I. INTRODUCTION

In order to diminish the financial motive for crime, Congress enacted federal statutes to monitor and criminalize certain activities related to both legally and illegally obtained monies. The theory was that by reducing the underlying motive for engaging in federal crime (i.e., the accumulation of wealth), there would be less incentive to commit crime. Federal prosecutors and law enforcement agents have increasingly used these statutes to combat criminal activity. As real estate law practitioners frequently receive, possess, and transfer large sums of money as a result of their involvement in real estate transactions, an understanding of the federal laws dealing with financial transactions is important. This outline is intended to expose the real estate practitioner to certain federal laws dealing with financial transactions, the receipt of cash, and the transfer of funds.

II. MONEY LAUNDERING

A. General Definition. Money laundering is concealing the existence, illegal source, or illegal use of money to make the money appear legitimate.

B. Statutory Law. Federal statutes used by the government to criminally prosecute money launderers include:

1. Laundering of Monetary Instruments (18 U.S.C. ' 1956);

2. Receipt of Ill-Gotten Gains (18 U.S.C. ' 1957);

3. Currency Transaction Reporting section of the Bank Secrecy Act (31 U.S.C. '' 5311 et. seq.); and

4. Trades or Business Cash Reporting Statute (26 U.S.C. ' 6050I)


A. Background. Congress enacted the Money Laundering Control Act in 1986. This was the first time that congress defined and criminalized money laundering.

2. The Act was intended to prohibit all "monetary transactions" involving "criminally derived property." 18 U.S.C. 1957(f) (1988); see G. Richard Strafer, Money Laundering: The Crime of the '90's, 27 AM.CRIM.L.REV. 149 (1989). The transactions do not have to involve financial institutions and can include any commercial transaction which affects commerce.

3. The Act really is an offshoot of the federal drug offenses since it was originally enacted to help fight the "War on Drugs." See Strafer, supra 22 at 177.

    (a) Drug-related offenses are brought within "specified unlawful activity" through 1956(c)(7)(A); which provides that any act or activity constituting an offense listed in 1961(1) may constitute specified unlawful activity.

    (b) Section 1961(1)(D) defines racketeering activity as "any offense involving . . . the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical punishable under any law of the United States." A full RICO violation does not have to be alleged. See United States v. Real Prop. Commonly Known as 16899 S. W. Greenbrier, 774 F. Supp. 1267, 1274 (D.Or. 1991) (1956 does not require RICO offense, but only one or more of the offenses listed in 1961).

B. **Penalties.**

1. **Criminal:** the penalty for non-drug related violations can be twenty years of imprisonment and/or a fine of $500,000, or twice the value of the monetary instruments or funds laundered. *See 18 U.S.C. ' 1956(a)(1)(2)(3).*

2. **Civil:** a civil penalty of not more than the greater of the value of the property, funds, or monetary instruments involved in the transaction, or $10,000, may be imposed. *See 18 U.S.C. ' 1956(b)(1)(2).*

C. **Three Categories of Money Laundering.** The Money Laundering Control Act divides criminal activity into three categories: (i) transactions involving the proceeds of criminal activity, undertaken with intent to promote unlawful activity, or with knowledge that the transaction is designed to conceal some aspect of the funds; (ii) transportation of monetary instruments in foreign commerce; and (iii) government "sting" operations.

1. **Transaction Involving Proceeds.** An entity can be held criminally liable under ' 1956 (a)(1) if it conducts a financial transaction with the proceeds of criminal activity with one of several enumerated intents: (1) the intent to promote specified unlawful activity; (2) the intent to evade taxes under 26 U.S.C. ' 7201 or 7206; (3) the intent to conceal or disguise the nature of the funds; or (4) the intent to avoid a state or federal reporting requirement. *See ' 1956 (a)(1)(A) - (B).*

   a. **Specified Unlawful Activity (SUA).** Section 1956(7) defines the term "specified unlawful activity" broadly. It includes virtually all federal narcotics felonies, mail fraud, wire fraud, racketeering, drug trafficking, false claims against the United States, bank fraud and embezzlement, counterfeiting, illegal gambling, commercial activities dealing with sexual exploitation of children, interstate transport of stolen property, any state offense dealing with murder, kidnapping, gambling, arson, robbery, extortion, dealing in obscene matter, or dealing in narcotic or dangerous drugs.

   b. **Knowledge Requirement.**

      (1) The defendant must have knowledge "that the property involved in a financial transaction represents the proceeds of some form of unlawful activity." *Id. at ' 1956(a)(1).*
(2) Section 1956(a)(2)(B) prohibits an action where the defendant knows "that the monetary instrument or funds involved in the transportation represent the proceeds of some form of unlawful activity." Id. at 1 1956(a)(2)(B); see also United States v. Campbell, 977 F.2d 854, 857 (4th Cir. 1992), cert. denied, 407 U.S. 938 (1993) (the government does not need to prove that the defendant purposefully concealed the proceeds of the illegal activity, only that the defendant knew that the transaction was designed to conceal illegal proceeds).

(3) Section 1956(c)(1) clarifies the knowledge requirement by stating that "some form of unlawful activity" means felonious conduct.

c. **Financial Transaction Requirement.**

(1) An attempted laundering is generally sufficient to constitute a financial transaction. See, e.g., United States v. McLamb, 985 F.2d 1284, 1292 (4th Cir. 1993) (conviction upheld where defendant was arrested prior to completion of the transaction); United States v. Loehr, 966 F.2d 201, 203 (6th Cir.), cert. denied, 506 U.S. 1020 (1992) (same); United States v. Martin, 933 F.2d 609 (8th Cir. 1991) (purchasing corporate stock was a "financial transaction").

(2) Under the statute, a "financial transaction" can mean a variety of activities. See, e.g., United States v. Arditti, 955 F.2d 331 (5th Cir. 1992), cert. denied, 506 U.S. 998 (transferring cashier's checks); United States v. Koller, 956 F.2d 1408 (7th Cir. 1992) (making a payment with a money order); United States v. Dimeck, 815 F. Supp. 1425 (D.Kan. 1993) (transporting cash from one state to another); United States v. McLamb, 985 F.2d 1284 (4th Cir. 1993) (selling a car); Blackman, 904 F.2d at 1257 (transferring title to a truck); U.S. v. Jackson, 935 F.2d at 832, 841 (7th Cir. 1991) (writing a check).

d. **Distinguish International Money Laundering.** Section 1956(a)(2) of the Act addresses international money laundering. The elements are virtually the same as those in Section 1956(a)(1). However, the international provisions do not require a financial transaction with the proceeds of specified unlawful activity. This
makes international transactions with money a crime, if it is a transaction to solely promote the crime.

e. **Timing of the Financial Transaction.** The Justice Department typically refrains from charging a defendant under subsection (a)(1) or (a)(2) unless the financial transaction occurs after the defendant first obtains control over the proceeds, and after the defendant deposits the proceeds into an account. See *Department of Justice Guidelines For Money Laundering Prosecutions* (April 21, 1993). Federal prosecutors do not charge defendants for gaining control over the proceeds because prosecutors fear Congress will narrow the statute if it is over-utilized. However, federal prosecutors can and will proceed with civil forfeiture and, therefore, charge money laundering in that context. *Id.*

2. **Transportation of Monetary Instruments.** One can be held criminally liable under 1956(a)(2) for transporting a monetary instrument into or out of the United States (1) with the intent to promote the carrying on of specified unlawful activity; or (2) knowing the monetary instrument represents the proceeds of some form of unlawful activity, and the transportation is designed to conceal or disguise such proceeds; or (3) knowing the monetary instrument represents the proceeds of some form of unlawful activity, and the transportation is designed to avoid a state or federal transaction reporting requirement.

a. **Knowledge Requirement.**


(2) The knowledge element of 1956(a)(2)(b) is satisfied if a law enforcement agent represents the source of the money and the purpose of the transaction as unlawful to the defendant, and the defendant's statements or actions indicate that the defendant believed the agent's representations, *See, e.g.*, *United States v. Silberman*, 732 F. Supp. 1057 (S.D. Cal. 1990), *cert. denied*, 407 U.S. 1035 (1993).
b. "Represents" includes "any representation made by a law enforcement officer or by another person at the direction of, or with the approval of, a Federal official authorized to investigate or prosecute violations of this section." 18 U.S.C. ' 1956(a)(3).

c. Law enforcement agent includes official agents, frequently acting undercover, and persons acting at the request of official law enforcement personnel.


a. In general, a "sting" operation is when undercover law enforcement officers pose as criminals and appear to take part in criminal activities as a means of gathering evidence. Government undercover agents typically use bait money in these operations.

b. Section 1956(a)(3) allows for a conviction when the defendant believes that the money involved in the prohibited transaction was the product of unlawful activity where in reality, no illegal proceeds were involved.

c. One can be held criminally liable under section 1956(a)(3) for conducting or attempting to conduct a financial transaction involving property represented to be the proceeds of specified unlawful activity, or property used to conduct or facilitate specified unlawful activity, whenever the intent is to: (1) promote specified unlawful activity; or (2) conceal or disguise the nature, location, source, ownership, or control of property believed to be the proceeds of specified unlawful activity; or (3) avoid a state or federal transaction reporting requirement.

(1) "Representation" Requirement. The "representation can be made by a law enforcement officer, by another person at the direction of a law enforcement officer, or with the approval of a federal official authorized to investigate or prosecute violations of the Money Laundering Control Act.

(a) It is sufficient if a law enforcement officer represents the property to be the proceeds of unlawful activity or that the property is used to conduct or facilitate unlawful activity. See United States v. Knecht, 55 F.3d 54,57 (2d Cir. 1995) (upholding money laundering conviction when
defendant's only reason to believe that the money to be laundered was the proceeds of illegal drug sales was a statement by an undercover agent); *United States v. Starke*, 62 F.3d 1374, 1382 (11th Cir. 1995) (holding that the government need only prove that law enforcement officer made the defendant aware of circumstances which would allow a reasonable person to infer that the property was drug proceeds); *United States v. Kaufmann*, 985 F.2d 884, 893 (7th Cir. 1993)(same).

(b) Distinguish from section 1956(a)(1). Whereas section 1956(a)(1) requires proof that the defendant knew that the property was the proceeds of some form of illegal activity, a sting operation under section 1956(a)(3) has no corresponding knowledge requirement.

(2) **Mens Rea Element.** Subsection (a)(3) requires only a showing that the defendant intended to further the purposes of the transaction.

(a) **Mens Rea** element is satisfied by proof that the property involved in the transaction was represented by a law enforcement officer to be something other than what it really was, i.e., federal bait money.

(b) Courts have held that section 1956(a)(3) does not require law enforcement agents to explicitly represent that the money or property being laundered derived from a specified offense. *See United States v. Wydermeyer*, 51 F.3d 319, 327 (2d Cir. 1995)(finding no congressional intent to require express statements by law enforcement officers of the illegal source of the funds being laundered).

(c) **Mens Rea** may also be satisfied by proof that the defendant intended to conceal or disguise the nature, location, source, ownership, or control of property believed to be the proceeds of specified unlawful activity, or that the defendant intended to avoid a transaction reporting requirement under
IV. RECEIPT OF ILLGOTTEN GAINS-- 18 U.S.C. 1957

A. Section 1957 criminalizes the knowing receipt of proceeds of a criminal transaction and provides in pertinent part:

> Whoever, in any of the circumstances set forth in subsection (d), knowingly engages or attempts to engage in a monetary transaction in criminally derived property that is of a value greater than $10,000 and is derived from specified unlawful activity, shall be punished . . .


B. Knowledge Requirement. A defendant does not need to have knowledge that the funds were proceeds of a specified unlawful activity, or have the intent to further conceal such an activity to be guilty of a criminal offense.

1. Section 1957 only requires knowledge that the money came from criminal conduct. See 18 U.S.C. 1957(a).

2. Subsection (c) states that the "government is not required to prove the defendant knew that the offense from which the criminally derived property was derived was specified unlawful activity." Id. Thus, the focus is on knowledge that a transaction involves "criminally derived property," not that the individual know that such property was derived from a "specified unlawful activity."

3. The statute simply makes it difficult for criminals to spend laundered money by prohibiting "innocent" people who know the money is dirty in any way, from accepting it. See Department of Justice Guidelines For Money Laundering Prosecutions (April 21, 1993). Federal prosecutors, however, seldom prosecute the initial receipt of proceeds or the initial deposit of proceeds. Instead, they weigh numerous factors for and against prosecution. Factors increasing likelihood of prosecution include: (1) proceeds are drug-related; (2) organized crime involvement; (3) large amount of money involved; (4) no other crime to charge defendant with; (5) provides funding for future criminal activity; (6) designed to conceal or disguise the nature of the money if the source of the money and the connection to it are hidden by a series of complex transactions; and (7) availability of the civil forfeiture remedies.
C. **Penalty Provisions.** Each financial transaction conducted in violation of the statute (section 1957) carries a ten year prison term, and a fine of $250,000 or twice the value of the proceeds laundered, whichever is greater, or both.

V. **TRADES AND BUSINESS REPORTING - 26 U.S.C. \textsuperscript{1} 6050I**

A. **Persons Required to Report.** The Internal Revenue Services requires all persons "engaged in a trade or business" who receive more than $10,000 in cash in one transaction or in a series of related transactions to file IRS Form 8300. See 26 U.S.C. \textsuperscript{1} 6050I.

B. **Information Required.** In Form 8300, the person receiving the funds must state:

1. the name, address, and taxpayer identification number of the person from whom the cash was received;
2. the amount of cash;
3. the date and nature of the transaction; and
4. such other information as the Secretary of the Treasury may require.

C. **Deadline for Filing.** Form 8300 must be filed within fifteen (15) days of the receipt of the cash, or 15 days of the receipt of a successive cash payment that causes the total amount to exceed $10,000.

D. **Anti-Structuring Provision.** An "anti-structuring" provision in the statute prohibits causing or attempting to cause a trade or business to fail to file a Form 8300 and also proscribes the structuring of transactions to evade the reporting requirements. See 26 U.S.C. \textsuperscript{1} 6050I(f)(1)(c).

E. **Penalties.** Willful non-filing or false filing carries a five year maximum imprisonment term. Non-willful failure to file or false filing carries a one year maximum prison term. Willful offenders are prosecuted under the failure to file provisions of the Internal Revenue Code, 26 U.S.C. \textsuperscript{1} 7203, or the general conspiracy statute, 18 U.S.C. \textsuperscript{1} 371.
VI. CURRENCY TRANSACTION REPORTING - 31 U.S.C. '11 5311 ET SEQ.

A. General Information

1. Background. The Bank Records and Foreign Transaction Act, commonly known as the Bank Secrecy Act, was enacted in the 1970's out of concern that financial institutions were playing an increasingly larger role in the laundering of illegally obtained funds. See California Bankers Assn. v. Schultz, 416 U.S. 21, 26-30 (1974).

2. Financial Institution Defined. The Act defines financial institutions broadly to include not only banking entities, but also loan and finance companies and brokers and dealers in securities and commodities markets. See 31 U.S.C. 5312(a)(3).

3. Covers Monetary Instruments. It is important to recognize that the reporting requirements apply to monetary instruments; thus, reports must be filed not only for the movement of currency, but for transactions involving any negotiable instrument including, but not limited to, securities and stock. See 31 U.S.C. '5312(a)(3).

B. Domestic Financial Institution Reporting Requirements-- 31 U.S.C. '1 5313

1. The Act requires domestic financial institutions to file Currency Transaction Reports (CTRs) for each deposit, withdrawal, exchange of currency, or other payment or transfer which exceeds $10,000. See 31 U.S.C. '5313(a); 31 C.F.R. '103.22(a)(1).

2. A CTR essentially requires a financial institution to disclose the identity of the person or entity on whose behalf the transaction is being conducted. See 31 C.F.R. '103.28.

3. Criminal penalties for failure to file a CTR under '5313 include a fine of up to $250,000 or imprisonment for not more than five years, or both. 31 U.S.C. '5322(a). These penalties are doubled where the government can show that the failure to file a CTR was part of a pattern of any illegal activity involving more than $100,000 in a 12-month period. 31 U.S.C. '5322(b).
D. **Foreign Currency Transactions Reporting Requirements--31 U.S.C. § 5315.**

1. The Act also requires that reports be filed on foreign currency transactions conducted by a United States person or a foreign person acting for or controlled by a United States person. *See* 31 U.S.C. § 5315(c).

2. The implementing regulations of the statute require reports on:
   a. transactions in foreign exchange;
   b. transfers of credit that are, in whole or part, denominated in a foreign currency; and
   c. the creation or acquisition of claims that reference transactions, holdings, or evaluations of foreign exchange. *31 C.F.R. § 128.2.*

3. These reports must be filed with the Federal Reserve bank in the district where the United States person or entity is located. *31 C.F.R. § 128.2.*

4. Failure to comply with § 5315 can result in civil penalties to the United States government of not more than $10,000. *31 U.S.C. § 5321(3).* The criminal penalties applicable to violations of § 5313 do not apply to foreign currency transactions.

E. **Reporting Requirements for the Export and Import of Monetary Instruments--31 U.S.C. § 5316**

1. **Reporting Requirement.** Section 5316 requires a person or entity to file a Currency or Monetary Instrument Report (CMIR) for the movement of monetary instruments of more than $10,000 into or out of the United States.

   a. Report shall include the legal capacity in which the person filing the report is acting, the origin, destination, and route of the monetary instruments, the amount and kind of instrument being transported, and the identity of the person who gave the instrument to the person to transport. *See* 31 U.S.C. § 5316(b).

   b. Monetary instruments include currency; personal checks, business checks, bank checks, promissory notes, money orders, all negotiable instruments; incomplete negotiable instruments, signed but with the payee's name omitted; and securities or stock in bearer form. *31 C.F.R. 103.11 (m) (1994).*
2. **Forfeiture Action used.** The government’s criminal prosecutions of violations under this section typically includes a forfeiture action to seize the monetary instrument pursuant to 31 U.S.C. 5317. Monetary instruments may be seized where a report has not been filed or contains a material omission or misstatement. See 31 U.S.C. 5317(c).

3. **Elements of Proof Required.** In criminal prosecution, the government would need to prove beyond a reasonable doubt that the defendant:

   a. transported or was about to transport;
   
   b. monetary instruments of more than $10,000;
   
   c. knowing that a CMIR was required; and
   
   d. failed to file the CMIR.

F. **Structuring Transactions--31 U.S.C. 5324.**

1. **Background.** Section 5324 was enacted to punish persons or entities who attempt to evade the reporting requirements of 5313 and 5316 by structuring monetary transactions. This provision was enacted pursuant to the Money Laundering Control Act of 1986 to clarify confusion among the courts as to whether structuring schemes to avoid reporting were punishable as criminal conduct. See Pub. L. No. 99-570, 100 Stat. 3207 (codified as amended in scattered sections of 18 U.S.C. and 31 U.S.C.).

2. **Prohibited Conduct.** No person shall, for the purpose of evading the reporting requirements of federal law, (1) cause, or attempt to cause, a financial institution to fail to file a CTR; (2) cause, or attempt to cause, a financial institution to file a report that contains a material omission or misstatement of fact; or, (3) structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more domestic financial institutions.

3. **Define "Structuring."** A person structures a transaction if that person, acting alone, or in conjunction with, or on behalf of, other persons, conducts or attempts to conduct one or more transactions in currency, in

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1 See, e.g., United States v. Goulding, 26 F.3d 656 (7th Cir. 1994).
any amount, at one or more financial institutions, on one or more days, in any manner, for the purpose of evading the reporting requirements under federal law. 31 C.F.R. 103.11 (p) (1994).

4. Define "In any Manner." "In any manner" includes, but is not limited to, the breaking down of a single sum of currency exceeding $10,000 into smaller sums, including sums at or below $10,000, or the conduct of a transaction, or series of currency transactions, including transactions at or below $10,000. 31 C.F.R. 103.11(gg).

5. Elements of Proof Required. The essential elements that the government must prove in establishing a violation of 31 U.S.C. 5324 are:

a. knowledge that the bank or individual had a legal obligation to report transactions exceeding $10,000;

b. the structuring of transactions so as to avoid the reporting requirements; and

c. purpose to evade the reporting requirement.

6. Intent element. In order to be found guilty of the offense of "structuring" the defendant need not know that the act of structuring is unlawful, he need only know of the reporting requirement and then structure his transactions(s) to evade it. See 31 U.S.C. 5322 (a) (1994).

7. Criminal Penalties. Criminal penalties include fines in accordance with title 18, United States Code, and imprisonment for not more than five years, or both. 31 U.S.C. 5322(a). These penalties are doubled where the government can show that the structuring conduct was part of a pattern of any illegal activity involving more than $100,000 in a 12-month period. 31 U.S.C. 5324(c).

VII. CIVIL FORFEITURE.

A. PRINCIPLE CIVIL FORFEITURE STATUTES.


a. The following shall be subject to forfeiture to the United States and no property right shall exist in them:
(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 to the interest of an owner, by reason of any act or omission established by that owner to have committed or omitted without the knowledge or consent of that owner. [Emphasis Added] (Underlined portion is known as "Innocent Owner" defense.)


(a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:

(7) All real property, including any right, title and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this title punishable by more than one year's imprisonment, except that no property 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 or consent of that owner. [emphasis Added] (Underlined portion is known as "Innocent Owner" defense.)
3. Title 18 U.S.C. § 981(a)(1)(A), in relevant part:

   (a)(1) Except as provided in paragraph (2), the following property is subject to forfeiture to the United States:

   (A) Any property, real or personal, involved in a transaction or attempted transaction in violation of section 5313(a)or 5324 of title 31, or of section 1956 or 1957 of this title, or any property traceable to such property . . .
CIVIL FORFEITURE LAWS

I. GENERAL OVERVIEW.

In an effort to more effectively discourage crime, Federal prosecutors and law enforcement agents have increasingly begun to rely on forfeiture law. In fact, forfeiture has become one of the most effective, prominent, and widely utilized law enforcement tools of the decade. A significant portion of law enforcement revenue now depends on aggressive and frequent pursuit of forfeitable property. In particular, forfeiture has achieved high priority among legislative initiatives in the fight against crime. As a result, forfeiture provisions have emerged in hundreds of federal statutes, both criminal and civil in nature. See Enclosure (1). This outline focuses primarily upon the civil forfeiture provisions of the drug trafficking and money laundering statutes. However, the issues related to these statutes are identical to the issues dealing with other forfeiture statutes.

II. HISTORICAL BACKGROUND.

A. Forfeiture Defined.

1. Forfeiture is a comprehensive term that means a divestiture of specific property without compensation; it imposes a loss by taking away some preexisting valid right without compensation.” Black’s Law Dictionary 650 (6th Ed. 1990).

2. It is a punishment annexed by law to some illegal act or negligence in the owner of land, tenements, or hereditaments whereby he loses all interest therein. Hammond v. Johnson, 94 Utah 20, 66 P.2d 894, 900 (1964)

B. Historical Roots. The roots of asset forfeiture can be traced to biblical times when forfeiture was based upon the theories of punishment and restitution. English forfeiture jurisprudence used this underlying concept to develop three types of forfeitures at common law: deodand, escheat upon attainder, and statutory forfeiture.  

1. Deodand. At English common law, property that was the direct or indirect cause of death was forfeited to the Crown as a deodand and distributed for pious uses. This was an in rem action.

2. Escheat upon Attainder. This type of forfeiture involved an in personam action to punish the offender for the commission of a

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crime. This common law forfeiture fell only upon those convicted of a felony or of treason. Calero-Toledo v. Pearson Yatch Leasing Co., 416 U.S. 663, 682 (1974) (“The convicted felon forfeited his chattels to the Crown and his lands escheated to his lord; the convicted traitor forfeited all of his property, real and personal, to the Crown.”).

3. **Statutory Forfeiture.** English Law provided for statutory forfeitures of offending objects used in violation of the custom and revenue laws. The most notable of these were the Navigation Acts of 1660 that required the shipping of most commodities in English vessels. Violations of the Acts resulted in the forfeiture of the illegally carried goods as well as the ship that transported them. See Austin v. United States, 509 U.S. 602, 612 (1993).

Of England’s three kinds of forfeiture, only the third, statutory forfeitures, took hold in the United States. See Calero-Toledo, 416 U.S. at 682 (“Deodands did not become part of the common-law tradition of this country.”); See also Austin, 509 U.S. at 613 citing U.S. Const., Art. III, 3, cl.2, and Act of Apr. 30, 1790, ch. 9, 24, 1 Stat. 117 (“The Constitution forbids forfeiture of estate as a punishment for treason ‘except during the Life of the Person attained’ . . . and the First Congress also abolished forfeiture of estate as a punishment for felons.”).

C. **Policy.** The Supreme Court has set forth four fundamental policies justifications for forfeiture: (1) “separating the criminal from his ill-gotten gains,” (2) raising funds for law enforcement, (3) raising funds to provide restitution to victims of crime, and (4) lessening “the economic power of organized crime and drug enterprises.” Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 629-30 (1989).

II. **ASSET FORFEITURE IN MODERN DAY.**

A. Although over 200 forfeiture statutes (including federal and local) exist, forfeiture was not broadened until Congress heightened its war on crime. In 1984, Congress amended the comprehensive Drug Abuse and Control Act of 1970 to include forfeiture of real property because the “traditional criminal sanctions of fines and imprisonment were inadequate to deter or punish the enormously profitable trade in dangerous drugs.” S. Rep. No. 225, 98th Cong., 1st Sess 225 (1983).

B. The United States Attorney’s Office responded to Congress’ expansion of forfeiture power by increasing its emphasis upon forfeiture as well. The amount of assets which have been seized due to this broadening of forfeiture power has jumped dramatically over the years. The United States has received from asset forfeitures (in millions):
1986: $93.7
1987: $580.8
1988: $531
1989: $177.6
1990: $459.6
1991: $555.7
1992: $205.9
1993: $643.6
1994: $549.9

III. CIVIL FORFEITURE ACTIONS.

A. Primary Civil Forfeiture Statutes.

1. 21 U.S.C. 881 (Property Involved in Drug Offenses):
   a. Provides for civil forfeiture of property upon violation of
      the drug laws, regardless of whether or not a criminal
      conviction for the offense is ever obtained.
   b. Many categories of property are subject to forfeiture,
      including houses and real property, cars, boats, and sums of
      currency. Forfeiture attaches, generally, under two
      nationales: (1) The Proceeds of Crime (2) Instrumentalities
      of Crime.
   c. Pertinent parts of statute are:
      (i) 21 U.S.C. 881(a)(6): The following shall be
           subject to forfeiture to the United States and no
           property right shall exist in them:

           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

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2 See Douglas Kim, Asset Forfeiture: Giving Up Your Constitutional Rights, 19 Campbell L. Rev. 527
(1997), citing, Sharon Walsh, Give and Take on the Hot Issue of Asset Forfeiture, Wash. Post, March 11,
1996, at F07 (Source: Department of Justice).
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 committed or omitted without the knowledge or consent of that owner. [Emphasis Added] (italicized portion is known as “innocent owner defense).

(ii) 21 U.S.C. 881(a)(7): The following shall be subject to forfeiture to the United States and no property right shall exist in them:

All real property, including any right, title and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this title punishable by more than one year’s imprisonment, except that no property 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 or consent of that owner. [Emphasis Added] (italicized portion is known as “Innocent Owner” defense).

d. Policy behind enactment of 881: to remove from the drug trafficker: (1) spoils of his occupation, thereby making drug dealing a less attractive proposition, and (2) the instrumentalities used to effect the criminal activity.

2. 18 U.S.C. 981(a)(1)(A) (Property Involved in Money Laundering): Provides for the forfeiture of real and personal property if such property is involved in a transaction or attempted transaction in violation of federal money laundering statutes or currency reporting statutes found at 31 U.S.C. 5313(a) or 5324 and 18 U.S.C. 1956 or 1957.
C. **Procedural Basis.**

1. **In Rem Action.** The action is instigated by filing a suit against the property.
   
   a. The *In Rem* proceeding is initiated by verified complaint pursuant to the provisions of Rule C of the Supplemental Rules for Certain Admiralty and Maritime Claims.
   
   b. The property is named as the defendant and must be described with reasonable particularity. Rule C of the Supplemental Rules for Certain Admiralty and Maritime Claims.
   
   c. The complaint shall state the place of seizure and whether it was on land or on navigable waters, and shall contain such allegations as may be required by the statute pursuant to which the action is brought. Rule C of the Supplemental Rules for Certain Admiralty and Maritime Claims.

2. **Common Legal Fiction.** A legal fiction was used at common law to justify civil forfeiture. Basically, the legal fiction was that the “thing” or “res” involved in the illegal activity is guilty of the offense and therefore was “punished” by the forfeiture.

   “The theory (or, more properly, the fiction) underlying civil forfeiture is that the property subject to forfeiture is itself tainted by having been used in an unlawful manner. The right of the Government to take possession does not depend on the Government’s ultimately convicting the person who used the property in an unlawful way, nor is it diminished by the innocence or bona fides of the party into whose hands the property falls . . .


3. **Jurisdiction.** Original jurisdiction exists in any district where the act or omission giving rise to the forfeiture occurred. 28 U.S.C.A. 1355(b)(1)(A) (1994). A court with jurisdiction may issue and serve process on a nationwide basis. 28 U.S.C.A. 1355(d) (1994)(“Any court with jurisdiction over a forfeiture action pursuant to subsection (b) may issue and cause to be served in any other district such process as may be required to bring before the court the property that is the subject of the forfeiture action.”).
4. **Venue.**

   a. Proper venue for civil forfeiture proceedings is in any district where the property is found. 28 U.S.C. 1395(b).

   b. In cases where the property belongs to a defendant and the basis for the forfeiture is the violation with which he is charged, the forfeiture may be instituted in the judicial district where the defendant owning such property is found or in the judicial district in which the criminal prosecution is brought. 21 U.S.C. 881(j); 18 U.S.C. 981 (h).

5. **Felony Requirement under 21 U.S.C. 881(a)(7).** Real property forfeitures that have a facilitation theory as their basis must be grounded in narcotics violations requiring a period of imprisonment of one year. This essentially means distribution, possession with intent to distribute or manufacturing controlled substances in violation of 21 U.S.C. 841(a)(1) and (2).

6. **Time For Filing.** A property owner has 20 days (from the date of the first publication of the notice of seizure) to file a claim in federal court challenging the government’s administrative forfeiture of property. See 19 U.S.C. 1608. To challenge a judicial forfeiture, the property owner has only 10 days after process has been executed. See *Wiren v. Eide*, 542 F.2d 757, 763 (9th Cir. 1973)

7. **Cost Bond.** A property owner wanting to contest a seizure of property under a civil forfeiture statute must post a bond of $5,000 or ten percent of the value of the property seized, whichever is less, but in no case less than $250.00. See 19 U.S.C. 1608.

8. ** Arrest and Seizure of Real Property.**

   a. Court reviews the complaint and supporting papers to determine if conditions for *In Rem* action exist. If so, the court directs the clerk to issue a warrant for the arrest of the defendant real property.

   b. The warrant is directed to the United States Marshal and he becomes custodian of the property. Rule C(3) of the Supplemental Rules for Certain Admiralty and Maritime Claims.
c. All real property forfeiture complaints must be based upon an independent finding of probable cause by either a United States District Court Judge, or Magistrate-Judge. (This is not law, but rather Department of Justice policy)

d. The probable cause determination is based upon application made by the United States in an ex parte hearing in which the United States requests issuance of a seizure warrant.

e. If the Court finds that probable cause exists, a seizure warrant is issued for the property along with the arrest warrant. 21 U.S.C. 881(b) and 18 U.S.C. 981(b)(1)(A)(i).

9. Restraint of Property Prior to Forfeiture

a. Upon the filing of the verified complaint, the United States will also file a lis pendens in the circuit court clerk's office for the county or city in which the property is located. (Again, a lis pendens is not required by law. Rather, it is policy of the Department of Justice).

b. The lis pendens restrains the property from disposition during the pendency of the proceedings. It greatly benefits title searches by placing parties on notice that property may be subject to forfeiture.

c. In unusual cases, the United States may obtain a seizure warrant for the property prior to filing the verified complaint. The property is effectively restrained when the United States docket the warrant along with a notice in the circuit court clerk’s records for the county or city where the property is locates. This not only restrains the property, but protects unwary purchasers and mortgagees from the harsh provisions of the “relation back” doctrine of 21 U.S.C. 881(h) and 18 U.S.C. 981 (f).

10. Interest. Even if a property owner prevails in a forfeiture action, he will receive no interest for the time period in which he lost use of his property. See Library of Congress v. Shaw, 478 U.S. 310, 311 (1986) (In the absence of an express waiver of sovereign immunity, the government is not liable for interest on seized currency).
11. **Burden of Proof:**

a. Initial burden to commence action rests with United States.

b. United States must show probable cause that the property is subject to forfeiture. 19 U.S.C. 1615. See also, United States v. Ursery, 116 S. Ct. 2135, 2148 (1996).

c. This probable cause showing does not require proof by preponderance of the evidence. Rather, the Government need only establish reasonable grounds to believe that certain property is subject to forfeiture. See United States v. Two Parcels of Property Located at 19 and 25 Castle Street, 31 F.3d 35 (2d Cir. 1994); United States v. $5000.00 in U.S. Currency, 40 F.3d 846 (6th Cir. 1994); United States v. $121,000 in U.S. Currency, 999 F.2d 1503 (11th Cir. 1993). These reasonable grounds can be supported by less than prima facie proof but require more than mere suspicion. United States v. Betsy Bruce Lane, 906 F.2d 110 (4th Cir. 1990); United States v. Thomas, 913 F.2d 1111 (4th Cir. 1990).

d. The government may satisfy its burden by circumstantial evidence. See United States v. One 1976 Ford F-150 Pick-up VIN F14YUB03797, 769 F.2d 525 (8th Cir. 1985).


f. Claimant must prove by a preponderance of the evidence that the property was not subject to forfeiture. See United States v. Certain Real Property 566 Henrickson Blvd., Clawson, Oakland County, Mich., 986 F.2d 990 (6th Cir. 1993).

g. The claimant opposing forfeiture must first establish standing to challenge the forfeiture. He must establish ownership in the property. See United States v. Various Computers and Computer Equipment, 82 F.3d 582, 585 (3d Cir. 1996)(stating that colorable claim to ownership of the computers allowed defendant to at least challenge the forfeiture proceedings); Torres v. $36, 256.80 U.S. Currency, 25 F.3d 1154, 1157 (2d Cir. 1994) (Forfeiture challenger asserted an ownership interest sufficient to confer standing to contest the forfeiture).
h. The claimant then must show by a preponderance of evidence that either the property was not used for an illegal purpose (i.e., the property was innocent) or that the illegal use was without the knowledge or consent of the claimant. This is known as the “Innocent Owner” defense. See 21 U.S.C. 881(a)(6) and (7); 18 U.S.C. 981(a)(2); See also United States v. Two Parcels of Property Located at 19 and 25 Castle Street, 31 F.3d 35 (2d Cir. 1994); United States v. Betsy Bruce Lane, 906 F.2d 110 (4th Cir. 1990).

i. If claimants are successful, burden shifts back to United States.

j. United States would have to rebut the claimant’s proof by competent evidence showing that the property facilitated the violations and that the claimants are not statutory “innocent owners.” See 19 U.S.C. 1615 (1984).

12. **Hearsay Evidence.**

a. Hearsay evidence is admissible both in the pleadings and in the initial phase of trial for the purpose of establishing probable cause. United States v. One Fifty Six foot Yacht, 702 F.2d 1276, 1283 (9th Cir. 1983).

b. Once the burden shifts to the claimants, hearsay is no longer admissible in the proceeding and all proof offered must comply with the Federal Rules of Evidence.

D. **Innocent Owner Defense.**

1. **Historical Development.**

a. **Admiralty Jurisprudence.** The innocent owner defense first emerged in Admiralty law in the early nineteenth century. Peisch v. Ware, 8 U.S. (4 Cranch) 347, 364 (1808)).

   [T]he law is not understood to forfeit the property of owners or consignees, on account of the misconduct of mere strangers, over whom such owners or consignees could have no control.”

   If, by private theft, or open robbery, without any fault on his part, [an owner’s] property should be invaded, . . . the law cannot be understood to punish him with the forfeiture of that property."
b. Despite early recognition, the innocent ownership defense was not very successful in admiralty cases. In fact, the Court routinely rejected the innocent owner defense and upheld forfeitures on the theory that the property itself is “guilty” of the offense, and that the owner may be held accountable for the wrongs of others to whom he entrusts his property. United States v. 1,960 Bags of Coffee, 12 U.S. (8 Cranch) 398 (1814); The Palmyra, 25 U.S. (Wheat.) 1 (1827); and Harmony v. United States, 43 U.S. (2 How.) 210 (1844).

c. Prohibition. After the admiralty cases, the innocent owner defense next appeared in challenges to the Liquor Tax and Prohibition Era Forfeiture Statutes in the late 1800s and early 1900s. Again, however, the Court limited the defense. See J.W. Goldsmith Jr. –Grant Co. v. United States, 254 U.S. 505 (1921) (Court upheld forfeiture of car used to illegally transport “distilled spirits” even though owner did not know how the car was being used illegally stating that owners should guard against negligent uses of property); Van Oster v. Kansas, 272 U.S. 465 (1926) (Court upheld state seizure of car used by third party transporting illegal alcohol on grounds that even though owner did not know of illicit use, the owner is responsible for entrusting the car to the third party). In these cases, the Court’s rationale was that the owner has been negligent in allowing his property to be misused and that he is properly punished for that offense.

d. War on Drugs. Civil Forfeiture laws remained dormant for 50 years after the prohibition era. Then, the War on Drugs prompted both the federal government and the states to increase the use of civil drug forfeitures to contain illicit activities. Civil forfeitures emerged as the new law enforcement tool in the 1970’s and the 1980’s. Innocent owner provisions, although historically disfavored at common law, began to emerge within the statutory framework of these civil forfeiture statutes.


a. For years, it seemed that the Constitution mandated an “innocent owner” defense to civil forfeiture action. In Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 689 (1974), the Supreme Court stated in dicta that “it
would be difficult to reject the constitutional claim 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 property.”

b. In 1996, however, the Supreme Court ruled that the defense was not mandated by either the due process clause of the Fourteenth Amendment or the just compensation clause of the Fifth Amendment. Bennis v. Michigan, 116 S. Ct. 994 (1996). The Court found that “a long and unbroken line of cases holds that an owner’s interest in property may be forfeited by reason of the use to which the property is put even though the owner did not know that it was to be put to such use.”

c. Impact of Bennis is limited by the fact that many federal civil forfeiture provisions contain statutory innocent owner defenses. See, e.g., 21 U.S.C. 881(a)(6) and (7); 18 U.S.C. 981(a)(2).

d. Problem exists, however, because not all forfeiture statutes provide for an innocent owner defense. See, e.g., 18 U.S.C. 1955 (d) (statute provides for forfeiture of property used in illegal gambling business). And, the statutory innocent owner defenses that do exist are not uniform. Further, federal courts are not even consistent in interpreting the statutory innocent owner defenses. There are splits in the circuits as to the knowledge and consent. See discussion below.

3. Asserting the Innocent Owner Defense.

a. Available to owner of property. Courts have uniformly held that a mortgage lender or other lienholder may qualify as an owner for purposes of 21 U.S.C. 881. United States v. One Urban Lot, 865 F.2d 427 (1st Cir. 1989); In re Metmor Financial, Inc., 819 F.2d 446, 448 n.2 (4th Cir. 1987).

b. Owner must show that the illegal acts giving rise to the forfeiture occurred without the knowledge or consent of the owner or lienholder. 21 U.S.C. 881(a)(6) and (7); 18 U.S.C. 981(a)(2).
c. Circuits split on whether owner must show a lack of both knowledge and consent, or choose disjunctively between the two.

d. Several circuit court interpretations imply a conjunctive reading (i.e., claimant has burden of proving both lack of knowledge AND consent):

   United States v. One parcel of Property Located at 121 Allen Place, Hartford, Conn., 75 F.3d 118, 121 (2d Cir 1996);

   United States v. 19 and 25 Castle St., 31 F.3d. 35, 39 (2d Cir 1994);

   United States v. 890 Noyac Rd., 945 F.2d 1252, 1255 (2d Cir. 1991);

   United States v. One Parcel of Land Known as Lot 111-B, Tax Maps Key 4-4-03-71(4), Waipouli, Kapoa, Island and County of Hawaii, State of Hawaii, 902 F2d 1443, 1445 (9th Cir. 1990)

   United States v. 15603 85th Ave., 933 F.2d 976, 981 (11th Cir. 1991);


e. The following circuit courts seem to endorse a disjunctive reading (i.e., claimant has burden of proving lack of knowledge OR consent):

   United States v. 1012 Germantown Rd., 963 F.2d 1496, 1503 (11th Cir. 1992)(the 11th Circuit has determined that both readings apply with the latest being the disjunctive reading);

   United States v. Certain Real Property and Premises, Known as 890 Noyac Rd., Noyac, N.Y, 945 F.2d 1252 (2d Cir. 1991);

   United States v. 141st St. Corp., 911 F.2d 870, 877-80 (2d Cir. 19909), cert. denied, 498 U.S. 1109 (1991);
E. Title and the Relation Back Doctrine.

1. All title, right, and interest in the property vests in the United States upon commission of the act giving rise to forfeiture under this section vests in the United States. 21 U.S.C. 881(h); 18 U.S.C. 981 (f).

2. This is known as the Relation Back Doctrine. This doctrine creates the legal fiction that when the Government gains title pursuant to a Final Order, the title relates back to the illegal act.

3. The doctrine operates to effectively cut off any rights acquired by a party (mortgage lender included) subsequent to the illegal acts giving rise to the forfeiture. That is why filing a “lis pendens” is so important. It puts the purchaser on notice.

4. Questionable now whether “innocent owners” are affected by the relation back doctrine. There used to be a split among the circuits. Then, in 1993, the Supreme Court allowed an innocent owner defense to be successful even when the transfer occurred after the illegal act. See United States v. Parcel of Land, buildings, Appurtenances & Improvements, Known as 92 Buena vista Ave., Rumson, N.J., 113 S. Ct. 1126 (1993).

5. Innocent Owners and Relation Back.

a. No Bona Fide Purchaser Requirement. To assert the innocent owner defense under § 881(a)(6), claimant must show she had no knowledge that funds used to purchase the real property were proceeds of illegal drug activity. Claimant does not need to show she was a bona fide purchaser for value of the land. See 92 Buena Vista, 113 S.Ct. at 1134 (Although Claimant purchased house with proceeds traceable to drug transactions, court
upheld innocent owner defense stating that claimant does not need to be bona fide purchaser for value to assert defense).

b. Relation-back provision does not preclude assertion of innocent owner defense under § 881(a)(6). Owners are allowed to invoke defense prior to title vesting in Government. The Government can not profit from the doctrine of relation back until claimant has had chance to invoke and offer evidence to support innocent owner defense. 92 Buena Vista, 113 S. Ct. at 1137.

IV. LEGISLATIVE PROPOSAL: CIVIL FORFEITURE REFORM ACT

A. Hyde Bill. Representative Henry Hyde of Illinois, a staunch supporter of civil forfeiture reform, has made three attempts to get a bill passed that will restructure the forfeiture process making it fairer to claimants by increasing their remedies while simultaneously increasing the government’s burden. See H.R. 1835, 105th Cong., 1st Sess. (1997). Hyde’s bill was previously introduced as H.R. 3315, 103d Cong., 1st Sess. (1994), and again as H.R. 1916, 104th Cong., 1st Sess. (1996).

1. As proposed, H.R. 1835 eliminated the shifting burdens of proof and altered the government’s burden of proof from probable cause to clear and convincing evidence.

   (a) Rep. Hyde chose this standard because it relieves the government from the need to prove guilt of the res beyond a reasonable doubt, but raises the burden from the low standard of probable cause. He wanted to equalize the relative burdens of the prosecution and the claimant.

   (b) The clear and convincing standard was not in the bill’s language. It was left out on the theory that proof of the offense should lie with the government.

2. H.R. 1835 proposed an elimination of the cost bond, which is a percentage of the subject property’s value that must be deposited with the court before a claimant can oppose the forfeiture.

3 In a statement before the House Committee on the Judiciary, Rep. Hyde explained that he chose “clear and convincing evidence” because it seemed more reasonable and equitable than the other choices, probable cause, preponderance of the evidence, and reasonable doubt. The first two choices were characterized as being too weak given the interests at stake, while the last seemed too strident a standard for a civil proceeding where no personal liberty is at stake. See Crime Prevention and Criminal Justice Reform Act: Hearings on H.R. 3315 Before the Subcomm. On Crime and Criminal Justice of the House Committee on the Judiciary, Feb. 22, 1994.
3. H.R. 1835 included a provision that would allow claimants to recover monetary damages for wrongful destruction, injury, or loss while the government holds the property.

4. H.R. 1835 also provided for court-appointed representation of indigent claimants. This is significant since many In Rem forfeiture actions go unopposed as the claimant can not always afford the cost bond and the cost of representation.

B. **Schumer Bill.** The Department of Justice joined forces with New York Representative Charles Schumer to proffer another pending reform bill in an effort to keep the mechanisms favorable to the government. See H.R. 1745, 105th Cong., 1st Sess. (1997).

1. Schumer’s proposal, House Bill 1745, restructures the cost bond requirement, making it waivable where the Attorney General determines “that the posting of a bond is not required in the interests of justice.” H.R. 1745, 101(a).

2. No mechanism exists for court-appointed legal representation of an indigent claimant.

3. No mechanism exists for the recovery of damages where the government loses, destroys, or injures subject property.

4. The Schumer/DOJ proposal retains the shifting burden of proof. Unlike the current statute, however, the burdens are equalized. After instituting forfeiture proceeding under the Schumer proposal, the government must prove its case against the res by a preponderance of the evidence. If the prosecution proves that the property in question is subject to forfeiture, the burden then shifts to the claimant. The claimant would then still be required to prove by a preponderance of the evidence that her interest should not be forfeited.

C. **H.R. 1965.** Neither the Schumer bill nor the Hyde bill, as drafted survived. Rather, H.R. 1965 ended up being the bill that was actually considered by the committee on the judiciary. H.R. 1965 appears to be a compromise of the Hyde and Schumer bill.

2. **Burden of Proof for Claimant.** The property owner would still have the burden of proving affirmative defenses, such as the innocent owner defense, by a preponderance of the evidence.

3. **Legal Representation for Indigents.** H.R. 1965 provides for legal representation for those who are indigent in appropriate circumstances. The Court determines whether to appoint counsel for an individual filing a claim based on three factors: (1) the nature and value of the property subject to forfeiture, including the hardship to the claimant from the loss of the property seized, compared to the expense of appointed counsel; (2) the claimant’s standing to contest the forfeiture; and (3) whether the claim appears to be made in good faith or to be frivolous.

4. **Innocent Owner Defense.** H.R. 1965 sets out an innocent owner defense for all federal civil forfeiture actions. Rather than having the defense attach to each separate forfeiture statute, H.R. 1965 combines it into a separate statutory provision. Under H.R. 1965, the innocent owner defense is uniform. Further, it offers protection in all appropriate cases (including situation where the innocent owner knew of but could not stop the illegal use of property by others).

5. **Release of Seized Property in Hardship Cases.** H.R. 1965 provides that an owner may be entitled to release of his seized property pending trial so long as he can show that (1) he has a possessory interest in the property sufficient to establish standing to contest forfeiture and that he has not filed a frivolous claim; (2) he has sufficient ties to the community; (3) continued possession by the government will cause substantial hardship, such as preventing him from working, leaving him homeless, or preventing the functioning of his business; and (4) his hardship outweighs the risk that the property will be destroyed, damaged, lost, concealed, diminished in value or transferred if it is returned.

6. **Recovery for Damaged Property.** H.R. 1965 amends the Federal Tort Claims Act to allow tort claims based on the negligent destruction, injury, or loss of goods, merchandise, or other property seized for the purpose of forfeiture while in the possession of any law enforcement officer.

7. **Cost Bond.** H.R. 1965 eliminates the requirement that a property owner must file a cost bond to challenge a civil forfeiture.
8. **Timing of Claim.** H.R. provides a property owner 30 days to file a claim following the final publication of notice (or, if written notice was provided, the date it was received) of an administrative forfeiture proceeding. In a judicial forfeiture proceeding, 20 days is provided after process has been executed.

9. **Interest.** H.R. 1965 provides that upon entry of judgment for the owner in a forfeiture proceeding, the United States shall be liable for post-judgment interest on any money awarded. The United States shall be liable for pre-judgment interest in cases involving currency, proceeds of an interlocutory sale, or other negotiable instruments. The government must disgorge any funds representing interest actually paid to the United States or an imputed amount that would have been earned had it been invested.

D. **Status of H.R. 1965.** H.R. 1965 was referred to the Committee on the Judiciary. This committee considered the bill, reported favorably on the bill with an amendment, and recommended that the bill as amended be passed. The vote in the Judiciary Committee was 26 to 1. The Bill has not yet made it to the House floor for a vote.

September 23, 1998