



Part 2: Relief for Victims and Third Parties Through Asset Forfeiture

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How Can a Victim Obtain Relief Through Forfeiture?

Forfeited property generally goes to the government to spend in whatever manner it sees fit. However there are means by which victims or third parties can challenge a forfeiture if they believe the property, in full or in part, rightfully belongs to them, or to seek relief based on losses resulting from the criminal acts that gave rise to the forfeiture. The first avenue of relief is the assertion of a claim to property sought to be forfeited, and this can be done by filing a claim and an answer in a civil forfeiture proceeding or through a petition for an ancillary hearing in a criminal case. The second avenue of relief involves the filing of a petition for remission or mitigation with the Department of Justice.

Any time the government intends to forfeit property, it is required to give notice to potentially interested third parties and to publish its intent on a government website. Any interested third party, including a victim of a crime, may then file a claim to the property in court within a specified time period. A claim must set forth the nature and extent of a party's "right, title, or interest" in the property, explain the circumstances in which the property was acquired, and be signed under penalty of perjury. Succeeding on a third party claim is difficult, however, because the claimant must prove either that it (1) has a right, title, or interest in the property superior to the government's, or (2) is a bona fide purchaser for value and, at the time of purchase, was reasonably without cause to believe the property was subject to forfeiture.

Under the "relation back" doctrine, the government is assumed to have acquired

title to the proceeds of a crime or property involved in a crime at the time the crime was committed. Therefore, to have a superior right, title, or interest in property, a third party must have had an interest in the property before the crime occurred. Bona fide purchasers are those who provided something of value in exchange for an interest in property subject to forfeiture, such as financial institutions that provided a mortgage to buy a home later deemed to be subject to forfeiture.

Petitions for mitigation or remission are intended to alleviate some of the harsh consequences of a crime by allowing victims to gain financial relief even if they cannot meet all of the strict requirements for filing a successful claim. As a matter of prosecutorial discretion, the Department of Justice can grant petitions for remission or mitigation from victims of crime. Increasingly, in complex fraud cases (such as the Madoff prosecution) the Department of Justice (sometimes in tandem with a trustee appointed under the Securities Investor Protection Act) will use the funds received in a criminal forfeiture proceeding to make victims whole. This can be particularly important to victims in those cases in which criminal restitution is not possible due to the complexity of determining what victims are entitled to receive, or where the sheer number of victims makes restitution not feasible. Because petitions are subject to the discretion of the government, however, and are not subject to judicial review, it is critical to present a compelling case for relief. Given recent trends, it seems likely that the government will continue to rely on forfeiture proceedings to recover the proceeds of financial crimes and, accordingly, that the

avenues of relief from forfeiture will become increasingly important for businesses that have been victimized or otherwise affected by such crimes. Businesses should be aware of these avenues and, if victimized by financial crime, should contact counsel with specialized experience in forfeiture matters to help navigate the process.

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