Summer 1991

The Impact of Forfeiture Statutes on Oklahoma Loan Transactions

Doris J. Astle
Lisa B. McNight

Follow this and additional works at: http://digitalcommons.law.utulsa.edu/tlr

Part of the Law Commons

Recommended Citation

Available at: http://digitalcommons.law.utulsa.edu/tlr/vol26/iss4/1

This Article is brought to you for free and open access by TU Law Digital Commons. It has been accepted for inclusion in Tulsa Law Review by an authorized editor of TU Law Digital Commons. For more information, please contact daniel-bell@utulsa.edu.
THE IMPACT OF FORFEITURE STATUTES ON OKLAHOMA LOAN TRANSACTIONS*

Doris J. Astle† and Lisa B. McKnight‡

I. INTRODUCTION

Forfeiture laws, whether federal or state statutory or common law, have historically plagued lenders, often with devastating results. Criminal forfeiture “represents an innovative attempt to call on our common law heritage to meet an essentially modern problem”,¹ but this effort to punish and deter a wrongdoer through the removal of the economic means and proceeds of crime may unduly impact secured creditors. Of particular concern with respect to Oklahoma loan transactions are those federal and state forfeiture statutes adopted in the war against organized crime and drugs, including, inter alia, the Racketeer Influenced and Corrupt Organization Act² (“RICO”), the Continuing Criminal Enterprises

---


Act\(^3\) (the "CCE"), the Comprehensive Drug Abuse Prevention and Control Act of 1970\(^4\) (the "Controlled Substances Act"), the Oklahoma Corrupt Organizations Prevention Act\(^5\) ("OCOPA"), and the Oklahoma Uniform Controlled Dangerous Substances Act\(^6\) (the "Oklahoma Controlled Substances Act"). The primary questions which arise under these statutes with respect to the impact of forfeiture on a secured creditor's interest are: (i) what property is subject to forfeiture; (ii) whether forfeiture proceedings are criminal (i.e., *in personam*) or civil (i.e., *in rem*), (iii) whether the government's interest "relates back" to a particular point in time and, if so, whether that time is the date of the illegal act, the date of seizure of the forfeited property, or some other date or event; (iv) whether a secured creditor's lien is impacted differently if it is perfected rather than unperfected, (v) what policies support or compel against forfeiture of a secured creditor's interest, and (vi) whether there are statutorily provided bars to prosecution which might, albeit vicariously, provide protection to a secured creditor.\(^7\)

II. FEDERAL LAW OF FORFEITURE OVERVIEW

RICO, the CCE, and the Controlled Substances Act were drafted as an attempt to combat organized crime and "to deal in a comprehensive

---

3. See infra note 4 and accompanying text.
fashion with the growing menace of drug abuse in the United States." Congress adopted the view that to successfully combat racketeering and drug trafficking, it would be necessary for law enforcement efforts to "include an attack on the economic aspects of these crimes. Forfeiture is the mechanism through which such an attack may be made." However, because of numerous limitations and ambiguities contained in these acts, law enforcement agencies did not utilize them to the full extent contemplated by Congress. As a result, Congress attempted to strengthen, broaden, and clarify the provisions of these acts through amendments contained in the Comprehensive Crime Control Act of 1984. 

As they currently exist, these federal laws authorize two types of forfeiture proceedings: criminal (in personam) forfeitures, exemplified by the provisions set forth in the CCE and in RICO and civil (in rem) forfeitures, exemplified by the provisions set forth in the Controlled Substances Act.

A. Criminal (in personam) Forfeitures Under RICO and the CCE.

Criminal forfeitures under RICO and the CCE are in personam proceedings in which an action is brought against a person charged with violating RICO or the CCE for the purpose of determining the guilt or innocence of that person. As part of the punishment for violations of RICO or the CCE, if convicted, the defendant must forfeit property tainted by that crime.

10. Id.
11. See id. at 3374-75:
Title III of [the Comprehensive Crime Control Act of 1984] . . . is designed to enhance the use of forfeiture, and in particular, the sanction of criminal forfeiture, as a law enforcement tool in combating two of the most serious crime problems facing the country: racketeering and drug trafficking. . . . Since the enactment in 1970 of [RICO] . . . and the Comprehensive Drug Prevention and Control (sic) Act . . . the Federal Government's record in taking the profit out of organized crime, especially drug trafficking, was far below Congressional expectations. . . . This bill is intended to eliminate the statutory limitations and ambiguities that have frustrated active pursuit of forfeiture by Federal law enforcement agencies.
1. Property Subject to Forfeiture under RICO and the CCE

a. RICO

Originally enacted for the purpose of addressing problems posed by organized crime, courts have broadly construed RICO to reach any person convicted of investing in, acquiring control of, or conducting an enterprise with money derived from a pattern of racketeering activity. As part of the penalty imposed upon a person convicted of violating a RICO provision, the convicted person shall forfeit to the United States, irrespective of any provision of State law—

(2) any —
(A) interest in;
(B) security of;
(C) claim against; or
(D) property or contractual right of any kind affording a source of influence over; any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct in violation of [RICO] ...; and

(3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of [RICO]. ...{18}

This section goes on to state that the type of property subject to criminal forfeiture under this provision includes:

(1) real property, including things growing on, affixed to, and found in land; and
(2) tangible and intangible personal property, including rights, privileges, interests, claims and securities.{19}

Thus, under RICO, any property which affords a source of influence over a criminal enterprise, or which constitutes or is derived from the proceeds of such an enterprise, is subject to forfeiture.

---

15. An "enterprise" may consist of "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although the group is not a legal entity." 18 U.S.C. § 1961(4) (1988).
16. To establish a "pattern of racketeering activity" the Government must show at least two acts of racketeering activity which occurred within 10 years of each other. Id. § 1961(5).
17. "Racketeering activity" means, inter alia, "any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotics or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year." Id. § 1961(1).
18. Id. §§ 1963(a)(2)-(3).
19. Id. § 1963(b).
b. CCE

The CCE provides that any person convicted of a violation of its provisions which is punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of State law —

1. any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation;
2. any of the person’s property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation; and
3. in the case of a person convicted of engaging in a continuing criminal enterprise in violation of section 848 of this title, the person shall forfeit, in addition to any property described in paragraph (1) or (2), any of his interest in, claims against, and property or contractual rights affording a source of control over, the continuing criminal enterprise.

This section, with language identical to that contained in section 1963(b) of RICO, subjects both real and personal property to criminal forfeiture. Therefore, as is the case under RICO, the CCE provides that any property which affords a source of control over a criminal enterprise or which constitutes, or is derived from, the proceeds of such an enterprise or violation is subject to forfeiture. In addition, any property which is used in any manner to facilitate such a violation is also subject to forfeiture.

2. Procedure for Forfeiture Under RICO and the CCE

a. RICO

A criminal forfeiture proceeding under RICO is conducted as part of the criminal trial of a defendant whose guilt must be proven beyond a reasonable doubt. If the defendant is convicted of the crime, the court will then enter a judgment of forfeiture of the tainted property to the United States and authorize the Attorney General to seize all such property "upon such terms and conditions as the court shall deem proper."
After entry of the order of forfeiture, the government then must "publish notice of the order and of its intent to dispose of the property in such a manner as the Attorney General may direct." Unlike the corresponding Oklahoma statute, discussed below, RICO contains no requirements for any type of recorded lien notice by the government. The government "may" also, "to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified." Since the statute is permissive, it does not require the notification of even secured creditors whose interests in the property are recorded or otherwise known to the government. The secured creditor, therefore, can neither assume that perfecting its security interest by filing will protect its interest in the property from forfeiture, nor assume that it will be given notice that the property subject to its security interest is subject to an order of forfeiture, other than the general constructive notice by publication required by statute.

The criminal proceeding under RICO establishes the rights of only the defendant in the property, i.e., whether or not the defendant's interest in the property will be forfeited. Accordingly, any claimant, other than the defendant, who claims an interest in the property subject to the order of forfeiture and intends to assert its interest, must petition the court for a hearing, after the defendant has been convicted of violating acts prohibited by RICO and after the order of forfeiture has been entered. This is the earliest time that the validity of the claimant's interest in the property can be adjudicated. Section 1963(i) of RICO provides that except for

---

Id. A court may also "enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability" of property subject to forfeiture, in certain circumstances, upon or prior to the filing of an indictment or information charging a violation of RICO. Id. § 1963(d).

23. Id. § 1963(l)(1). Section 1963(h)(1) gives the Attorney General the right to promulgate regulations with respect to "making reasonable efforts to provide notice to persons who may have an interest in property ordered forfeited under this section. . . ."

24. Id. § 1963(l)(1) (emphasis added).

25. Id.

26. Subsection 1963(l)(2) states that:

[a]ny person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property.

Id.
this post-judgment proceeding, no one claiming an interest in the property may

(1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or

(2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.

At the post-judgment hearing the claimant must establish by a preponderance of the evidence that

(A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or

(B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section.

Since a third party cannot assert an interest in property subject to forfeiture until after resolution of the criminal proceeding, such third party claims could be delayed for years. For the secured creditor, this could result in adjudication of its claim substantially beyond the time of a default in the obligations secured, or delay for such a period as to allow delapidation of the collateral, or other occurrences which significantly decrease its value.

b. CCE

The proceedings for forfeiture under the CCE are substantially similar to those set forth under RICO, including the provisions for notification that a judgment of forfeiture has been entered. The language of the CCE, prohibiting a third party who claims an interest in the subject property from intervening in the criminal action brought under the CCE

27. Id. § 1963(i).
28. Id. § 1963(o)(6).
29. For a more complete discussion of the history and disadvantages of this procedure, see Goldsmith and Linderman, Asset Forfeiture and Third Party Rights: The Need for Further Law Reform, 1989 DUKE L.J. 1254, 1282-91.
or filing an action collateral to the CCE proceeding once an indictment
or information has been filed, is also identical to that set forth in section
1963(i) of RICO and provides only a post-judgment remedy for third
party claims.32

3. Relation Back Under RICO and the CCE.

a. RICO

Under RICO, if a party acquires an interest in property which is
subject to forfeiture after the commission of the crime, even if the interest
is acquired before an order of forfeiture has been issued or notice of for-
feiture has been published or received, the acquiring party can preserve
its interest in the property only by petitioning for a hearing and proving,
by a preponderance of the evidence, that such party was a bona fide pur-
chaser for value of its interest in the property and that, at the time such
interest was acquired, the claimant was reasonably without cause to be-
lieve the property was subject to forfeiture.33 This result is reached on
the theory that the right, title, and interest of the United States in the
forfeited property “relates back” to the time the crime was committed
and is subject only to statutorily protected interests. Pursuant to section
1963(c) of RICO

[all right, title, and interest in property [subject to forfeiture] ... vests in
the United States upon the commission of the act giving rise to forfei-
ture under this section. Any such property that is subsequently trans-
ferred to a person other than the defendant may be the subject of a
special verdict of forfeiture and thereafter shall be ordered forfeited to
the United States, unless the transferee establishes in a hearing pursuant
to subsection (l) that he is a bona fide purchaser for value of such prop-
erty who at the time of purchase was reasonably without cause to believe
that the property was subject to forfeiture under this section.34

This provision of RICO codifies the common law “relation-back doc-
trine”, with only a few differences.

The common law relation-back doctrine was discussed at length by
the United States Supreme Court in United States v. Stowell, a decision
rendered several years prior to RICO or the CCE, in 1890. In Stowell,
the Supreme Court stated the common law doctrine as follows:

33. See supra note 28 and accompanying text.
35. 133 U.S. 1 (1890).
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; the right to the property then vests in the United States, although their title is not perfected until judicial condemnation; the forfeiture constitutes a statutory transfer of the right of the United States at the time the offense is committed; and the condemnation, when obtained, relates back to that time, and avoids all intermediate sales and alienations, even to purchasers in good faith. 36

While RICO provides an exception for a bona fide purchaser for value which is not contained in the common-law relation-back doctrine delineated in Stowell, the common law and statutory versions of the doctrine effect the same result, that is, each allows the government’s title to the property to “relate back” to the time of the illegal act, even though the government’s interest in the property is not “perfected” (here, the Stowell Court uses “perfected” to mean that legal title has transferred to the government) until an order of forfeiture is entered. 37 The effect of this doctrine is to preserve the interest of the government against any party who acquires title to or an interest in the property between the time of the illegal act and the order decreeing forfeiture of the property. 38 Accordingly, any secured creditor’s interest in the forfeiture property is potentially jeopardized if it does not predate the illegal act. There is also an issue as to the degree of protection, if any, afforded a secured creditor even as to interests acquired and perfected prior to the illegal act. The relation-back doctrine can effect particularly harsh and potentially devastating results on any party unable to successfully assert a bona fide purchaser status. 39

b. CCE

The language of subsection 853(c) of the CCE is identical to that contained in subsection 1963(c) of RICO. 40 Therefore, as with RICO, the CCE codifies the relation-back doctrine, which results in the title of the United States, once “perfected” by an order of forfeiture, relating back to the time of the illegal act. This subsection also, like section

36. Id. at 16-17 (emphasis added).
37. Id. at 17.
38. Id. at 16-17.
39. If relief is not obtained under these statutory provisions, a third party may still seek relief through an administrative remission or mitigation procedure. Criteria governing remission and mitigation are set forth at 28 C.F.R. § 9.5 (1989). See also infra note 52 and accompanying text.
40. See supra note 34 and accompanying text.
1963(c) of RICO, establishes an exception to forfeiture for any transferee of the subject property if that transferee can establish that (1) it is a bona fide purchaser for value, and (2) that at the time of the purchase of the subject property, such transferee had no reason to believe the property was subject to forfeiture.41

B. Civil (in rem) Forfeitures Under the Controlled Substances Act

Civil forfeitures, such as those provided for in section 881 of the Controlled Substances Act, are in rem proceedings in which an action is brought against the property itself, rather than against the person accused of a crime. This result is based upon the legal fiction that the property committed, or is tainted by, the crime. Under this fiction, the property itself is “arrested” and forfeited because of its “wrongdoing”.42 This is in contrast to criminal, in personam, forfeitures which are, as discussed above, penal in nature, for the purpose of determining the guilt or innocence of the alleged perpetrator of the crime, and to punish those convicted of wrongdoing by, inter alia, effecting forfeiture of property used in or derived from that crime.

A civil forfeiture proceeding determines the rights of all parties claiming an interest in the property in question, rather than just the

---


42. See Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 680-83 (1974), reh'g denied, 417 U.S. 977 (1974). In Calero-Toledo the court traces the origins of civil forfeiture from English common law to the present. Id. at 680-86. The origins of civil forfeiture are rooted in Biblical and pre-Judeo-Christian practices,

which reflected the view that the instrument [which caused someone's death] . . . was accused and that religious expiation was required . . . . The value of the instrument was forfeited to the King, in the belief that the King would provide the money for Masses to be said for the good of the dead man's soul . . . . When application of the deodand [meaning "to be given to God"] to religious or eleemosynary purposes ceased, and the deodand became a source of crown revenue, the institution was justified as a penalty for carelessness. Id. at 681.

Under early English law, a crime amounting to a felony or treason was an act for which “corruption of blood attached.” See United States v. Grande, 620 F.2d 1026, 1038-39 (4th Cir. 1980) cert. denied sub nom. Castagna v. United States, 449 U.S. 830 (1980), cert. denied sub nom. Berg v. United States, 449 U.S. 919 (1980). Under the “corruption of blood” doctrine a defendant convicted of a felony or treason completely forfeited all his real and personal property and the offspring of such a defendant was divested of any rights to inherit property from such defendants. Grande, 620 F.2d at 1038. This type of complete forfeiture is prohibited under the Constitution of the United States, which provides: “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.” U.S. CONST. art. III, § 3, cl. 2. However, a less severe type of forfeiture, such as that contained in RICO and the Controlled Substances Act, has been held to be valid. See Calero-Toledo, 416 U.S. at 680-84; Grande, 620 F.2d at 1038-39. The Calero-Toledo Court stated that “whether the reason for [forfeiture] be artificial or real, it is too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced.” Id. at 686 (citing Goldsmith-Grant Co. v. United States, 254 U.S. 505, 510-11 (1921)).
rights and interests of the defendant, as in a criminal forfeiture proceeding. 43

1. Property Subject to Civil Forfeiture Under the Controlled Substances Act

Under section 881(a) of the Controlled Substances Act, the following types of property are subject to forfeiture to the United States:

(6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner. 44

and

(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. 45


45. Id. § 881(a)(7) (emphasis added). The breadth of this forfeiture provision is evidenced by case law. In United States v. Premises Known as 3639-2nd St., N.E., 869 F.2d 1093 (8th Cir. 1989), the court upheld the forfeiture of a house because the property owner sold two ounces of cocaine. The court stated:

we [do not] find merit in any underlying 'de minimis' argument [made by the owner] that the sale of a relatively small amount of cocaine does not warrant forfeiture of the house. The so-called nexus test is not a measure of the amount of drugs or drug trafficking, and we find the proportionality between the value of the forfeitable property and the severity of the injury inflicted by its use to be irrelevant.

Id. at 1096. In United States v. Two Tracts of Real Property, Containing 30.08 Acres, Bruce Township, Guilford City, N.C., 665 F. Supp. 422, 425-426 (M.D.N.C. 1987), aff'd sub nom. United States v. Reynolds, 856 F.2d 675 (4th Cir. 1988), the court used section 881(a)(7) to justify the forfeiture of an entire 30 acre tract of land, notwithstanding the fact that the illegal activity occurred only in the house, pool, and driveway located on the land.
This provision effectively terminates any interest in the property other than those which qualify under the exception set forth therein for an innocent owner.46

2. Procedure for Civil Forfeiture Under the Controlled Substances Act

A civil forfeiture proceeding, unlike a criminal forfeiture proceeding, is separate from and independent of any criminal action against an accused person.47 Neither a criminal action nor a conviction is a precondition to civil forfeiture under the Controlled Substances Act. Because of the different standards of proof in each of these types of actions, it is possible that a court could decide that the owner of certain property failed to meet the burden of proof required to show a crime had been committed "without the knowledge or consent of the owner", thus resulting in forfeiture of the property, even when the defendant is acquitted of the criminal charges or even when such charges were never brought against the alleged perpetrator of the crime.48

A civil forfeiture action requires a substantially lower burden of proof than that of a criminal forfeiture action. While the government must prove each element of the crime beyond a reasonable doubt in a criminal proceeding involving forfeiture, the standard of proof the government must meet in a civil forfeiture proceeding is only one of probable

46. For a discussion of the innocent owner defense, see infra notes 52-59 and accompanying text.
47. See Dobbins, 96 U.S. at 399; Miller, 78 U.S. at 321-22.
48. Calero-Toledo, 416 U.S. at 683 ("the innocence of the owner of property subject to forfeiture has almost uniformly been rejected as a defense"); Dobbins, 96 U.S. at 401 (forfeiture "is attached primarily to the distillery . . . without any regard whatsoever to the personal misconduct or responsibility of the owner"); United States v. Dunn, 802 F.2d 646, 647 (2d Cir. 1986), cert. denied, 480 U.S. 931 (1987)

Appellee's prior acquittal under the criminal forfeiture statute merely determined that the government's proof failed to overcome all reasonable doubt that the sum of $28,500 should be forfeited. Hence, issues of res judicata and collateral estoppel do not arise [in this civil forfeiture proceeding and] by failing to repeal or restrict § 881 when it enacted § 853, Congress evinced an intent to permit continued use of civil forfeiture in a case, as here, where criminal proceedings are unsuccessful. 802 F.2d at 647 (citations omitted). Although the purpose of the Controlled Substances Act is to cause the forfeiture of drug-tainted property and thus to attempt to render the business of drug sales less profitable, Congress attempted to temper this goal by providing an innocent owner defense. See 21 U.S.C. §§ 881(a)(6)-(7) (1988). As Congress expanded the scope of property subject to forfeiture under this act, it simultaneously expanded the protection of innocent owners under the act in an attempt to mitigate the potential harsh effects which could result under the amended forfeiture laws. For a discussion on the history of the broadening of section 881 forfeiture provisions and innocent owner defenses, see Comment, Tempering the Relation-Bank Doctrine: A More Reasonable Approach to Civil Forfeiture in Drug Cases, 76 VA. L. REV. 165, 167-71 (1990).
cause⁴⁹ that the property in question was illegally derived from or involved in an act in violation of the Controlled Substances Act.⁵⁰ Once this is established, any party claiming an interest in the property (which arguably includes a secured creditor)⁵¹ must prove by a preponderance of the evidence that such claimant is within the class of interests intended to be protected by the innocent owner defense.⁵²

⁴⁹ The Government may establish probable cause by demonstrating that reasonable grounds exist for believing a link exists between the illegal activity and the property. United States v. All Funds and Other Property Contained in Account Number 031-217362, 661 F. Supp. 697, 700-01 (S.D.N.Y. 1986). In this case the court stated that “reasonable grounds” was defined as more than mere suspicion but less than a preponderance of the evidence. Id. at 700. Probable cause in the forfeiture context has been defined as a “reasonable ground for belief of guilt, supported by less than prima facie proof but more than mere suspicion.” United States v. Three Hundred Sixty Four Thousand Dollars in United States Currency, 661 F.2d 319, 323 (9th Cir. 1981) (quoting United States v. One 1978 Chevrolet Impala, 614 F.2d 983, 984 (5th Cir. 1980). Accord United States v. A Single Family Residence, 803 F.2d 625, 628 (11th Cir. 1986); United States v. One Parcel of Real Estate, 715 F. Supp. 355, 357 (S.D. Fla. 1989). The standard of proof required of the government in a civil forfeiture proceeding is broader than that required under a criminal forfeiture proceeding. In fact, at least one court has held that probable cause need be demonstrated only by “reliable evidence”, technical evidentiary rules being “irrelevant to the question of probable cause” in a section 881 civil forfeiture proceeding. United States v. $250,000 in United States Currency, 808 F.2d 895, 899-900 (1st Cir. 1987). See also United States v. Property at 4492 South Livonia Road, 889 F.2d 1258, 1267 (2d Cir. 1989), reh’g denied, 897 F.2d 659 (2d Cir. 1990) (permitting proof of probable cause based onhearsay); United States v. Four Million Two Hundred Fifty Five Thousand Dollars in United States Currency, 661 F.2d at 324-25; United States v. All Funds and Other Property in Account Number 031-217362, 661 F. Supp. 697, 701 (S.D.N.Y. 1986) (“The government may prove probable cause by direct or circumstantial evidence.”).


⁵¹ To establish that a party challenging a forfeiture action has standing to do so, such party must claim ownership of or an interest in the property. See United States v. One Hundred Twenty-Thousand Forty-Three Dollars ($122,043.00) in United States Currency, 792 F.2d 1470, 1473 (9th Cir. 1986); United States v. $47,875.00 in United States Currency, 746 F.2d 291, 293 (5th Cir. 1984); United States v. Three Hundred Sixty Four Thousand Nine Hundred Sixty Dollars ($364,960.00) in United States Currency, 661 F.2d 319, 326 (5th Cir. 1981). In amending the Controlled Substances Act, Congress stated that the term “owner” was to be broadly construed so as to include “any person with a recognizable legal or equitable interest in the property seized,” which would include a secured creditor. Joint Explanatory Statement of Titles II and III, 1978 U.S. Code Cong. & Admin. News 9518, 9522, United States v. One Parcel of Real Estate Property, 660 F. Supp. 483 (S.D. Miss. 1987), aff’d, 819 F.2d 427 (5th Cir. 1987); United States v. Urban Lot Located at 1 Street A-1, 865 F.2d 427, 430 (1st Cir. 1989); In re Metmor Fin., Inc., 819 F.2d 446, 448 n.2 (4th Cir. 1987); United States v. One 56-Foot Yacht Named Tahuna, 702 F.2d 1276 (9th Cir. 1983) (holding that a subsequent purchaser had standing); United States v. A Parcel of Real Property, 650 F. Supp. 1534, 1541 (E.D. La. 1987) (holding that possession, among other things, is sufficient to satisfy the standing requirement).

⁵² See United States v. Premises Known as 3639-2nd St., N.E., 869 F.2d 1093, 1095 (8th Cir. 1989); United States v. $39,000 in Canadian Currency, 801 F.2d 1210, 1216-17 (10th Cir. 1986). We note here that under the Customs procedures, which are incorporated by reference into section 881 (see 21 U.S.C.§ 881(d) (1988)), a party who is an “innocent owner” and who claims an interest in
It is unclear what steps a claimant must take in order to establish the innocent owner defense and the courts have interpreted the provision differently. Some courts have held that the innocent owner language of the statute, "without the knowledge or consent of that owner", is to be read in the disjunctive rather than the conjunctive. Under the disjunctive reading, a claimant must show either that it did not know of the crime or, if it did know of the crime, that it did not consent to the crime. Other courts have held that the language is to be read in the conjunctive. Under the conjunctive reading, a claimant must show that it did not have knowledge of the crime and that it did not consent to the crime. Therefore, under the conjunctive analysis, if the property owner has knowledge of the illegal use of the property, the innocent owner defense cannot be asserted, regardless of any steps which may have been taken by the claimant to report or halt the crime. Finally, some courts have taken the approach that a claimant, in order to establish the innocent owner defense, must have done "all that could be reasonably expected" to prevent the crime.

The procedures for seizing property subject to civil forfeiture under property subject to forfeiture does have available to it an administrative proceeding which provides that party with an opportunity to petition the Department of Justice for funds to ameliorate the effects of the forfeiture of the property. This administrative proceeding is referred to as remission and mitigation. See 28 C.F.R. §§ 9.1-9.7 (1989). Under the regulations providing for this procedure, remission may be obtained when the petitioner has a valid, good faith interest in the seized property, had no knowledge of the illegal activity, and took all reasonable steps to prevent the illegal use of the property. See United States v. Premises Known as 171-02 Liberty Avenue, 710 F. Supp. 46, 49 (E.D.N.Y. 1989).


United States v. $39,000 in Canadian Currency, 801 F.2d at 1216-17.


Several courts have held that the standard of knowledge to be applied is that of actual knowledge. See United States v. Ten Thousand Six Hundred Ninety-Four Dollars ($10,694.00) United States Currency, 828 F.2d 233, 235 (4th Cir. 1987), overruled by Case of One 1985 Nissan 300ZX, VIN: JNIC214SFX069854, 889 F.2d 1317 (4th Cir. 1989), where the court stated that there is "nothing in the plain language of § 881(a)(6) requiring courts to look to the objective rather than subjective knowledge of the owner when determining whether forfeiture is proper. . . . [W]e conclude that § 881(a)(6) envisions an actual knowledge inquiry." Id. at 234-35. Accord United States v. Banco Cafetero Pan., 797 F.2d 1154 (2nd Cir. 1986); United States v. Four Million Two Hundred and Fifty-Five Thousand, 762 F.2d 895, 906 (11th Cir. 1985), cert. denied, 474 U.S. 1056 (1986).


See, e.g., United States v. Four Million Two Hundred Fifty-Five Thousand, 762 F.2d 895 (11th Cir. 1985), cert. denied, 474 U.S. 1056 (1986); United States v. One (1) 1982 28' International Vessel, 741 F.2d 1319, 1322 (11th Cir. 1984). These courts, and others adopting this standard, rely
the Controlled Substances Act are set forth in the Supplemental Rules for Certain Admiralty and Maritime Claims. 60

3. Relation Back Under the Controlled Substances Act

As with RICO and the CCE, section 881 of the Controlled Substances Act codifies the relation-back doctrine by providing that title to the forfeited property vests in the United States at the time of “commission of the act giving rise to forfeiture under this section”. 61 However, subsection 881(h) of the Controlled Substances Act, unlike subsections 881(a)(6) and (7) of this Act and unlike the relation-back provisions of RICO and the CCE, does not contain innocent owner language. Because of this, courts disagree over whether the relation-back provisions of subsection 881(h) effectively circumvent the innocent owner defense otherwise available under subsections 881(a)(6) and (7).

Some courts have strictly construed the subsection 881(h) relation-
back doctrine, holding that once an illegal act has occurred, no one can acquire an interest in the property superior to that of the United States, due to the fact that subsection 881(h), unlike subsections 881(a)(6) and (7), contains no innocent owner exception and therefore no such exception to this codified relation-back doctrine exists. As a result, under this strict interpretation, no secured creditor, regardless of its innocence, could acquire an interest in property subject to forfeiture superior to the interest of the United States once the illegal act giving rise to forfeiture has occurred. Other courts have held that the doctrine discussed in Stowell does not apply to section 881 of the Controlled Substances Act, based on the interpretation that the section 881 forfeiture provision is permissive rather than mandatory.

III. OKLAHOMA LAW OF FORFEITURE OVERVIEW

OCOPA and the Oklahoma Controlled Substances Act are supported by the same policies as those underlying the federal laws discussed.

62. See, e.g., Eggleston v. Colorado, 873 F.2d 242, 248 (10th Cir. 1989), cert. denied sub nom. Colorado Dept. of Revenue v. United States, 110 S. Ct. 1112 (1990), in which the court held that while title of the government in forfeited property was subject to the innocent owner defense, any interest of the alleged innocent owner in the property must vest prior to the illegal act; United States v. $41,305 in Currency, 802 F.2d 1339, 1346 (11th Cir. 1986), in which the court, in dicta, stated that illegal use of property "immediately vests title to the property in the sovereign and cuts off rights of third parties to obtain legally protectible interests in the property"; United States v. One Parcel of Real Estate Property, 660 F. Supp. 483, 487 (S.D. Miss. 1987), aff'd, 831 F.2d 566 (5th Cir. 1987), in which the court stated that "the property interest asserted by the claimant must pre-date the right to forfeiture asserted by the United States, for it is well established that when property is subject to forfeiture for violation of the law, title vests absolutely in the government on the date of the illegal act. Seizure and a subsequent decree of forfeiture merely confirms the forfeiture that has already taken place."

63. See supra notes 35-38 and accompanying text.

64. In United States v. Currency Totalling $48,318.08, 609 F.2d 210 (5th Cir. 1980), reh'g denied, 612 F.2d 579 (5th Cir. 1980), the court distinguished, in a matter of first impression, the application of the relation-back doctrine of Stowell to statutes mandating forfeiture as opposed to statutes permitting forfeiture. The statute interpreted in Stowell required that the property "shall be forfeited", whereas the statute interpreted in Currency Totalling $48,318.08 provided that the property be "subject to seizure and forfeiture". Distinguishing between the "shall" language and the "subject to" language, the court in Currency Totalling $48,318.08 held that the relation-back doctrine as set forth in Stowell "does not apply where the statute provides only for a possibility of subsequent forfeiture". Currency Totalling $48,310.08, 609 F.2d at 213. Subsequently, courts interpreting the forfeiture provisions of section 881 have held that since the language of subsection 881(a) states that the property "shall be subject to forfeiture to the United States" that this provision is permissive rather than mandatory and that, as a result, the Stowell relation-back doctrine is inapplicable. See, e.g., United States v. Thirteen Thousand Dollars in United States Currency, 733 F.2d 581, 584 (8th Cir. 1984); United States v. Real Property Titled in Name of Shashin, Ltd., 660 F. Supp. 332 (D. Haw. 1987); United States v. A Parcel of Real Property, 650 F. Supp. 1534 (E.D. La. 1987). For a discussion supporting this more lenient application of the relation-back doctrine, see Comment, Tempering the Relation-Back Doctrine: A More Reasonable Approach to Civil Forfeiture in Drug Cases, 76 Va. L. Rev. 165, 183-196 (1990).
above. OCOPA provides for criminal forfeiture and civil divestiture. The Oklahoma Controlled Substances Act provides for civil forfeiture.

A. Criminal (in personam) Forfeiture Under OCOPA

OCOPA provides for criminal forfeiture of certain property, discussed below, as part of the punishment for a violation of any of the provisions of section 1403 of OCOPA, which prohibits activities conducted through a pattern of racketeering activity, or the collection of an unlawful debt.65 As under RICO and the CCE, conviction is a pre-condition to criminal forfeiture under OCOPA.66

1. Property Subject to Criminal Forfeiture Under OCOPA

Any party convicted of violating any provision of section 1403 of OCOPA must criminally forfeit to the state any real or personal property used in the course of, intended for use in the course of, derived from, or realized through conduct in violation of Section [1403] ... of the Oklahoma Corrupt Organizations Prevention Act, including any property constituting an interest in or means of control or influence over the enterprise involved in the conduct in violation of Section [1403] ... 67

Upon approval of the district court, all property forfeited in any

65. OKLA. STAT. tit. 22, § 1403 (Supp. 1990) provides that:
A. No person employed by or associated with any enterprise shall conduct or participate in, directly or indirectly, the affairs of the enterprise through a pattern of racketeering activity or the collection of an unlawful debt.
B. No person, through a pattern of racketeering activity or through the collection of an unlawful debt, shall acquire or maintain, directly or indirectly, any interest in or control of any enterprise or real property.
C. No person who has received any proceeds derived, directly or indirectly, from a pattern of racketeering activity, or through the collection of any unlawful debt, in which he participated as a principal, shall use or invest, directly or indirectly, any part of the proceeds or any proceeds derived from the investment or use of any of those proceeds in the acquisition of any right, title or interest in real property or in the establishment or operation of any enterprise. ... 
D. No person shall attempt to violate or conspire with others to violate the provisions of subsection A, B or C of this section.


67. Id. § 1405(A). "Real property" is defined by OCOPA as "any real property or any interest in real property, including any lease of, or mortgage upon real property. Real property and beneficial interest in real property shall be deemed to be located where the real property is located ...." Id. § 1402(11).

"Personal property" is defined to include "personal property, or any interest in such personal property, or any right, including bank accounts, debts, corporate stocks, patents or copyrights. Personal property and beneficial interest in personal property shall be deemed to be located where the trustee, the personal property, or the instrument evidencing the right is located ...." Id. § 1402(8).
such criminal proceeding under OCOPA must be disposed of by the Attorney General or district attorney "as soon as feasible, making due provisions for the rights of innocent parties" and

D. The proceeds of any sale or other disposition of forfeited property imposed pursuant to the Oklahoma Corrupt Organizations Prevention Act shall be applied as follows:

1. To a bona fide innocent purchaser, conditional sales vendor, or mortgagee of the forfeited property up to the amount of his interest in the forfeited property.

The foregoing provision does not state that the proceeds from disposition of the forfeited property will be applied in the order indicated, that is, first to bona fide innocent purchasers, conditional vendors, or mortgagees of the forfeited property. While this would be a preferable and reasonable interpretation, it must be compared to Oklahoma's only other forfeiture act, the Oklahoma Controlled Substances Act, discussed below, which expressly states that the proceeds under its forfeiture provision are to be applied "in the order indicated." The fact that the coinciding provision of OCOPA does not contain this language raises the question of whether the omission of such language in OCOPA evidences the intent of the Oklahoma legislature to not establish an order of application of proceeds, or whether this was merely an inadvertent drafting omission. A court should apply proceeds in the order indicated, since such an interpretation would maintain the integrity of the underlying policy in preserving the interests of bona fide innocent purchasers and mortgagees. Also, this would not benefit the government beyond the interests and rights expressly given them by OCOPA.

2. Procedure for Criminal Forfeiture Under OCOPA

The procedures established for criminal forfeiture are set out in section 1405(B) of OCOPA. As noted above, a pre-condition to criminal forfeiture under OCOPA is that the defendant be convicted of a violation of OCOPA. The statute further requires that a "special verdict containing a finding of property subject to forfeiture, specifying the extent of

---

68. *Id.* § 1410(A).
69. *Id.* § 1410(D). OCOPA defines an "innocent party" to include "bona fide purchasers and victims". *Id.* § 1402(3).
70. *Id.* § 1405(B).
such property and describing with specificity\textsuperscript{71} such property and the circumstances by which the property is subject to forfeiture" must be returned and if any property which is described in the special verdict of criminal forfeiture

\begin{itemize}
  \item[b.] has been sold to a bona fide purchaser for value,
  \item[\ldots] or
  \item[g.] is subject to a valid security interest, to the extent of the security interest, held by a bank, savings and loan association, credit union or supervised lender licensed by the Oklahoma Administrator of Consumer Credit, acquired prior to the lien notice provided
\end{itemize}

by section 1412 of OCOPA, then, the district court shall "order forfeiture of any other property of the defendant up to the value of the property that is unreachable" by application of this provision\textsuperscript{72}.

The foregoing provision, however does not address the situation in which there is no other reachable property. Due to the use of the word "unreachable" in reference to property subject to a valid security interest, and the fact the state acquires the property subject to these other specified categories of interests, the provision should be construed to prohibit forfeiture of property subject to a valid security interest, but only to the extent of such a valid interest.

As with RICO and the CCE, an order of criminal forfeiture authorizes seizure by the Attorney General or district attorney of the property declared forfeited.\textsuperscript{73} The terms and conditions for the time and manner of seizure are to be determined by the district court.\textsuperscript{74}

In addition to forfeiture, the district court may, after filing of an indictment or information by the Attorney General or district attorney, and after hearing and thirty (30) days notice and opportunity to participate to any person affected, enter restraining orders, injunctions, require bonds, or take other protective action such as appointment of a receiver, if the Attorney General or district attorney shows "by a preponderance of the evidence" that such is necessary in order to preserve and protect the property which is the subject of the criminal forfeiture proceeding.\textsuperscript{75} Further, as with RICO and the CCE, after entry of judgment, the district court has the authority to enter restraining orders, injunctions, require

\textsuperscript{71} The term "specificity" is not defined by OCOPA and this lack of definition creates an uncertainty as to the effect of special verdicts and subsequent lien notices which contain incomplete or inaccurate descriptions of property. See infra notes 89-92 and accompanying text.

\textsuperscript{72} Id. § 1405(B)(2) (emphasis added).

\textsuperscript{73} Id. § 1407.

\textsuperscript{74} Id.

\textsuperscript{75} Id. § 1406.
bonds, or take such other action, including appointment of a receiver as deemed proper in order to protect the property subject to the interests of the state. The same protection of a lender with respect to its security interest in the property is not set out with respect to the appointment of a receiver; therefore, the rights of a lender to secure appointment of a receiver or commence a foreclosure proceeding should be expected to be subject to the rights of the state under these provisions. It is not specified if an injunction could prevent or delay a foreclosure proceeding or ancillary appointment of a receiver, or if the state would simply be required to enter its claim in the same manner as any other lienholder.

3. Relation Back Under OCOPA

In contrast to the federal forfeiture statutes, the interest of the state in forfeited property under OCOPA does not relate back to the time of the violative act or to the seizure of the property. Rather, it is “created” by filing a lien notice as provided in OCOPA. While the lien notice filing creates the interest, title does not transfer to the state at the time of lien filing, but rather:

Upon the entry of a final judgment of forfeiture in favor of the state, the title to the forfeited real property shall be transferred to the state and [the judgment of forfeiture] shall be recorded in the official records of the county where the real property or beneficial interest in it is located.77

The forfeiture judgment in fact vests title in the state, with relation back, for priority purposes, to the lien notice filing in a manner similar to the perfection by judicial condemnation procedure of the Controlled Substances Act, discussed above. The statutory requirement that the judgment be recorded is necessary to impart constructive notice of the transfer of legal title from the record title owner to the government and is consistent with state laws and title practice standards affecting judgments purporting to either convey title to or which affect an interest in real property.78

76. Id.
77. Id. § 1412(F) (emphasis added).
78. See, e.g., OKLA STAT. tit. 12, § 706(A) (Supp. 1990), providing that the lien of a judgment commences upon the date the judgment is filed in the office of the County Clerk; OKLA. STAT. tit. 12, §§ 181, 1278 (1981); OBA Real Property Section Title Standard 16.3 (1990), providing that judgments of the district court awarding title to one spouse in a divorce action are effective to pass title, but they must be recorded in the records of the county clerk to give constructive notice of such transfers.
With respect to personal property interests forfeited or beneficial interests therein OCOPA provides “the property shall be seized if not already in possession of the state and disposed of in accordance with the Oklahoma Corrupt Organizations Prevention Act.” Accordingly, the transfer or vesting of title in personal property occurs with possession by the state.

a. Effect of the State’s Interest on Valid Security Interests

In order for property which is subject to a “valid security interest” to be protected from forfeiture, the security interest must be “acquired prior to the lien notice”. In contrast to RICO and the CCE, which, as discussed above, provide that the right, title, and interest of the government relates back to the time of the illegal act, and can be defeated only by a bona fide purchaser for value, under OCOPA the interest of the state does not relate back to a time prior to, but is rather fixed at, the time a lien notice is filed by the state. OCOPA does not define “valid security interest” for purposes of determining the rights, protections, and interests of a secured party in property subject to forfeiture. Also, the OCOPA provision does not specify whether perfection in accordance with state law is necessary for the protection of a secured creditor’s security interest, or if an unperfected security interest is afforded the same protection, i.e., what is “valid.” Another unresolved issue is whether the competing interests of the state and the secured creditor, if perfection is not required, would then be subject to state laws governing priority.

Two theories may be advanced in addressing the issue of perfection of a secured creditor’s interest for determining the degree of protection afforded under OCOPA. Under the first theory, perfection is not required. In support of this theory, it may be argued that since the term “valid” is not synonymous with “perfected” as between the parties to a security agreement or mortgage (i.e., an unperfected lien may also be a valid lien as between the parties), the OCOPA provision should not be construed to require a perfected security interest in order to be protected. Also, the state does not acquire any greater interest in the property than the interests that the defendant had in the property, i.e., the

80. Id. § 1405(B).
81. “Other things being equal, different liens upon the same property have priority according to the time of their creation . . . .” OKLA STAT. tit. 42, § 15 (1981). The first mortgage filed for record is superior. See, e.g., Cassidy v. Bonner, 54 F.2d 234 (10th Cir. 1931); OKLA STAT. tit. 16, § 15 (1981).
82. See, e.g., Leche v. Ponca City Prod. Credit Ass'n, 478 P.2d 347, 350 (Okla. 1970), which
lien is "on the . . . property of the person named in the notice . . ." and the state is not a bona fide purchaser for value and should simply be subrogated to the rights, title, and interest of the person named in the lien notice and the final judgment. This theory is based on the proposition that the statute should not be construed to allow the state to acquire any greater rights in and to the property than the statute expressly provides at the time of filing the lien notice or any greater rights in and to the property than those of the defendant at the time of the lien notice.

Under the second theory, perfection is required. In support of this theory, it may be argued that a lienholder has an obligation to protect its security interest from subsequently arising interests of third parties who take steps to appropriately perfect their security interests, without knowledge of the first interest, in and to property. Accordingly, since the record is notice for purposes of a third party who may rely on it, and since an unperfected security interest under state law is junior and subordinate to a perfected security interest, the filing of the lien notice by the state should establish priority of the state’s lien over any unperfected security interests in the property.

While the second argument is consistent with general priority principles, it would not appear to be consistent with the intent of the Oklahoma legislature in drafting the OCOPA statute which expressly refers to security interests “acquired” prior to the lien notice and does not refer to security interests “perfected”. There is a definite distinction between “acquired” and “perfected” under Oklahoma law in reference to liens and the relative interests of secured creditors. There are no Oklahoma decisions construing this provision of OCOPA; however, other jurisdictions in construing “bona fide” (as opposed to Oklahoma’s use of the word “valid”) security interests under certain drug forfeiture laws have been split on this issue.

---

84. See infra note 132 and accompanying text.
b. OCOPA Lien Notice Requirements

The lien notice required is provided by OCOPA as follows:

A. At any time after the institution of any civil proceeding or at any time after the filing of an indictment or information pursuant to the provisions of the Oklahoma Corrupt Organizations Prevention Act,\(^85\) the state may file a lien notice in the official records as may be required for perfecting a security interest for any given property.\(^86\)

Any lien notice filed pursuant to OCOPA is required to be signed by the Attorney General or by a district attorney and in form promulgated by the Attorney General.\(^87\) Any such lien notice must also include the following information:

1. The name of the person against whom the proceeding has been brought or who has been charged or indicted . . . and any other names under which the person may be known. [It] . . . may also name in the lien notice any enterprise that is either controlled by or entirely owned by the person;
2. If known . . . the present residence and business addresses of the persons named in the lien notice;
3. A reference to the criminal or civil proceeding stating that a proceeding pursuant to the provisions of the Oklahoma Corrupt Organizations Prevention Act has been brought against the person named in the lien notice or that the person has been charged or indicted for a violation of this act, the name of the county or counties where the proceeding has been brought or the conviction was made and any other lien notices filed, and, if known . . . at the time of filing the lien notice, the case number of the proceeding;
4. A statement that the notice is being filed pursuant to the provisions of the Oklahoma Corrupt Organizations Prevention Act; and
5. The name and address of the Attorney General or the district attorney filing the lien notice.\(^88\)

As noted above, OCOPA requires that the lien notice be filed in the same manner "required for perfecting a security interest for any given property . . . ."\(^89\) This imposes on the state the same specificity in description and recording requirements as are imposed on any other person perfecting an interest in real or personal property. While there are no

---

86. Id. § 1412(A) (emphasis added).
87. Id. § 1412(B).
88. Id.
89. Id. § 1412(A).
cases reported which construe this requirement, the specificity in description required for purposes of an effective lien notice with respect to real property, and, arguably, the special verdict discussed above, should be interpreted to require a complete and valid legal description, sufficient to satisfy title examination and statutory requirements for proper recording and indexing, thus imparting constructive notice.

A description of real property in a mortgage is sufficient if it is enough to cause a reasonably prudent person to investigate and if upon investigation, the property subject to the mortgage may be identified. The description of personal property for purposes of Article 9 of the Oklahoma Uniform Commercial Code should comply with the description requirements of the UCC (except in the case of non-Article 9 personal property security interests such as those subject to Federal Aviation Administration or title certificate lien notation requirements which must satisfy other standards). The UCC provides that a financing statement description of personal property is sufficient if a third party can determine the property which is subject to the financing statement.

A financing statement description of property need not be specific and it is enough that it simply specify the "type" of collateral.

If the description of the property subject to forfeiture (or divestiture, discussed below) is not a complete and sufficient description, constructive notice will not be effectively imparted by the state to either protect its interest or determine creditors' rights and claims. Accordingly, without a complete and sufficient description, the very purpose of a lien notice is defeated. The state should not, in the event of a defective description of the property or defective filing of the lien notice, be permitted to occupy a position in relation to the property superior to that of others relying on the public records.

c. Relative Priorities Subsequent to Lien Notice and Property Subject to Lien Notice

Relative priorities and property subject to the lien notice are established by OCOPA which also provides the time of creation of the state's lien as follows:

D. From the time of its filing, a lien notice creates a lien in favor of the state on the following property of the person named in the notice:

1. Any personal or real property owned by the person under any name set forth in the lien notice which is situated in the county where the notice is filed; and

2. Any beneficial interest of said property owned by the person under any name located in the county where the notice is filed.

The lien shall commence and attach as of the time of filing of the lien notice and shall continue thereafter until expiration, termination, or release of the lien. The lien created in favor of the state shall be superior and prior to the interest of any other person in personal or real property or beneficial interest in said property, if the interest is acquired subsequent to the filing of the notice.93

The description of property affected by a lien notice filing is substantially broader in scope than the statutory description of property subject to forfeiture. The broader scope of property subject to the lien notice is logical since the lien notice is filed prior to concluding a criminal (or civil) proceeding and, at the time of lien notice filing, the scope of the property which will actually be subject to a special verdict ordering either forfeiture or divestiture will not be known. Since the lien notice is ineffective except as to property expressly provided by statute, and the lien of the state commences and attaches as of filing, the state's interest would not be protected if a more restricted description of property were required prior to disposition and identification of the specific property actually subject to forfeiture.

A lien notice does not affect the rights of any person named therein to rents, avails, and proceeds of any property subject to forfeiture prior to judgment of forfeiture.94 The severing of this interest in property could arguably result in a secured creditor's interest in property being bifurcated so that an assignment of rents, issues, and profits would be superior to the state's interest, even though the secured creditor's interest in the property itself could be subordinate. Any reliance on such theory, however, should be with knowledge of potential adverse judicial construction, and it is unlikely any title protection could be obtained under that

94. Id. § 1412(H) states:

The filing of a lien notice shall not affect the use to which personal or real property or a beneficial interest in it owned by the person named in the racketeering lien may be entitled to or the right of the person to receive any avails, rents, or other proceeds resulting from the use and ownership of the property, except for the conveyance of said property, until a judgment of forfeiture is entered.

Id.
scenario. This is particularly risky given the fact that the statute only addresses the rights of the person named, and the notice is of record. It should be expected that a subordinate secured creditor’s interest therein also would only be free of the state’s interest during the pendency.

The lien notice statute of OCOPA is discretionary (i.e., “may” file). The statute fails to address the effect of the state electing not to file the lien notice and how that election impacts a secured creditor’s interests. While not addressed by OCOPA, if the state does not file the lien notice, the rights of the state subsequently created in the property should be subject to the claims of intervening secured interests within the foregoing provisions based on the statutory provision that the filing of the lien notice is, in fact, the act which “creates” the lien of the state.

A question arises as to the significance of a secured creditor filing an instrument perfecting a security interest “acquired” after institution of civil forfeiture proceedings, or filing of an indictment or information by the state. If the secured creditor has full knowledge of the proceedings, indictment or information, or of the illegal acts of the borrower/defendant forming the basis for such seizure, then, prior to a lien notice filing by the state, the question is whether the secured creditor may rely on the race notice concept set out in the statute (“filing” of the lien notice “creates” the lien), or is there any requirement of good faith, innocence, lack of knowledge, or notice, either actual, constructive, or inquiry. Section 1405 clearly refers to interests “acquired prior to the lien notice” and section 1412 clearly provides the lien of the state is “from the time of its filing”. This would seem to completely eliminate any such knowledge, notice, good faith, or innocence standards.

d. Term of Lien Notice and to Whom it Applies

The Attorney General, or district attorney, as applicable, is required to provide a copy of the recorded lien notice to the person named in the lien notice within ten (10) days after it is filed of record. The copy is required to be provided by certified mail, return receipt requested, to the last-known business or residential address of the named person. Service by publication is permitted only if service by certified mail is not possible.

A particular lien notice applies to only one person (notwithstanding use of the plural form in subitem 2 above) and, if applicable, the names of

95. Id. § 1412(C).
96. Id.
enterprises, as permitted by the statute. A separate lien notice is required to be filed for any other persons. The statute does not address the effect of a defective lien notice, which purports to apply to more than one person, on a secured creditor who subsequently acquires or perfects a security interest. It is not known if the lien notice fails completely to impart constructive notice; if it is without effect only as to the named persons; if it applies to only the first named person; or if, in fact, it is sufficient to give constructive notice of the state’s interest. Clearly any secured creditor who has any notice or knowledge of the additional parties should conduct its business as if the lien notice is effective as to such additional parties and requires releases and terminations as appropriate.

A lien notice filed pursuant to the requirements of OCOPA is valid for a term of six years from the date of filing and a renewal lien notice may be filed which would extend the term of the lien notice for six years “from the date of its filing”. Only one renewal of the lien notice may be filed and the statute does not address when the renewal must be filed or the effect of filing a lien notice renewal after expiration of the initial six year lien notice period. Without question, the provision should be construed to require filing of a lien notice renewal prior to expiration of the original lien term since one cannot renew that which has lapsed. A secured creditor should be able to rely on the statute in concluding that any lien notice filed more than six years prior and not renewed by filing of a lien notice renewal is completely without effect and the interest of an intervening secured creditor in the property should be superior. However, to avoid perfection and priority issues or disputes, and, as a practical matter, prudent lenders and title examiners will require a release of the (purportedly expired) lien notice. Additionally, there are certain circumstances, discussed below, which will result in the effectiveness of a lien notice beyond the six year term other than by filing a lien notice renewal.

97. Id. § 1412(B) (5).
98. But see Matter of Fowler, 407 F. Supp. 799 (W.D. Okla. 1975), which addressed the listing of multiple debtors on a UCC-1 financing statement. In that case, the financing statement filed with respect to a partnership and identifying two general partners was subsequently held to be sufficient notice with respect to interests in property of one of the general partners named.
99. OKLA. STAT. tit. 22, § 1412(I).
100. Id.
101. An Article 9 security interest becomes unperfected as against other interests when lapse occurs. See OKLA. STAT. tit. 12A, § 9-403(2) (Supp. 1990); Security Nat'l Bank and Trust Co. of Norman v. Dentsply Professional Plan, 617 P.2d 1340 (1980). OKLA. STAT. tit. 46, § 301(A) (1981) provides that no suit, action, or proceeding to foreclose a mortgage or enforce other remedies may be maintained after expiration of ten (10) years from the stated maturity of the last obligation secured unless a written notice of extension is filed of record.
e. Termination or Release of Lien Notice

If a “civil proceeding” (discussed below), as provided for in OCOPA, which seeks forfeiture of property owned by the person named in the lien notice is not instituted, then acquittal in the criminal proceeding of such person or dismissal of the criminal proceeding will terminate the lien notice. However, if a civil proceeding has been instituted for divestiture, the lien notice will continue for the duration of the civil proceeding even though the criminal proceeding may be dismissed or the defendant (identified in the lien notice) acquitted. Accordingly, a lien notice may continue for a period substantially longer than the above six year term(s).

Any recorded lien notice may be released in whole or in part with respect to any property described in it or with respect to any beneficial interest in such property. The statute provides that such a release “may” be filed in the appropriate county records. While this is permissive, prudent lenders and title examiners will require that the release be filed for record.

A lien filing may also be released by the initiative of the person named in the lien notice if no civil proceeding or criminal proceeding is then pending. This procedure requires that the person named “apply to the district court in the county where the notice has been filed for the release or extinguishment of the notice” in which event “the district court shall enter a judgment extinguishing the lien notice or releasing the personal or real property or beneficial interest in it from the lien notice” Further, even if a civil proceeding is pending against a person named in a lien notice, the person named may enter a motion requesting relief of certain property from the civil proceeding in which case the district court may grant the relief at a special hearing:

1. If a sale of the personal or real property or beneficial interest in it is pending and the filing of the notice prevents the sale of the property or interest, the district court shall immediately enter its order releasing from the lien notice any specific personal or real property or beneficial interest in it. The proceeds . . . shall be deposited with the clerk of the district court, subject to the further order of the district court; and

2. At the hearing, the district court may release from the lien notice any personal or real property or beneficial interest in it upon the

103. Id. § 1412(J).
104. Id. § 1412(L).
posting by such person of such security as is equal to the value of
the personal or real property or beneficial interest in it owned by
such person. 105

Therefore, in the case of purchase money financing, secured credi-
tors are cautioned not to release funds to the seller if the property is
subject to a lien notice filing to be released in accordance with the forego-
ing. Instead the purchase money lender, at a minimum, should require
that the seller execute a consent for the transfer of the purchase money
proceeds, and then actually should transfer them, to the clerk of the dis-

f. Fraudulent and Preferential Conveyances Under OCOPA

With respect to disposition of property after filing of the lien notice,
OCOPA includes a fraudulent and preferential conveyance provision
which could be adverse to secured creditors. It provides that a convey-
ance, alienation, or disposition of personal or real property or an interest
in it will be treated as “a fraudulent and preferential conveyance” if the
“property or a beneficial interest in it . . . is conveyed, alienated, disposed
of, or otherwise rendered unavailable for forfeiture after the filing of the
lien notice . . . ” 106 In the case of such transfer, the state may

institute an action in any district court against the person named in the
lien notice, the defendant in the civil proceeding, or the person con-

victed in the criminal proceeding; and the court shall enter final judg-
ment against such person or any beneficial interest in it together with
investigative costs and attorneys fees incurred by the state in the ac-
tion. If a civil proceeding is pending, such action shall be filed only in
the court where such civil proceeding is pending. 107

The procedure for setting aside a fraudulent and preferential conveyance
is not provided by OCOPA.

B. Civil (in rem) Divestiture Under OCOPA

Civil proceedings under OCOPA are provided at title 22, section
1409 of the Oklahoma Statutes. As under its federal counterpart, civil
proceedings under OCOPA are not conditioned upon criminal convic-
tion and are not required to be ancillary to a criminal proceeding. The

105. Id. § 1412(M).
106. Id. § 1412(G).
107. Id.
civil proceeding is an independent action. As discussed above, the standard of evidence is substantially lower in a civil proceeding than in a criminal proceeding; therefore, the state may find the remedies afforded under the civil provisions of OCOPA satisfactory or even preferable to protect societal interests.\textsuperscript{108}

The civil proceedings provision of OCOPA does not use the word "forfeiture" in describing the relief which may be granted by order of the court. OCOPA instead provides for a "divestiture" in which the Attorney General, any district attorney, or any district attorney appointed under the provisions of title 19, section 215.9 of the Oklahoma Statutes, may institute civil proceedings against any person, for relief from conduct constituting a violation of any provisions of section 1403 of OCOPA, as follows:

the district court, after making due provisions for the rights of innocent parties, may grant relief by entering any appropriate order of judgment, including:

1. Ordering any defendant to divest himself of any interest in any enterprise or any real property;
2. Imposing reasonable restrictions upon the future activities or investments of any defendant . . . ;
3. Ordering the dissolution or reorganization of any enterprise;
4. Ordering the suspension or revocation of a license, permit, or prior approval granted to any enterprise by an agency of the state; or
5. Ordering the surrender of the charter of [such] corporation . . . or the revocation of a certificate authorizing a foreign corporation to conduct business within the state.\textsuperscript{109}

In addition, the court may grant injunctions, restraining orders, or require bonds.\textsuperscript{110}

The fact that the civil proceeding does not provide for "forfeiture", but rather requires, inter alia, "divestiture", and does not specify "to the state" is significant. Given the abhorrence in the law for forfeitures,\textsuperscript{111}

\begin{itemize}
\item \textsuperscript{108} See supra note 49 and accompanying text.
\item \textsuperscript{109} Okla. Stat. tit. 22, § 1409(A) (Supp. 1990) (emphasis added).
\item \textsuperscript{110} Id.
\end{itemize}
and the constitutional constraints against forfeiture, it should be expected the provision would be strictly construed. If so, this should afford a secured creditor greater flexibility in protecting its security interest in the property subject to divestiture. Other provisions of OCOPA, however, refer to both civil proceedings and “forfeiture” within the same provisions, creating potential confusion and ambiguity.

1. Distinction Between Forfeiture and Divestiture

Oklahoma statutory law does not provide a basis for establishing the distinction between “forfeiture” and “divestiture”, and there are no reported Oklahoma cases addressing the distinction. However, pursuant to title 22, Section 1419 of the Oklahoma Statutes, OCOPA is to be construed, when the language of OCOPA is the same or similar to the language of RICO, in accordance with the construction given to federal law by federal courts. A federal court addressed this issue in United States v. Bonanno Organized Crime Family.

In Bonanno the U.S. District Court distinguished between “forfeiture” and “divestiture” in determining the appropriateness of certain civil remedies under RICO. Divestiture was defined by the court as “where the owner of the property retains the proceeds of its sale” while forfeiture occurred “where the proceeds are retained by the government”. In Bonanno, the government sought to deprive the defendant of certain property without compensation. The court determined that the provisions of section 1964 of RICO entitled “Civil remedies” authorized appropriate orders “including, but not limited to: ordering any person to divest himself of” certain interests and that the court had discretion in the fashioning of equitable relief. Accordingly, while “not expressly authorized by the RICO statute because it does not contemplate compensation to the defendant, such relief would be authorized

112. See supra note 42, for a discussion of U.S. CONST. art. III, § 3, cl. 2. See also OKLA. CONST. art. II, § 15, which provides: “No bill of attainder, ex post facto law, nor any law impairing the obligation of contracts, shall ever be passed. No conviction shall work a corruption of blood or forfeiture of estate: Provided, that this provision shall not prohibit the imposition of pecuniary penalties.”


to the extent that it is an equitable remedy which furthers § 1964's remedial goals.” The court held that “if the government succeeds in...proving that the defendants have violated RICO, it would be within the broad equitable powers of the Court to fashion relief requiring the defendants to disgorge any ill-gotten gains”.

While the foregoing expanded remedy of disgorgement should not be expected to be applied since OCOPA and RICO are distinguishable on this issue by virtue of RICO's inclusion (and OCOPA's omitting) the “including, but not limited to” language in the civil remedies provision, the distinction drawn between divestiture and forfeiture should be applied. The court stated that “[t]he government would not be entitled to an order depriving, without compensation, the defendants of their entire interest in the enterprises at issue regardless of whether the property interest is tainted.” If not so limited, “[s]uch relief would amount to a forfeiture and would be unauthorized under RICO's civil remedies provision.”

In cases of divestiture, “[t]he defendant receives compensation for the loss of the interest although he may suffer some economic hardship as a result of the divestiture.”

A civil action under OCOPA does not preclude a civil or criminal remedy otherwise provided under OCOPA or any other law. In addition to other relief provided, OCOPA provides that the state may seek civil relief in federal court under OCOPA or civil relief pursuant to any comparable provision of federal law. The question of whether this allows incorporation of the RICO provision discussed above as to divestiture, or, if a narrower intent established in the state law precludes application of an expanded federal remedy, is untested, i.e., judicial construction is not available addressing whether the federal provision is “comparable”.

2. Lien Notice and Lis Pendens Notice

A lien notice, in accordance with the provisions discussed above in the case of criminal proceedings under OCOPA, may be filed. In addition, section 1412(E) of title 22 of the Oklahoma Statutes provides for filing of a lis pendens notice of civil divestiture proceedings as follows:

117. Id. at 1448.
118. Id. at 1449 (emphasis added).
119. Id.
120. Id.
121. Id. at 1447.
122. OKLA. STAT. tit. 22, § 1409(G) (Supp. 1990).
123. Id. § 1416.
E. In conjunction with any civil proceeding:
   1. The Attorney General or district attorney may file without prior court order in any county a lis pendens pursuant to the provisions of the Oklahoma Corrupt Organizations Prevention Act. . . . [A]ny person acquiring an interest in the subject real property or beneficial interest in it after the filing of the lis pendens, shall take the interest subject to the civil proceeding and any subsequent judgment of forfeiture; and
   2. If a lien notice has been filed, the Attorney General or district attorney may name as defendants, in addition to the person named in the notice, any person acquiring an interest in the personal or real property or beneficial interest in it subsequent to the filing of the notice. If a judgment of forfeiture is entered in the proceeding in favor of the state, the interest of any person in the property that was acquired subsequent to the filing of the notice and judgment of forfeiture shall be subject to the notice and judgment of forfeiture.124

Accordingly, a lis pendens notice, or a lien notice as discussed above, effectively establishes of record the interest claim of the state, and the rights of third parties are subject to the notice imparted.

The simple running of the clock may not provide a secured creditor any protection given the extended limitations period provided by OCOPA. Section 1409(E) of OCOPA provides that a civil action “may be commenced at any time within five (5) years after the conduct made unlawful . . . terminates or the cause of action accrues.” However,

[T]he running of the period of limitations . . . with respect to any cause of action of an aggrieved person, based in whole or in part upon any matter complained of in any such prosecution, action, or proceeding shall be suspended during the pendency of such prosecution, action, or proceeding and for two (2) years following its termination.125

There are no reported cases construing OCOPA as of the date of this article.

C. Civil (in rem) Forfeitures Under the Oklahoma Controlled Substances Act.

The Oklahoma Controlled Substances Act126 was initially adopted in 1971 and was modeled in substantial part on the Uniform Controlled Substances Act.127 It is based on the same policy goals set forth supra for

124. Id. § 1412(E) (emphasis added).
125. Id. § 1409(E).
the federal Controlled Substances Act. Proceedings under the Oklahoma Controlled Substances Act are civil in nature and the Act does not include a provision for criminal forfeiture.

1. Property Subject to Forfeiture Under the Oklahoma Controlled Substances Act

The Oklahoma Controlled Substances Act provides that certain property, both real and personal property and interests in such property, is subject to forfeiture for violation of that Act including, *inter alia*, the following:

A. . . .

4. All conveyances, including aircraft, vehicles, vessels, or farm implements which are used to transport, conceal, or cultivate for the purpose of distribution . . . or . . . to facilitate the transportation or cultivation for the purpose of sale or receipt of property described in . . . this subsection or when such property is unlawfully possessed by an occupant thereof, except that:
   a. no conveyance . . . shall be forfeited . . . unless it shall appear that the owner or other person in charge of such conveyance was a consenting party or privy to a violation of the Uniform Controlled Dangerous Substances Act; and
   b. no conveyance shall be forfeited under the provisions of this section by reason of any act or omission established by the owner thereof to have been committed or omitted *without the knowledge or consent of such owner*, and if the act is committed by any person other than such owner the owner shall establish further that the conveyance was *unlawfully in the possession of a person other than the owner* in violation of the criminal laws of the United States, or of any state . . .

8. All real property, including any right, title, and interest in the whole of any lot or tract of land and any appurtenance or improvement thereto, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of the Uniform Controlled Dangerous Substances Act which is punishable by imprisonment for more than one (1) year, except that no property right, title or interest shall be forfeited pursuant to this paragraph, by reason of any act or omission established by the owner thereof.

128. See *supra* notes 8 to 11 and accompanying text.


to have been committed or omitted without the knowledge or consent of that owner.

B. Any property or thing of value... is subject to forfeiture if it is established by a preponderance of the evidence that such property or thing of value was acquired... during the period of the violation... or within a reasonable time after such period and there was no likely source for such... other than the violation...

C. Any property or thing of value... if it is established by preponderance of the evidence that the person has not paid all or part of a fine imposed...

D. All items forfeited in this section shall be forfeited under the procedures established in Section 2-506 of this title...

E. All property taken or detained... shall not be repleviable.

The Oklahoma Controlled Substances Act provides an "innocent owner" defense in subsections 2-503(A)(4)(b) and 2-503(A)(8). There are no cases reported under the Oklahoma Controlled Substances Act construing whether an "owner" includes a lienholder or mortgagee; however, at least one other jurisdiction has held it does not. 132 Nonetheless, in addition to the innocent owner provision, the Oklahoma Controlled Substances Act provides for a claim and relief in the forfeiture proceedings by lien holders and mortgagees, as follows:


132. See Commonwealth v. One 1978 Ford Van, Ford Motor Credit Co., 11 Mass. App. Ct. 760, 419 N.E.2d 1060 (1981), where the Appeals Court of Massachusetts considered the Massachusetts Controlled Substances Act, modeled in part on the Uniform Controlled Substances Act adopted by the National Conference of Commissioners on Uniform State Laws in 1970. Unif. Controlled Substances Act § 101 through § 607, 9 U.L.A. (Master ed. 1988). Section 505 of the Uniform Act provides in subsection (a)(4)(iv) that "a forfeiture of a conveyance encumbered by a bona fide security interest is subject to the interest of the secured party if he neither had knowledge of nor consented to the act or omission." Id. The Massachusetts court reflected on the history of the Massachusetts statute, and the fact that several bills were introduced in Massachusetts to provide an exception to forfeiture for the bona fide interests of a person without knowledge of the unlawful use. All of these bills were rejected. One 1978 Ford Van, 419 N.E.2d at 1062. Based on this history of rejection of an exception, the Appeals Court of Massachusetts concluded that the legislation was not intended to include within the word "owner" a party holding a security interest. Id. at 1063. The court noted that cases from other jurisdictions allowing relief to secured parties from forfeiture were based on express statutory exceptions analogous to that contained in the Uniform Act. Id. (citing One 1957 Chevrolet v. Division of Narcotics Control, 27 Ill. 2d 429, 189 N.E.2d 347 (1963); One Cessna Aircraft v. State, 90 N.M. 40, 559 P.2d 417 (1977); General Motors Acceptance Corp. v. Atkins, 204 Tenn. 700, 325 S.W.2d 270 (1959)). The lienholder claimant in the Massachusetts case had taken all steps required by law to perfect its security interest in the subject property. However, the court stated that the lienholder claimant was "charged with knowledge when it acquired its interest that secured parties were not excepted from the effect of... forfeiture." One 1978 Ford Van, 419 N.E.2d at 1064. Further, "the claimant must have foreseen and taken into account the occasional loss of a security interest to forfeiture. Moreover, forfeiture does not extinguish the underlying debt which remains enforceable against the maker of the note and any indorsers." Id.
H. The claimant of any right, title or interest in the property may prove his lien, mortgage or conditional sales contract to be a bona fide or innocent ownership interest and that his right, title or interest was created without any knowledge or reason to believe that the property was being, or was to be, used for the purpose charged.

I. In the event of such proof, the court shall order the property released to the bona fide or innocent owner, lien holder, mortgagee or vendor, if the amount due him is equal to, or in excess of, the value of the property as of the date of the seizure, it being the intention of this section to forfeit only the right, title or interest of the purchaser.

J. If the amount due to such person is less than the value of the property, or if no bona fide claim is established, the property shall be forfeited to the state and sold. . . .

K. Property taken or detained under this section shall not be repleviable. . . .

L. The proceeds of the sale . . . shall be distributed as follows, in the order indicated:

1. To the bona fide or innocent purchaser, conditional sales vendor or mortgagee of the property, if any, up to the amount of his interest in the property, when the court declaring the forfeiture orders a distribution to such person . . .

M. Whenever any vehicle, airplane or vessel is forfeited . . . the district court . . . may order [that such] . . . be retained by the . . . agency which seized [such] . . . for its official use.133

The foregoing subparagraph M of section 2-506 does not address the rights of the mortgagee; however, read in conjunction with the balance of section 2-506 of the Oklahoma Controlled Substances Act, it is reasonable to expect that a court would require disposition of the subparagraph M property in accordance with the other provisions of section 2-506 in order to protect the mortgagee’s interest.

In summary, during these proceedings, a secured creditor claiming an interest in the property must prove (i) its mortgage to be bona fide or that it has an innocent interest; (ii) that it had no knowledge of the illegal use of the property, and (iii) that it had no reason to believe there existed such illegal use. The Oklahoma Controlled Substances Act does not define “bona fide”, “innocent”, “knowledge”, or what constitutes “reason to believe”. Accordingly, a secured creditor must depend on uncertain judicial construction to ascertain the practices and procedures necessary for it to adequately protect in advance its security interest in property

which is or may become subject to forfeiture under the Oklahoma Controlled Substances Act.

2. Procedure for Forfeiture Under the Oklahoma Controlled Substances Act

The procedures for forfeiture under the Oklahoma Controlled Substances Act are set out in section 2-506. In general, the property is subject to seizure by a peace officer, and notice of seizure and intent to proceed to forfeiture proceedings are required to be filed in the office of the clerk of the district court for the county where the property is seized. A copy of the notice of seizure is required to be given to all “owners and parties in interest” by one of the following methods:

1. Upon each owner or party in interest whose right, title or interest is of record in the Tax Commission, by mailing a copy of the notice by certified mail to the address as given upon the records of the Tax Commission;
2. Upon each owner or party in interest whose name and address is known to the attorney in the office of the agency prosecuting the action to recover unpaid fines, by mailing a copy of the notice by registered mail to the last-known address; or
3. Upon all other owners or interested parties, whose addresses are unknown, but who are believed to have an interest in the property, by one publication in a newspaper of general circulation in the county where the seizure was made.\(^{134}\)

A “party in interest” is not defined by the Oklahoma Controlled Substances Act. However, read in conjunction with section 2-503(H), it should be construed to include those persons (including, inter alia, “mortgagee”) listed in section 2-506(H).

The party receiving notice of seizure pursuant to the foregoing provisions is given a period of sixty (60) days after the mailing or publication date in which to file a verified answer and claim to the seized property described in the notice. If at the end of such sixty (60) day period, no verified answer has been filed, the court shall hear evidence and issue its order whereby the property described in the notice will be forfeited to the state upon proof. If, however, a verified answer is filed, the matter will be set for hearing at which the burden of proof is on the state and the standard of proof is a preponderance of the evidence.\(^{135}\)

\(^{134}\) Id. § 2-506(C).

\(^{135}\) Id. §§ 2-506(D)-(G).
3. Relation Back Under the Oklahoma Controlled Substances Act

The interest of the state is established at the time of seizure of the forfeited property subject only to the rights of innocent owners and lienholders as discussed above. Only one case has been reported construing these provisions of the Oklahoma Controlled Substances Act. In *Forfeiture of 1977 Chevrolet Pickup*[^136] the Oklahoma Court of Appeals, Division No. 2, held that a post-seizure lien was ineffective against the state's right of forfeiture under the Oklahoma Controlled Substances Act.[^137] In this case, on July 18, 1984, the owner of a pickup truck was arrested for the unlawful delivery of marijuana and the owner's truck utilized in the delivery impounded. Subsequently, the state sought forfeiture of the impounded truck. A bank (the "Bank") had made a loan of money to the owner of the truck, and in consideration, took and promptly perfected a security interest in the truck on July 26, 1984. It was stipulated that the Bank had no knowledge and no reason to believe that the truck had been previously utilized by the owner to violate Oklahoma's drug laws. A notice of seizure and forfeiture was filed by the state and served on the owner on August 3, 1984. The trial court denied the forfeiture and found that the Bank was an "innocent mortgagee". However, the state appealed and the Oklahoma Court of Appeals rejected the trial court's holding.

It was stipulated that at the time of the loan, the truck had been seized and was in the physical custody of county authorities. The Bank made no effort to inspect the truck. The state argued, in reliance on the relation-back doctrine as set forth in *United States v. Stowell*,[^138] that the transfer of the right to property by forfeiture statutes occurs "at the time of the offense."[^139] Under this relation-back perspective, the state argued, a subsequent adjudication of forfeiture would merely perfect the title in the government, which would relate back to the time of the offense voiding all intervening transactions, even if entered into in good faith.[^140]

The Oklahoma Court of Appeals noted that title 63, section 2-506(H) of the Oklahoma Statutes provides that the "claimant of any

[^137]: *Id.* (citing OKLA. STAT. tit. 63, §§ 2-503 to 2-506 (Supp. 1990)).
[^138]: 133 U.S. 1 (1890).
[^139]: *Forfeiture of 1977 Chevrolet Pickup*, 734 P.2d at 858.
[^140]: *Id.*
right, title or interest in the vehicle . . . may prove his lien, mortgage or conditional sales contract to be bona fide.” 141 Further, the secured party must show that his “right, title or interest was created without any knowledge or reason to believe that the vehicle . . . was being, or was to be, used for the purpose charged.” 142 Note that the court does not say “perfected” in accordance with laws governing perfection of security interests.

The Court of Appeals stated that the statute clearly applied only to those situations in which the claimant’s interest was obtained without knowledge that the forfeited property was used or would be used at some time in the future for prohibited acts subject to the forfeiture statutes. 143 The Court stated that it “does not cover a case where the interest is obtained after the vehicle had been or was used for the purpose charged.” 144 The Court further noted the provisions of title 63, section 2-506(I) of the Oklahoma Statutes provide that an innocent lienholder would receive the vehicle

if the amount due him is equal to, or in excess of, the value of the vehicle . . . as of the date of the seizure, it being the intention . . . to forfeit only the right, title, or interest of the purchaser. 145

When reading subsection (H) and subsection (I) together, the Court of Appeals considered that the “State acquires the value of any right, title, or interest of a defendant as of the date of the seizure, subject only to bona fide or innocent secured creditors as may have existed prior to the seizure”. 146 The court held that the post-seizure lien by the lienholder claimant was ineffective against the interest acquired by the state by the forfeiture. They rejected what was termed the “expansive rule of Stowell and its progeny” on the basis that the Oklahoma Statute does not, by its terms, support such an interpretation. 147 The Court of Appeals defined the state’s rights as “the defendant’s unencumbered interest in the vehicle as of the date of the seizure.” 148

In reaching this conclusion, the Oklahoma Court of Appeals noted that the forfeiture statutes, which were the subject of the action at bar, were subject to the interpretation provisions of title 63, section 2-603 of

141. Id. (citing OKLA. STAT. tit. 63, § 2-506).
142. Id. (emphasis added).
143. Id.
144. Id. at 888, 889.
145. Id. at 859 (citing OKLA. STAT. tit. 63, § 2-506) (emphasis added).
146. Id. (emphasis added).
147. Id.
148. Id. (emphasis added).
the Oklahoma Statutes requiring that the Uniform Controlled Substances Act be construed "to effectuate its general purpose to make uniform the law of those states which enact it." Based on this provision, the Oklahoma Court of Appeals relied on State v. Crampton, in which the Oregon Court of Appeals held that a post-seizure lien could not be created in property which had been seized on the theory that "forfeiture takes effect immediately upon the commission of the act" and "relates back to that time, and avoids all intermediate sales and alienations, even to purchasers in good faith". While the Forfeiture of 1977 Chevrolet Pickup court relied on the holding of State v. Crampton, it did not follow the Oregon court’s reasoning in invalidating the lien at issue. Rather, the court followed the reasoning of the special concurring opinion which theorized that "the pivotal time after which no further liens may attach is the moment when the state takes physical possession of the vehicle." The Oklahoma Court of Appeals further relied on State v. One Certain

149. Id. at 859, n.2.
150. Id.; State v Crampton, 30 Or. App. 779, 568 P.2d 680 (1977). State v. Crampton involved a vehicle seized following arrest for an alleged narcotics offense and the claim of an attorney who was, post seizure, granted a lien on the vehicle by the arrested owner. The question before the Oregon Court was whether the arrested owner could, post seizure, grant an effective lien on the seized vehicle to a third party superior to the state's interest in a forfeiture claim. The attorney-claimant had full knowledge of the arrest and forfeiture. The certificate of title to the seized vehicle was noted with the attorney's lien, and a new certificate of title issued by the State of Oregon. On the same day the title was noted with the attorney's lien, the state filed its Motion for Order to Retain Vehicle Pending Litigation. The trial court found that the attorney-claimant's lien was granted prior to the state's Motion and that the attorney-claimant did not have actual knowledge that the state was pursuing a formal action. Accordingly, the trial court held that the arrested owner could grant an effective lien in his seized vehicle in favor of his attorney. Id. at 681.

The Court of Appeals of Oregon was unconvinced and reversed holding that "no post-seizure lien can be created where the subject property has been thus seized, and that the attorney claimant's lien at bar cannot prevail." Id. at 684. Further, "the only lienors protected from the forfeiture are those whose liens attached prior to the illegal act or acts". Id. The Court of Appeals of Oregon concluded that:

[T]he authorities in other jurisdictions uniformly hold that whenever a statute enacts that upon the commission of a certain illegal act specific property used in or connected with the act shall be forfeited, the forfeiture takes effect immediately upon the commission of the act; the right to the property vests in the state, although its title is not perfected until judicial condemnation; the forfeiture constitutes a statutory transfer of the right to the state at the time the offense is committed and the condemnation, when obtained, relates back to that time, and avoids all intermediate sales and alienations, even to purchasers in good faith.


151. State v. Crampton, 568 P.2d at 683-84.
152. Id. at 684. See also Forfeiture of 1977 Chevrolet Pickup, 734 P.2d at 859.
Conveyance 1978 Dodge Magnum,153 where the Iowa Supreme Court held that the validity of a secured party’s interest in seized property is determined “as of the date of seizure.”154

The Forfeiture of 1977 Chevrolet Pickup court also relied on State v. One 1978 Chevrolet Corvette,155 in stating a policy basis for this interpretation, as follows:

To permit the guilty owner to realize the value of the car by sale to an “innocent” owner or by mortgage to an “innocent” lienholder after seizure would defeat more than just the penal aspects of the statute. In case of a sale there could be no forfeiture; in case of a lien there could well be nothing left to forfeit. Either way the legislative intent to penalize the guilty owner would be frustrated.156

As discussed above, forfeitures are not favored, and Oklahoma has adopted the position that forfeiture statutes are to be strictly construed consistent with fair principles of interpretation and that forfeiture will not be allowed unless the statutory provision is clear.157 Based on this construction, the Oklahoma Supreme Court protected the interest of a bona fide prior lienholder without knowledge of use of the seized vehicle to illegally transport liquor. In so doing, the court stated that “to hold otherwise would be to ascribe to the legislative department an indifference to fundamental constitutional principles not warranted so long as another construction is possible.”158

The holding of the Oklahoma Supreme Court in Forfeiture of 1977 Chevrolet Pickup is consistent with the concept that notice, although not necessarily actual notice, is required to determine the rights of innocent parties in forfeited property. Possession of the property by the state would impart at a minimum inquiry notice, causing a lender to investigate further or, to utilize the words of another jurisdiction, this would “excite suspicion”.159

---

153. 334 N.W.2d 724, 727 (Iowa 1983).
156. 667 P.2d at 896.
157. See supra notes 111-12 and accompanying text.
159. See Singleton v. State, 396 So.2d 1050, 1055 (Ala. 1981). Singleton involved seizure of a truck used to transport marijuana, and a bank claim secured by a lien on the truck. The bank did not have actual knowledge of the involvement by the truck owner in the alleged drug activity, nor did it have knowledge of any fact calculated to “excite suspicion”. Id. Accordingly, the Alabama Supreme Court, relying on an Alabama Statutory provision which states that a “forfeiture of a conveyance encumbered by a bona fide security interest is subject to the interest of the secured party if he neither had knowledge of nor consented to the act or omission,” held that the interest of the bank
The interests of the secured party under the Oklahoma Controlled Substances Act are determined at the time of seizure of the property and interests acquired subsequent to seizure are not protected against the claims of the state. Therefore, any secured party should inquire if sufficient information is available to provide actual notice, constructive notice, or inquiry notice; any of these could defeat a claim that the secured party is a bona fide mortgagee or innocent party.

While the Oklahoma Controlled Substances Act does not by its terms require that the mortgage or lien be perfected, judicial construction is split. Certain jurisdictions have required perfection (by recording) in order to protect the secured creditor’s position. Other jurisdictions have not required perfection in order to protect the secured creditor's position.

in the seized vehicle was not subject to forfeiture. Id. The court allowed the bank to recover from the proceeds of disposition of the forfeited property but only “to the extent of any undersecured debt; that is to say the Bank may recover to the extent that the outstanding debt now exceeds the value of any remaining collateral.” Id. This effectively imposed the duty on the secured creditor to first pursue other collateral.

160. See, e.g., State v. One Certain Conveyance 1978 Dodge Magnum, 334 N.W.2d 724 (Iowa 1983), in which the Iowa Supreme Court construed the Iowa drug forfeiture statute insofar as it protected rights of a secured party. The court held “that the validity of a claimant’s security interest must be determined as of the date of seizure.” Id. at 727. Further, only lien holders of record are entitled to receive notice of the forfeiture hearing and recording (perfecting) the lien prior to seizure was a condition to the protection of a lien holder’s interest from forfeiture. Otherwise, the state’s interest is superior. The court noted that the holding “is consistent with the recording requirements of the statutory . . . provision” applicable to the particular property (a vehicle, subject to certificate of title notation perfection). Id. at 728. As a policy explanation, the court stated that a “contrary holding, which would allow the lien holder to perfect his claim after seizure, would set the stage for collusion between the conveyor of contraband and a bad faith claimant.” Id. See also State v. One 1978 Chevrolet Corvette, 8 Kan. App. 2d 747, 667 P.2d 893 (1983), which involved a post-seizure attorney’s lien. The attorney-claimant had notice of both the offense and the seizure. That court noted, albeit in dicta, that physical custody by the state might be sufficient constructive notice to negate the bona fide and “innocent” requirements of the statute. Id. The court held that the lien of a holder “acquir[ing] his interest after seizure and with actual notice [of a pending forfeiture proceeding] does not have a bona fide security interest” as required by the Kansas Uniform Controlled Substances Act which provided that “a forfeiture of a conveyance encumbered by a bona fide security interest is subject to the interest of the secured party if he neither had knowledge of nor consented to the act or omission. . . .” 667 P.2d at 895, 897. The court concluded that the interest of the attorney-claimant was subordinate to the interest of the state in the forfeited property.

161. See, e.g., State v. One 1979 Pontiac Trans Am, 771 P.2d 682 (Utah 1989), in which the Court of Appeals of Utah held that a “bona fide” security interest under the forfeiture statute, UTAH CODE ANN. § 58-37-13(I)(c)(ii) (1988), required only “an actual, good faith interest in the property not derived by fraud or deceit”. 771 P.2d at 685. The court involved the forfeiture of an automobile used for transporting drugs and the claim of the owner’s grandparents to a security interest, albeit an unperfected one. The trial court felt that it would be “unconscionable” to forfeit the interest of the grandparents’ as lien holders and held that the unperfected security interest was superior to the interest of the state. The Utah Court of Appeals rejected the basis for the trial court’s decision while affirming the holding. Id. at 686. The Utah Statute provided that certain properties were subject to forfeiture and further that “any forfeiture of a conveyance subject to a bona fide security interest is
4. Bars to Prosecution

Section 2-413 of title 63 of the Oklahoma Statutes provides that "If..."
a violation of this act is a violation of a federal law or the law of another state, a conviction or acquittal under federal law or the law of another state for the same act is a bar to prosecution in this state.” This bar to prosecution is identical to section 405 of the Uniform Controlled Substances Act.162 While this statute has not been judicially construed in Oklahoma, a substantially identical provision163 has been construed in Illinois.

The Illinois Appellate Court in People v. One 1979 Chevrolet Camaro164 held that a forfeiture proceeding was not barred because of a federal criminal prosecution since the forfeiture action is a civil in rem action and is not dependent on a conviction. The court noted that the bar to prosecution provision is limited to criminal prosecutions precluding “prosecution” whether “convicted or acquitted” in the first instance.165 Accordingly, secured creditors should not take comfort in the fact that neither federal nor other state forfeiture proceedings have reached property in which a secured interest is held or being created.

IV. CONCLUSIONS

The civil and criminal forfeiture provisions of RICO, the CCE, the Controlled Substances Act, OCOPA, and the Oklahoma Controlled Substances Act affect both real and personal property in Oklahoma. The timing of the creation of the government’s interest in forfeited property varies, both by statutes, and their judicial interpretation. Secured creditors should be informed, and should make reasonable inquiries into the use and operation of the property on which a security interest is to be taken. Further, secured creditors should investigate the financial history (including, inter alia, income sources) of the debtor and the property. They should also inspect the property subject to the security interest, and not delay in perfecting security interests. Inquiry should also be made into the business and operations of the tenants or other third party users of the collateral property, who could subject the property to forfeiture through their activities. Clearly, however, even these steps may not protect against certain forfeitures.

163. "Conviction or acquittal under the laws of the United States or of any state relating to controlled substances for the same act is a bar to prosecution in this State". ILL. REV. STAT. 1979, ch. 56, par. 1409. See People v. One 1979 Chevrolet Camaro, 96 Ill. App. 3d 109, 420 N.E.2d 770, 771 (1981).
165. 420 N.E.2d at 772.