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## Asset Forfeiture (Modern Anti-Drug Weapon): Is Bankruptcy a Defense

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# ASSET FORFEITURE (MODERN ANTI-DRUG WEAPON): IS BANKRUPTCY A "DEFENSE"?

## I. INTRODUCTION

Asset forfeiture statutes provide law enforcement officials with potent weapons with which to confiscate the proceeds and instrumentalities of crime.<sup>1</sup> Today it is urged that such laws be used extensively in the war against the sale and use of illegal narcotics.<sup>2</sup> Changes in the applicable federal statutes and the enactment of various state laws have resulted in the frequent use of forfeiture laws by prosecutors. This has prompted opposing counsel, seeking to protect their client's assets, to assert a variety of defenses.<sup>3</sup> In addition to the conventional defenses, the tactic of filing for relief in bankruptcy by the property owner might be employed. As a result, the owner's property would be placed under the direct control of the bankruptcy court, not the district court. The government would then be in a position behind the unsecured creditors when it came to distribution of the assets of the bankrupt estate. Even more importantly, the forfeiture action would be stayed pending determination by the bankruptcy court. In certain circumstances, the forfeiture action could become a fruitless pursuit, thus achieving the wrongdoer's objective of avoiding the forfeiture and its criminal overtones.

Such a result should not be tolerated by the courts as it is contrary to the legislative intent behind both the forfeiture laws and the Bankruptcy Code. Further, the exercise of jurisdiction by the bankruptcy court over the forfeiture proceeding may violate article III of the Constitution. Additionally, the long-standing doctrine of "relation back" necessitates that the forfeiture proceeding precede any action by the bankruptcy court inasmuch as a ruling on the forfeiture will determine what remains in the bankrupt estate.

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1. Forfeiture of property can attach for the violation of a wide range of laws. See Kandaras, *Due Process and Federal Property Forfeiture Statutes: The Need for Immediate Post-Seizure Hearing*, 34 Sw. L.J. 925, 925-28 (1980).

2. *Asset Forfeiture Urged as Effective Law Enforcement Tool*, 16 CRIM. JUST. NEWSL., Nov. 15, 1985, at 5.

3. Such defenses are asserted not only for the benefit of the client, but also for the attorney whose fee may be forfeitable if traceable to criminal proceeds. See Bernholz & Herman, *Fending Off Forfeiture*, 21 TRIAL, Dec. 1985, at 70.

## II. FORFEITURE BACKGROUND AND PURPOSES

### A. Generally

Forfeiture has been used throughout the history of both the American and English legal systems, though in different forms.<sup>4</sup> Generally, forfeiture of property is the process by which a person or entity is completely divested of all rights in certain property based on the commission of an illegal act.<sup>5</sup> English law held a felony as an act for which "corruption of blood" attached.<sup>6</sup> This "corruption of blood" disentitled the felon's heirs to any and all rights they had in the property of the felon.<sup>7</sup> This complete divestiture of a felon's entire estate is constitutionally prohibited in the United States.<sup>8</sup> Today, however, United States courts acknowledge that forfeiture statutes are valid<sup>9</sup> as long as they affect only certain property criminally connected, not necessarily the felon's entire estate.<sup>10</sup>

Generally speaking, a forfeiture cannot be accomplished without statutory authority.<sup>11</sup> Additionally, forfeiture statutes are not judicially favored and should be narrowly construed;<sup>12</sup> forfeiture should be enforced only when the case falls within the "letter and spirit" of the statute.<sup>13</sup> Consequently, effective modern forfeiture statutes are very specific as to what behavior will result in forfeiture, what property is forfeitable, and which claimants (innocent or culpable) are affected.

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4. For a detailed account of the history of forfeiture in England, see Note, *Bane of American Forfeiture Law—Banished At Last?*, 62 CORNELL L. REV. 768 (1977).

5. 37 C.J.S. *Forfeitures* § 1 (1943).

6. *United States v. Grande*, 620 F.2d 1026, 1038 (4th Cir.) (citing 1 J. BISHOP, COMMENTARIES ON THE CRIMINAL LAW 581-83 (1882)), cert. denied, 449 U.S. 830 (1980).

7. *Id.* The court in *Grande* discusses the history of "corruption of blood" at length. *Grande*, 620 F.2d at 1037-39.

8. *Id.* U.S. CONST. art. III, § 3, cl. 2 states: "The Congress shall have the Power to declare the Punishment of Treason, but no Attainder of Treason shall work a Corruption of Blood, or Forfeiture except during the Life of the Person attained."

9. The court in *Grande* stated that article III was not "intended to prohibit anything other than corruption of blood or forfeiture of estate as imposed at common law." *Grande*, 620 F.2d at 1039.

10. See generally *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680-84 (1974).

11. *King v. United States*, 292 F. Supp. 767, 772 (D. Colo. 1968) (pre-conviction forfeiture "cannot be maintained unless authorized by an applicable statute") (quoting *United States v. Lane Motor Co.*, 199 F.2d 495, 496-97 (10th Cir.), aff'd, 344 U.S. 630 (1952)).

12. See *United States v. One (1) 1977 Cadillac Coupe DeVille*, 644 F.2d 500, 501 (5th Cir. 1981) (citing *United States v. One Ford Coach*, 307 U.S. 219 (1929)).

13. The court in *United States v. Premises Known as 3639 2d Street*, 869 F.2d 1093 (8th Cir. 1989), reviewed forfeiture under 21 U.S.C. § 881 and held that "forfeitures are not favored; they should be enforced only when within both the letter and spirit of the law." *Id.* at 1098 (quoting *United States v. One Ford Coach*, 307 U.S. 219, 226 (1939)).

## B. *Forfeiture and the Drug War*

As a result of the heightened awareness of the drug abuse problem in this country, forfeiture laws have been enacted and utilized by not only the federal government, but by the states as well, to assist law enforcement bodies in the war against illegal narcotics.<sup>14</sup> President George Bush recently proposed a number of anti-drug policies and told a United States Hispanic Chamber of Commerce meeting in New Orleans, Louisiana, that the nation is "fighting for its very soul" in the war on drugs.<sup>15</sup> The problem of illegal narcotics has been an issue for at least the last two decades, but in this decade the problem has come to the forefront because of the tremendous sums of money involved and the appalling amount of violence associated with those who participate in the sale and distribution of controlled substances.

In the past the emphasis has been on incarcerating drug dealers and users, but this method has not proven to be totally effective; drug lords can continue to operate their illicit organizations from prison<sup>16</sup> or, more likely, a successor can easily step into the shoes of the drug lord when drug profits are still available to fund the operation. The amount of money involved in the illegal narcotics business is staggering and is the primary motivation for its continued operation. Therefore, in addition to stiff sentences of the continuing criminal enterprise statute,<sup>17</sup> it appears that a very effective mode of attack is confiscating assets related to the criminal enterprise, the idea being to make crime not pay.

In 1970, Congress passed the Racketeer Influenced and Corrupt Organization (RICO) statutes and the Comprehensive Drug Prevention and

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14. N.Y. CIV. PRAC. L. & R. 13-A (Consol. 1984) is an example of a state forfeiture law enacted for the express purpose of controlling large scale narcotics traffickers. The law was designed to address the problem of an increased flow of illegal drugs into the State of New York. Kessler, *Taking the Profit Out of Crime: Asset Forfeiture*, 59 N.Y. ST. B.J. 48, 52 (1987).

15. Tulsa World, Sept. 9, 1989, at A-5, col. 1.

16. In her book, *DESPERADOS*, Elaine Shannon quotes a report made by Senator Joseph Biden to the Senate Foreign Relations and Judiciary committees: "DEA and the Justice Department generally have achieved, as one Justice official admitted, a 'dismal record' in attacking the financial empires and the merchandising networks of the illegal drug trade. That is a primary reason why major violators can preserve their networks and resources and, in some cases, will continue to operate them from prison." E. SHANNON, *DESPERADOS (LATIN DRUG LORDS, U.S. LAWYERS, AND THE WAR AMERICA CAN'T WIN)* 78 (1988).

17. 21 U.S.C. § 848 (Supp. V 1987) (first offenders convicted under this section shall be sentenced to not less than 20 years and up to life imprisonment, subject to fines not to exceed two million dollars; repeat offenders are subject to 30 years to life imprisonment; both sentences eliminate the possibility of parole).

Control Act.<sup>18</sup> These statutes contained the first federal criminal forfeiture<sup>19</sup> provisions designed to attack the "business" of illegal narcotic sales. Nevertheless, because of numerous limitations and ambiguities within those statutes, federal law enforcement agencies did not use them as extensively as Congress had intended.<sup>20</sup>

To remedy the situation, Congress amended the statutes in 1984<sup>21</sup> with the expressed intent of clarifying the ambiguities.<sup>22</sup> Additionally, Congress added real property to the list of items which may be forfeited for its use in furtherance of a felony violation of the Drug Abuse and Controlled Substances Act.<sup>23</sup> Congress hoped that the amendment would make it possible for prosecutors to attack more successfully drug traffickers by taking away their profits.<sup>24</sup>

### C. *Types of Forfeiture Statutes*

The two basic categories of forfeiture statutes are criminal forfeiture which is *in personam* and civil forfeiture which is *in rem*.<sup>25</sup> Criminal forfeiture is the action brought against the person connected with the property and charged with a violation of the law.<sup>26</sup> On the other hand, civil forfeiture actions are directed at the *res*, not necessarily accompanied by a charge against the owner.<sup>27</sup> Prosecutors use both types in prosecuting wrongdoers. However, criminal forfeiture has an added advantage when achieved, because it results in the incarceration of the

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18. See Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (codified as amended at 18 U.S.C. §§ 1961-68 (1982 & Supp. IV 1986); 21 U.S.C. § 848 (1982 & Supp. V 1987)).

19. See present version at 21 U.S.C.A. § 848(a), 853 (West Supp. 1989).

20. See S. REP. NO. 225, 98th Cong., 2d Sess. 191, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3374 [hereinafter S. REP. NO. 225].

21. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837.

22. S. REP. NO. 225, 98th Cong., 2d Sess. 191, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3374.

23. *Id.* at 3398.

24. *Id.* at 3374-81.

25. 37 C.J.S. *Forfeitures* § 1 (1943); see also S. REP. NO. 225, *supra* note 20 at 82, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS at 3264-65.

26. *In personam* forfeiture statutes originated in the common law where forfeiture of the property was a consequence of conviction of a crime. *The Palmyra*, 25 U.S. (12 Wheat.) 1, 14 (1827); *United States v. Long*, 654 F.2d 911, 914 (3d Cir. 1981).

27. See *The Palmyra*, 25 U.S. at 14; S. REP. NO. 225, *supra* note 20, at 82, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS at 3265. These definitions have been followed by modern courts in distinguishing between *in personam* and *in rem* forfeiture statutes. *In rem* forfeitures treat the thing as if it were the offender. See *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 684 (1974); *Florida Dealers and Growers Bank v. United States*, 279 F.2d 673, 677 (5th Cir. 1960) (forfeiture of vehicle used in violation of internal revenue laws).

defendant as well as the forfeiture of any property criminally connected.<sup>28</sup> However, because of its civil nature, *in rem* forfeiture statutes have some unique benefits to law enforcement as well.<sup>29</sup>

Civil forfeiture requires a substantially lower burden of proof than its criminal counterpart. As in other criminal proceedings, criminal forfeiture requires the prosecution to prove guilt beyond a reasonable doubt, but civil forfeiture of property can be achieved based upon a preponderance of the evidence.<sup>30</sup> Also, a civil forfeiture proceeding determines the status of *all* claimants of the property subject to forfeiture, while the criminal proceeding determines only the property right of the criminal defendant. Because the two proceedings are not mutually exclusive, the government can pursue a civil forfeiture even if the criminal forfeiture was unsuccessful because the owner was acquitted of the criminal charges or because criminal charges were never brought against the wrongdoer/owner in the first instance.<sup>31</sup>

### III. THE CIVIL FORFEITURE PROCESS AS A WEAPON IN THE DRUG WAR

#### A. *The Process*

To understand the importance of civil forfeiture to prosecutors, an analysis of the process is necessary. The government must show only probable cause that the property was illegally derived or involved in an illegal act by establishing a nexus between the property and some illegal activity.<sup>32</sup> Once this is accomplished, an interested party contesting the forfeiture must have standing<sup>33</sup> and must then prove by a preponderance of the evidence that the property is not connected to or derived from an illegal transaction, and is therefore not subject to forfeiture.<sup>34</sup>

The government may establish probable cause by showing there are

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28. *Long*, 654 F.2d at 915.

29. Because the *in rem* action is a civil proceeding, the prosecutor can take advantage of the discovery provisions of the Federal Rules of Civil Procedure.

30. *United States v. Dunn*, 802 F.2d 646, 647 (2d Cir. 1986) (citing *United States v. One 1977 Lincoln Mark V*, 453 F. Supp. 1388 (S.D.N.Y. 1978)), *cert. denied*, 480 U.S. 931 (1987).

31. *Id.* at 647-48.

32. *United States v. One 1986 Mercedes Benz*, 660 F. Supp. 410, 414 (S.D.N.Y. 1987) (interpreting 21 U.S.C. § 881(a)(4)), *aff'd*, 846 F.2d 2 (2d Cir. 1988).

33. To have standing to challenge the forfeiture action, the person must claim ownership or an interest in the property. See *United States v. One Hundred Twenty-Two Thousand Forty-Three Dollars in United States Currency*, 792 F.2d 1470, 1473 (9th Cir. 1986); *United States v. One 1978 Piper Navajo PA-31 Aircraft*, 748 F.2d 316, 319 (5th Cir. 1984).

34. See *United States v. \$39,000 in Canadian Currency*, 801 F.2d 1210, 1216-17 (10th Cir. 1986) and cases cited therein.

“reasonable grounds” to believe there exists a link between the illegal activity and the property.<sup>35</sup> This standard appears to be very broad and allows civil forfeiture proceedings to be initiated on somewhat weaker evidence than that required for criminal forfeiture. In fact, the proof of “reasonable grounds” can be circumstantial and based upon evidence otherwise inadmissible<sup>36</sup> as long as the court deems the source reliable.<sup>37</sup>

### B. *The Applicable In Rem Statute: Section 881*

The applicable civil forfeiture statute used in the theatre of illegal narcotics is title 21, section 881 of the United States Code (hereinafter Section 881).<sup>38</sup> Originally enacted in 1970, the statute has subsequently

35. *United States v. All Funds and Other Property in Account Number 031-217362*, 661 F. Supp. 697, 700-01 (S.D.N.Y. 1986). The court defined “reasonable grounds” as more than “mere suspicion” but less than a preponderance of the evidence. *Id.* at 700 (citing *United States v. Banco Cafetero Panama*, 797 F.2d 1154, 1160 n.7 (2d Cir. 1986)).

36. *See, e.g., United States v. \$250,000 in United States Currency*, 808 F.2d 895, 899-900 (1st Cir. 1987) (probable cause showing need only be by “reliable” evidence—technical evidentiary rules are “irrelevant to question of probable cause” in the context of an application to the civil forfeiture statute, 21 U.S.C. § 881).

37. *Id.* at 900.

38. 21 U.S.C.A. § 881(a) states in part:

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

- (1) All controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of this subchapter.
- (2) All raw materials, products, and equipment of any kind which are used, or intended for use . . . in violation of this subchapter.
- (3) All property which is used, or intended for use, as a container for property described in paragraph (1), (2), or (9).
- (4) All conveyances including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1), (2) or (9) . . . [except that no conveyance is forfeited if owner can establish innocence as to knowledge of or consent to the violation].
- (5) All books, records, and research, including formulas, microfilm, tapes, and data which were used, or intended for use, in violation of this subchapter.
- (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 no property shall be forfeited under this paragraph . . . [if an interest in which owner can establish innocence as to knowledge of or consent to the violation].
- (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 . . . [used in violation of this subchapter except if the interest owner can establish innocence as to knowledge of or consent to the violation].
- (8) All controlled substances which have been possessed in violation of this subchapter.
- (9) All listed chemicals, all drug manufacturing equipment, all tableting machines . . . [for use in a felony violation of this subchapter].

21 U.S.C.A. § 881(a) (West 1981 & Supp. 1989).

been amended along with the other drug-related forfeiture laws.<sup>39</sup> Section 881 provides for certain property to be forfeited to the government upon the violation of the Controlled Substances Act.<sup>40</sup>

### C. *Innocence As a Defense*

Courts have consistently held that a claimant's innocence is not enough to overcome or defeat a civil forfeiture action because it is the property being deemed guilty.<sup>41</sup> However, recent amendments to the drug enforcement forfeiture statute have necessarily reduced its harshness or severity by providing that innocent interest holders may recover the seized property<sup>42</sup> or the reasonable value thereof. These amendments allow courts to construe the laws reasonably (as opposed to strictly), resulting in the higher forfeiture success rate Congress intended.<sup>43</sup>

## IV. BANKRUPTCY AS A "DEFENSE"

All defenses to a forfeiture action discussed thus far have been directed at proving the innocence of the owner or of the property. Another tactic may be to protect the property from being forfeited with the filing of bankruptcy by the wrongdoer/owner.<sup>44</sup> Once the wrongdoer/owner files bankruptcy, the property comes under the control of the bankruptcy court, and section 362(a) of the Bankruptcy Code operates to stay all proceedings against the estate of the wrongdoer/owner/debtor with

39. See *supra* notes 18 and 21.

40. See 21 U.S.C.A. § 881 (West 1981 & Supp. 1989); Controlled Substances Act of 1970, Pub. L. No. 91-513, 84 Stat. 1242 (now codified at 21 U.S.C. §§ 841-852 (1982 & Supp. V 1987)).

41. See, e.g., *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 684-88 (1974) (upholding Puerto Rican statute modelled after Section 881(a) providing for forfeiture of vessels used for unlawful purpose).

42. See, e.g., 21 U.S.C.A. § 881(a)(4)(C) (West Supp. 1989) which states:

[N]o 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.

*Id.*

43. Prior to the 1984 and 1988 amendments, unfairness resulted in cases such as *Calero-Toledo*, where a yacht owner lost his interest in a yacht leased to an individual caught in possession of one marijuana cigarette. *Calero-Toledo*, 416 U.S. at 693 (Douglas, J., dissenting). The court determined that such was not a taking without just compensation in violation of the fifth amendment, nor a violation of due process, and affirmed the forfeiture. *Id.* at 680.

44. This defense was attempted recently in a forfeiture action filed in the United States District Court for the Eastern District of Oklahoma, in *United States v. SE 1/4 of SE 1/4 of Section 36, Township I North, Range 12 East, No. 88-244-C* and related cases, 88-245-C, 88-246-C, 88-247-C, 88-248-C, 88-261-C and 88-320-C (E.D. Okla. 1988). The claimant, Junior Ranch, Inc., or in the alternative, its individual shareholders, filed Chapter 7 (liquidation) bankruptcy, seeking a stay of the forfeiture proceedings and removal of the forfeiture to the bankruptcy court.



some exceptions.<sup>45</sup> If the bankruptcy court asserts jurisdiction and permits the stay to remain in effect, the forfeiture proceeding would be stalled and the government would then arguably take the posture of a creditor.

The claimant<sup>46</sup> in the forfeiture proceeding becomes the debtor in the bankruptcy proceeding upon the filing of a voluntary case under a chapter of the Bankruptcy Code.<sup>47</sup> At that time, the claimant/debtor could move the district court, where the forfeiture case is pending, to stay its proceedings<sup>48</sup> and obtain from the bankruptcy court a determination that the property subject to forfeiture is part of the bankrupt estate.<sup>49</sup> Should this procedure prove successful, the government could possibly take a position behind the unsecured creditors in the distribution of the bankrupt estate's assets.<sup>50</sup>

45. 11 U.S.C. § 362(a) (1988) states in part:

Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title . . . operates as a stay, applicable to all entities, of —

- (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
- (2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;
- (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate . . . .

*Id.*

46. "Claimants," as used in this Comment, are those persons or entities who claim some right, title, or interest in the property subject to forfeiture whether it be the owner/wrongdoer, creditors of the owner/wrongdoer, or lienholders of the subject property.

47. According to 11 U.S.C. § 301 (1988), "[t]he commencement of a voluntary case under a chapter of this title constitutes an order for relief under such chapter."

48. See 11 U.S.C. § 362(a) (1988).

49. 11 U.S.C. § 541 (1988) states in part:

Property of the estate

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

- (1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

*Id.*

50. 11 U.S.C. § 724(a) (1988) states: "The trustee may avoid a lien that secures a claim of a kind specified in section 726(a)(4) of this title." *Id.* 11 U.S.C. § 726(a)(4) (1988) places a claim "in payment of any allowed claim, whether secured or unsecured, for any fine, penalty, or forfeiture . . . to the extent that such fine, penalty, forfeiture, or damages are not compensation for actual pecuniary loss suffered by the holder of such claim" fourth in line behind the unsecured creditors. *Id.* (emphasis added).

The term forfeiture contained within section 726 does not appear to be the same type of forfeiture as provided in 21 U.S.C. § 881. Under section 726, Congress appears to implicate the forfeiture of property as a result of the owner's failure to pay a monetary penalty, *i.e.*, failure to pay income tax penalties. Congress stated in the legislative history of section 726: "Paragraph (4) provides that

Clearly, if the above logic is followed, the wrongdoer's creditors would prefer this outcome. A bankruptcy court in its capacity as a court of equity would certainly be concerned about performing its obligation to achieve an equitable outcome for all concerned parties. It should be noted that the property owners or interest holders in forfeiture proceedings must establish their innocence or the innocence of the property before they are entitled to have their claim or interest in the property recognized; they must prove that they acted in good faith and without knowledge of the nexus between the property and the alleged illegal act or acts.<sup>51</sup> Such is not the case in the bankruptcy proceeding; the creditor's innocence is immaterial because the only pertinent determination is whether the creditor has a claim against the estate.<sup>52</sup>

The claimant/wrongdoer<sup>53</sup> whose property is the subject of forfeiture would also prefer the bankruptcy forum. Bankruptcy proceedings do not have criminal trial overtones. Furthermore, the bankruptcy court may be less familiar with the forfeiture provisions, and may be more concerned with satisfying the greatest number of creditors than in ensuring that the assets alleged to be forfeitable to the government are forfeited. Additionally, the bankruptcy proceeding could delay and possibly avoid the forfeiture proceeding.<sup>54</sup>

The government, on the other hand, would oppose the bankruptcy court's control over the forfeiture proceeding or its jurisdiction over the *res* for the reasons stated above. From the government's perspective, if a claimant/wrongdoer's assets in a forfeiture escape through a bankruptcy loophole, Congressional intent behind both the Bankruptcy Code and the anti-drug forfeiture laws is defeated.

There are very few reported decisions in which this issue has been addressed.<sup>55</sup> Nonetheless, the bankruptcy tactic is likely to become more frequently utilized as the number of forfeiture cases increases. Drug

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punitive penalties, including prepetition tax penalties, are subordinated to the payment of all other claims. . . ." S. REP. NO. 598, 95th Cong., 2d Sess. 97, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 5883. Forfeiture under 21 U.S.C. § 881 is based upon the property being connected with criminal activity and not necessarily based upon the owner's wrongdoing. Though unclear, Congress apparently intended to address monetary penalties on the basis of the debtor's *wrongdoing*, not judgment against *property* based upon *its* connection to the illegal act.

51. See *supra* notes 41-43 and accompanying text.

52. See 11 U.S.C. §§ 501, 502 (1988).

53. "Claimant/wrongdoer" is used herein to encompass a culpable claimant (property owner) in a civil forfeiture action.

54. See 11 U.S.C. §§ 362(a), 726(a)(4) (1988).

55. See *infra* notes 58-73 and accompanying text.

lords often launder money through banking institutions using various negotiable instruments of dummy corporations set up to conceal laundering activities. These corporations, set up as a subterfuge to conceal the drug organization's illegal activities, are expendable; throwing these corporations into bankruptcy does not damage the drug lord's empire. Bankruptcy merely has the effect of paralyzing the government's efforts to forfeit the assets of the drug lord; the corporations will claim the assets belong to the bankrupt estate.

A. *Governmental Goal: Pecuniary Gain or Exercise of Police Power*

The automatic stay provision, 11 U.S.C. § 362,<sup>56</sup> which precludes the continuation or commencement of judicial proceedings against the debtor, has limitations. The key exceptions to the stay provision as related to forfeiture proceedings are sections 362(b)(4) and (5). These exceptions allow judicial proceedings to continue if the purpose is to enforce a governmental unit's police or regulatory power.<sup>57</sup> The key to determining whether the forfeiture proceeding is automatically stayed lies in whether the forfeiture action is an exercise of police power under section 362(b)(4).

The case of *In re Ryan (Ryan I)*<sup>58</sup> determined that the forfeiture proceeding initiated under Maryland state law was not an exercise of the state's police power. The court based its decision on the fact that Maryland's *in rem* forfeiture proceeding is not pursuant to a health or safety statute.<sup>59</sup> Additionally, the court referred to the language in 11 U.S.C.

56. 11 U.S.C. § 362 (1988).

57. 11 U.S.C. § 362(b)(4) and (5) (1988) state:

(b) the filing of a petition . . . does not operate as a stay—

. . .  
(4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

(5) under subsection (a)(2) of this section, of the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power. . . .

*Id.*

58. 15 Bankr. 514, 518 (Bankr. D. Md. 1981).

59. *Id.* at 519. The court stated: "Section 362(b)(1) is by its terms applicable only with respect to criminal proceedings 'against the debtor.' The money in question here has been named by the State as an *in rem* defendant in the forfeiture action. Such a proceeding is not excepted from the broad scope of the automatic stay." *Id.* (footnote omitted). The court further dismissed section 362(b)(4) as an exception to the stay in this case, holding that the exception was meant to "encompass only governmental action against the Debtor necessary to 'prevent or stop violation of fraud, environmental protection, consumer protection, safety, or similar police or regulatory laws.'" *Id.* (quoting H. R. REP. NO. 595, 95th Cong., 2d Sess. 343, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6299).

§ 726<sup>60</sup> which appears to place forfeiture determinations in a position behind unsecured creditors in the order of receiving payment from the distribution of the estate's assets.<sup>61</sup> However, the *Ryan I* court did recognize congressional intent to prevent individuals from using the Bankruptcy Code as a means to escape the consequences of wrongful behavior by subordinating forfeiture claims and by providing that forfeiture claims are not dischargeable.<sup>62</sup> Finally, the court did not reach the issue of whether to hear the state forfeiture action in its forum as such relief was not sought by the state. The state court forfeiture proceeding, however, was stayed.<sup>63</sup>

The state then sought relief from the automatic stay. *In re Ryan II* (*Ryan II*)<sup>64</sup> determined that the automatic stay should be modified to allow the state court to proceed with the forfeiture action, but only to judgment.<sup>65</sup> The *Ryan II* court held that at that time the money would become a non-exempt part of the estate to be distributed according to the provisions of section 726.<sup>66</sup> The court felt that the relation-back doctrine<sup>67</sup> contained in Maryland's state law would run afoul of the Supremacy and Bankruptcy clauses of the United States Constitution.<sup>68</sup> In addition, the court decided that Congress intended through the provisions of section 726 that the estate not be depleted as a result of the debtor's wrongdoing.<sup>69</sup>

A later Maryland case, *In re Reid*,<sup>70</sup> applied a different analysis to the same issue. Unlike *Ryan I*, the court in *Reid* determined that the debtor's right to claim the property was the only property interest the debtor possessed. Therefore the "right" was the only interest that passed into the bankruptcy estate.<sup>71</sup> The *Reid* court reasoned that the language of the Maryland statute reserved title to the property in the state and left only an interest to reclaim the property by the debtor.<sup>72</sup> Though the

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60. 11 U.S.C. § 726 (1988).

61. *Ryan*, 15 Bankr. at 519.

62. *Id.* at 520 (citing 11 U.S.C. § 523(a)(7)).

63. *Id.* at 520-21.

64. 32 Bankr. 794 (Bankr. D. Md. 1983).

65. *Id.* at 799.

66. *Id.* at 798.

67. *See infra* notes 86-108 and accompanying text.

68. *Ryan II*, 32 Bankr. at 797.

69. *Id.*

70. 60 Bankr. 301 (Bankr. D. Md. 1986).

71. *Id.* at 305.

72. *Id.* The court stated: "[T]he extent of the debtor's interest in the currency at the commencement of the case was a right to claim the currency at a forfeiture hearing; that such interest became property of the estate upon commencement of the case . . ." *Id.*

result was contra to *Ryan I* and *Ryan II*, the *Reid* court still refused to modify the stay in order to allow the state to continue its forfeiture case in state court. Instead, the bankruptcy court held the forfeiture hearing.<sup>73</sup>

This line of cases appears to support the fact that civil forfeitures are not an exercise of a governmental unit's police power; nevertheless, the legislative history behind the 1984 amendments to 21 U.S.C. § 881<sup>74</sup> and the Bankruptcy Code indicate the converse.<sup>75</sup> The comments made during the 1978 revision of the Bankruptcy Code indicate that the automatic stay had been over used in the area of governmental regulation.<sup>76</sup> Correspondingly, section 362(b)(4) was inserted to protect the government's right to protect the public health, welfare, and safety.<sup>77</sup> Likewise, a review of the history of amendments to 21 U.S.C. § 881 indicates that the civil forfeiture actions were created to protect the public by reducing illegal drug-related activities.<sup>78</sup> Congress also appears to treat the respective criminal and civil forfeiture provisions, 21 U.S.C. § 848 and 21 U.S.C. § 881, similarly, with the intent that they work together in the war against illegal narcotics.<sup>79</sup>

The legislative history of the Bankruptcy Reform Act of 1978 explicitly addressed similar concerns for public safety. "The bankruptcy laws are not a haven for criminal offenders, but are designed to give relief from financial over-extension."<sup>80</sup> Therefore, allowing the automatic stay to preclude a civil forfeiture action<sup>81</sup> runs afoul with the expressed Congressional intent to protect the public and guard against the bankruptcy courts being used as a haven for criminal offenders.

The question, then, is whether forfeiture of property under Section 881 will be permitted to proceed under 11 U.S.C. § 362(b)(4) and (5).<sup>82</sup>

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73. *Id.* at 306. Applying Maryland law, the court determined that some of the money sought to be forfeited was not criminally derived, therefore not forfeitable, and ordered those funds turned over to the bankruptcy trustee. *Id.* at 308

74. *See supra* note 20 and accompanying text.

75. H.R. REP. NO. 595, 95th Cong., 2d Sess. 174, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6135.

76. *Id.*

77. *See* 11 U.S.C. § 362 (b)(4) (1988); H.R. REP. NO. 595, *supra* note 75, at 175, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS at 6135.

78. *See* S. REP. NO. 225, *supra* note 20, at 191, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 3374.

79. *Id.* at 3398.

80. 134 Baker Street, Inc. v. Georgia, 47 Bankr. 379, 381 (N.D. Ga. 1984) (quoting H.R. REP. NO. 595, *supra* note 75, at 342, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS at 6299).

81. Criminal forfeitures are permitted to proceed under 11 U.S.C. § 362(b)(1) (1988).

82. *See* text of statute, *supra* note 57.

The district court in *134 Baker Street, Inc. v. Georgia*<sup>83</sup> set forth a test for this determination. If the primary motivation for the government's action is pecuniary, such as obtaining payment of a dischargeable debt, rather than public duty or punishment, the government's proceeding should be stayed by the bankruptcy court.<sup>84</sup> On the other hand, if the purpose of the government's action is to punish criminal conduct and "vindicate the public welfare," the stay should not stall the action.<sup>85</sup>

### B. *The Relation-Back Doctrine*

Probably the strongest argument in the government's favor is the application of the relation-back doctrine as stated in *United States v. Stowell*.<sup>86</sup> *Stowell* discussed the applicable forfeiture statute for the illegal operation of a distillery. The Court ruled that where a statute provides for the forfeiture of property to the government upon the commission of a certain act, the right to the property vests in the government at the time the illegal act is committed.<sup>87</sup> Though the government's title is not perfected until judicial decree, the forfeiture relates back to the time of the illegal act.<sup>88</sup> This allows the government's title to supersede any sale or alienation made after the forfeiting event, even as to good-faith purchasers.<sup>89</sup>

Because the relation-back doctrine could produce rather harsh results, some courts have resisted its application via strict construction. The Fifth Circuit Court of Appeals in *United States v. Currency Totalling \$48,318.08*<sup>90</sup> held that the doctrine applies only where forfeiture is clearly mandated by the forfeiture statute.<sup>91</sup> A similar decision was reached by the Eighth Circuit Court of Appeals in *United States v. Thirteen Thousand Dollars in United States Currency*<sup>92</sup> in construing Section 881. The court ruled that the Section 881 language, "subject to forfeiture," is permissive and does not mandate forfeiture; the subsequent lien

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83. 47 Bankr. 379 (N.D. Ga. 1984).

84. *Id.* at 382.

85. *Id.*

86. 133 U.S. 1 (1890).

87. *Id.* at 16-17 ("By the settled doctrine of this court, whenever a statute enacts that upon the commission of a certain act specific property used in or connected with that act shall be forfeited, the forfeiture takes effect immediately upon the commission of the act . . .").

88. *Id.* at 17.

89. *Id.*

90. 609 F.2d 210 (5th Cir. 1980).

91. *Id.* at 213 (language of Currency and Foreign Transactions Reporting Act, "subject to seizure and forfeiture," was merely permissive, not mandatory, therefore the *Stowell* relation-back doctrine was inapplicable).

92. 733 F.2d 581 (8th Cir. 1984).

of an attorney for services rendered in the case was not extinguished by the relation-back doctrine.<sup>93</sup>

These decisions have been questioned by other courts in more recent rulings. The Supreme Court of Colorado refused to follow this line of thinking in *United States v. Wilkinson*.<sup>94</sup> The court reviewed a forfeiture case under the Colorado abatement of nuisance statute that contained the "subject to forfeiture" language. In holding that the relation-back doctrine applied to this type of statute, the court reasoned that public policy and legislative intent would otherwise be subverted.<sup>95</sup> If title were not divested at the time of the illegal act, the wrongdoer/owner could transfer all interests in the subject property to a sympathetic party and thus defeat the intent of the law.<sup>96</sup>

The Tenth Circuit Court of Appeals specifically rejected the narrow construction proffered by the Fifth Circuit in *Currency Totalling \$48,318.08*. In *Eggleston v. Colorado*,<sup>97</sup> the Tenth Circuit held that the "subject to" language of Section 881 did not preclude the application of the relation-back doctrine.<sup>98</sup> The court noted that decisions of United States courts have consistently upheld the doctrine of relation-back; in fact, Congress amended Section 881 in 1984 to codify the doctrine within the statute.<sup>99</sup> Legislative history of the Comprehensive Crime Control Act of 1984<sup>100</sup> reflects that Congress recognized that the doctrine is "well-established in the current law."<sup>101</sup> Therefore, the court reasoned

93. *Id.* at 584. The government argued that the attorney did not have standing to contest the forfeiture as any rights in the property he may have acquired were after the illegal act and therefore void as to the government's interest under the relation-back doctrine. *Id.* The court, relying in part on *Currency Totalling \$48,318.08*, disagreed, interpreting Section 881 as a permissive forfeiture statute to which the relation-back doctrine did not apply. *Id.*

94. 686 P.2d 790 (Colo. 1984).

95. *Id.* at 792-93.

96. *Id.* The court then applied the relation-back doctrine, thereby divesting the wrongdoer of all property interests in the subject *res* at the time the illegal act was committed. *Id.* at 794.

97. 873 F.2d 242 (10th Cir. 1989), *petition for cert. filed*, No. 89-699 (1989 W.L. 136766).

98. *Id.* at 246-47. The case contains a lengthy discussion of the relation-back doctrine. In addition to holding that the doctrine applies to Section 881, the court stated that the exception for innocent lienholders does not defeat the doctrine's application to non-innocent claimants. *Id.* at 247. See also 21 U.S.C. § 881(a)(6) (1982 & Supp. V 1987); *infra* note 102.

99. *Eggleston*, 873 F.2d at 247. 21 U.S.C. § 881(h) (Supp. V 1987) states:

All right, title, and interest in property described in subsection (a) of this section shall vest in the United States upon commission of the act giving rise to forfeiture under this section.

*Id.*

100. Pub. L. No. 98-473, 98 Stat. 1827 (1984).

101. S. REP. NO. 225, 98th Cong., 2d Sess. 215, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3398. The Senate Report states: "The principle that the interest of the United States in forfeited property vests at the time of the acts giving rise to the forfeiture is well established in the context of civil forfeitures." *Id.*

that an action brought under Section 881 vests title in the government at the time of the illegal act, subject only to the innocent claimant exception of section 881.<sup>102</sup> The innocent owner, however, must have a vested interest in the subject property prior to the illegal act.<sup>103</sup>

Recently, the Supreme Court of the United States recognized the *Stowell* relation-back doctrine as valid in two cases involving attorney fees paid with assets subject to forfeiture.<sup>104</sup> These cases involved the forfeiture of property under the criminal narcotic forfeiture statute, 21 U.S.C. § 853,<sup>105</sup> including money used to pay the defendants' attorney fees.<sup>106</sup> The relation-back doctrine was asserted by the government and upheld by the Supreme Court. The Court stated specifically in *Caplin & Drysdale, Chartered v. United States* that the statute "reflects the application of the long-recognized and lawful practice of vesting title to any forfeitable assets, in the United States, at the time of the criminal act giving rise to forfeiture."<sup>107</sup> The Court affirmed the doctrine's application even as to attorney fees for the representation of a defendant in a criminal trial.<sup>108</sup>

### C. Abstention and Withdrawal

#### 1. Abstention

The doctrine of relation-back should thus be a serious consideration of a bankruptcy court when deciding whether to exercise its jurisdiction over a forfeiture matter or abstaining from it altogether until the forfeiture action is completed.<sup>109</sup> If the title to the property at issue is vested

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102. 21 U.S.C. § 881(a)(6) (1982 & Supp. V 1987) states in part: "[N]o 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." *Id.*

103. *Eggleston*, 873 F.2d at 248.

104. See *Caplin & Drysdale, Chartered v. United States*, 109 S. Ct. 2646 (1989); *United States v. Monsanto*, 109 S. Ct. 2657 (1989).

105. 21 U.S.C. § 853(a) (Supp. V 1987).

106. The issue presented in both cases was whether the section 853 forfeiture of money used to pay attorney fees violated the defendants' rights to counsel under the sixth amendment of the Constitution. *Caplin*, 109 S. Ct. at 2649; *Monsanto*, 109 S. Ct. at 2659. In both cases the court upheld forfeiture as constitutional. *Caplin*, 109 S. Ct. at 2649; *Monsanto*, 109 S. Ct. at 2659.

107. *Caplin*, 109 S. Ct. at 2653 (upholding 21 U.S.C. § 853(c) which provides for vesting of the property interest in the United States at the time of the criminal act, thereby avoiding any subsequent transfer to a third party who has cause to believe that the property is subject to a criminal forfeiture).

108. *Id.* at 2652 ("A defendant has no Sixth Amendment right to spend another person's [the government'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.").

109. 11 U.S.C. § 305 (1988) allows the bankruptcy court, after notice and hearing, to dismiss a



in the government at the time of the illegal act,<sup>110</sup> the property cannot become a part of the bankruptcy estate. Should the property alleged to be forfeitable be a significant part of the debtor's total estate, the bankruptcy proceeding would be a complete waste of time for all concerned. The bankruptcy court should abstain until the forfeiture proceeding is resolved.

## 2. Withdrawal

In addition, because of the substantial impact the forfeiture proceeding may have upon the estate, the district court which has original jurisdiction over all title 11 matters may withdraw the bankruptcy case to its forum.<sup>111</sup> However, when considering whether to urge the district court to withdraw its referral to the bankruptcy court, certain matters should be considered. The bankruptcy court may hear and determine all cases "arising under title 11"<sup>112</sup> and "all core proceedings arising under title 11, or arising in a case under title 11."<sup>113</sup> Furthermore, the district court may be reluctant to withdraw where the subject *res* is related to Title 11. Nevertheless, if the matter can be determined upon non-bankruptcy issues and if those issues could substantially affect the outcome of the bankruptcy, the district court could exercise the power granted it under Section 157(d).<sup>114</sup>

The district court may decide to withdraw referral of a case to the bankruptcy court after considering the outer boundaries of the bankruptcy court's jurisdiction suggested in *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*<sup>115</sup> In *Marathon*, the Court held that 28 U.S.C. § 1471(b)<sup>116</sup> was an unconstitutional grant of power to the bankruptcy court, an article I court, as it conferred jurisdiction over matters that should be determined only by article III judges.<sup>117</sup>

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case or suspend it if "the interests of creditors and the debtor would be better served by such a dismissal or suspension."

110. See *supra* notes 86-108 and accompanying text.

111. 28 U.S.C. § 157(d) (Supp. V 1987).

112. *Id.* § 157(a).

113. *Id.* § 157(b)(1).

114. *Id.* § 157(d).

115. 458 U.S. 50 (1982), *judmt. stayed*, 459 U.S. 813 (1982). See also *In re Johns-Manville Corp.*, 63 Bankr. 600, 602 (S.D.N.Y. 1986).

116. 21 U.S.C. § 1471(b) (1976 & Supp. IV 1980) stated in pertinent part that the bankruptcy court had jurisdiction over "all civil proceedings arising under Title 11 or arising in or related to cases under Title 11." *Id.*

117. The distinction between article III judges and adjunct judges is crucial in determining whether the power granted to the adjuncts is unconstitutional. Article III judges are appointed for life and can be removed only by impeachment. Additionally, their salaries cannot be reduced during

Reacting to the *Marathon* decision, Congress amended 28 U.S.C. § 157<sup>118</sup> to provide for mandatory withdrawal of reference when the resolution of a case hinges on issues related to "other laws of the United States regulating organizations or activities affecting interstate commerce."<sup>119</sup> The withdrawal may be accomplished *sua sponte* or by a timely filed motion.<sup>120</sup>

Withdrawal issues have subsequently been decided by some courts with great awareness of *Marathon*. In *In re Johns-Manville Corp.*,<sup>121</sup> the district court specifically noted the import of *Marathon* in its ruling.<sup>122</sup> The district court held that mandatory withdrawal was appropriate when key issues required interpretation of federal environmental statutes.<sup>123</sup> Similarly, the forfeiture issue would hardly be appropriately within the jurisdiction of the bankruptcy court as it also clearly involves "other laws of the United States" affecting interstate commerce.

However, in practice, withdrawal under section 157(d) rarely occurs, as district courts are generally not equipped to adjudicate entire bankruptcy cases as efficiently as bankruptcy courts. The better result is an abstention by the bankruptcy court under 11 U.S.C. § 305.<sup>124</sup>

#### D. *Application of Custodia Legis*

*Custodia legis* literally translated means "in the custody of the law,"<sup>125</sup> but the term as a doctrine refers to a "first come, first served" method of settling disputes between courts of concurrent jurisdiction over the same property.<sup>126</sup> Strictly applied, the doctrine gives priority to the court that first secured actual or constructive possession of the

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their service. On the other hand, bankruptcy judges are appointed for fourteen year terms, may be removed by a judicial council, and their salaries are not immune to reduction by Congress. Hence, adjunct judges are not so free from political influence as article III judges. See generally *Marathon*, 458 U.S. at 60-61.

118. See 28 U.S.C. § 157(d) (Supp. V 1987). See also *In re White Motor Corp.*, 42 Bankr. 693, 697 (N.D. Ohio 1984).

119. 28 U.S.C. § 157(d).

120. *Id.*

121. 63 Bankr. 600 (S.D.N.Y. 1986).

122. *Id.* at 602. Another court believed that a determination of the bankruptcy court's jurisdiction began with a discussion of *Marathon* in *Harley Hotels, Inc. v. Rain's Int'l Ltd.*, 57 Bankr. 773 (M.D. Pa. 1985), but that court determined that neither withdrawal or abstention was required to resolve the issue of assumption of an executory contract. *Id.* at 783-84.

123. *Johns-Manville*, 63 Bankr. at 603.

124. 11 U.S.C. § 305(a) (1988).

125. BLACK'S LAW DICTIONARY 460 (4th ed. 1968).

126. *Coastal Production Credit Ass'n v. Oil Screw "Santee"*, 51 Bankr. 1018, 1020 (S.D. Ga. 1985).

property.<sup>127</sup>

The *custodia legis* doctrine has a long history. In a late 1800's case, *Moran v. Sturges*,<sup>128</sup> the United States Supreme Court considered the doctrine to be a general principle of law.<sup>129</sup> The *Moran* court stated that a particular court had possession of certain property when it was "taken and held" by virtue of that court's process.<sup>130</sup> Once this was established, another court could not disturb that court's power over the property until the matter was resolved.<sup>131</sup>

In a scenario where certain property is involved in a forfeiture proceeding (the property has been attached by order of the district court) and the owner/claimant challenges the action, then files for relief in bankruptcy, a conflict arises as to which court has jurisdiction.<sup>132</sup> *Moran* gives jurisdiction to the district court because it had custody first,<sup>133</sup> but the modern application of *custodia legis* in this situation is not clear.<sup>134</sup>

Such a case as detailed in the above-mentioned scenario has yet to be reported. Hence, an analysis of various *custodia legis* decisions may, by analogy, provide a method or rationale for its application in Section 881 versus Bankruptcy Code disputes. Though courts have applied the doctrine in cases where the subject property was an appeal bond,<sup>135</sup> stock held by a court as security for a judgment lien,<sup>136</sup> or property obtained through a writ of replevin,<sup>137</sup> the seemingly most applicable cases are admiralty forfeiture decisions.

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127. *Id.*

128. 154 U.S. 256 (1894).

129. The Court stated: "It is a rule of general application that where property is in the actual possession of one court of competent jurisdiction, such possession cannot be disturbed by process out of another court." *Id.* at 274.

130. *Id.*

131. *Id.*

132. The district court's jurisdiction is based upon 28 U.S.C. § 1331 (the federal question arising under 21 U.S.C. § 881) and the bankruptcy court's jurisdiction over Title 11 matters is grounded in 28 U.S.C. § 1334.

133. See *Coastal Production Credit Ass'n v. Oil Screw "Santee,"* 51 Bankr. 1018, 1020 (S.D. Ga. 1985).

134. Courts are split over the application of the doctrine of *custodia legis* if one of the conflicting courts is a bankruptcy court. See *id.* (the *Coastal Production* court perceived the application of the doctrine turning on the comparable objectives, primarily equitable, of the two courts).

135. See, e.g., *Mid-Jersey Nat'l Bank v. Fidelity Mortgage Investors*, 518 F.2d 640 (3d Cir. 1975). The court held that the only property interest retained by the debtor was a contingency. *Id.* at 644.

136. See, e.g., *In re Braen*, 72 Bankr. 56 (Bankr. D. N.J. 1987) (The possession of the stock certificates by the court constituted perfection which defeated the bankruptcy trustee's position as lien creditor.).

137. See, e.g., *Brunswick Corp. v. J & P Inc.*, 424 F.2d 100 (10th Cir. 1970) (The court concluded that the writ of replevin placed the property in the custody of the court under its control until final judgment, whether or not the court had actual possession.).

The case of *Ciel Y Cia v. Nereide Societa di Navigazione Per Azioni*<sup>138</sup> involved a ship which was subject to attachment under admiralty law in the district court.<sup>139</sup> The owner filed bankruptcy three months after the attachment.<sup>140</sup> The court first noted its awareness of the then-recent *Marathon* decision<sup>141</sup> and concluded that not only did the doctrine of *custodia legis* place the proper jurisdiction in the hands of the district court but the bankruptcy court lacked jurisdiction to determine admiralty claims.<sup>142</sup>

A forfeiture pursuant to Section 881 is not unlike the situation in *Ciel*. The forfeiture is predicated on law not familiar to the bankruptcy court and, as in the scenario previously mentioned, the attachment by order of the district court places the property in the custody of that court. Because its custody and control precedes that of the bankruptcy court, the doctrine of *custodia legis* should operate to grant subject matter jurisdiction exclusively in the district court until the forfeiture proceeding is finalized. It should be noted that this doctrine could work against a prosecutor when the debtor/wrongdoer anticipates the forfeiture and files for bankruptcy before the forfeiture procedure is initiated by attachment.

#### V. CONCLUSION AND SUGGESTED APPROACH TO THE BANKRUPTCY "DEFENSE"

At present, the drug war is at the forefront in the minds of politicians, law enforcement officials, and the general public. Forfeiture laws, both state and federal, are vital weapons in our nation's fight against drugs. Consequently, bankruptcy courts should carefully circumspect what course to take when presented with a case which involves a civil forfeiture proceeding.

Even assuming that a bankruptcy petition is filed in good faith,<sup>143</sup> the bankruptcy court, being aware of the implications of the Section 881 provision vesting title in the government upon commission of the act which gives rise to the forfeiture, should suspend its proceedings under

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138. 28 Bankr. 378 (E.D. Va. 1983).

139. *Id.* at 381.

140. *Id.*

141. *Id.* at 380.

142. *Id.* at 380-82.

143. 11 U.S.C. § 1129(a)(3) (1988) states in part that the court will confirm a plan only if it has been proposed in good faith. *Id.* The court in *In re Sanders*, 28 Bankr. 917 (Bankr. D. Kan. 1983), determined that a debtor's plan under Chapter 13 should be denied as the purpose of the filing was to manipulate the system to avoid \$70,000.00 of debt tainted with fraud. *Id.* at 922.

11 U.S.C. § 305, either upon motion of the government or *sua sponte*. The suspension would allow the district court to proceed to determine outcome of the forfeiture case, thereby properly defining what assets remain in the debtor's estate.

Another approach would allow the government to move the district court to withdraw its referral to the bankruptcy court pursuant to 28 U.S.C. § 157(d)<sup>144</sup> and to resolve the issues in both the bankruptcy case and the forfeiture case. This avenue would not only satisfy the concerns of *Marathon* but would also promote efficiency. In the case of *Wooten v. DOI*,<sup>145</sup> a district court in Louisiana followed this approach and held that withdrawal was appropriate if resolution of the action required "substantial and material considerations" of non-bankruptcy statutes.<sup>146</sup>

As indicated earlier, it is essential that the forfeiture issues be addressed prior to any determination of the extent of the bankrupt debtor's estate. The relation-back doctrine vests title in the government prior to the bankruptcy petition, leaving in the estate at most a right to claim the property subject to forfeiture. Additionally, the doctrine of *custodia legis* places the *res* within the exclusive jurisdiction of the district court when the forfeiture proceeding is initiated prior to the bankruptcy filing. Undoubtedly, the proper course would be either to suspend the bankruptcy proceeding until the forfeiture case is resolved, to grant relief from the automatic stay under the police power provision, or to adjudicate both the bankruptcy and the forfeiture cases in the district court.

Similar procedures should apply to state forfeiture proceedings as well because the governmental purposes are the same. Certainly the Supremacy Clause was not intended by the framers to act as a method of avoiding state laws necessary for the protection of public interests. Furthermore, the bankruptcy court is no better equipped to adjudicate a state forfeiture proceeding than it is to adjudicate a federal forfeiture proceeding.

The above-noted approaches would best serve the legislative intent behind 21 U.S.C. § 881, the various state forfeiture laws, and the Bankruptcy Code. In order to insure that the bankruptcy forum is not abused,

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144. 28 U.S.C. § 157(d) (1982 & Supp. V 1987) states in part: "The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce." *Id.*

145. 52 Bankr. 74 (W.D. La. 1985).

146. *Id.* at 75 (citing *In re White Motor Corp.*, 42 Bankr. 693, 703-05 (N.D. Ohio 1984)).

forfeiture proceedings must be separate and detached from the bankruptcy proceeding. Additionally, the Constitution and well settled case law support the proposition that a bankruptcy court exercising its jurisdiction over a forfeiture proceeding is both improper and premature.

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