

ONE STRIKE AND YOU'RE OUT

The Impact of U.S. v. Marion on Third Party Rights in Federal Forfeiture Proceedings

Todd Foster, Esq.

On March 26, 2009 the Eleventh Circuit interpreted key terms in 21 USC 853(n) and Fed. R. Crim. Pro. 32.2. This Statue and Rule are one of the numerous methods the United States Government has to forfeit property of those charged with federal crimes. This interpretation means that banks, lenders, co-owners or other third parties holding liens or otherwise claiming an interest in forfeited property have one narrow and procedurally challenging chance to preserve their interest or face having it extinguished forever.

In *United States v. Marion*, 562 F. 3d 1330 (11th Cir. 2009), the Court was faced with determining whether a late filed petition for relief from forfeiture could be considered. The District Court allowed the late filed petition, liberally reading 853(n) and Rule 32.2 in the interest of an equitable and just result. The Eleventh Circuit reversed in an Opinion replete with references to legislative intent and decreeing the limited jurisdiction of Federal Courts if the forfeiture statutes and rules are not followed precisely.

The *Marion* Court first debunked the general belief that third party rights in forfeited property cannot be affected until a criminal judgment and sentence is entered against a defendant, citing the 2000 changes to Rule 32.2 allowing proceedings to determine the rights of third parties in forfeited property to be commenced “as soon as practicable...after a plea of guilty or nolo contendere”. Lenders and third parties need to be aware of this new possible timeline and not feel safe because there has been no sentencing.

Marion also decreed that the bar created by a third party’s failure to strictly comply with the 30 day time limit or other requirements for filing petitions for relief from a preliminary order of forfeiture entered pursuant to 853(n) and 32.2 may not be remedied. The Court held that failure to comply is jurisdictional and deprives the claimant of standing. Referring to the Committee Notes on Rule 32.2, the Court agreed that if a third party has notice and fails to timely file a claim, his or her interests “are extinguished”. The Rules allow “Notice” to be actual or constructive by publication, so it may be difficult for a claimant to later assert lack of notice as a basis for failure to comply with the statute.

Finally, *Marion* defends the strictness and applicability of Rule 32.2. Federal cases governing the impact of the Federal Rules of Criminal Procedure interpret them to “trump” any possible inconsistent provision of 853(n). *Marion* has made it clear that forfeiture proceedings under 853(n) and Rule 32.2 are not merely “claims processing rules” but are truly “jurisdictional rules” within the meaning of *Bowles v. Russell*, 551 US 205 (2007). This means a court in a federal forfeiture proceeding has no jurisdiction or power to grant any form of equitable relief to a non-compliant claimant. However, since ancillary proceedings involving third parties under Rule 32.2(c) are tried using the Federal Rules of Civil Procedure, a third party finding itself barred, may try to move, if factually able, under Rule 60(b) for relief from a preliminary order of forfeiture.

Commencing an ancillary proceeding for relief from a federal forfeiture under 853(n) requires a unique mix of federal criminal practice and state property law skills. Few lawyers know this system or how it applies federal procedural and state property law to arrive at a final order of forfeiture. In counseling clients in this area, *Marion* and the applicable Federal Statutes and Rules do tell us some basic mistakes to avoid:

- The Petition For Relief must be filed within 30 days of actual service of the Preliminary Order of Forfeiture on a client (usually done by certified mail, return receipt requested) or 30 days after the conclusion of publication...whichever is earlier. 853(n)(2).

- The Petition must be signed by the petitioner. 853(n)(3). The petition must be signed by the actual petitioner, or its authorized officer. Courts have interpreted this to mean that an attorney's or other agent (like a mortgage servicer) signature is insufficient. *Mercado v. U.S. Customs Service*, 873 F. 2d 641, 645 (2d Cir. 1989); *U.S. v. Speed Joyeros, S.A.*, 2006 WL 197094, p. 3 (E.D.N.Y. 2006).
- The Petition must be sworn. 853(n). This is not a mere technical requirement. *United States v. Edwards*, 2007 WL 2088608 (W.D. La 2007); *U.S. v. Commodity Account No. 549 54930*, 219 F. 3d 595, 597 (7th Cir 2000).
- The Petition must set forth in reasonable detail, including time and circumstances, facts supporting the petitioner's claim. 853(n).

Petitioners also need to be certain that the grounds set forth in their Petition establish a right to a "superior interest" or that they are a "bona fide purchaser for value" under 853(n)(6). In the Eleventh Circuit alone, there are dozens of cases interpreting the nuances of adjudicating these two limited and exclusive grounds for relief from a federal criminal forfeiture in the ancillary proceeding commenced after a proper petition is filed.

Failure to comply with the procedural or substantive requirements of a petition under 853(n) allows the court to dismiss the petition without notice or a hearing pursuant to under Rule 32.2(c)(1)(A). The result of such dismissal is to extinguish the petitioner's claims.

Lawyers in and out of the Eleventh Circuit need to be particularly diligent, cautious and precise in protecting a client's rights in federal criminal forfeiture proceedings. The *Marion* Court served up a fastball and if we get caught looking... our client will be "out".

Todd Foster, Esq.
Cohen, Foster & Romine, P.A.
Tampa, Florida

Mr. Foster is a Senior Partner at Cohen, Foster & Romine, P.A. and an AV rated lawyer. He earned his JD from Florida State University College of Law, with honors in 1981. Todd Foster's experience as a former FBI agent and federal and state prosecutor sets him apart from other attorneys. He represents individuals and corporate clients in complex civil and criminal litigation in federal and state court. Mr. Foster sits on the Board of Directors of the National Association of Criminal Defense Lawyers and is an adjunct professor of trial advocacy at Stetson University College of Law.