

RESOLUTION NO. 2015164

RE: AMENDING THE 2015 ADOPTED COUNTY BUDGET AS IT PERTAINS TO THE DISTRICT ATTORNEY (A.1165.05)

Legislators ROMAN, FLESLAND, HORTON, JOHNSON, STRAWINSKI, SAGLIANO, and JETER-JACKSON offer the following and move its adoption:

WHEREAS, the District Attorney has requested the appropriation of forfeiture of crime proceeds, and

WHEREAS, pursuant to Article 13-A of the CPLR, said funds must be used to enhance prosecutorial and law enforcement efforts and not to supplement ordinary budgetary expenses, and

WHEREAS, the District Attorney has requested that the sum of \$24,212 be placed in various District Attorney Asset Forfeiture accounts to be used for the purchase of equipment, office supplies and training expenses, listed on the attached Asset Forfeiture Expenditure sheet, now therefore, be it

RESOLVED, that the Commissioner of Finance is authorized and directed to amend the 2015 Adopted County Budget as follows:

APPROPRIATIONS

Increase

A.1165.05.4160	Office supplies	\$ 5,572
A.1165.05.4750	Other equipment – ND	14,600
A.1165.05.4125	Food & kitchen supplies	360
A.1165.05.4631	Training/seminars & conferences	2,250
A.1165.05.4622	Veterinary services	<u>1,430</u>
		<u>\$24,212</u>

REVENUES

Increase

A.9998.95110.01	Approp. Res. Asset Forfeiture – State	<u>\$24,212</u>
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CA-0100-15
LDF/crc/kvh/G-0135
5/15/15

Fiscal Impact: See attached statement

STATE OF NEW YORK

ss:

COUNTY OF DUTCHESS

This is to certify that I, the undersigned Clerk of the Legislature of the County of Dutchess have compared the foregoing resolution with the original resolution now on file in the office of said clerk, and which was adopted by said Legislature on the 8th day of June 2015, and that the same is a true and correct transcript of said original resolution and of the whole thereof.

IN WITNESS WHEREOF, I have hereunto set my hand and seal of said Legislature this 8th day of June 2015.

CAROLYN MORRIS, CLERK OF THE LEGISLATURE

FISCAL IMPACT STATEMENT

NO FISCAL IMPACT PROJECTED

APPROPRIATION RESOLUTIONS

(To be completed by requesting department)

Total Current Year Cost \$ 24,212

Total Current Year Revenue \$ 24,212
and Source

Source of County Funds *(check one)*: Existing Appropriations, Contingency,
 Transfer of Existing Appropriations, Additional Appropriations, Other *(explain)*.

Identify Line Items(s):

Please see attached spreadsheet

Related Expenses: Amount \$ _____

Nature/Reason:

Anticipated Savings to County: _____

Net County Cost (this year): _____

Over Five Years: _____

Additional Comments/Explanation:

This resolution is to appropriate Asset Forfeiture Funds to enable the purchase of equipment, etc. listed on the attached Asset Forfeiture Expenditure sheet.

Prepared by: Gina Barry/Heidi Owens

Asset Forfeiture Expenditures

Other Equipment - ND - 4750		
Service Dog for victims and witnesses	10,000.00	District Attorney's Office
GJ Waiting Room Video System for Child Interviews	4,600.00	District Attorney's Office
TOTAL:	14,600.00	
FOOD & KITCHEN SUPPLIES - 4125		
Dog Food for Service Dog	360.00	District Attorney's Office
Total:	360.00	
TRAINING AND SEMINARS/CONF - 4631		
Training for Three Handlers for Service Dog at \$750 each	2,250.00	District Attorney's Office
Total:	2,250.00	
OFFICE SUPPLIES - 4160		
Ricoh E-copy Paperworks Support Renewal - One Year	572.00	District Attorney's Office
Miscellaneous Items, (office supplies, items for therapy dog)	5,000.00	District Attorney's Office
Total:	5,572.00	
VETERINARY SERVICES - 4622		
Veterinary Services Start up for Service Dog	1,430.00	District Attorney's Office
Total:	1,430.00	
TOTAL TO BE APPROPRIATED:	24,212.00	
TOTALS BY PROGRAM		
District Attorney's Office	24,212.00	
TOTAL TO BE APPROPRIATED:		

District Attorney Asset Forfeiture

APPROPRIATIONS

Increase

A.1165.05.4750	Other Equipment - ND	\$14,600
A.1165.05.4125	Food & Kitchen Supplies	\$360
A.1165.05.4631	Training Seminars/Conf	\$2,250
A.1165.05.4160	Office Supplies	\$5,572
A.1165.05.4622	Veterinary Services	\$1,430
		<u>\$24,212</u>

REVENUES

Increase

A.9998.95110.01	Appropriated Reserve Asset Forfeiture - State	\$24,212
		<u>\$24,212</u>

McKinney's Consolidated Laws of New York Annotated
Civil Practice Law and Rules (Refs & Annos)
Chapter Eight. Of the Consolidated Laws
Article 13-a. Proceeds of a Crime--Forfeiture (Refs & Annos)

McKinney's CPLR § 1310

§ 1310. Definitions

Currentness

In this article:

1. "Property" means and includes: real property, personal property, money, negotiable instruments, securities, or any thing of value or any interest in a thing of value.

2. "Proceeds of a crime" means any property obtained through the commission of a felony crime defined in subdivisions five and six hereof, and includes any appreciation in value of such property.

3. "Substituted proceeds of a crime" means any property obtained by the sale or exchange of proceeds of a crime, and any gain realized by such sale or exchange.

4. "Instrumentality of a crime" means any property, other than real property and any buildings, fixtures, appurtenances, and improvements thereon, whose use contributes directly and materially to the commission of a crime defined in subdivisions five and six hereof.

4-a. "Real property instrumentality of a crime" means an interest in real property the use of which contributes directly and materially to the commission of a specified felony offense.

4-b. "Specified felony offense" means:

(a) a conviction of a person for a violation of section 220.18, 220.21, 220.41, or 220.43 of the penal law, or where the accusatory instrument charges one or more of such offenses, conviction upon a plea of guilty to any of the felonies for which such plea is otherwise authorized by law or a conviction of a person for conspiracy to commit a violation of section 220.18, 220.21, 220.41, or 220.43 of the penal law, where the controlled substances which are the object of the conspiracy are located in the real property which is the subject of the forfeiture action; or

(b) on three or more occasions, engaging in conduct constituting a violation of any of the felonies defined in section 220.09, 220.16, 220.18, 220.21, 220.31, 220.34, 220.39, 220.41, 220.43 or 221.55 of the penal law, which violations do not constitute a single criminal offense as defined in subdivision one of section 40.10 of the criminal procedure law, or a single criminal transaction, as defined in paragraph (a) of subdivision two of section 40.10 of the criminal procedure law, and at least one

of which resulted in a conviction of such offense, or where the accusatory instrument charges one or more of such felonies, conviction upon a plea of guilty to a felony for which such plea is otherwise authorized by law; or

(c) a conviction of a person for a violation of section 220.09, 220.16, 220.34 or 220.39 of the penal law, or a conviction of a criminal defendant for a violation of section 221.30 of the penal law, or where the accusatory instrument charges any such felony, conviction upon a plea of guilty to a felony for which the plea is otherwise authorized by law, together with evidence which: (i) provides substantial indicia that the defendant used the real property to engage in a continual, ongoing course of conduct involving the unlawful mixing, compounding, manufacturing, warehousing, or packaging of controlled substances or where the conviction is for a violation of section 221.30 of the penal law, marijuana, as part of an illegal trade or business for gain; and (ii) establishes, where the conviction is for possession of a controlled substance or where the conviction is for a violation of section 221.30 of the penal law, marijuana, that such possession was with the intent to sell it.

5. "Post-conviction forfeiture crime" means any felony defined in the penal law or any other chapter of the consolidated laws of the state.

6. "Pre-conviction forfeiture crime" means only a felony defined in article two hundred twenty or section 221.30 or 221.55 of the penal law.

7. "Court" means a superior court.

8. "Defendant" means a person against whom a forfeiture action is commenced and includes a "criminal defendant" and a "non-criminal defendant".

9. "Criminal defendant" means a person who has criminal liability for a crime defined in subdivisions five and six hereof. For purposes of this article, a person has criminal liability when (a) he has been convicted of a post-conviction forfeiture crime, or (b) the claiming authority proves by clear and convincing evidence that such person has committed an act in violation of article two hundred twenty or section 221.30 or 221.55 of the penal law.

10. "Non-criminal defendant" means a person, other than a criminal defendant, who possesses an interest in the proceeds of a crime, the substituted proceeds of a crime or an instrumentality of a crime.

11. "Claiming authority" means the district attorney having jurisdiction over the offense or the attorney general for purpose of those crimes for which the attorney general has criminal jurisdiction in a case where the underlying criminal charge has been, is being or is about to be brought by the attorney general, or the appropriate corporation counsel or county attorney, provided that the corporation counsel or county attorney may act as a claiming authority only with the consent of the district attorney or the attorney general, as appropriate.

12. "Claiming agent" means and shall include all persons described in subdivision thirty-four of section 1.20 of the criminal procedure law, and sheriffs, undersheriffs and deputy sheriffs of counties within the city of New York.

13. "Fair consideration" means fair consideration is given for property, or obligation, (a) when in exchange for such property, or obligation, as a fair equivalent therefor, and in good faith, property is conveyed or an antecedent debt is satisfied, or (b)

when such property, or obligation is received in good faith to secure a present advance or antecedent debt in amount not disproportionately small as compared with the value of the property, or obligation obtained.

14. "District attorney" means and shall include all persons described in subdivision thirty-two of section 1.20 of the criminal procedure law and the special assistant district attorney in charge of the office of prosecution, special narcotics courts of the city of New York.

Credits

(Added L.1984, c. 669, § 1. Amended L.1986, c. 8, § 1; L.1986, c. 174, § 1; L.1990, c. 655, §§ 1, 2.)

Editors' Notes

SUPPLEMENTARY PRACTICE COMMENTARIES

by Anthony J. Girese

2014

In *U.S.v. Real Property and Premises located at 249-20 Cambria Avenue, Little Neck, NY 11362*, ___ F.Supp. ___, 2014 WL 2198618 (E.D.N.Y. 2014), the court faced "... a question of first impression-namely, whether a New York State civil action brought pursuant to Article 13-A of the CPLR amounts to a jurisdictional bar to a later commenced civil *in rem* action in a federal court."

Here, in a case involving the sale of counterfeit goods, the Suffolk County District Attorney commenced a CPLR Article 13-A action in state court and had obtained attachments pursuant to CPLR 1317 against some of the defendants' property. The federal government subsequently commenced a federal civil *in rem* forfeiture action against cash seized from the defendants, who then sought to block that forfeiture on the basis of "... a common law rule of long standing (which) prohibits a court from assuming *in rem* jurisdiction over a res that is already under the jurisdiction of another court..." (citations omitted).

The defendants necessarily asserted that Article 13-A was at least a *quasi in rem* statute. The court rejected the claim, finding that "... Article 13-A by its terms makes clear that it is an *in personam*, rather than an *in rem* statute."

On a later motion for reconsideration, the defendants sought to focus on the state attachment under CPLR 1317, claiming that this was a "seizure" of the property. The court rejected the claim, noting that even were this to be the case "... it does not follow that such 'seizure', by itself, confers *in rem* or *quasi in rem* jurisdiction over that property. *U.S. v. Real Property and Premises located at 249-20 Cambria Avenue, Little Neck, NY 11362*, ___ F.Supp. ___, 2014 WL 3339567 (E.D.N.Y. 2014).

2013

Forfeiture of Instrumentalities

In *People v. DeProspero*, 20 N.Y.3d 527, 987 N.E.2d 264, 964 N.Y.S.2d 487 (2013), the defendant, following a criminal conviction for possessing a sexual performance by a child based upon a single pornographic image found on his computer, sought the return of various digital devices which had been seized from his residence pursuant

to a search warrant. These devices, seized before the original conviction, were still in the possession of the police following that conviction. That request led to an examination of the content of the devices, the discovery of further pornographic images, additional criminal charges, and a second conviction. On appeal from that latter conviction, the defendant challenged the retention and examination of the property via a motion to suppress, which was denied. Affirming that rejection of the claim, the Court of Appeals noted in passing that "... although the parties do not argue the point, it seems that some or all of the property here, even if not contraband, might have been subject to forfeiture as instrumentalities of crime in a proceeding brought under CPLR 1311."

Guilty Pleas

As noted in the main commentary, forfeiture is frequently part of a guilty plea bargain, and in *People v McCoy*, 96 A. D. 3d 1674, 947 N.Y.S.2d 740 (4th Dept. 2012), the Court noted the legitimacy of the process, albeit finding it improper under the circumstances therein presented. The defendant was convicted of narcotics charges pursuant to a plea of guilty. The plea was conditioned, in part, on the defendant's agreement to forfeit some \$5,000 and a vehicle which he had been driving when arrested. He also agreed to waive his right to challenge the forfeiture on appeal or in a collateral proceeding.

The Court first noted a "procedural irregularity," as there had not been an order of judgment of forfeiture issued by the court or compliance with the filing requirements of CPLR 1311 (11)(a) or the procedures of Penal Law Article 480 [criminal forfeiture.] Literally, however, the CPLR section only requires that "[a]ny stipulation or settlement agreement between the parties to a forfeiture action be filed with the clerk of the court in which the forfeiture action is pending," and here, it appears that no such action was ever commenced.

Substantively, the Court found that "the forfeited funds were not the proceeds of the crimes with which the defendant was charged, nor is there any indication that the funds were derived from uncharged criminal activity in which defendant engaged. Defendant did not possess the funds when he was arrested, and, in fact, it appears from the record that the forfeited funds did not belong to the defendant but to the person who posted bail on his behalf." The defendant did not challenge the forfeiture of the vehicle.

The Court held that under these circumstances both the purported agreement and the waiver of the right to appeal were infirm, and: "the conditioning of defendant's sentence upon his ability to procure funds for forfeiture creates an unacceptable appearance of impropriety."

As previously noted, the Court recognized that forfeiture may be a lawful component of a negotiated guilty plea to criminal charges, and vacated the forfeiture herein without prejudice to the commencement of a CPLR Article 13-A proceeding.

PRACTICE COMMENTARIES

by Anthony J. Girese

General Introduction

In its broadest sense, forfeiture can be defined as the taking of property by the state without compensation as a consequence of the commission of some criminal act. 37 C.J.S. *Forfeitures*, § 1, p.4. Although it is an ancient concept, in modern times it has become an increasingly popular law enforcement tool. When the United States Department of Justice established the Executive Office for Asset Forfeiture in 1989, the Attorney General noted that "[o]ne of the Department's most effective weapons in combating drug trafficking and organized crime is the seizure and forfeiture

of the instrumentalities and proceeds of these illegal activities. Experience has shown that forfeitures can permanently dismantle the financial underpinnings of the criminal enterprises and, because of the massive resources of drug and organized crime syndicates, we have also found that forfeiture has enormous potential as a source of revenue for law enforcement at all levels of government.” More recently, Attorney General Eric Holder, in remarks at the Organized Crime Drug Enforcement and Asset Forfeiture Programs National Leadership Conference on July 22, 2009, noted that “[s]ince 1984, more than \$13 billion in net federal forfeiture proceeds have been deposited into the Justice Assets Forfeiture Fund.”

The present statute, CPLR Article 13-A, which became effective on August 1, 1984, has an elaborate legislative history. Prior to its enactment, New York had a hodgepodge of narrowly drawn, *in rem* (*see* below) forfeiture statutes, such as Public Health Law § 3388 (forfeiture of vehicles, vessels, and aircraft used to convey, conceal, or transport controlled substances.) These statutes, which are still extant and still being used today, generally provide for the forfeiture of specified types of property as a consequence of the commission of a specified type of crime. An illustration of the potential narrowness of their application is *Mtr. of Property Clerk v. Rosea*, 1984, 63 N.Y.2d 961, 473 N.E.2d 260, 483 N.Y.S.2d 1010, *aff'g on opinion* at 99 A.D.2d 961, 472 N.Y.S.2d 657 (1st Dep't), where it was decided that Penal Law 415.00, which authorizes forfeiture of “vessels, vehicle and aircraft” used to transport or conceal gambling records would apply to a taxicab which was used for such purposes, but was not applicable to the perhaps far more valuable taxi medallion, which, “... is not the vehicle or any part thereof.”

Otherwise, forfeiture of property seized by the authorities pursuant to a search warrant or other means could sometimes be had by local law, or by application of the doctrine of “unclean hands” *See, e.g., Hofferan v. Simmons*, 1943, 290 N.Y. 449, 49 N.E.2d 523; *People v. Derito*, 1965, 17 N.Y.2d 473, 214 N.E.2d 160, 266 N.Y.S.2d 980 [replevin not available to one who got possession of property though illegal activity.] Sometimes, there were debates about whether seized property was unrecoverable “contraband.” *See, Boyle v. Kelly*, 1976, 53 A.D.2d 457, 463, 385 N.Y.S.2d 791 (2d Dep't), *rev'd on other grounds*, 1977, 42 N.Y.2d 88, 365 N.E.2d 791, 390 N.Y.S.2d 834 [“Here, the taking of cash, claimed incidental to a numbers running charge, appears not to be contraband, as opposed to the numbers stubs themselves.”]

In the 1980s, attempts began to create a more comprehensive New York forfeiture structure. An initial measure was passed at the end of the 1983 legislative session (S3308B/A4545A). A few days after passage, and long before its January 1, 1984 effective date, chapter amendments were introduced to answer some of the criticism from the law enforcement community (S6950/A8190). However, in September of 1983 another measure (S6950A/A8223) was passed, which was also the subject of intense criticism. This was signed into law (c. 1017, L.1983) after the Governor obtained commitments from appropriate parties to work on further improvements. This was the “original” or “former” CPLR Article 13-A, which became effective on March 1, 1984. This was repealed and replaced by the present statute, (c. 669, L.1984, bill number S10039/A11143), which was effective on August 1, 1984. It does not appear that the original version was ever utilized. *See, Governor's Approval Memorandum c. 669, L.1984.*) The statute has since been significantly revised only once, in 1990 (c. 655, L.1990).

Terminology

Because the terminology of forfeiture can be confusing, a brief guide to some basic concepts may prove useful.

Criminal vs. civil forfeiture

As noted above, forfeiture is the consequence of criminal activity, so all forms of forfeiture may perhaps be said to be “crime-linked.” However, forfeiture can be imposed either as an integral part of a criminal proceeding, in which case it is called “criminal forfeiture,” or in a separate parallel or subsequent civil proceeding, hence “civil forfeiture.”

CPLR Article 13-A is a civil forfeiture statute. CPLR 1311(1). Parenthetically, other civil statutes establish other consequences of the commission of criminal activity, such as certain provisions of the Real Property Law and the RPAPL (RPL § 231 (1), RPAPL § 711 (5), and RPAPL § 715) which establish the right and procedure to evict tenants who are using property for illegal purposes, such as operating a “bawdy house” or selling narcotics.

It might be noted that New York also has several criminal forfeiture provisions. Penal Law Article 480, which was created along with the 1990 revision of this article, permits criminal forfeiture of certain property in conjunction with prosecution for felony controlled substances offenses. Property forfeited under that provision is, by cross-reference (Penal Law § 480.20) disposed of pursuant to § 1349 of this article. The second New York criminal forfeiture statute is Penal Law 460.30, which provides for criminal forfeiture in conjunction with prosecution for Enterprise Corruption a under the New York Organized Crime Control act (OCCA), New York's version of RICO. Unlike Article 13-A, which is primarily concerned with divesting the forfeiture defendant of property used in or obtained by a previously-committed crime, the essential purpose of OCCA's criminal forfeiture, which is supplemented by a separate civil provision, CPLR Article 13-B (*see* commentary to CPLR 1353) is to sever the tainted link between an individual defendant and an enterprise, which may or may not be a legitimate business. *See* Penal Law 460.30(1). Accordingly the OCCA statute contains a sort of election of remedies provision regulating the relationship between the two forms of forfeiture. Penal Law 460.30(6).

In rem vs. in personam forfeiture

Again, painting in broad strokes, civil forfeiture can be structured as either “in personam” or “in rem.” The former is an action against a person, such as an ordinary civil tort or, for that matter, a criminal prosecution, while the latter is an action to settle title to a particular piece of property.

CPLR 1311(1) declares that the statute is “civil, remedial, and in personam in nature...” CPLR 1350 provides that the ordinary provisions of the CPLR govern “... the procedure in proceedings and actions commenced under this article...” except where Article 13-A itself provides inconsistent provisions. In the original Practice Commentary, Professor Peter Preiser characterized the statute as “a hybrid—that combines the features of *in rem* civil and *in personam* civil proceedings. The action itself is *in personam*, while the extensive provisional remedies available (*see* CPLR 1312) permit the claiming authority to secure the assets pending final outcome of the case.” This is a fair characterization, since a 13-A action can be structured to seek forfeiture only of a particular piece of property specifically linked to the commission of a crime, such as, for example, a printer used to produce counterfeit money. However, such an action remains procedurally *in personam*, and, in practice, in some circumstances an alternative money judgment may be sought. *See* the discussion of “instrumentality forfeiture” below. Thus, to put it another way, Article 13-A is an *in personam* civil forfeiture statute which subsumes certain features of a more traditional *in rem* statute. In *Morgenthau v. Citisource Inc.*, 1986, 68 N.Y.2d 211, 217, 508 N.Y.S.2d 152, 500 N.E.2d 850, the Court of Appeals characterized it as “... an action which is civil, remedial, and in personam in nature...”

One early form of *in personam* forfeiture, sometimes called “estate forfeiture,” simply deprived a person who committed certain crimes of all of his or her property. Such is prohibited in New York by Civil Rights Law § 79-b. While the language of that provision is broad (“A conviction of any person for any crime, does not work a forfeiture of any property...”), in *County of Nassau v. Pazmino*, 2007, 40 A.D.3d 905, 907, 836 N.Y.S.2d 653 (2d Dept), the Court sensibly held that this provision merely “prohibits a conviction, in and of itself, from operating to divest title a convicted person may have in real or personal property, whether connected to the subject crime or not” and does not conflict with CPLR Article 13-A.

New York retains a goodly number of *in rem* forfeiture statutes. E.g., Penal Law § 410.00 (equipment used in producing pornography); Penal Law § 415.00, (vehicles used to transport gambling records); Penal Law § 420.05 (equipment used in making unauthorized recordings); Public Health Law § 3388 (vehicles, vessels and aircraft used

to transport illegal drugs); Tax law §§ 1846-1848 (unlicensed or unregistered alcohol, tobacco products, and motor fuel and vehicles vessels and aircraft used to transport same.) These have not been abolished by Article 13-A, and the relevant authorities may choose among them, presumably guided by considerations of efficacy and disposition of forfeited property.

Another difference between the two forms of civil forfeiture is that in the case of an *in personam* statute, jurisdiction is not dependent upon seizure of the asset to be forfeited. *County of Nassau v. Rojas*, 2008, 49 A.D.3d 487, 856 N.Y.S.2d 124 (2d Dep't)

The basic structure of the statute

At first blush, the statute may appear lengthy, complex and daunting to the reader. To some extent, appearances are deceiving. The basic statutory structure might be said to be established by three sets of concepts. First, forfeiture may be “post-conviction” or, in certain instances, “pre-conviction.” Next, forfeiture may be against a “criminal defendant” or a “non-criminal defendant.” Finally, forfeiture can be had for a number of things, including the “proceeds of a crime,” the “substituted proceeds of a crime,” an “instrumentality of a crime” or a “real property instrumentality of a crime”, or, in some circumstances, an amount equal in value to those things. The essential structure of the statute readily emerges from these concepts. Most are set forth in sections 1310-1311. Section 1310 contains the essential definitions, while the following section, CPLR 1311, sets forth the nature and structure of potential forfeiture actions, burdens of proof, and related matters.

Initially, subdivisions five and six of section 1310 define a “post conviction forfeiture crime” as “any felony defined in the penal law or any other chapter of the consolidated laws of the state,” while a “pre-conviction forfeiture crime” means only a felony defined in article two hundred twenty or section 221.30 or 221.55 of the penal law, “a reference to controlled substances and marihuana felonies. Despite the terminology of the latter, “pre-conviction” forfeiture can be brought in the absence of any conviction, or indeed, even after an acquittal. *Hendley v. Clark*, 1989, 147 A.D.2d 347, 543 N.Y.S.2d 554 (3d Dep't).

Thus, CPLR Article 13-A forfeiture must be predicated upon the commission of a felony, although subsequent to its passage, some jurisdictions have enacted forfeiture for misdemeanor-level crimes by local law. Article 13-A does not preempt such legislation. CPLR 1352, *see, Grinburg v. Safir*, 1999, 181 Misc.2d 444, 449, 694 N.Y.S.2d 316, *aff'd* 266 A.D. 2d 43, 698 N.Y.S.2d 218, *appeal dismissed*, 94 N.Y.2d 898, 728 N.E.2d 339, 707 N.Y.S.2d 143, *lv. to appeal denied*, 95 N.Y.2d 756, 734 N.E.2d 760, 712 N.Y.S.2d 448. Any felony, whether in the penal law or elsewhere in the laws of New York, can serve as a predicate for forfeiture.

Structurally, “post-conviction” forfeiture is a separate *in personam* civil action which follows a criminal conviction for any felony [section 1311(1)(a)], while “pre-conviction” forfeiture is an *in personam* civil action brought independently of any criminal proceeding [section 1311(1)(b)]. In the case of the latter, the prosecutor-who in Article 13-A is known as a “claiming authority” [section 1310(11)] must prove the commission of the drug felony by clear and convincing evidence in the civil forfeiture action itself. (section 1311[3][b]). In “post-conviction” forfeiture, there is an automatic stay of forfeiture proceedings during the pendency of the criminal action. CPLR 1311(1)(a).

Next, forfeiture proceedings can be brought against a “criminal defendant” or against a “non-criminal defendant.” CPLR 1310(8), (9). Essentially, a criminal defendant is either someone who has been criminally convicted of the underlying felony or, in the case of “pre-conviction” forfeiture, someone who will be proven to have committed the crime in the forfeiture action itself. Thus, the criminal defendant is simply the one who commits the crime.

The “non-criminal defendant” is a transferee of property, generally one who receives property from a criminal defendant and either “knew or should have known” that the property was linked to a crime, or did so part of a

fraudulent attempt to avoid forfeiture. CPLR 1311(3)(b)(ii-v). A series of presumptions is established to help prove this, including ones applicable to those who do not pay fair consideration, have knowledge of the existence of a provisional remedy, or aid in the concealment of the property in question. CPLR 1311(3)(c) “Fair consideration” is a defined term CPLR 1310(13). Another presumption applies to where currency or negotiable instruments are found in close proximity to controlled substances. CPLR 1311(3)(d). As explained below, an action for a “money judgment” is not available against a non-criminal defendant, and, in one specific situation, the value of instrumentality forfeiture against a non-criminal defendant is limited.

The question of what can be forfeited begins with the most general term, “property.” Subdivision one of section 1310 defines “property” in an expansive manner, including “real property, personal property, money, negotiable instruments, or any thing of value or any interest in a thing of value.” These are also defined elsewhere in NY law. *See, e.g.*, General Construction Law § 39 (“personal property”); CPLR 105(s) (“real property”). The catchphrase “any thing of value” also appears in Penal Law 155.00(1). The obvious intent was to make almost any sort of property potentially forfeitable.

The next four subdivisions of section 1310 define the necessary linkage between the crime and the property. Under varying circumstances, essentially described in section 1311, forfeiture may be had for property which is the “proceeds of a crime,” the “substituted proceeds of a crime,” an “instrumentality of a crime,” a “real property instrumentality of a crime,” or, in certain circumstances, a equivalent money judgment.

“Proceeds of a crime” is defined as “any property obtained through the commission of a felony crime ...” including any appreciation in value, while “substituted proceeds of a crime” is “any property obtained by the sale or exchange of proceeds of a crime, and any gain realized by such sale or exchange.” Section 1310(2).

It has been held that given the broad definition of proceeds “There is simply no legal basis to conduct any hearing as to what portion of the restrained funds comprising a portion of the ‘total receipts’, i.e. the forfeiture sum, are profits and what portion are expenses.” *Morgenthau v. Vinarsky*, 2008, 21 Misc.3d 1137(a), 2008 WL 5069789, 2008 N.Y. Slip. Op. 52411 (U) (Supreme Court, NY County). Procedurally, the plaintiff must establish the relevant amount, which “... may not be determined by mere speculation and guesswork.” *Hynes v. Dallas*, 2011, 83 A.D.3d 896, 922 N.Y.S.2d 137 (2d Dep’t).

The next two subdivisions define an “instrumentality of a crime (section 1310 [4]) and a “real property instrumentality of a crime” (subdivision 4-a). An instrumentality of a crime means any property *other than real property and any buildings, fixtures, appurtenances, and improvements thereon* “... whose use contributes directly and materially to the commission of a crime ...” This includes such things as a car used by one who is feloniously driving while intoxicated. Occasionally, whether a piece of property is sufficiently linked to the commission of a particular crime to satisfy the “use contributes directly and materially” standard may be less obvious. *See, DiFiore v. Ramos*, 2009, 62 A.D.3d 643, 878 N.Y.S.2d 762 (2d Dep’t) [defendant was convicted of assault and weapons possession; car used by him to flee the scene, with weapon in the vehicle, was an instrumentality.]

The exclusion of real property prior to the 1990 amendment, which created the “real property instrumentality”, reflected a political judgment that notwithstanding the statute’s numerous protective mechanisms, the forfeiture of valuable real property which, for example, was the location of a marginal, albeit felonious, gambling enterprise might simply be too onerous.

A confusing cross reference in CPLR 1311(1) limits “instrumentality” forfeiture against non-criminal defendants to the value of the proceeds of the crime in one specific situation--where the non-criminal defendant “knew that the instrumentality was or would be used in the commission of a crime.” CPLR 1311(1), 1311(3)(b)(iv)(A). Apparently the intent was to partially protect a non-criminal “guilty loaner,” such as one who loans an expensive car to another

knowing that it is going to be used as the situs of a drug sale. In that situation, the owner will only lose an interest in the property which is equivalent in value to the proceeds of the sale. By contrast, if the drug-selling driver were the car owner, a “criminal defendant,” the entire vehicle would be potentially forfeitable. This provision is separate and apart from the court's authority to limit instrumentality forfeiture in the interests of justice under section 1311(4)(a)(ii).

As noted above, in 1990 the statute was amended to allow for forfeiture of a “real property instrumentality of a crime” (section 1310[4-a]) under very circumspect conditions, perhaps reflecting continued legislative uneasiness with the concept. Notably, this sort of property may be forfeited only when the underlying crime is one of a list of “specified felony offense[s]” which are elaborately-and somewhat painfully-set forth, CPLR 1310(4-b). It might be noted that the definition specifies that it is met, in various circumstances, by conviction by way of an authorized plea of guilty to a lesser offense, a conspiracy to commit the specified offense, or additional evidence linking the property to the crime (compare, CPLR 1310 (4-b(a), (b), (c)). Special burdens and protections are enacted elsewhere in the statute. CPLR 1311(3)(b)(v), 3-a, 4-a).

The statute's *in personam* nature allows for the last sort of forfeiture--“a money judgment in an amount equal in value to the property which constitutes the proceeds of a crime, the substituted proceeds of a crime, an instrumentality of a crime, or the real property instrumentality of a crime.” CPLR 1311(1). Notably, a money judgment is only available against a criminal defendant. Again, this is a reflection of the legislative desire to limit forfeiture against transferees.

The effect of this last provision in actions against a criminal defendant is to entirely eliminate the necessity to trace the actual crime-linked property itself, although it is still necessary to trace the *value* of the property in question. So, to take the simplest example, if a person steals a car which is then stolen from him, the *value* of the car remains potentially forfeitable from the first thief, and a money judgment in that amount can be recovered and enforced in the usual manner, and the thief, a criminal forfeiture defendant, would have to pay the judgment with funds which had nothing to do with the crime. By contrast, if the first thief had given the car to a person who knew it had been stolen, and who was thus a non-criminal forfeiture defendant, because a money judgment is not available against such a person, only the actual car in question could be forfeited, and, if it was then stolen from the transferee or destroyed, there could be no recovery against the non-criminal defendant for its value.

Finally, in post-conviction forfeiture, the forfeiture property can be considerably broader than the property that was involved in the crime of conviction. A post-conviction forfeiture action can be structured to recover not only the property which was linked in one of the above ways to the crime for which the defendant was convicted, but also property which was linked to all of the criminal activity arising from a common scheme or plan which included the activity which resulted in the conviction. Thus, a confidence artist who creates a “Ponzi scheme” and who is convicted for theft from one victim may be subject to forfeiture of property which was taken from other victims of the scheme. *See, Morgenthau v. Khalil*, 2010, 73 A.D.3d 509, 511, 902 N.Y.S.2d 501 (1st Dep't) [unlawful check cashing scheme]; (1st Dep't); *Dillon v. Farrell*, 1966, 230 A.D.2d 818, 646 N.Y.S.2d 843 (2d Dep't) [series of usurious loans]; *Vergari v. Lockhart*, 1989, 144 Misc.2d 860, 545 N.Y.S.2d 223 (Supreme Court, Westchester County) [drug crimes.]

Procedure

Other noteworthy provisions of sections 1310 and 1311 establish procedure. Many are self evident. Forfeiture actions are brought by a “claiming authority”--essentially, the district attorney or attorney general having appropriate criminal jurisdiction, or, by consent of these officials, a corporation counsel or county attorney CPLR 1310(11), (14). The statute also defines the “claiming agent” by cross-reference to the definition of “police officer” in CPL § 1.20(34), supplemented by specific reference to certain New York City officials. These are normally the officials who investigate the underlying criminal offense, and who may discover or maintain the property to be forfeited.

Forfeiture actions must be brought in a superior court. CPLR 1310(7). All defendants have “the right to a trial by jury on any issue of fact.” CPLR 1311(2). It might be noted that the statute itself recognizes the legitimacy of various forms of negotiated settlements, the terms of which must be reported to various state agencies CPLR 1311(11). There is also a provision in the Criminal Procedure Law, added in the 1990 revision of this statute, which requires a similar report for property forfeited in connection with a plea of guilty. CPL 220.60(6). *See, People v. McCoy*, 2012, 2012 WL 2481612 (4th Dep’t) [“We recognize that forfeiture may be a lawful component of a negotiated plea agreement under certain circumstances not present here (citations omitted).”].

The ordinary procedures of the CPLR govern, unless they are inconsistent with the provisions of this article. CPLR 1350. This includes the need to establish *in personam* jurisdiction pursuant to CPLR 302. *See, Goldstock v. Restrepo*, 1994, 209 A.D.2d 378, 379, 618 N.Y.S.2d 423 (2d Dep’t), *lv. to app. dismissed*, 1995, 85 N.Y.2d 924, 650 N.E.2d 1327, 627 N.Y.S.2d 325. [In 13-A action, “[w]e agree with the Supreme Court that neither the mere act of depositing checks drawn on New York banks, nor the fact that deposits were made in Panama and Florida branches of ... entities which happen to be headquartered in New York is sufficient to confer in personam jurisdiction pursuant to CPLR 302.”]

Venue is governed by CPLR 1311(10). The forfeiture action is commenced “by service pursuant to this chapter of a summons with notice or summons and verified complaint.” CPLR 1311(5). The action must be brought within five years of the commission of the crime. CPLR 1311(1). There are no specified exclusions from that period, albeit the limitations of time set forth in CPLR Article 2, *e.g.*, periods when the defendant is absent from the state or residing under a false name (CPLR § 207) are, *per* CPLR 1350, presumably applicable.

As noted above, the various burdens of proof—either a preponderance of the evidence or clear and convincing evidence—are set forth in CPLR 1311(3). These burdens vary with the nature of the defendant, the nature of the property sought to be forfeited, and the nature of the action. For example, in “post-conviction” forfeiture action against a “criminal defendant” the claiming authority must prove by a preponderance of the evidence that the object of the forfeiture action constitutes proceeds, substituted proceeds, or an instrumentality, or that a demanded money judgment is in an amount equivalent to same. Obviously, in the usual situation the fact that someone has been convicted of the offense upon which forfeiture is based should not be controversial, and should be easily proved. However, if an action against a criminal defendant is based upon a “pre-conviction forfeiture crime” the defendant’s criminal liability must be established in the forfeiture action itself, and accordingly the claiming authority must prove that by clear and convincing evidence (*see* CPLR 1311(1), (3)(a), (b)). Later provisions of CPLR 1311(3) establish the burden in other scenarios.

As previously noted, paragraph (c) of subdivision three establishes a number of rebuttable presumptions to aid the claiming authority in sustaining the plaintiff’s burden of showing that the non-criminal defendant is not an “innocent owner,” but rather a person who either “knew or should have known” that the property was linked to a crime, or did so part of a fraudulent attempt to avoid forfeiture.

Finally, Subdivision 3-a of section 1311, added as a protective device in connection with the forfeiture of a “real property instrumentality,” deals with a situation where a person charged with a specified felony pled guilty to some other charge for which the plea was legally authorized. As previously noted, a real property instrumentality may be subject to forfeiture in such circumstances. Accordingly, this provision affords the defendant an opportunity to avoid forfeiture of the real property instrumentality by showing that the conduct involved in the offense would not establish the elements of the specified felony offense. Where defendant offers such proof, the claiming authority must go forward with clear and convincing evidence to establish that the conduct underlying the plea would establish the necessary foundation for a specified felony offense. In order to make certain that nothing set forth in this subdivision can negate a settlement agreement regarding forfeiture worked out at the time of the plea, the subdivision expressly so provides.

Interest of justice dismissal and total value limit

Special mention should be made of the protective mechanisms of CPLR 1311(4) and 1311(4-a). The former is an extraordinary “interest of justice” provision, seemingly patterned after a similar mechanism in the criminal law (*see* Criminal Procedure Law 170.40 and 210.40 and Practice Commentaries thereto). In the criminal context, it has long been recognized “... that the exercise of such discretion should occur only under extraordinary and compelling circumstances in situations which cry out for fundamental justice.” *People v. Serkiz*, 2005, 17 A.D.3d 28, 31, 790 N.Y.S.2d 296, 298 (3d Dep’t) (citation omitted).

The provision appears to be “unique” to Article 13-A, and is not applicable to any other form of forfeiture action (*see Matter of Property Clerk of NYC Police Dept. v. Ferris*, 1991, 77 N.Y.2d 428, 431, 568 N.Y.S.2d 577, 570 N.E.2d 225 [interest of justice dismissal not possible in forfeiture action brought pursuant to NYC local law]).

The subdivision [§ 1311(4)] allows a court to dismiss any form of 13-A forfeiture or to limit the value of instrumentality forfeiture to an amount equal in value to proceeds or substituted proceeds. There is a bit of a gap here—the court may dismiss any form of forfeiture action, including one for proceeds or substituted proceeds, but cannot simply reduce or limit the value of forfeitable property in such an action. There are specified, but non-exclusive, criteria for the application of such relief [§ 1311(4)d]. Applications have not generally succeeded. *See, Hynes v. Dallas*, 2011, 83 A.D.3d 896, 922 N.Y.S.2d 137 (2d Dep’t); *Morgenthau v. Clifford*, 1992, 157 Misc.2d 331, 346, 597 N.Y.S.2d 843 (Supreme Court N.Y. Co.) *appeal withdrawn*, 1993, 198 A.D.2d 923, 603 N.Y.S.2d 937 (1st Dep’t); *Dillon v. Morgan Oil Terms*, 1987, 138 Misc.2d 135, 139, 523 N.Y.S.2d 719 (Nassau Co.Ct.); *Holtzman v. Bailey*, 1986, 132 Misc.2d 25, 28-30, 503 N.Y.S.2d 473 (S.Ct. Kings Co.); *Dillon v. Castelli*, 1986, 132 Misc.2d 1077, 506 N.Y.S.2d 418 (Nassau Co.Ct.).

The following provision, § 1311(4-a) is applicable to real property, and provides various mechanisms aimed at protecting the interests of innocent owners of such property. As noted in the original practice commentary to this section, “The intent of this provision was to safeguard against ‘substantial, albeit unintended, hardships on financial institutions, tenants and owners who are guilty of no criminality’ and ‘to protect the interests of innocent parties in situations where the innocent party and a forfeiture defendant are joint tenants or own property as tenants by the entirety, or otherwise jointly own property’ (see letter of Hon. Sheldon Silver, then Chair of Assembly Committee on Codes to Governor Mario M. Cuomo in Bill Jacket for L.1990, c.655).”

Another protective mechanism is the “total value limit” of CPLR 1311(8) This essentially is aimed at preventing “double recovery,” such as forfeiture of the value of both proceeds and substituted proceeds of one crime from different people. Finally, it might also be noted the statute provides that persons who are not forfeiture defendants, that is, properly served with the necessary notice, do not forfeit property under Article 13-A. CPLR 1311(5) (*but see* the discussion of remission, below.)

Remission

Subdivision 7 provides a mechanism for an innocent owner to regain forfeited property if the owner never received actual notice of the proceeding. The petition must be filed within one year after “entry of the judgment” (CPLR 5016) and the court does not appear to have authority to extend that deadline. *Cf. People v. Public Service Mutual Insurance Co.*, 1975, 37 N.Y.2d 606, 339 N.E.2d 128, 376 N.Y.S.2d 421 (1975) [remission of bail]. Note that the one year limitation, which seems to cut off a person or entity with an interest in the property who never received notice of the forfeiture proceeding, may be subject to due process attack, and seems inconsistent with the language of § 1311(5): “No person shall forfeit any right, title, or interest in any property who is not a defendant in the [forfeiture] action.”

Earlier, during the pendency of the forfeiture action, another provision, CPLR 1327, allows an interested person to bring a proceeding to determine adverse claims, "Prior to the application of property or debt to the satisfaction of a judgment." That section has been construed to disallow a challenge which was brought after the forfeiture action was settled by stipulation, which the court held had the effect of terminating the forfeiture action. *Cambrios v. Morgenthau*, 2008, 48 A.D.3d 278, 851 N.Y.S.2d 180 (1st Dep't)

Assuming the applicant for remission did not receive actual *notice* of the forfeiture action, he or she must then establish that they did not have "... actual *knowledge* of the forfeiture action or any related proceeding for a provisional remedy *and* did not know or should not have known that the forfeited property was connected to a crime or fraudulently conveyed (emphasis supplied) If all of this can be established, the court *may* restore the property, provided it determines that restoration "would serve the ends of justice." Unlike the interest of justice mechanism of subdivision four, no specific factors are identified to aid the court in determining that.

Constitutional Considerations

There are several areas of constitutional law which impact on forfeiture proceedings. These include considerations of double jeopardy, excessive fines, and procedural due process. Owing to careful draftsmanship, 13-A thus far seems to have avoided some constitutional pitfalls which have plagued other forfeiture statutes.

Due process and related provisions

Constitutional concern here has generally focused upon the seizure and retention of potentially forfeitable property pending forfeiture, rather than the actual mechanisms of the forfeiture itself. Initially, in *Morgenthau v. Citisource Inc.*, 1986, 68 N.Y.2d 211, 508 N.Y.S.2d 152, 500 N.E.2d 850, the first Article 13-A case to reach the Court of Appeals, the Court reviewed the provisional remedies allowing for the seizure of property and held that procedural due process was satisfied. 68 N.Y.2d at 222.

Further, in *Krimstock v. Kelly*, 2002, 306 F.3d 40 (2nd Cir.), the Court decided that the process of seizing and retaining vehicles subject to forfeiture as an instrumentality of misdemeanor level drunk driving under the New York City Administrative Code (§ 14-14) lacked sufficient procedural safeguards to satisfy the Due Process Clause or the Fourth Amendment. The infirmities were primarily in regard to providing the opportunity for a prompt post-seizure challenge to the legality and justification for the seizure as well as protection for innocent third party owners. However, in several places, the Court distinguished the mechanisms of Article 13-A, at one point citing to *Morgenthau v. Citisource* (306 F.3d, fn 2 at 45, fns 19, 20 at 58). *See, also County of Nassau v. Canavan*, 2003, 1 N.Y.3d 134, 143-144, 802 N.E.2d 616, 624-25, 770 N.Y.S.2d 277, 285-86, where the Court, construing a local forfeiture ordinance similar to the NYC Administrative Code provision in *Krimstock*, held "that due process requires that a prompt post-seizure retention hearing before a neutral magistrate be afforded, with adequate notice, to all defendants whose cars are seized and held for possible forfeiture." Again, certain provisions of Article 13-A were contrasted with the ordinance in question.

Another due process issue arising in forfeiture actions concerns the rights of innocent third parties in such proceedings. *See, e.g. Property Clerk of the Police Department of the City of New York v. Harris*, 2007, 9 N.Y.3d 237, 878 N.E.2d 1004, 848 N.Y.S.2d 588 [due process requires that innocent co-owner of vehicle impounded under NYC Administrative Code be given notice and opportunity to be heard at post-seizure hearing]. As noted above, Article 13-a contains broad protections for innocent third parties. *See, §§ 1311(3)[b](iv)(v), (4-a)(a), (7); 1329.* Transitioning to the Sixth Amendment, the statute also allows for a release of property to pay attorney's fees in the forfeiture or criminal action. § 1312(4).

Given this precedent, the nature of the provisional remedies contained in Article 13-A, the absence of a forfeiture-specific seizure provision in that statute, and the fact that the forfeiture then proceeds as an ordinary civil action with all attendant rights, up to and including a jury trial, due process would seem an unlikely challenge.

Double jeopardy

Civil forfeiture under 13-A may under certain circumstances either precede or follow a criminal action. In either case, the question arises whether the double jeopardy clause of the Fifth Amendment of the United States Constitution, or the State constitutional cognate (NY Constitution, Article 1, § 6) or New York statutory double jeopardy (CPL Article 40) are implicated.

Historically, the answer was no. Civil forfeiture laws survived double jeopardy challenges essentially because of their civil (but mostly *in rem*) nature, and courts gave great deference to legislatures in making that classification. *See, U.S. v. Ward*, 1980, 448 U.S. 242, 248-49, 100 S.Ct. 2636, 2641, 65 L.Ed.3d 742; *U.S. v. One Assortment of 89 Firearms*, 1984, 465 U.S. 354, 104 S.Ct. 1099, 79 L.Ed.2d 361. Notably, CPLR 1311(1) specifically declares that the statute is "... civil, remedial, and in personam in nature and shall not be deemed a penalty or criminal forfeiture for any purpose An action under this article is not a criminal proceeding and may not be deemed a previous prosecution under article forty of the criminal procedure law."

So matters stood until, in a series of cases beginning in 1989, the United States Supreme Court re-examined the relationship between civil statutes and criminal penalties for double jeopardy purposes. The initial decisions seemed to undermine the traditional view that all such statutes are purely civil in nature, thus making double jeopardy protection potentially applicable, but ultimately the Court swung back to something more closely approximating the earlier rule.

The first two cases did not involve forfeiture laws. In the first *United States v. Halper*, 1989, 490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed.2d 487, the defendant had been criminally convicted of a Medicare fraud involving the theft of \$585 from the federal government, and was sentenced to two years in prison and a \$5000 fine. The subsequent civil action, brought under the federal False Claims Act, sought to recover some \$130,000 in civil penalties, damages and costs. The Court, after reviewing the extensive body of precedent concerning deference to legislative classification of statutes as "civil" for double jeopardy purposes, nevertheless concluded that a defendant who has already been criminally punished may not be subjected to an additional civil sanction to the extent that the civil sanction may not be fairly viewed as remedial, but only as a deterrent or retribution. 490 U.S. at 448-49. The opinion emphasized that this was a rule for the "rare case...." 490 U.S. at 449.

Notwithstanding that caveat, five years later, in *Department of Revenue of Montana v. Kurth Ranch*, 1994, 511 U.S. 767, 114 S.Ct. 1937, 128 L.Ed.2d 767, the Court struck down a Montana statute that imposed a tax on the possession and storage of illegal drugs. The defendants, who had operated a marihuana farm, pled guilty to a criminal offense, were sentenced, and were also subjected to a civil forfeiture proceeding. Then, in a separate third proceeding, the state sought to collect almost \$900,000 in "taxes" under a scheme that *inter alia*, was conditioned upon commission of a crime, applied only to contraband goods, and was assessed at eight times the value of the goods. The Court called the statute "a concoction of anomalies too far removed in crucial respects from a standard tax assessment to escape characterization as a punishment for the purpose of Double Jeopardy analysis." 511 U.S. at 783.

However, in the next two cases the pendulum swung sharply back. First, in an actual *in rem* forfeiture case, *United States v. User*, 1996, 518 U.S. 267, 116 S.Ct. 2135, 135 L.Ed.2d 549, the Court upheld the forfeiture of property used to facilitate illegal drug transactions and to launder money, distinguishing traditional *in rem* civil forfeiture from the sorts of statutes involved in *Halper* and *Kurth Ranch*. The Court noted that such forfeiture laws have existed "[s]ince the earliest years of this Nation," and that the Double Jeopardy Clause had repeatedly been held inapplicable, because such laws "do not impose punishment." The Court further held that "the case by case balancing test set

forth in *Halper*, in which a court must compare the harm suffered by the Government against the size of the penalty imposed, is inapplicable to civil forfeiture.” It is important to note, however, that the Supreme Court at various points emphasized the distinction between *in personam* civil proceedings and *in rem* forfeiture. In the latter, because of historical antecedents such as the deodand, the property itself is in a sense the offender. This affects the double jeopardy analysis.

Next came *Hudson v. United States*, 1997, 522 U.S. 93, 118 S.Ct. 488, 139 L.Ed.2d 450. In a 5-4 decision, the Court disavowed, or perhaps abrogated, *Halper*. Federal bank regulators had imposed monetary and occupational penalties on bank officials who had violated federal statutes. When the government subsequently indicted these officials for the same conduct, they moved to dismiss under the Double Jeopardy Clause. The Court ruled that the prosecutions could proceed, and severely criticized *Halper's* analysis as giving too little deference to legislative classification. The Court pronounced the *Halper* test—determining whether the sanction “civilly” imposed was so grossly disproportionate to the harm caused as to constitute punishment”—“unworkable,” and announced a return to “traditional double jeopardy principles.”

In essence, under *Hudson* “[a] court must first ask whether the legislature, in establishing a penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other.... Even in those cases where the legislature ‘has indicated an intention to establish a civil penalty, we have inquired further whether the statutory scheme was so punitive either in purpose or effect ... as to transform what was clearly intended as a civil remedy into a criminal penalty.’ ” 522 U.S. at 99 (citations omitted).

As to the latter determination, the Court provided a series of “useful guideposts” drawn from precedent, including;

(1) “[w]hether the sanction involves an affirmative disability or restraint”; (2) “whether it has historically been regarded as a punishment”; (3) “whether it comes into play only on a finding of *scienter*”; (4) “whether its operation will promote the traditional aims of punishment—retribution and deterrence”; (5) “whether the behavior to which it applies is already a crime”; (6) “whether an alternative purpose to which it may rationally be connected is assignable for it”; and (7) “whether it appears excessive in relation to the alternative purpose assigned.” It is important to note, however, that “these factors must be considered in relation to the statute on its face” ... and “only the clearest proof” will suffice to override legislative intent and transform what has been nominated a civil remedy into a criminal penalty. 522 U.S. at 99-100 (citations omitted)

The Court also noted that there were other constitutional principles which could be applicable in such situations: “the Due Process and Equal Protection Clauses already protect individuals from sanctions which are downright irrational The Eighth Amendment protects against excessive civil fines, including forfeitures....” 522 U.S. at 103 (citations omitted.)

As previously noted, the Article 13-A statute itself declares that it is civil and remedial [§ 1311(1)], and, in *Morgenthau v. Citisource Inc.*, 1986, 68 N.Y.2d 211, 217, 508 N.Y.S.2d 152, 500 N.E.2d 850, the Court of Appeals, characterized Article 13-A as “... an action which is civil, remedial, and in personam in nature” Additionally, § 1311(1) specifies that “An action under this article is not a criminal proceeding and may not be deemed to be a previous prosecution under article forty of the criminal procedure law.” Thus, both the legislature itself and the state's highest court have spoken on the matter of civil vs. criminal categorization. Legislative intention is not at issue.

Before *Hudson*, *District Attorney of Kings County v. Iadarola*, 1995, 164 Misc.2d 204, 623 N.Y.S.2d 999 (Supreme Ct., Kings Co.) found the double jeopardy clause inapplicable to a 13-A proceeding. Subsequent to *Hudson*, *DiFiore v. Ramos*, 2009, 62 A.D.3d 643, 878 N.Y.S.2d 762 (2d Dep't), and *People v. Edmonson*, 300 A.D.2d 317 (2d Dep't 2002), *habeas corpus denied Edmonson v. Artus*, 2006 WL 3486769 (E.D.N.Y. 2006) have held, in various postures, that at least preliminary Article 13-A proceedings do not raise double jeopardy issues. *See also, Gumbs v. Kelly*, 2000 WL 1172350 (S.D.N.Y.) [to same effect]. New York Courts have also applied *Hudson* to deny double jeopardy

challenges in cases involving other civil penalties. *See, Town of Grafton v. Cox*, 2005, 23 A.D.3d 906 (3d Dep't) [prior criminal prosecution does not bar civil proceeding against an unlicensed junkyard]; *Town of Babylon v. Hyland*, 2011, 34 Misc.3d 132(A), 946 N.Y.S.2d 69 (Appellate Term, 2d Dep't) [prior criminal prosecution of operator of illegal boarding house did not bar civil monetary penalties.]

What can be gleaned from all of this at this point would seem to be the following. Under the governing Supreme Court cases, the distinction between *in rem* and *in personam* proceedings remains somewhat significant. The first part of the *Hudson* test--whether the legislative intent was to characterize the proceedings as civil--is here answered without question.

As to the second part of the test--whether, notwithstanding the civil characterization the statutory scheme was so punitive either in purpose or effect as to transform what was clearly intended to be a civil remedy into a criminal penalty--this would seem a difficult argument to make in the context of an action for proceeds, substituted proceeds, or an equivalent monetary judgment. As noted below in the excessive fines context, such actions do no more than recover the fruits of criminal activity Cf. *State ex. rel. Goddard v. Gravano*, 2005, 210 Ariz. 101, 108 P.3d 251, holding that an Arizona statute under which a criminally convicted person was subject to a proceeds-based *in personam* civil forfeiture served a non-punitive goal under *Hudson*, and therefore double jeopardy was not violated. With regard to instrumentality forfeiture, which, somewhat ironically, has survived constitutional attack because it is usually structured as an *in rem* proceeding, matters may be less clear.

Excessive Fines

There remains the question of the applicability of the Eighth Amendment protection against excessive fines. As summarized by the Court of Appeals in *County of Nassau v. Canavan*, 2003, 1 N.Y.3d 134, 139-40, 802 N.E.2d 616, 621 770 N.Y.S.2d 277, 282:

Both the Federal and State Constitutions prohibit the imposition of excessive fines (*see* U.S. Const. 8th Amend.; N.Y. Const., art. I, § 5). The Excessive Fines Clause thus "limits the government's power to extract payments, whether in cash or in kind, as 'punishment for some offense.'" (*Austin v. United States*, 509 U.S. 602, 609-610, 113 S.Ct. 2801, 125 L.Ed.2d 488 [1993] [Forfeitures-payments in kind-are "fines" if they constitute punishment for an offense (*see United States v. Bajakajian*, 524 U.S. 321, 328, 118 S.Ct. 2028, 141 L.Ed.2d 314 [1998]). As the County concedes, the civil forfeiture at issue here serves, at least in part, deterrent and retributive purposes and is thus punitive and subject to the Excessive Fines Clause" (emphasis in original.)

The "forfeiture at issue" in that case was a proceeding under a local county ordinance to forfeit property which was an instrumentality of a misdemeanor or petty offense--here a car. The vehicle in question, which was valued at some \$6,500, had been operated by a woman who pled guilty to "the traffic infractions of speeding and driving while impaired by alcohol." 1 N.Y.3d at 137, 802 N.E.2d at 620, 770 N.Y.S.2d at 281.

The Court applied the federal standard of *Bajakajian* ["a punitive forfeiture of an instrumentality of a crime violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense." A cluster of factors were identified to determine "gross disproportion": the seriousness of the offense, the severity of the harm caused and of the potential harm had the defendant not been caught, the relative value of the forfeited property and the maximum punishment to which defendant could have been subject for the crimes charged, and the economic circumstances of the defendant. 1 N.Y.3d at 140, 802 N.E.2d at 621-22, 770 N.Y.S.2d at 282-83. The Court held that in this case, the forfeiture was not grossly disproportionate, but did go on to warn that instrumentality forfeiture for minor offenses was not without constitutional risk: "In any event, the forfeiture of an automobile for a minor traffic infraction such as driving with a broken taillight or failing to signal would surely be 'grossly disproportional to the gravity of a defendant's offense.'" *Ibid.* (citation omitted.)

Does the Excessive Fines Clause impact Article 13-A forfeitures? With regard to forfeiture of proceeds, substituted proceeds, or an equivalent monetary value, there would appear to be no issue—either these are simply not punitive for Eighth Amendment purposes, or they are obviously not excessive, as they do no more than track the amount of property gained through the commission of crime. *See, Hynes v. Dallas*, 2011, 83 A.D.3d 896, 897, 922 N.Y.S.2d 137 (2d Dep't) [“Contrary to the Supreme Court's conclusion, since the plaintiff is seeking to recover proceeds stemming from defendant's criminal conduct, the forfeiture cannot be considered punitive in nature.”]

With regard to instrumentality forfeiture, however, it may be a different story. Professor Peter Preiser's conclusion was that instrumentality forfeiture may qualify as punishment for Eighth Amendment purposes. This may well be the case. However, even so, Article 13-A actions are predicated upon the commission of felonies, unlike the local ordinance in *Canavan*, and, as in *Canavan* itself, claims of excessiveness have generally been rejected. *See, Property Clerk of N.Y. City Police Department v. Ber*, 2008, 49 A.D.3d 430, 854 N.Y.S.2d 376 (1st Dep't) [forfeiture of vehicle worth \$20-27,000 for misdemeanor driving while impaired not excessive]; *Malafi v. A 1967 Chevrolet, Vin No. 135177G120642*, 2009, 63 A.D.2d 1112, 883 N.Y.S.2d 884 (2d Dep't) [vehicle forfeiture not excessive in light of defendant's conduct.] *See also, Matter of Attorney General v. One Green 1993 Four Door Chrysler*, 1996, 217 A.D.2d 342, 636 N.Y.S.2d 868 (3d Dep't) [rejecting claim in *in rem* forfeiture action.]

Further, note might be taken of the potential effect of the extraordinary “interest of justice” provision [§ 1311(4)], which allows a court to dismiss any form of 13-A forfeiture or to limit the value of instrumentality forfeiture to an amount equal in value to proceeds or substituted proceeds. That provision, which may be unique in forfeiture law, essentially renders forfeiture under Article 13-A non-mandatory, and extends potential leniency pursuant to guided discretion, which may be of some significance here.

Notes of Decisions (21)

McKinney's CPLR § 1310, NY CPLR § 1310

Current through L.2015, chapters 1 to 13, 50 to 58, 60 to 61.

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