than with third party rights generally. See also *infra* note 142.

133. At least one court has ruled that this feature of the new criminal forfeiture law is unconstitutional. See *Crozier*, 777 F.2d at 1384 (noting five year delay); see also *United States v. Moya-Gomez*, 860 F.2d 706 (7th Cir. 1988) (absence of a hearing in 21 U.S.C. § 853 violates due process when pretrial restraints render defendant indigent); *United States v. Unit No. 7 and Unit No. 8 of Shop in the Grove Condominium*, 853 F.2d 1445 (8th Cir. 1988) (lack of hearing on the merits violates due process), *reh'g granted and opinion vacated*, 883 F.2d 53 (8th Cir. 1989). But see *United States v. Draine*, 637 F. Supp. 482, 485-86 (S.D. Ala. 1986) (limiting *Crozier* to its facts). The issue awaits further resolution.

134. See D. SMITH, *supra* note 6, at 14-52; see also *Schwartz v. United States*, 582 F. Supp. 224 (D. Md. 1984). In *Schwartz*, the court held that prior judgments in a RICO prosecution were admissible at a later third party hearing. In arriving at its conclusion the court relied on Rule 803(22) of the Federal Rules of Evidence, which provides an exception to the rule against hearsay for "evidence of a final judgment, entered after trial . . . adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove a fact essential to sustain the judgment." FED. R. EVID. 803(22). Thus, the court held that the judgments were admissible. *Schwartz*, 582 F. Supp. at 228.

RICO and CCE also allow the court to consider "relevant portions of the record of the criminal case which resulted in the order of forfeiture." 18 U.S.C. § 1963(I)(5) (1988); 21 U.S.C. § 853(n)(5) (Supp. V 1987).

defendant's right at the time of the act giving rise to forfeiture, or (2) his status as a "bona fide purchaser for value . . . reasonably without cause to believe the property was subject to forfeiture"¹³⁵ Thus, only claimants with a legal—as opposed to equitable—interest in the property may contest forfeiture.¹³⁶ In contrast to civil forfeiture, subsequent transferees must have been reasonably without knowledge of any illegality; mere ignorance will not necessarily provide a defense.¹³⁷

135. 21 U.S.C. § 853(n)(6) (Supp. V 1987); 18 U.S.C. § 1963(l)(6)(B) (1988). Recently courts have struggled with whether a general creditor qualifies as a bona fide purchaser under these sections. The courts addressing the issue are split. Compare *Reckmeyer*, 836 F.2d at 208 (unsecured creditors fall into category of bona fide purchaser because they gave "value to the defendant in an arms' length transaction") and *United States v. Mageean*, 649 F. Supp. 820, 831 (D. Nev. 1986), *aff'd without opinion*, 822 F.2d 62 (9th Cir. 1987) (general unsecured creditors were bona fide purchasers under RICO section 1963(m)(6) and therefore had claim to forfeited assets) with *Campos*, 859 F.2d at 1237 (unsecured creditors were not bona fide purchasers under 21 U.S.C. § 853(n)(6)(B)). Because unsecured creditors may have an important stake in the defendant's assets, their interests must be protected by statute.

136. *Campos*, 859 F.2d at 1238 (noting that "legal title" is necessary); *Mageean*, 649 F. Supp. at 828 (citing legislative history). In *Mageean*, this limitation had the effect of denying relief to tort claimants from a tragic airplane crash. The Senate Report also seems to indicate that only a claimant with a legal interest may contest the forfeiture:

Paragraph (6) provides that a third party will prevail if his claim falls into one of two categories: first, where the petitioner had a *legal* interest in the property that, at the time of the commission of the acts giving rise to the forfeiture, was vested in him rather than the defendant or was superior to the interest of the defendant; or second, where the petitioner acquired his *legal* interest after the acts giving rise to the forfeiture but did so in the context of a bona fide purchase for value and had no reason to believe that the property was subject to forfeiture.

S. REP. NO. 225, *supra* note 10, at 3379, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS, *supra* note 10, at 3392 (emphasis added).

It is clear from the legislative history of RICO and CCE that the administrative remittance or mitigation procedures remain the exclusive basis for relief for claimants asserting equitable and not legal rights to the property. See *id.* at 208, 1984 U.S. CODE CONG. & ADMIN. NEWS, *supra* note 10, at 3392.

The term "legal interest" is not defined by RICO or CCE. In *Reckmeyer*, 836 F.2d at 205, the Fourth Circuit determined that "legal interest" "encompasses all legally protected rights, claims, titles, or shares in real or personal property." See also *Reed*, *supra* note 30, at 772. Thus, in *Reckmeyer*, the court allowed an unsecured creditor to challenge the forfeiture. Similarly, it is also clear that a nominal title holder will not have standing to contest the forfeiture. See *Braxton v. United States*, 858 F.2d 650 (11th Cir. 1988); cf. *United States v. 526 Liscum Drive*, 866 F.2d 213 (6th Cir. 1988) (nominal title holder lacked standing in civil forfeiture).

Another issue examined in *Reckmeyer* was whether a third party holding a legal interest in forfeited property has standing only to seek a hearing to recover his interest in the property, or whether a third party also has standing to contest the validity of the underlying forfeiture. In order to avoid due process problems arising from binding persons to judgments to which they were not parties, the court allowed the third party to contest the validity of the underlying forfeiture. *Reckmeyer*, 836 F.2d at 206-07. But since the judgment and evidence from the prior criminal proceeding is admissible at a subsequent third party hearing, attacks on the underlying forfeiture will be difficult to maintain. See *supra* note 132.

137. In addition, civil claimants under sections 881(6) and (7) need not necessarily be purchasers. Arguably they may be donees acting in good faith. D. SMITH, *supra* note 6, at ¶ 13.04 (1985 & Supp. 1989).

By adopting a negligence test instead of some higher standard or one that distinguishes between types of third party claims, Congress has failed to adequately protect the third party interest. A third party's claim to forfeited property is similar to the claim of a bona fide purchaser who buys property from someone other than the true owner.¹³⁸ If the true owner had lost the property through fraud or other illegality, the bona fide purchaser and the true owner would be innocent victims of another's criminality. As between two innocent victims the bona fide purchaser doctrine ordinarily protects the good faith buyer as the less culpable of the two.¹³⁹

In forfeiture situations, however, only one innocent party claims an interest in the property. The innocent third party asserts his claim to the property *against* the government *which is not an innocent victim*. Although the government claims title as the true owner of the property, its claim is based solely on a legal fiction—the relation back doctrine.¹⁴⁰ This legal fiction should not be allowed to cut off automatically the rights

138. For an historical look at the bona fide purchaser doctrine, see *Phillips v. Phillips*, 4 D.F. & J. 208, 45 Eng. Rep. 1164 (1861); Ames, *Purchase for Value Without Notice*, 1 HARV. L. REV. 1 (1887); Kennesson, *Purchase for Value Without Notice*, 23 YALE L.J. 193 (1914).

Modern law makes a distinction between a bona fide purchaser who takes title clouded by theft and title clouded by fraud. One who purchases goods acquires only the title the transferor had power to transfer. Therefore, in the case of theft, title cannot transfer to the bona fide purchaser. However, the true owner who was defrauded takes a measure of responsibility and title passes to the bona fide purchaser. U.C.C. § 2-403 (1977). This is analogous to a bona fide purchaser taking title free and clear of defects even though the transferee fails to comply with requirements of the sale, *id.* § 6-110(2). A bona fide purchaser also takes free and clear all rights and interests as opposed to rights that may be asserted by the defaulting party and the secured party even though the secured party fails to comply with the requirements of sale. *Id.* § 9-504(4) (1977). A true owner is protected against theft but not fraud. Fraud requires participation, whereas theft occurs independent of the owner. Where both parties are culpable, as may occur in a forfeiture scenario, the least culpable individual's rights and interests should prevail.

139. See *supra* note 138; Dolan, *The U.C.C. Framework: Conveyancing Principles and Property Interests*, 59 B.U.L. REV. 811, 813-14 (1979) (The bona fide purchaser doctrine is directly opposite the security of property postulate (that one cannot convey more than one has) in that a good faith purchaser can purchase more than the conveyor has. The true owner misleads the innocent purchaser through the conveyor by not taking care to protect his interest from entering the stream of commerce.); see also *McNeil v. The Tenth Nat'l Bank*, 46 N.Y. 325 (1871). In *McNeil*, the court held that the rights of a bona fide purchasers in such cases

do not depend upon the actual title or authority of the person with whom they deal directly, but are derived from the act of the real owner, which precludes him from disputing, as against them, the existence of the title or power which, through negligence or mistaken confidence he caused or allowed to appear to be vested in the party the conveyance.

Id. at 329. Moreover, under the UCC a person may qualify as a good faith purchaser—irrespective of his negligence—so long as he acted with “honesty in fact.” See UCC § 2-403 (relating to good faith purchase of goods); UCC § 1-201 (defining good faith as honesty in fact).

140. For a discussion of the relation back doctrine, see *supra* note 30 and accompanying text.

of third parties who, albeit negligent, acted neither knowingly nor recklessly with regard to the illegality.¹⁴¹

In commercial situations, the negligence standard established by RICO and CCE places all parties to a transaction in an untenable position. For example, suppose a car dealer suspects his customer to be involved in racketeering. Although the seller may "have reason to know," he naturally still wants the sale. How is the seller to resolve the situation? Is he expected to ask the buyer whether the buyer is a racketeer? The question itself probably would kill the transaction (and perhaps the seller as well). Moreover, if the question is asked and the buyer answers with a denial, must the seller demand further proof? If so, what kind and how much? Any result under this scenario is unfair to both the seller and potential buyer, especially since law enforcement files are not available to help resolve such matters expeditiously. The situation is exacerbated if the seller knows the buyer is under indictment. In this case, the seller automatically has reason to suspect racketeering. Yet, the presumption of innocence makes it unreasonable to preclude a defendant from engaging in any commercial transactions while his case is pending.¹⁴² Thus, although the negligence standard may be appropriate in

141. Furthermore, a successful defense to criminal forfeiture under RICO requires the claimant to have a thorough understanding of the substantive provisions of a very complicated statute. RICO section 1963(l)(6) together with section 1963(a) requires a third party to prove that he was "reasonably without cause to believe," 18 U.S.C. § 1963(l)(6)(B) (1988), that the forfeited property (1) was acquired or maintained in violation of RICO, or (2) was part of an enterprise in violation of RICO, or (3) was proceeds or derived from proceeds obtained in violation of RICO. *Id.* § 1963(a) (1988). For the text of § 1963(a), see *supra* note 126. This requires a third party to have mastered the substantive provisions of RICO and determined that the property was not subject to forfeiture under any circumstances. See *Comprehensive Drug Penalty Act: Hearings before the Subcomm. on Crime of the Comm. on the Judiciary*, 98th Cong., 1st Sess. (1983) (statement by Stephen Horn and William W. Taylor, on behalf of Criminal Justice Section of the American Bar Association), reprinted in AMERICAN BAR ASSOCIATION CRIMINAL JUSTICE SECTION, A COMPREHENSIVE PERSPECTIVE ON CIVIL AND CRIMINAL RICO LEGISLATION AND LITIGATION app. D, at 9 (Apr. 18, 1985). By imposing such a burden, the statute fails to protect unsophisticated third parties—those that most need protection.

142. The absence of reasonable knowledge—as a requirement for bona fide purchaser status—has raised special problems for attorneys representing narcotics dealers. Since an attorney virtually always has reason to know that fees paid by an alleged narcotics dealer are proceeds of crime, the lawyer will not be able to qualify as a bona fide purchaser under the statute. As a result, attorney fees may be subject to forfeiture. See generally Brickey, *Forfeiture of Attorney's Fees: The Impact of RICO and CCE Forfeitures on the Right to Counsel*, 72 VA. L. REV. 493 (1986); Note, *Forfeiture of Attorneys' Fees: Should Defendants Be Allowed to Retain the "Rolls Royce of Attorneys" with the "Fruits of Crime"?*, 39 STAN. L. REV. 663 (1987). Similar concerns can arise in civil forfeiture contexts as well. See *United States v. One Parcel of Land*, 614 F. Supp. 183, 186 (N.D. Ill. 1985) (lawyer not a bona fide purchaser under § 881(a)(6)). Fortunately, Department of Justice guidelines call for proof of actual knowledge in attorney fee forfeiture cases. UNITED STATES ATTORNEYS' MANUAL § 9-105.600 at J-8 (Oct. 1, 1988). Under the guidelines, actual knowledge must be derived from sources outside the attorney-client relationship. *Id.*

other forfeiture contexts,¹⁴³ it should not be applied automatically to all third party claimants.

Finally, pre-conviction restraining orders—authorized under both RICO¹⁴⁴ and CCE¹⁴⁵—also may affect the rights of innocent parties.¹⁴⁶

143. See *infra* notes 190-91 and accompanying text.

Recently, in *Caplin & Drysdale, Chartered v. United States*, 109 S. Ct. 2646 (1989), and its companion case, *United States v. Monsanto*, 109 S. Ct. 2657 (1989), the Supreme Court upheld the forfeiture of attorney's fees. In these cases, the Court ruled on two important issues: (1) whether the forfeiture provision of CCE includes an exemption for assets that a defendant wishes to use to pay an attorney who conducted his defense in the criminal case in which forfeiture was sought; and (2) if no such exemption exists under the forfeiture statute, whether that statute, so interpreted, is unconstitutional. After examining the language of the statute, the Court concluded that the statute acts to forfeit all property that falls within its scope, with no exception for attorney's fees. *Monsanto*, 109 S. Ct. at 2662. Furthermore, the Court rejected the defendant's claims of a violation of his sixth amendment right to counsel of choice, and of a violation of the due process clause of the fifth amendment. *Caplin & Drysdale*, 109 S. Ct. at 2656. In examining the petitioner's sixth amendment claim, the Court noted that the relation back doctrine vests the title to forfeitable property in the government at the time of the criminal act, and from that time on, the defendant has no further right to transfer it. The Court reasoned:

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 the defendant will be able to retain the attorney of his choice. A robbery suspect, for example, has no Sixth Amendment right to use funds he has stolen from a bank to retain an attorney to defend him if he is apprehended. The money, though in his possession, is not rightfully his; the government does not violate the Sixth Amendment if it seizes the robbery proceeds, and refuses to permit the defendant to use them to pay for his defense. "[N]o lawyer, in any case, . . . has the right to accept stolen property, or . . . ransom money, in payment of a fee The privilege to practice law is not a license to steal."

Caplin & Drysdale, 109 S. Ct. at 2652-53 (quoting *Laska v. United States*, 82 F.2d 672, 677 (10th Cir. 1936)).

The Court also rejected petitioner's fifth amendment argument. Petitioner claimed that the prosecutor could abuse the devastating power of the forfeiture provisions in a way that would violate the rights of the accused. The Court concluded that the possibility the forfeiture provisions might act unconstitutionally in situations of prosecutorial misconduct was not enough to hold the provisions invalid. *Caplin & Drysdale*, 109 S. Ct. at 2657. Specific cases of prosecutorial misconduct can be dealt with when they arise. *Id.*

144. 18 U.S.C. § 1963(d) (Supp. 1987). Section 1963(d) provides in part:

The court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property.

....

- (A) upon the filing of an indictment or information . . . alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or
- (B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that—
 - (i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and
 - (ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered.

Id. Section 853(e) of title 21 contains an identical provision.

145. 21 U.S.C. § 853(e) (Supp. 1987). See generally *Reed, supra* note 30, at 761-69.

Congress adopted pre-conviction restraining orders to prevent defendants from evading forfeiture by hiding or transferring forfeitable assets prior to conviction.¹⁴⁷ Upon the filing of an indictment or information,¹⁴⁸ and prior to indictment in certain limited circumstances,¹⁴⁹ courts may "enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property . . . for forfeiture."¹⁵⁰ Consequently, because third parties may not intervene in the criminal trial or appeal,¹⁵¹ property interests remain in limbo until entry of an order of forfeiture.¹⁵²

146. The Second Circuit, in *United States v. Regan*, 858 F.2d 115 (2d Cir. 1988), concluded that § 1963(a)(1)(A) allowed restraints on unindicted third parties. The court reasoned that assets could not be preserved "if courts graft onto the statute a wholesale bar to restraints on third parties." *Regan*, 858 F.2d at 120.

147. The legislative history states:

Unlike civil forfeitures, in which the government's seizure of the asset occurs at or soon after the commencement of the forfeiture action, in criminal forfeitures, the assets generally remain in the custody of the defendant until the time of his conviction for the offense upon which the forfeiture is based. Only after conviction does the government seize the asset. Thus, a person who anticipates that some of his property may be subject to criminal forfeiture has not only an obvious incentive, but also ample opportunity, to transfer his assets or remove them from the jurisdiction of the court prior to trial and so shield them from any possibility of forfeiture.

...
The sole purpose of the bill's restraining order provision, like that in the current RICO and CCE statutes, is to preserve the status quo, i.e., to assure the availability of the property pending disposition of the criminal case.

S. REP. NO. 225, *supra* note 10, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS, *supra* note 10, at 3387. Courts realize the need to preserve assets for forfeiture. See *Regan*, 858 F.2d 115; *United States v. Long*, 654 F.2d 911 (3d Cir. 1981) (court enjoined transfer of airplane to defendant's attorney). The court in *Regan* concluded that a restraining order may be proper even though it impairs the defendant's ability to conduct business. However, the court held that such an order should not be used where less restrictive measures are available. *Regan* at 120-21.

148. 18 U.S.C. § 1963(d)(1)(A) (Supp. 1987); 21 U.S.C. § 853(e)(1)(A) (Supp. 1987).

149. 18 U.S.C. § 1963(d)(1)(B) (Supp. 1987); 21 U.S.C. § 853 (e)(1)(B) (Supp. 1987).

150. 18 U.S.C. § 1963(d)(1) (Supp. 1987); 21 U.S.C. § 853(e)(1) (Supp. 1987). For further text of these subsections, see *supra* note 144.

151. 18 U.S.C. § 1963(l) (Supp. 1987). This section provides:

[N]o party claiming an interest in property subject to forfeiture under this section may—

- (1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or
- (2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.

Id. Section 853(k) of title 21 contains a similar provision.

152. See *Reed*, *supra* note 26, at 767. Recognizing the need for third party protection from temporary restraining orders imposed pursuant to section 1963(d) of RICO, the Justice Department recently amended the United States Attorneys' Manual Title 9 to contain the following guidelines:

1. As part of the approval process for RICO prosecutions, the prosecutor must submit any proposed forfeiture TRO for review by the Organized Crime and Racketeering Section. The prosecutor must show that less-intrusive remedies (such as bonds) are not likely to preserve the assets for forfeiture in the event of a conviction.
2. In seeking approval of a TRO, the prosecutor must articulate any anticipated impact that forfeiture and the TRO would have on innocent third parties, balanced against the government's need to preserve the assets.

Thus, negligence, neither RICO nor CCE adequately protect third party interests. Moreover, similar problems exist under many state laws.

C. *State Forfeiture Laws*

State forfeiture laws parallel their federal counterparts. Most jurisdictions authorize civil forfeiture, and many also contain racketeering statutes permitting criminal forfeiture.¹⁵³ As with prevailing federal legislation, state laws often fail properly to protect third party interests. Accordingly, this section examines state civil and criminal forfeiture, and identifies illustrative problems involving third party interests.

1. *State Civil Forfeiture.* Most state civil forfeiture laws are based on the Uniform Controlled Substances Act (Uniform Act).¹⁵⁴ In parti-

3. In deciding whether forfeiture (and, hence, a TRO) is appropriate, the Section will consider the nature and severity of the offense: the government's policy is not to seek the fullest forfeiture permissible under the law where that forfeiture would be disproportionate to the defendant's crime.

4. When a RICO TRO is being sought, the prosecutor is required, at the earliest appropriate time, to state publicly that the government's request for a TRO, and eventual forfeiture, is made in full recognition of the rights of third parties—that is, in requesting the TRO, the government will not seek to disrupt the normal, legitimate business activities of the defendant; will not seek through use of the relation back doctrine to take from third parties assets legitimately transferred to them; will not seek to vitiate legitimate business transactions occurring between the defendant and third parties; and will, in all other respects, assist the court in ensuring that the rights of third parties are protected, through proceedings under 18 U.S.C. 1963(1) and otherwise.

Although these guidelines may ultimately help to protect third party interests from temporary restraining orders, these guidelines are not binding and therefore do not necessarily offer sufficient protection.

153. For a discussion and comparison of state statutes, see U.S. DEP'T OF JUSTICE, DRUG ENFORCEMENT ADMINISTRATION, DRUG AGENTS' GUIDE TO FORFEITURE OF ASSETS A8-A37 (1987).

154. UNIF. CONTROLLED SUBSTANCES ACT §§ 101-607, 9 (II) U.L.A. 1 (1979). The act was promulgated to supplant the Uniform Drug Act (1933) and the Model State Drug Abuse Control Act (1966). Section 505 of the Act states:

The following are subject to forfeiture:

- (1) All controlled substances which have been manufactured, distributed, dispensed or acquired in violation of this Act;
- (2) all raw materials, products and equipment of any kind which are used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance in violation of this Act;
- (3) all property which is used, or intended for use, as a container for property described in paragraphs (1) or (2);
- (4) all conveyances, including aircraft, vehicles or vessels, which are used, or intended for use, to transport, or in any manner to facilitate the transportation, for the purpose of sale or receipt of property described in paragraph (1) or (2), but:
 - (i) no conveyance used by any person as a common carrier in the transaction of business as a common carrier is subject to forfeiture under this Section unless it appears that the owner or other person in charge of the conveyance is a consenting party or privy to a violation of this Act;
 - (ii) no conveyance is subject to forfeiture under this Section by reason of any act or omission established by the owner thereof to have been committed or omitted without his knowledge or consent;

nent part, section 505 of the Uniform Act permits the forfeiture of controlled substances, items used to manufacture or distribute controlled substances, and conveyances used to transport controlled substances.¹⁵⁵ In addition, many states have adopted forfeiture provisions relating to proceeds of narcotics trafficking.¹⁵⁶

State legislation that is based on the Uniform Act provides a broad defense for innocent third parties. The Act provides that "no conveyance is subject to forfeiture . . . by reason of any act or omission established by the owner thereof to have been committed or omitted without his knowledge or consent"¹⁵⁷ Secured parties likewise are protected if they did not know or consent to the illegality.¹⁵⁸ The actual knowledge standard within the Act affords strong protections to third party interests. State forfeiture laws that vary significantly from the Uniform Act, however, often fail to protect third party interests adequately.

For example, although the Uniform Act does not reach narcotics proceeds, many states have authorized such forfeiture.¹⁵⁹ Often, states providing for the forfeiture of narcotics proceeds do not provide innocent owner defenses.¹⁶⁰ For instance, Illinois and Georgia protect lienholders when conveyances are forfeited, yet they deny lienholders protection when proceeds are forfeited.¹⁶¹ In Illinois and Georgia, therefore, a lienholder must avoid all contact with proceeds or risk forfeiture. This result is unfair. Whereas it may be difficult for an owner to know that his conveyance is being used for narcotics trafficking, it is often impossible to

(iii) a conveyance is not subject to forfeiture for a violation of Section 401(c) [Section 401(c) prohibits the unlawful possession of controlled substances and makes such possession a misdemeanor]; and,

(iv) a forfeiture of a conveyance encumbered by a bona fide security interest is subject to the interest of the secured party if he neither had knowledge of nor consented to the act or omission.

(5) all books, records, and research products and materials, including formulas, microfilm, tapes, and data which are used, or intended for use, in violation of this Act.

Id. § 505(a). The Uniform Controlled Substances Act has been the basis for legislation in approximately forty-eight states. D. SMITH, *supra* note 6, ¶ 4.02[4] [a], at 4-10.

155. D. SMITH, *supra* note 6, ¶ 4.02[4] [a], at 4-10.

156. See, e.g., ARIZ. REV. STAT. ANN. § 13-4313 (Supp. 1989); CAL. HEALTH & SAFETY CODE § 11470(f) (West 1975 & Supp. 1989) ("[a]ll moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance, all proceeds traceable to such an exchange"); GA. CODE ANN. § 16-13-49(a)(6) (1988) (same); HAW. REV. STAT. § 329-55(a)(6) (1985) (same); ILL. ANN. STAT. ch. 56 1/2, ¶ 1505(a)(5) (Smith-Hurd 1985 & Supp. 1989) ("everything of value furnished, or intended to be furnished, in exchange for a substance in violation of this Act, all proceeds traceable to such an exchange").

157. UNIF. CONTROLLED SUBSTANCES ACT, § 505(a)(4)(ii), 9(II) U.L.A. 1, 834 (1979).

158. *Id.* § 505(a)(4)(iv), 9(II) U.L.A. at 834.

159. See *supra* note 156.

160. See, e.g., GA. CODE ANN. § 16-13-49(a)(6) (1988).

161. ILL. ANN. STAT. ch. 56 1/2, ¶ 1505(a)(3)(5) (Smith-Hurd 1985 & Supp. 1989); GA. CODE ANN. § 16-13-49(a)(4)(c), (a)(5) (1988).

recognize narcotics proceeds. And it is especially difficult to recognize proceeds in commercial contexts, because narcotics proceeds may be mixed with other legitimate assets.

In addition, many states have abandoned the actual knowledge standard recommended by the Uniform Act in favor of stricter third party standards.¹⁶² Iowa, for example, has adopted a negligence standard governing the rights of innocent owners. To avoid forfeiture, an innocent owner must establish that he neither knew, nor should have known, that the property would be used in connection with a narcotics violation.¹⁶³ This standard is similar to the negligence standard applied to bona fide purchasers under RICO and CCE and is subject to similar criticisms.¹⁶⁴

New York and other states¹⁶⁵ have adopted a third party provision much like former section 881(a)(4) of the federal statute.¹⁶⁶ These state laws exempt innocent owners from forfeiture only if the unlawful act was unintentional or the conveyance was unlawfully in the possession of another during commission of the unlawful act.¹⁶⁷ Because such exemptions do not apply to the ordinary third party claimant, their protection is extremely limited.¹⁶⁸

Finally, the National Conference of Commissioners on Uniform State Laws soon may amend the forfeiture section of the Uniform Act. In a draft dated August 4, 1989, the National Conference proposed changing the third party scienter standard from actual knowledge to neg-

162. See, e.g., MD. CRIMES AND PUNISHMENTS CODE ANN. § 297(a)(4)(ii) (1988 & Supp. 1989) (similar to 21 U.S.C. § 881(a)(4)); N.Y. PUBLIC HEALTH LAW § 3388(6) (McKinney 1985) (same); CAL. HEALTH & SAFETY CODE § 11470(e)-(g) (West 1975 & Supp. 1989) (negligence standard); COLO. REV. STAT. § 16-13-504(2) (1985 & Supp. 1986) (similar to 21 U.S.C. § 881(a)(4) (1988)); IOWA CODE § 809.14 (1979 & Supp. 1989) (negligence standard).

163. IOWA CODE § 809.14 (1979 & Supp. 1988); see also CAL. HEALTH & SAFETY CODE § 11,470(e)-(g) (West 1975 & Supp. 1989) (third party must establish that she neither knew nor should have known of the illegality).

164. See *supra* notes 138-43 and accompanying text.

165. See, e.g., MD. CRIMES AND PUNISHMENTS CODE ANN. § 297(a)(4)(ii) (1988 & Supp. 1989) (law merely provides innocent owner defense when conveyance unlawfully in possession of another during commission of unlawful act); COLO. REV. STAT. § 16-13-504(2) (1985 & Supp. 1986) (innocent owner protected only if property taken from him and used without his consent, or if he did everything he reasonably could to prevent proscribed use of his property and was uninvolved in unlawful activity).

166. For a discussion of former section 881(a)(4), see *supra* notes 68-84 and accompanying text.

167. See, e.g., N.Y. PUBLIC HEALTH LAW § 3388(6) (McKinney 1985).

168. Still other states, such as California, only exempt third party interests for certain types of property, leaving other property interests unprotected. The California Uniform Controlled Substances Act exempts from forfeiture only vehicles that are worth less than \$10,000, are the sole family vehicle, and are community property. CAL. HEALTH & SAFETY CODE § 11470(e) (1975 & West Supp. 1989). An innocent owner's real property is likewise exempt if it is worth less than \$100,000, is used as a family residence, and is owned by two or more persons. *Id.* § 11470(g).

ligence.¹⁶⁹ As a result, the problems associated with a negligence standard under RICO and CCE may soon hamper third party interests in state courts.¹⁷⁰

2. *State Criminal Forfeiture.* State racketeering statutes generally protect third party interests during forfeiture in one of two ways. The first type of protection, modeled after the original provisions of RICO,¹⁷¹ merely requires prosecutors to make due provision for the rights of innocent persons.¹⁷² Such provisions are inadequate because they do not provide explicit third party protections. The second alternative, based on the 1984 amendments to RICO,¹⁷³ allows third parties to petition the court after the defendant's conviction and assert an interest in the forfeited property.¹⁷⁴ Under this procedure, the third party may avoid forfeiture by establishing either that his interest was greater than the defendant's or that he was a bona fide purchaser for value.¹⁷⁵ Consequently, the previously expressed criticisms of RICO apply here as well.¹⁷⁶

169. Annual Conference of Commissioners on Uniform State Laws, Proposed Uniform Controlled Substances Act 80 (Feb. 20, 1989). The proposal provides that a subsequent transferee of tainted property must show that "at the time the interest was acquired, [he] was reasonably without cause to believe that the property was subject to forfeiture or likely to become subject to forfeiture" *Id.*

170. For criticisms of federal RICO's innocent owner defense, see *supra* notes 133-43 and accompanying text.

171. Racketeer Influenced and Corrupt Organizations Act (codified at 18 U.S.C. § 1963(g)(4) (1988)) (The United States shall "[make] due provision for the rights of innocent persons.")

172. States adopting provisions similar to the original provisions of federal RICO include: Arizona, ARIZ. REV. STAT. ANN. §§ 13-2301 to -2317 (1989); Colorado, COLO. REV. STAT. §§ 18-17-101 to -109 (1986 & Supp. 1988); Florida, FLA. STAT. ANN. §§ 895.01-.09 (West 1976 & Supp. 1989); Louisiana, LA. REV. STAT. ANN. §§ 15:1351-1356 (West Supp. 1989); New Jersey, N.J. STAT. ANN. §§ 2C:41-1 to -6.2 (West 1982 & Supp. 1989); and Pennsylvania, 18 PA. CONS. STAT. ANN. § 911(d)(ii) (Purdon 1983).

173. See *supra* text accompanying note 131.

174. States adopting provisions similar to the amended provisions of federal RICO include: California, CAL. PENAL CODE §§ 186-186.8 (West 1988); Georgia, GA. CODE ANN. §§ 16-14-1 to -14-15 (1988 & Supp. 1989); Hawaii, HAW. REV. STAT. §§ 842-1 to 12 (1988 & Supp. 1989); Mississippi, MISS. CODE ANN. §§ 97-43-1 to -11 (Supp. 1988); Nevada, NEV. REV. STAT. §§ 207.350-.520 (1986 & Supp. 1989); and New York, N.Y. PENAL LAW §§ 460.00-.80 (McKinney Supp. 1989).

175. See, e.g., CAL. PENAL CODE §§ 186.4(a), .7(a) (West 1988); GA. CODE ANN. § 16-14-7 (1988); 1988 HAW. SESS. LAWS 260 § 2; MISS. CODE ANN. § 97-43-11(2)(a) (Supp. 1988); NEV. REV. STAT. § 207.420(3) (1986); N.Y. PENAL LAW § 460.30 (McKinney Supp. 1989).

176. For criticisms of the amended federal RICO, see *supra* notes 135-52 and accompanying text.

Other state racketeering statutes, such as Ohio's, protect third party interests by vesting the state's title to the property only after seizure of the property or filing of a corrupt activity lien. OHIO REV. CODE ANN. § 2923.36(G) (Anderson 1987). Section 2923.36 provides in part:

[T]itle of the state to the forfeited property shall . . . :

(2) In the case of personal property or a beneficial interest in it, relate back to the date the property or interest was seized by the state, or the date of filing of a corrupt activity

In summary, although state laws attempt to protect third party interests, they are inadequate in several important respects. First, some states have failed to incorporate innocent owner defenses into laws that authorize the forfeiture of narcotics proceeds.¹⁷⁷ Second, many states have abandoned the Uniform Act's actual knowledge standard in favor of stricter third party standards based on negligence.¹⁷⁸ Finally, state criminal forfeiture laws often do not provide explicit protections, and the explicit protections that do exist are not sufficiently comprehensive.¹⁷⁹ Thus further reform is necessary.¹⁸⁰

D. *Administrative Remission Procedures*

Although statutory law often fails to recognize third party claims to forfeited property, administrative remission procedures may provide an opportunity to seek relief. Generally, remission procedures require claimants to petition a designated agency and request either remission or mitigation of forfeiture. Remission, however, is purely a matter of agency discretion—no legal right to remission of a forfeiture exists.¹⁸¹ Moreover, the standards for relief vary considerably, and administrative decisions are not subject to judicial review.¹⁸²

Section 1618 of the customs laws, for example, authorizes agencies to remit or mitigate a forfeiture.¹⁸³ The agency may grant remission or

lien notice in the county where the property or beneficial interest is located. If the property was not seized and no corrupt activity lien notice was filed, it relates back to the date of the recording of the final judgment of forfeiture in the county where the personal property or beneficial interest is located.

Id. This approach substantially modifies the relation back doctrine contained in other state and federal forfeiture legislation. Although third parties receive enhanced protection, the Ohio statute severely hinders law enforcement. Until the state files a lien or takes possession of the property, a defendant may transfer the property to a third party and avoid forfeiture. Such a provision protects not only innocent third parties, but also third party transferees who have knowledge of the illegality—those whose interests should be subject to forfeiture.

177. See, e.g., GA. CODE ANN. § 16-13-49(6) (1988).

178. See, e.g., MD. CRIMES AND PUNISHMENTS CODE ANN. § 297(a)(4)(ii) (1988 & Supp. 1989).

179. See, e.g., ARIZ. REV. STAT. ANN. § 13-2314(B) (1989); COLO. REV. STAT. § 18-17-106(6) (1985). Although both Arizona and Colorado have characterized these sections of their laws as civil, they are based on the criminal forfeiture provisions of RICO. Illinois also seems to have ignored this issue in its narcotics racketeering law. See ILL. ANN. STAT. ch. 56 1/2, ¶ 1655 (Smith-Hurd 1987 & Supp. 1989).

180. See *infra* notes 187-204 and accompanying text.

181. The *Laura*, 114 U.S. 411 (1884) (holding that remission was the equivalent to a pardon). Presidential power to grant a pardon is set forth in article II of the United States Constitution, which states: The President "shall have Power to grant Reprieves and Pardons for Offenses against the United States." U.S. CONST. art. II, § 2.

182. Indeed, the complexity of the regulations has been criticized. D. SMITH, *supra* note 6, ¶ 15.02[1], at 15-4 (1985 & Supp. 1989).

183. 19 U.S.C. § 1618 (1988).

mitigation "if [it] finds that such . . . forfeiture was incurred without willful negligence or without any intention on the part of the petitioner to . . . violate the law, or finds the existence of such mitigating circumstances as to justify . . . remission or mitigation."¹⁸⁴

The Justice Department has promulgated regulations interpreting section 1618.¹⁸⁵ These regulations, unfortunately, ignore the statutory text by requiring the petitioner to show not only that she had no actual knowledge of the crime, but also that she took all "reasonable steps to prevent the illegal use of the property."¹⁸⁶ This standard simply restates the *Pearson* defense available to third parties under all types of forfeiture. Furthermore, any third party capable of demonstrating she is not negligent may successfully challenge a federal civil forfeiture. Such persons have no need for the remission procedure, and the protection provided by remission is thus illusory. Finally, remission based on agency discretion is, at best, unpredictable. Although the availability of remission may alleviate the apparent harshness of the *Pearson* doctrine, it does not assure that third party interests will be protected adequately .

IV. THE NEED FOR FURTHER REFORM

This Article has attempted to clarify the confusing array of federal and state forfeiture legislation that potentially affects third party interests. To a degree, the rights of innocent third parties may be advanced simply by interpreting these laws consistently with their legislative intent. Because judicial analysis alone cannot cure defective laws, however, further reform is in order. Reform can be achieved without hampering the effectiveness of asset forfeiture as a law enforcement tool. Indeed, a well-balanced reform package also must consider ways to strengthen asset forfeiture legislation. Based on the analysis in this Arti-

184. *Id.*

185. Criteria governing remission and mitigation, 28 C.F.R. § 9.5 (1988) provide:

- (b) *Remission.* The Determining Official shall not remit a forfeiture unless the petitioner establishes: (1) That petitioner has a valid, good faith interest in the seized property as owner or otherwise; and
- (2) That petitioner had no knowledge that the property in which petitioner claims an interest was or would be involved in any violation of the law; and
- (3) That petitioner had no knowledge of the particular violation which subjected the property to seizure and forfeiture; and (4) That petitioner had no knowledge that the user of the property had any record for violating laws of the U.S. or of any State for a related crime; and (5) That petitioner had taken all reasonable steps to prevent the illegal use of the property.
- (c) *Mitigation.* In addition to having the discretionary authority to grant relief by way of complete remission of forfeiture, the determining official may, in the exercise of discretion, mitigate forfeitures of seized property.

Id.

186. *Id.*

cle, a well-balanced reform program would include the following components:

- (1) a comprehensive definition of ownership that includes all third party interests;
- (2) a suitable scienter element operating under an appropriate allocation of the burden of proof; and
- (3) a means to avoid a prolonged freeze of all third party commercial activity whenever there is a RICO or CCE indictment.

Of these three components, the easiest to redress is the need for a broad definition of ownership. Because third party interests may be equitable rather than legal,¹⁸⁷ the definition must be all-inclusive. Even an unsecured creditor may have an important stake in assets subject to seizure, so the definition also must respect his interests.¹⁸⁸ An appropriate definition of owner would be the following: *Owner includes anyone with any legal or equitable interest in property subject to forfeiture, regardless of whether that interest is secured.* This broad approach would remedy previous inequities and ensure full application of third party rights.

The selection of an appropriate scienter standard is more problematic because this task necessarily implicates allocation of the burden of proof. Federal civil forfeiture applies an actual knowledge standard, with the exception of the willful blindness standard for conveyances under subsection (a)(4).¹⁸⁹ Though this standard favors third parties, its palliative effect is undermined by placing the burden of proof on the claimant.¹⁹⁰ By contrast, state civil forfeiture laws often apply a negligence standard, but place the burden of proof on the government.¹⁹¹ RICO, CCE, and their state criminal counterparts tend to apply a negligence standard *and* place the burden of proving non-negligence on the claimant.¹⁹²

Each of these approaches is misdirected. For example, the federal distinction limiting willful blindness to conveyance forfeitures overlooks the fact that other forfeiture situations merit similar treatment. The justification for willful blindness makes sense because conveyance situations often involve familial or personal relationships in which the third party owner recklessly ignores criminal activity. This justification suggests

187. See *supra* notes 108-10, 135-36 and accompanying text.

188. See *supra* notes 135, 161 and accompanying text.

189. See *supra* notes 60-123 and accompanying text.

190. See generally Note, *Due Process Implication of Shifting the Burden of Proof in Forfeiture Proceedings Arising Out of Illegal Drug Transactions*, 1984 DUKE L.J. 822, 839 ("[s]uch an allocation of the burden of proof creates a greater risk of an erroneous deprivation").

191. See D. SMITH, *supra* note 6, ¶ 11.03[1], at 11-11 ("State forfeiture provisions placing the burden of proof on the claimant are rare.").

192. See *supra* notes 135, 173-76 and accompanying text.

that at least a recklessness standard should apply to all transactions involving familial or personal relationships. In personal relationship situations, a negligence standard would be more appropriate than recklessness because the party often will have reason to know of an actor's culpability. The greater severity of a negligence standard may be tempered by shifting the burden of proof to the government.¹⁹³ To the extent that the negligence standard already reflects present law under RICO and CCE,¹⁹⁴ shifting the burden of proof to the government affords third parties greater protection against forfeiture.

The negligence standard, however, ought not govern all cases. For example, in routine commercial situations the practicalities of economic relationships preclude the fair and effective operation of a negligence standard.¹⁹⁵ Consequently, such cases should be controlled by a recklessness test. Some might contend that an actual knowledge standard is preferable to avoid stifling commercial affairs.¹⁹⁶ Indeed, subsections 881(a)(6) and (a)(7) impose this standard for *all* nonconveyance forfeitures regardless of commercial concerns.¹⁹⁷ No one acting with reckless indifference to criminal activity, however, should be permitted to avoid asset forfeiture. And since the recklessness standard requires conscious disregard of "a substantial and unjustifiable risk" amounting to a "gross deviation" from law abiding standards, most legitimate commercial activity would continue unabated. Appropriate language for reform would include the following:

*No property interest may be forfeited unless the government establishes by a preponderance of the evidence that the owner knew of, or acted recklessly with respect to, the illegality.*¹⁹⁸ *Provided, however, that when forfeitable property has been the subject of a transaction between family members and/or friends, a property interest may be forfeited if the gov-*

193. The typical justification for placing the burden of proof on the claimant is that he has access to the facts whereas the government does not: "[W]here the facts, with regard to an issue lie peculiarly in the knowledge of a party, that party has the burden of proving the issue." MCCORMICK ON EVIDENCE 950 (E. Cleary 3d ed. 1984). However, to place the burden of proof on the claimant in a forfeiture proceeding solely because he has access to information ignores the government's access to discovery.

194. See *supra* note 135 and accompanying text.

195. See *supra* text accompanying note 142.

196. See Note, *supra* note 190, at 835, which states:

Applying the general principles of regulatory forfeiture to the forfeiture of proceeds under the Drug Control Act would require guilty knowledge as a prerequisite to the forfeiture of the proceeds of a crime. Creating a duty of inquiry in the context of proceeds would constitute unreasonable regulation because the duty would apply in literally every transaction involving an exchange of money or property, making compliance effectively impossible.

Id.

197. See *supra* note 102 and accompanying text.

198. The statute necessarily must define the term "reckless." The MODEL PENAL CODE provides a well accepted definition for this term. See *supra* note 122 and accompanying text.

*ernment establishes by a preponderance of the evidence that the owner knew, or had reason to know, of the illegality.*¹⁹⁹

The proposed reform accordingly rejects the negligence standard that prevails under RICO and CCE, and that is adopted in the draft amendment to the Uniform Act. Instead, the proposal adopts a general recklessness test and creates a special reduction to negligence for familial or personal relationships. And although the proposal reflects a reduction from the actual knowledge test contained in some forfeiture laws,²⁰⁰ third party protections effectively are maintained by shifting the burden of proof to the government.

Further measures must be taken to ensure that persons indicted under RICO and CCE are not precluded from engaging in commercial transactions. Because the publicity accompanying indictments confers considerable notoriety, third parties fearing forfeiture may decline to deal in any manner with the defendant. Taken to an extreme, the defendant may be unable to get a haircut, shop for necessities, or secure medical assistance, much less engage in complex commercial transactions. The presumption of innocence in the criminal context makes this result intolerable. Accordingly, RICO and CCE should be amended to provide a life necessities exception to forfeiture. For example, after indictment the district court should be empowered to designate certain assets as nonforfeitable and available for the necessities of life. To ensure against abuse, the defendant may be required to provide an accounting of how these assets were spent. The following language addresses this concern:

The district court shall have authority to set aside sufficient assets to allow a defendant to pay for daily necessities. The term "necessities" includes reasonable shelter, clothing, food, transportation, and medical expenses for the defendant and his family. Provided, however, that the district court may require the defendant to account for his expenses under this section. Assets lawfully transferred to third persons under this provision are not subject to forfeiture.

Finally, the courts should be empowered to allow any RICO defendant to engage in general commercial transactions, provided that the defendant's estate is not diminished as a result. In other words, as long as a defendant's assets are not dissipated before conviction, the government should not be concerned about how the defendant spends his money. Under present law, the defendant may be required to post a bond.²⁰¹

199. A difficult case may involve the hybrid commercial situation between friends or family members who have conducted business together for years. In such cases, the judge will have to make a preliminary factual determination before deciding which evidentiary standard to apply. *Cf.* FED. R. EVID. 104.

200. *See* 21 U.S.C. § 881(a)(6) (1982); *id.* § 881(a)(7) (Supp. V 1987).

201. 18 U.S.C. § 1963(d) (1988). Michael Milken, junk bond dealer, was recently indicted for ninety-eight RICO violations and required to post a \$700 million bond against the \$1.8 billion the

Alternatively, the court may impose a receiver to monitor a defendant's commercial transactions. The receivership ensures that no transaction unduly threatens to diminish the residue of funds available for forfeiture. By approving transactions in advance, the receiver protects third parties who have engaged in approved transactions from having to forfeit assets received from the defendant. Ultimately, by allowing the defendant's business to continue to operate, the receivership eliminates a major criticism of RICO and CCE.²⁰²

In reality, the broad terms of RICO and CCE already contain authority to appoint a receiver for this purpose.²⁰³ However, because this authority has rarely been exercised for this purpose, legislative clarification may be helpful. Accordingly the present text of section 1963(d)(i) should be modified as follows:

"Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) for forfeiture under this section"; *provided, however, that upon the posting of a bond or the appointment of a receiver, assets lawfully transferred to third persons under this provision are not subject to forfeiture.*²⁰⁴

CONCLUSION

Asset forfeiture is vital to society's struggle against systemic criminal activity which illicitly generates billions of dollars. Forfeiture properly supplements traditional criminal justice remedies by attacking the economic foundation of criminal enterprises. Nevertheless, asset forfeitures often impinge unfairly on innocent third parties.

government claims is subject to forfeiture. *L.A. Times*, Apr. 17, 1989, at 1, col. 1; *see also* *United States v. Regan*, 858 F.2d 115 (2d Cir. 1988) (investment firm required to post bond).

202. More specifically, in a business context critics contend that a pretrial asset freeze effectively—and unfairly—compels a business to cease operations even before a conviction has been attained. *See* *Orland, When Pressure Forces Guilty Pleas*, *N.Y. Times*, Jan. 1, 1989, § 3, at 3, col. 1; *Nocera, Drexel: Hanged Without a Trial*, *N.Y. Times*, Dec. 30, 1988, at A31, col. 1.

203. 18 U.S.C. § 1963(d) (Supp. V 1987); *see supra* note 144; *cf.* *United States v. Local 30, United Slate, Tile and Composition Roofers*, 871 F.2d 401, 405 (3d Cir. 1989) (broad injunctive relief could be issued against organization whose leaders violated RICO) *cert. denied*, 110 S. Ct. 363; *United States v. Local 560 of the Int'l Bhd. of Teamsters*, 780 F.2d 267, 295-96 (3d Cir. 1985) (RICO empowers district court to remove union's executive board from office and replace with temporary trustee) *cert. denied*, 476 U.S. 1140 (1986).

204. The additional language is supported by the Second Circuit's decision in *United States v. Regan*, 858 F.2d 115 (2d Cir. 1988). In *Regan*, the court held that "orders directed at third parties are strong medicine and should not be used where measures that are adequate and less burdensome on the third parties are available." *Id.* at 121. The proposed language favors the less burdensome posting of a bond or appointment of a receiver over other more inhibiting restrictions.

As originally enacted, federal and state forfeiture laws generally ignored third party interests. The Supreme Court's 1974 decision in *Calero-Toledo v. Pearson Yacht Leasing Co.* reinforced the trend by conferring due process protections only upon owners who "had done all that reasonably could be expected to prevent the proscribed use of [their] property."²⁰⁵ Although Congress has since recognized the need to provide additional safeguards for innocent third parties, its reforms have proved inadequate. State legislatures likewise have failed in this respect. True reform requires a well balanced approach solicitous of both third party rights and law enforcement concerns. By offering a proposal that addresses critical aspects of standing doctrine, scienter, burden of proof allocations, and pre-trial asset restraints, this Article offers a preliminary foundation for reform. Remedial action now awaits a legislative response.

205. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 689 (1973).