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The Uniform Innocent Owner Defense to Civil Asset Forfeiture: The Civil Asset Forfeiture Reform Act of 2000 Creates a Uniform Innocent Owner Defense to Most Civil Forfeiture Cases Filed by the Federal Government

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The Uniform Innocent Owner Defense to Civil Asset Forfeiture: The Civil Asset Forfeiture Reform Act of 2000 Creates a Uniform Innocent Owner Defense to Most Civil Forfeiture Cases Filed by the Federal Government

BY STEFAN D. CASSELLA*

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I. INTRODUCTION

The asset forfeiture laws allow the government to bring a civil action to confiscate—or "forfeit"—property derived from, or used to commit, a criminal offense.1 Historically, because the civil action was filed in rem, the only issue in the forfeiture case was whether there was an adequate nexus between the property and the offense; if the property was derived from or used to commit the offense, it was subject to forfeiture regardless of who the owner of the property might have been, or whether the owner took part in, or even was aware of, the offense when it occurred.

Property owners challenged the civil forfeiture laws on the ground that they did not adequately protect the rights of innocent property owners. In Bennis v. Michigan,2 however, the Supreme Court held that the Due Process Clause of the Fourteenth Amendment and the Takings Clause of the Fifth Amendment do not protect property owners from the forfeiture of their property, when the property was used to commit a criminal offense, even if the property owner had no knowledge of, and did not consent to, the illegal use of the property.

The Bennis decision meant that Congress and state legislatures were free to enact civil forfeiture laws subjecting property to confiscation by the

1 There is no general authority to forfeit property in connection with a federal crime. To the contrary, forfeiture must be authorized on a statute-by-statute basis. See, for example, 18 U.S.C.A. § 981(a)(1)(C) (2000), which authorizes forfeiture of the "proceeds" of more than 100 crimes, including all of the most common offenses. Forfeiture of "facilitating property" or "property involved in the offense" is authorized for a smaller but significant number of offenses, including drug trafficking, 21 U.S.C. § 881(a)(4), (6)-(7) (1994), and money laundering, 18 U.S.C.A. § 981(a)(1)(A).

government when it was used in connection with a wide variety of criminal offenses—from soliciting prostitution and driving while intoxicated to international drug trafficking and money laundering in aid of terrorism—without having to take into account the property owner’s role in the offense. Many state forfeiture provisions, like the anti-prostitution ordinance at issue in *Bennis*, did in fact authorize asset forfeiture without providing an "innocent owner defense." On the other hand, the federal forfeiture statutes—or at least those enacted since the late 1970s—have generally contained innocent owner protections, even though they were not constitutionally required.

For that reason, *Bennis* did not have a great impact on asset forfeiture under federal law. The decision did, however, spur debate on the adequacy of the federal innocent owner defenses, and it served to highlight what forfeiture practitioners had long known: that the federal innocent owner provisions were ambiguous in their language and scope, and inconsistent in their application to different crimes. The protection afforded property owners in drug cases, for example, was different from the protection afforded in money laundering, or alien smuggling, or child pornography cases. In addition, the language of the various statutes was so ambiguous that different courts afforded different protections to property owners in similar factual situations in cases brought under the same forfeiture statute. Moreover, *Bennis* served as a reminder that some of the older federal civil forfeiture statutes contained no innocent owner protection at all.

In 1996, the U.S. Department of Justice proposed a uniform innocent owner defense that would apply to virtually all civil forfeiture actions undertaken under federal law. After much debate and amendment, that proposal was enacted into law as part of the Civil Asset Forfeiture Reform Act of 2000 (CAFRA), which took effect on August 23, 2000. The defense, codified at 18 U.S.C. § 983(d), applies only to federal forfeiture cases, but it is likely to serve as a model for state forfeiture statutes as well.

This Article discusses the problems that troubled the courts in connection with the innocent owner defenses under pre-CAFRA law, and

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3 *Id.* at 444-45 (describing forfeiture provisions at issue).


how the sponsors of the uniform defense thought that those problems might be resolved. It then discusses the terms of the new statute and how they are likely to be interpreted in light of the legislative history and the pre-CAFRA case law.

II. PROBLEMS WITH THE OLD LAW

A. Historical Background

The first federal forfeiture statutes were enacted in the late eighteenth century, and new statutes were enacted periodically for the next 200 years; but until the late 1970s none of these statutes contained any exception for property belonging to innocent owners. There were several reasons for this. One was that the early statutes provided primarily for the forfeiture of contraband or other property that it was illegal to possess. In such cases, there is no need for an innocent owner defense, because the government has an obvious interest in “removing the items from private circulation, however blameless or unknowing their owners may be.”

The early statutes were also directed at ships that engaged in piracy on the high seas, in the slave trade, or in smuggling goods into the United States. In such cases, it was considered appropriate to presume, under ancient maritime law, that the owner of the ship was aware (or should have been aware) of the way in which his property was being used. Thus, in a series of nineteenth century cases, the Supreme Court adopted the principle that property, such as a ship, could be confiscated without regard to the owner’s participation in, or knowledge of, the illegal act that the ship had been used to commit.

It is one thing to apply a principle of strict liability to pirates, slave traders, and smugglers, and quite another to apply it to the owners of less exotic property used to commit more mundane offenses. Nevertheless, in the twentieth century, during the Prohibition Era, Congress enacted

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7 The historical background of the innocent owner defense, and the need for federal legislation to create a uniform statute, were discussed in detail at a symposium on civil forfeiture reform at Notre Dame Law School in 1995. See Stefan D. Cassella, Forfeiture Reform: A View From the Justice Department, 21 NOTRE DAME J. LEGIS. 212-28 (1995).
9 Bennis, 516 U.S. at 460 (Stevens, J., dissenting).
10 Id. at 461 (Stevens, J., dissenting).
forfeiture statutes authorizing the confiscation of equipment and vehicles used for the manufacture and transportation of alcoholic beverages—including vehicles that belonged to an innocent owner and, in all likelihood, were used in most instances for a legitimate purpose. In other words, the government could confiscate a car filled with bottles of moonshine, even if the bootlegger driving the car was not the owner, and the owner knew nothing about the illegal use of his car on this particular occasion. Based on the earlier precedents, the Supreme Court upheld the forfeiture of the vehicles in such cases on the ground that the use of the property was so undesirable that an owner allowed his property to be used by another at his own peril.\(^\text{11}\)

What had evolved was the notion that the forfeiture laws could be used not only for a remedial purpose—to take contraband or property used to commit illegal acts out of circulation—but also for deterrence—to encourage property owners to be vigilant in how they allowed their property to be used. In essence, the Court held that property owners will take greater care, when they allow their property to be used by another, if they know that they risk the loss of the property, through forfeiture, if the third party uses the property to commit a crime. It was precisely that principle that the Supreme Court reaffirmed in \textit{Bennis}, when it held that a car used by Mr. Bennis to pick up a prostitute could be forfeited even though the car belonged to Mrs. Bennis—an innocent owner who, all parties agreed, did not consent to this particular use of her property.\(^\text{12}\)

Using the forfeiture laws to encourage property owners to take greater care in how they allow their property to be used by others has considerable appeal as a matter of public policy. But as the \textit{Bennis} case illustrates, it can have harsh results. Indeed, even the Supreme Court has considered, however fleetingly, that there might be a constitutional limit on the use of forfeiture as a means to encourage greater vigilance on the part of property owners. In 1974, in dicta in the Supreme Court’s decision in \textit{Calero-Toledo v. Pearson Yacht Leasing Co.},\(^\text{13}\) Justice Brennan noted that “it would be difficult to reject the constitutional claim of... an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property.”\(^\text{14}\)

\(^{11}\) \textit{Id.} at 447-48 (discussing the facts and the holding in \textit{Van Oster v. Kansas}, 272 U.S. 465 (1926)).

\(^{12}\) \textit{Id.} at 452.


\(^{14}\) \textit{Id.} at 689.
The dicta in *Calero-Toledo* never became part of constitutional doctrine,15 but by the late 1970s, when the first modern forfeiture statutes for drug offenses were enacted, the sentiment expressed by Justice Brennan began to find its way into federal law. More than anything else, the reason for this was that the scope of the forfeiture statutes had changed. Laws that were previously directed at slave traders and bootleggers were being applied in the 1970s to property—like cars, homes, businesses, and bank accounts—that most citizens own, and that are used in most instances for legitimate purposes. In those circumstances, the public policy considerations that favor putting the burden on property owners to supervise the way their property is used by others had to give way, to some extent, to the desire to protect the interests of the truly innocent owner who had no reason to suspect that his home or his car was being used by someone else to commit a crime.16

It was this desire to protect the truly innocent that caused Congress, beginning in 1978, generally to include some degree of protection for innocent owners whenever it enacted a new forfeiture statute.

B. *Inconsistencies and Ambiguities in the Statutory Defenses*

It is one thing to accept the notion that the rights of innocent owners should be protected in some circumstances, and another to find the language that strikes the proper balance. Too much protection for property owners undermines the historically recognized public policy goal of preventing property owners from allowing their property to be used by others to commit a criminal offense. Too little protection results in property owners bearing the weight of the national campaign against crime in circumstances where they are truly powerless to prevent the illegal act. Unfortunately, Congress's first attempts at drafting innocent owner statutes produced ambiguity, inconsistency, and loopholes that frustrated the enforcement of the forfeiture laws.17

1. *Inconsistent Language*

First, the innocent owner provisions in the most commonly used civil forfeiture statutes—the ones pertaining to drug and money laundering

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15 *See Bennis*, 516 U.S. at 449-50 (describing the quoted passage from *Calero-Toledo* as dicta, and refusing to follow it).
16 *See* Cassella, *supra* note 7, at 213.
17 *Id.* at 213-19 (listing problems caused by the drafting of the innocent owner statutes and related case law).
offenses—were inconsistent with each other. For example, 21 U.S.C. § 881(a)(4),\(^{18}\) authorizing the forfeiture of vehicles, vessels and aircraft used to transport drugs, protected an owner whose property was used without his "knowledge, consent or willful blindness."\(^{19}\) Sections 881(a)(6) (drug proceeds)\(^{20}\) and 881(a)(7) (real property facilitating drug offenses),\(^{21}\) on the other hand, contained no reference to willful blindness: they protected those who demonstrated lack of "knowledge or consent."\(^{22}\) Finally, 18 U.S.C. § 981(a)(2) (property involved in money laundering),\(^{23}\) required only a showing of lack of "knowledge."\(^{24}\) These inconsistent provisions resulted in the development of different innocent owner standards depending on which forfeiture statute the government happened to employ.

Moreover, the statutory defenses for drug and money laundering cases were inconsistent with other innocent owner protections elsewhere in the U.S. Code. Whereas, for example, the defenses in drug and money laundering cases applied to all categories of "owners," the innocent owner provision applicable to alien smuggling in 8 U.S.C. § 1324(b)\(^{25}\) applied only to common carriers (airlines, bus companies, etc.),\(^{26}\) and owners deprived of property in violation of the law.\(^{27}\) Thus, a person whose car was stolen from him and used to smuggle illegal aliens was considered an innocent owner, but a person who loaned his car to his brother, not knowing that the brother was going to use it for such an unlawful purpose, was not.

Of course, the greatest inconsistency was that most of the recently-enacted civil forfeiture provisions had at least some form of innocent owner defense, but the older statutes—such as the gambling forfeiture provision

\(^{19}\) Id. § 881(a)(4)(C).
\(^{20}\) Id. § 881(a)(6) (Supp. IV 1999).
\(^{21}\) Id. § 881(a)(7).
\(^{22}\) Id. § 881(a)(6)-(7).
\(^{24}\) Id. For a general discussion of the ambiguities and inconsistencies in the pre-CAFRA innocent owner statutes, see Civil Asset Forfeiture Reform Act: Hearing on H.R. 1916 Before the House Comm. on the Judiciary, 104th Cong. 222-26 (1996) [hereinafter 1996 Hearings] (testimony of Stefan D. Cassella, Deputy Chief, Asset Forfeiture and Money Laundering Section of the Department of Justice), reprinted in U.S. DEP'T OF JUSTICE, supra note 4, at 114-16.
\(^{26}\) Id. § 1324(b)(1)(A).
\(^{27}\) Id. § 1324(b)(1)(B).
contained no protection for innocent owners at all. In light of Bennis v. Michi
gan,30 courts were required to hold that claimants in cases brought
under the older statutes had no right to assert an innocent owner defense.31

2. Disjunctive or Conjunctive?

There was also a healthy measure of inconsistency introduced by the
case law. As previously discussed, the innocent owner defense under some
of the drug forfeiture statutes required the owner to establish that the illegal
use of his property took place “without the knowledge or consent” of the
owner.32 But were the terms “knowledge” and “consent” intended to be
disjunctive or conjunctive requirements?

The Ninth Circuit interpreted “knowledge or consent” to mean that a
person had to prove that she did not have knowledge of the criminal offense
and did not consent to the use of the property to commit that offense.33
Thus, in the Ninth Circuit, a wife who knew that her husband was using her
property to commit a criminal offense could not defeat the forfeiture of that
property by showing that she did not consent to the illegal use, or that she
tried to stop it. Her failure to establish lack of knowledge, by itself, was
fatal to her innocent owner claim. Similarly, a claimant in the Ninth Circuit

29 Id. § 545.
this case, see supra notes 2-4 and accompanying text.
31 See United States v. An Antique Platter of Gold, 184 F.3d 131 (2d Cir. 1999)
(applying Bennis and holding that there is no innocent owner defense for violations
of 18 U.S.C. § 545); United States v. Various Ukranian Artifacts, No. CV-96-3285,
1997 WL 793093 (E.D.N.Y. Nov. 21, 1997) (holding that there is no innocent
owner defense for violations of 19 U.S.C. § 1497); United States v. $83,132.00 in
(applying Bennis and holding that there is no innocent owner defense in forfeiture
cases involving unreported currency brought under 31 U.S.C. § 5317).
33 See United States v. Lot 111-B, 902 F.2d 1443, 1445 (9th Cir. 1990)
(interpreting “knowledge” and “consent” as conjunctive terms, and holding that a
claimant must prove lack of both). See generally Anthony J. Franze, Note,
Casualties of War?: Drugs, Civil Forfeiture, and the Plight of the “Innocent
Owner,” 70 Notre Dame L. Rev. 369 (1994). The Eighth Circuit apparently also
followed the conjunctive approach. See United States v. One 1989 Jeep Wagoneer,
976 F.2d 1172 (8th Cir. 1992) (holding that a claimant who could show lack of
knowledge and lack of consent still had to show he was not willfully blind).
who did not know that her property was being used illegally nevertheless had to show that she did not consent in advance to the illegal use.\textsuperscript{34} Failure to show lack of consent was fatal to the claim.\textsuperscript{35}

But the Second and Third Circuits, interpreting the statute disjunctively, held that a person could establish an innocent owner defense by showing either lack of knowledge or lack of consent. Thus, a person who had knowledge that her property was being used for an illegal purpose could avoid forfeiture by showing that she did not consent to that use of the property.\textsuperscript{36} In addition, a person who did not know that the property was being used illegally was automatically deemed an innocent owner on the ground that a person could not consent to what she did not know.\textsuperscript{37}

\textsuperscript{34} See United States v. Property Titled in the Names of Ponce, 751 F. Supp. 1436, 1440 n.3 (D. Haw. 1990) (disagreeing with the Second Circuit and stating that the claimant must show that she did not consent in advance to the illegal use of her property, even if she proves that she did not actually know whether such use ever occurred).

\textsuperscript{35} District Courts in the Eleventh Circuit must apply the conjunctive test because when there is an intra-circuit split on an issue, the earlier decision controls. See United States v. 7079 Chilton County Rd. 37, 123 F. Supp. 2d 602, 608-09 (M.D. Ala. 2000) (requiring that a claimant must show lack of knowledge and that all reasonable steps were taken to prevent illegal use of property). Compare United States v. 1012 Germantown Rd., 963 F.2d 1496, 1500 (11th Cir. 1992) (holding that a claimant may show lack of knowledge or lack of consent), with United States v. 15603 85th Ave. N., 933 F.2d 976, 981 (11th Cir. 1991) (holding that a claimant must prove both that he had no knowledge of the illegal act and that he did not consent to the illegal activities). In this situation, however, the earlier appellate decision controls. See 7079 County Rd. 37, 123 F. Supp. 2d at 608-09 (adopting the conjunctive interpretation in 15603 85th Ave. N.).

\textsuperscript{36} See United States v. One 1973 Rolls Royce, 43 F.3d 794, 816-17 (3d Cir. 1994) (surveying cases from the different circuits and following 6109 Grubb Rd.); United States v. 141st St. Corp., 911 F.2d 870, 877-78 (2d Cir. 1990) (holding that a landlord who knew building was being used for drug trafficking was entitled to an opportunity to show he did not consent to such use); United States v. 6109 Grubb Rd., 886 F.2d 618, 626 (3d Cir. 1989) (holding that a wife who knew of her husband’s use of their residence for drug trafficking was entitled to show she did not consent to such use). The Eleventh Circuit issued seemingly contradictory opinions on this point. See supra note 35. The Fifth Circuit reserved judgment on this issue. See United States v. Lot 9, Block 2 of Donnybrook Place, 919 F.2d 994, 1000 (5th Cir. 1990).

\textsuperscript{37} See 141st St. Corp., 911 F.2d at 878. The Seventh Circuit also recognized an innocent owner defense where there was a lack of actual knowledge. See United States v. 7426 Highway 45 N., 965 F.2d 311, 315 (7th Cir. 1992).
A difference in the statutory language for money laundering and bank fraud cases resulted in an entirely different rule. As mentioned previously, the forfeiture provision for those offenses in 18 U.S.C. § 981(a)(2) lacked a “consent” requirement: the claimant was required only to establish that the criminal offense was committed without her knowledge. This made it easier for a claimant to establish an innocent owner defense in the “conjunctive” circuits, because a claimant who established a lack of knowledge had no additional burden of showing lack of consent. In the “disjunctive” circuits, however, a claimant who knew her property was involved in a money laundering or bank fraud offense was out of luck: there was no opportunity under § 981(a)(2) to show that the claimant nevertheless did not consent to the illegal activity.

3. Property Acquired After the Offense

The most serious difficulties with the pre-CAFRA innocent owner provisions resulted from the failure to distinguish between property interests that existed at the time of the criminal offense (i.e., interests that existed before the property became subject to forfeiture), and interests that were not acquired until after the crime was committed (i.e., interests that did not exist until the property was already subject to forfeiture). All of the legislative history and early case law suggest that the innocent owner statutes were drafted with only pre-existing ownership interests in mind. The typical scenario involved a spouse or third party who had an interest in a car or house that was being used to facilitate a criminal offense such

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39 See United States v. 874 Gartel Drive, 79 F.3d 918, 923-24 (9th Cir. 1996) (holding that the language in § 981(a)(2) does not require a claimant to take reasonable steps to prevent the illegal use of his or her property under the “consent” prong of the innocent owner defense); United States v. $1,646,000 in Cashiers Checks and Currency, 118 F. Supp. 2d 977 (N.D. Cal.) (following the reasoning in 874 Gartel Drive), withdrawn, 123 F. Supp. 2d 1186 (N.D. Cal. 2000); United States v. $705,270.00 in U.S. Currency, 820 F. Supp. 1398, 1402 (S.D. Fla. 1993); see also United States v. Various Computers, 82 F.3d 582 (3d Cir. 1996) (holding that proof of having taken all reasonable steps to prevent the illegal use of the property not required unless the statutory innocent owner defense contains a “consent” prong).
40 See United States v. Eleven Vehicles, 836 F. Supp. 1147, 1160 n.16 (E.D. Pa. 1993) (holding that lack of consent is not available as a defense under § 981(a)(2)).
41 See One 1973 Rolls Royce, 43 F.3d at 794.
as drug trafficking. Little or no attention was paid to issues that might arise if the wrongdoer transferred property he had used to commit a criminal offense to a third party after the crime had been committed.

It is likely that everyone assumed, when the innocent owner statutes were drafted, that the relation-back doctrine, codified at 21 U.S.C. § 881(h),\(^\text{42}\) would void any post-illegal act transfer of forfeitable property, making any innocent owner defense in such cases unnecessary.\(^\text{43}\) Section 881(h) provides that "[a]ll right, title, and interest" in property subject to forfeiture vests in the United States "upon commission of the act giving rise to [the] forfeiture."\(^\text{44}\) This meant that at the moment a property owner used, or allowed his property to be used, to commit a crime, the property owner was divested of his interest in the property, with title passing to the U.S. Government.

When property is transferred from one person to another, the receiver can obtain no better title than the transferor has to give. So if the owner of property subject to forfeiture had already been divested of his title upon the commission of the illegal act, he had no title that could be passed on to a third party, and the third party had no interest that could be asserted in the forfeiture proceeding. Thus, it was the prevailing view that the post-illegal act receiver of forfeitable property lacked standing to assert an innocent owner defense when the property was forfeited.\(^\text{45}\)

All of that changed with the Supreme Court's decision in \textit{United States v. 92 Buena Vista Ave.}\(^\text{46}\) In that case, a drug dealer made a gift of $240,000 in drug proceeds to his girlfriend, who used the money to buy the defendant real property. The government, invoking the relation-back theory, argued that the drug dealer lacked title to the illicitly-derived funds, and thus had no title he could pass on to his girlfriend. For that reason, according to the government, the girlfriend, who was the claimant in the forfeiture case, had

\footnotesize


\(^{43}\) See One 1973 Rolls Royce, 43 F.3d at 817 (discussing the general assumption that the "relation back" provision prevented a post-illegal act transferee from asserting an innocent owner defense).

\(^{44}\) 21 U.S.C. § 881(h).

\(^{45}\) See United States v. One 1985 Nissan, 300ZX, 889 F.2d 1317, 1320 (4th Cir. 1989) (holding that no one can acquire title to property after the illegal act takes place because the wrongdoer lacks good title to pass on to a third party and that, "unless a claimant has a claim to the property forfeited which existed prior to the time the acts take place which bring on forfeiture, then the innocent owner provision of the statute [§ 881(a)(6)] has no application.").

no interest in the defendant property and could not assert an innocent owner defense under the applicable statute.47

The Supreme Court, however, held that the relation back doctrine is not self-executing and thus does not divest a wrongdoer of title to his or her property until a court enters a judgment of forfeiture to that effect.48 For that reason, the government could not use the relation-back doctrine to prevent property owners with an after-acquired interest in property from contesting the forfeiture. Such persons were “owners” within the meaning of the statute, and could file claims and assert an innocent owner defense.

Moreover, the Court held that because the civil forfeiture statutes did not limit the innocent owner defense to persons who purchase the property in good faith, the defense could be asserted by an innocent donee.49 Justice Kennedy, in a dissenting opinion, noted that this allowed drug dealers to shield their property from forfeiture through transfers to relatives or other innocent persons. The ruling, Justice Kennedy said, “rips out the most effective enforcement provisions in all of the drug forfeiture laws,”50 and “leaves the forfeiture scheme that is the centerpiece of the Nation’s drug enforcement laws in quite a mess.”51 Justice Stevens, however, writing for the plurality, said that the Court was bound by the statutory language enacted by Congress. “That a statutory provision contains ‘puzzling’ language, or seems unwise,” he wrote, “is not an appropriate reason for simply ignoring its text.”52

The holding in 92 Buena Vista produced a number of troubling results. For one thing, as Justice Kennedy predicted, it became routine for drug dealers and other criminals to pass on their forfeitable property to family members, girlfriends and other innocent third parties, knowing that the government could not use the civil forfeiture statutes to recover it.53 In

47 Id. at 123-24. The 92 Buena Vista case is discussed in detail in Franze, supra note 33, at 361.
48 92 Buena Vista, 507 U.S. at 125. See United States v. Spahi, 177 F.3d 748, 754 (9th Cir. 1999) (stating that, because the relation back doctrine is not self-executing, title to property sought to be forfeited does not vest automatically in the government upon commission of the act giving rise to forfeiture but must be acquired by the government through legal action).
49 92 Buena Vista, 507 U.S. at 123.
50 Id. at 145 (Kennedy, J., dissenting).
51 Id. at 144 (Kennedy, J., dissenting).
52 Id. at 126 n.20.
53 See United States v. 221 Dana Ave., 81 F. Supp. 2d 182, 188 (D. Mass. 2000) (holding that an innocent heir who acquired interest upon death of drug dealer prevailed under 92 Buena Vista and explaining that pre-92 Buena Vista cases
response, the government made it a standard part of its forfeiture training to instruct federal prosecutors that in cases where a defendant had transferred forfeitable property to an innocent third party, such as a minor child, the government had to rely on the criminal forfeiture statutes (which do contain a bona fide purchaser requirement) to void the transfer and confiscate the property.54

Even more troubling, from the government’s perspective, was an issue left unresolved in 92 Buena Vista: whether a claimant’s state of mind—for purposes of the innocent owner defense—should be determined at the time the crime was committed or at the time the claimant acquired his interest in the forfeitable property.55 Predictably, the courts split on this issue.

The Eleventh Circuit held that, for purposes of the innocent owner defense, the claimant’s state of mind had to be determined as of the time the person acquired his interest in the forfeitable property. A person who acquires property knowing that it was used to commit an illegal act, the court held, is not an innocent owner.56 Thus, in that circuit, even though a holding to the contrary are probably no longer good law), vacated by 239 F.3d 78 (1st Cir. 2001); cf. In re Seizure of $82,000, 119 F. Supp. 2d 1013 (W.D. Mo. 2000) (holding that the claimant acquired an interest in abandoned property by operation of law and became an owner before the government’s interest vested under the relation-back doctrine).

54 In criminal forfeiture cases, the relation-back doctrine is codified at 21 U.S.C. § 853(c) (1994), which provides that “[a]ll right, title and interest in property” subject to forfeiture “vests in the United States upon the commission of the act giving rise to the forfeiture,” and subsequent transfers to third parties are therefore void “unless the transferee establishes . . . that he is a bona fide purchaser for value.” Id. It is this provision that allows courts to void a post-illegal act transfer of forfeitable property in a criminal case where the transferee, like the claimant in 92 Buena Vista, is a mere donee; as well, it was the absence of such a provision that allowed innocent donees to defeat forfeiture actions in civil cases. See United States v. Hooper, 229 F.3d 818, 822 (9th Cir. 2000) (holding that the 92 Buena Vista decision does not apply to criminal forfeiture cases and that it does not apply to civil cases under CAFRA); United States v. BCCI Holdings (Luxembourg), S.A. (Petition of American Express Bank II), 961 F. Supp. 287, 30-32 (D.D.C. 1997) (explaining that 18 U.S.C. § 1963(l)(6)(A)-(B) (1994) embody the relation-back doctrine, and because there is no ambiguity in these provisions (as there was in the civil forfeiture statutes at issue in 92 Buena Vista) regarding the interplay of the doctrine with third party defenses, 92 Buena Vista does not expand the claimant’s right to recover on grounds outside of what subparagraphs (A) and (B) authorize).


56 See United States v. 6640 SW 48th St., 41 F.3d 1448 (11th Cir. 1995) (holding that a lawyer who acquired an interest in forfeitable property as his fee...
person with an after-acquired interest in the property could contest a forfeiture under 92 Buena Vista, the claimant still had to establish his innocence by showing that he did not know the property was subject to forfeiture at the time he acquired it. The majority of courts followed this rule. But in the Third Circuit, the rule was the opposite. In United States v. One 1973 Rolls Royce, the court held that the claimant's state of mind had to be evaluated as of the time the property became subject to forfeiture—i.e., when the criminal act took place. In the case of after-acquired property, this meant that the claimant was automatically entitled to be considered an innocent owner, because he could not have consented to the illegal use of the property before he owned it.

The holding in One 1973 Rolls Royce rendered the civil forfeiture statutes useless in the Third Circuit in cases involving after-acquired interests in property. But the panel clearly stated that if its decision left

was not an innocent owner).

57 See United States v. 352 Northup St., 40 F. Supp. 2d 74, 82 (D.R.I. 1999) (holding that a father who received money he knew to be proceeds of his son’s drug trafficking, and used it to buy land, was not an innocent owner of the land); United States v. Funds in the Amount of $228,390, No. 94 C 6618, 1996 WL 284943, at *3 (N.D. Ill. May 23, 1996) (“[I]f a post-illegal act transferee knows of illegal activity which would subject property to forfeiture at the time he takes his interest, he cannot assert the innocent owner defense.”); United States v. 3 Parcels in La Plata County, 919 F. Supp. 1449, 1457 (D. Nev. 1995) (holding that claimant must show that he holds an ownership interest and was ignorant of the illegal conduct giving rise to the forfeiture action at the time he acquired his ownership interest); see also United States v. 10936 Oak Run Circle, 9 F.3d 74, 76 (9th Cir. 1993) (holding that the statute bars an owner with knowledge of the origin of the property as coming from drug proceeds from asserting the innocent owner defense and noting that such person has a duty to inquire at the time of the transfer).


59 Id. at 817 (“[A] post-illegal-act transferee who did not know of the illegal act at the time it occurred will always be able to make out the innocent owner defense, regardless of whether he or she knew about the taint at the time of the transfer.”); see also United States v. 221 Dana Ave., 239 F.3d 78, 83-90 (1st Cir. 2001) (declining to choose between the Eleventh Circuit and Third Circuit rules as the applicable rule in all circumstances, but applying the Third Circuit rule where a wife had a pre-existing partial interest in her personal residence, was “innocent” of her husband’s criminal activity, and acquired her interest in the remainder of the property by virtue of her husband’s suicide).

60 See, e.g., United States v. 1993 Bentley Coupe, 986 F. Supp. 893 (D.N.J. 1997) (applying One 1973 Rolls Royce and holding that claimant who bought property in a tax sale after being notified it was subject to pending federal forfeiture action was nevertheless an innocent owner).
the innocent owner statute in a mess, "the problem originated in Congress when it failed to draft a statute that takes into account the substantial differences between those owners who own the property during the improper use and some of those who acquire it afterwards." The court concluded, "Congress should redraft the statute, if it desires a different result."62

C. The Justice Department's Proposal

In 1996, the Department of Justice submitted to Congress a proposed revision of the innocent owner statutes that addressed all of these concerns.63

First, the proposal replaced the various inconsistent innocent owner provisions with a uniform defense that would apply to most federal civil forfeiture statutes. Thus, there would no longer be different defenses when forfeiture was sought in connection with different crimes, and there would no longer be a total lack of a defense for the older forfeiture provisions enacted before the late 1970s.64

Second, using the criminal forfeiture statute as a model,65 the proposal created separate defenses for property interests that existed at the time of the illegal act and interests that were acquired afterward. In the first category, the proposal adopted the "disjunctive" rule so that property owners would be able to defeat forfeiture by showing that either 1) that they lacked knowledge of the offense, or 2) upon learning of the illegal use

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61 One 1973 Rolls Royce, 43 F.3d at 820.
62 Id.
64 See 1996 Hearings, supra note 24, at 215 (testimony of Stefan D. Cassella), reprinted in U.S. DEP’T OF JUSTICE, supra note 4, at 110 ("The Supreme Court held this Term that the Constitution does not prohibit the government from forfeiting property of an innocent person. Maybe so, but Congress by statute can provide more protection than the Constitution requires, and we think it should.").
65 See 21 U.S.C. § 853(n)(6)(A)-(B) (1994). The criminal forfeiture statute served as a model for the new uniform innocent owner defense in the sense that it created separate defenses for persons who had a pre-existing interest in the property when it became subject to forfeiture and persons with an after-acquired interest. Also, as discussed infra Part III.C, the provision relating to after-acquired interests
of the property, they "did all that reasonably could be expected to terminate such use of the property." This was intended to allow a spouse or other third party to challenge the forfeiture of her property, even if she knew that it was being used illegally, by showing that she did everything that a reasonable person in her circumstances would have done to prevent the illegal use. The "all that reasonably could be expected" test was derived from the dicta in Calero-Toledo and was consistent with the way the courts had defined the term "consent" under the existing statutes. The defense is modeled closely after § 853(n)(6)(B). But note that the defense for pre-existing interests in civil cases is quite different from the corresponding defense in criminal cases. In civil cases, the claimant has to be "innocent," whereas in criminal cases the claimant need only show that she had a "superior" interest in the property. In other words, a non-innocent third party can prevail under § 853(n)(6)(A) in a criminal case, because criminal forfeitures are limited to the interests of the defendant. See United States v. Lester, 85 F.3d 1409 (9th Cir. 1996) (noting, in dicta, that defendant could have challenged forfeiture on the grounds that property was held by a corporation, not by the defendant, and that unless the corporate form could be ignored, defendant's only forfeitable interest was his stock in the corporation); United States v. Riley, 78 F.3d 367 (8th Cir. 1996) (holding that if the corporation used by defendant to commit the offense is not a defendant, only defendant's interest in the corporation may be forfeited, not the corporation itself or its assets); United States v. BCCI Holdings (Luxembourg), S.A. (Petition of Chawla), 46 F.3d 1185, 1190 (D.C. Cir. 1995) (stating that "only the property of the defendant (including property held by a third party pursuant to a voidable transaction) can be confiscated in a RICO proceeding"); United States v. Jimerson, 5 F.3d 1453 (11th Cir. 1993) (holding that the government may not use an ancillary proceeding in a criminal forfeiture case to forfeit the interests of third parties). But a non-innocent third-party cannot prevail in a civil case. This is the reason the government must resort to civil forfeiture when the defendant uses property belonging to a third party (with the third party's knowledge) to commit a crime.

69 Thus, as the majority of courts now hold, under the second defense a spouse could defeat forfeiture of her property, even if she knew that it was being used illegally, by showing that she did everything that a reasonable person in her circumstances would have done to prevent the illegal use.
Department’s proposal also assumed that “knowledge,” under the first prong of the test, would include “willful blindness,” as many courts had decided under the old law.\textsuperscript{70}

For the second category of cases—those involving property acquired \textit{after} the offense giving rise to the forfeiture—the Department proposed language modeled on 21 U.S.C. § 853(n)(6)(B),\textsuperscript{71} the statute governing after-acquired third-party interests in criminal forfeiture cases. Under the proposal, a person would be considered an innocent owner if she established that she acquired the property as a bona fide purchaser for value who at the time of the purchase did not know and was reasonably without cause to believe that the property was subject to forfeiture.\textsuperscript{72} In hearings to consider the proposal in 1996, the Department’s witness noted that this provision would be of particular importance in cases involving the acquisition of drug dollars on the black market in South America. In such cases, wealthy persons assist in the laundering of drug money by purchasing U.S. dollars, or dollar-denominated instruments, while maintaining ignorance of their source.\textsuperscript{73} The new statute, the Department suggested, would put the burden on such individuals to show that they took all reasonable steps to ensure that they were not acquiring drug proceeds.\textsuperscript{74}

The Department’s proposal addressed two other recurring issues: the definition of “owner,” and the authority of the court to sever the defendant property in the event that the property was owned, in part, by an innocent


\textsuperscript{70} 1996 Hearings, supra note 24, at 65, reprinted in U.S. Dep’t of Justice, supra note 4, at 35 (“[A] showing of a lack of knowledge would be a complete defense to forfeiture. But to show lack of knowledge, the owner would have to show that he was not willfully blind to the illegal use of the property.”); see 1996 Hearings, supra note 24, at 225 (testimony of Stefan D. Cassella), reprinted in U.S. Dep’t of Justice, supra note 4, at 115; 1999 Hearings, supra note 69, reprinted in U.S. Dep’t of Justice, supra note 4, at 368. See also cases at infra note 137 and accompanying text.


\textsuperscript{72} 1996 Hearings, supra note 24, at 138-39, reprinted in U.S. Dep’t of Justice, supra note 4, at 72.

\textsuperscript{73} Before the Subcomm. on Criminal Justice Oversight of the S. Comm. on the Judiciary, 106th Cong. (1999), 1999 WL 20010421 [hereinafter 1999 Hearings], reprinted in U.S. Dep’t of Justice, supra note 4, at 366-78. See also cases at infra note 146 and accompanying text.
owner. The proposal defined “owner” to include lienholders and others with secured interests in the subject property, but to exclude general creditors, bailees and nominees. It authorized the district court to take any of three alternative actions to dispose of property jointly owned by a guilty person and an innocent owner: 1) sever the property; 2) liquidate the property and order the return of a portion of the proceeds to the innocent party; or 3) allow the innocent party to remain in possession of the property, subject to a lien in favor of the government to the extent of the guilty party’s interest.

III. REQUIREMENTS OF § 983(d)

A. Uniform Affirmative Defense

The innocent owner defense ultimately enacted by Congress as part of CAFRA is essentially the Justice Department’s 1996 proposal with a few additions and amendments. The remainder of this Article discusses the elements of the defense as it is now codified at 18 U.S.C. § 983(d).

Section 983(d)(1) sets out the basic principle that “[a]n innocent owner’s interest in property shall not be forfeited under any civil forfeiture statute.” Thus, all federal civil forfeiture statutes are now subject to an innocent owner defense, and the defense is the same regardless of the statute under which the forfeiture action is brought. The only exception concerns the forfeiture statutes that are specifically exempted from the definition of “civil forfeiture statute” by § 983(i). For forfeitures under those statutes, there is still no innocent owner defense.

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75 Id. at 140, reprinted in U.S. DEP’T OF JUSTICE, supra note 4, at 73.
77 Id. § 983(d)(1).
78 Section 983(i) provides:
In this section, the term “civil forfeiture statute”—
(1) means any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense; and
(2) does not include—
(A) the Tariff Act of 1930 or any other provision of law codified in title 19;
(B) the Internal Revenue Code of 1986;
(C) the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 et seq.);
(D) the Trading with the Enemy Act (50 U.S.C. App. 1 et seq.); or
Id. § 983(i).
A conforming amendment in § 2(c) of CAFRA repeals the pre-existing innocent owner provisions in 18 U.S.C. § 981(a)(2), 21 U.S.C. § 881(a)(4), (6), (7), 18 U.S.C. § 2254(a), and 8 U.S.C. § 1324(b). It is evident from the legislative history that Congress expressly intended that CAFRA override any inconsistent provisions found in the "old law," except where the specific exemption in § 983(i) applied. Thus, if Congress inadvertently failed to repeal the innocent owner provision in any federal forfeiture statute when it drafted CAFRA, forfeitures under that statute will nevertheless be governed by § 983(d).

Section 983(d)(1) goes on to provide that "[t]he claimant shall have the burden of proving that the claimant is an innocent owner by a preponderance of the evidence." This provision was included in the bill to make clear that "innocent ownership" remains an affirmative defense, as it was under all of the previously enacted statutes, notwithstanding CAFRA's shifting of the burden to the government in proving the nexus between the property and the underlying offense as part of its case-in-chief.

B. Pre-existing Owners

Section 983(d) adopts the Justice Department's proposed division of the innocent owner defense into two parts, so that pre-existing ownership

80 See H.R. REP. NO. 106-192, at 21 (1999), reprinted in U.S. DEP'T OF JUSTICE, supra note 4, at 283 ("To the extent these procedures are inconsistent with any preexisting federal law, these procedures apply and supercede preexisting law.").
82 See, e.g., United States v. 194 Quaker Farms Rd., 85 F.3d 985, 990 (2d Cir. 1996) (shifting of the burden of proof to the party who has superior access to evidence is not unconstitutional); United States v. Land, Prop. Recorded in Name of Neff, 960 F.2d 561, 563 (5th Cir. 1992) (holding that once the government establishes probable cause, the burden shifts to claimant to establish affirmative defense by preponderance of the evidence).
83 See 18 U.S.C.A. § 983(c). The House version of CAFRA was unclear as to whether, under the new law, the claimant would retain the burden of proof as to the affirmative defense. During the House debate in 1999, several members of Congress erroneously assumed that because the bill shifted the burden of proof to the government regarding the forfeitability of the property, it also intended to place the burden on the government to disprove the innocent owner defense. U.S. DEP'T OF JUSTICE, supra note 4, at 292. The explicit statement regarding the burden of proof in § 983(d)(1) was necessary to negate any contrary inference that might otherwise have been drawn from the legislative history.
interests and after-acquired interests are treated differently. Pre-existing interests are governed by § 983(d)(2),\(^\text{84}\) and after-acquired interests are governed by § 983(d)(3).\(^\text{85}\)

Regarding pre-existing interests, § 983(d)(2)(A) provides:

with respect to a property interest in existence at the time the illegal conduct giving rise to forfeiture took place, the term “innocent owner” means an owner who—
(i) did not know of the conduct giving rise to forfeiture; or
(ii) upon learning of the conduct giving rise to the forfeiture, did all that reasonably could be expected under the circumstances to terminate such use of the property.\(^\text{86}\)

1. Distinguishing “Ownership” and “Standing”

The threshold requirement of this statute is that the claimant must establish, as part of his affirmative defense, that he is an “owner” of the defendant property. If the claimant cannot establish that he has the required ownership interest, his innocence is irrelevant.\(^\text{87}\)

The requirement that the claimant establish an ownership interest in the defendant property is part of her affirmative defense, and is separate and distinct from her duty to establish that she has standing to contest the forfeiture. In every civil forfeiture case, of course, the claimant must establish that she has standing to litigate her claim.\(^\text{88}\) But to establish standing, a claimant need only show that she has a “facially colorable interest in the proceedings sufficient to satisfy the case-or-controversy

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\(^{84}\) 18 U.S.C.A. § 983(d)(2).

\(^{85}\) Id. § 983(d)(3).

\(^{86}\) Id. § 983(d)(2)(A).

\(^{87}\) See In re Seizure of $82,000, 119 F. Supp. 2d 1013, 1018 (W.D. Mo. 2000) (conceding that claimants were innocent, but still requiring that they prove that they are owners under state law); United States v. 1512 Lark Drive, 978 F. Supp. 935, 940 (D.S.D. 1997), aff’d, 187 F.3d 644 (8th Cir. 1999) (holding as a matter of state law that, if the wife is not an owner or a lienholder of the property, her knowledge of the illegal activity is irrelevant); United States v. All Funds in “The Anaya Trust” Account, No. C-95-0778 DLJ, 1997 WL 578662, at *4-5 (N.D. Cal. 1997) (discussing the two parts of the innocent owner defense: claimant must be an owner, and must be innocent—as defined by statute).

\(^{88}\) See, e.g., United States v. $515,060.42 in U.S. Currency, 152 F.3d 491, 497 (6th Cir. 1998); United States v. $9,041,598.68, 163 F.3d 238, 245 (5th Cir. 1998).
requirement" under Article III of the Constitution. A "facially colorable interest," however, is not the same thing as ownership, and a person may establish standing without being an owner of the property.

Indeed, courts have granted standing to persons with a mere possessory interest in the property, or to a person whose name appears on the title to the property, even though the person is merely a nominee. One court

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89 $9,041,598.68, 163 F.3d at 245. See United States v. $81,000.00, 189 F.3d 28, 35 (1st Cir. 1999) ("Courts generally do not deny standing to a claimant who is either the colorable owner of the res or who has any colorable possessory interest in it."). United States v. Accounts Nos. 3034504504 and 144-07143, 971 F.2d 974 (3d Cir. 1992).

50 See Kadonsky v. United States, 246 F.3d 681 (10th Cir. 2001) (unpublished table decision) (holding that for standing, claimant need not prove merits of underlying claim; allegation of ownership and some supporting evidence, such as possession, is sufficient; but claimant may yet fail to establish ownership on the merits); In re Seizure of $82,000, 119 F. Supp. 2d at 1017-18 (holding that the titled owner and purchaser of vehicle both have a colorable interest sufficient for standing, but must prove ownership as part of innocent owner defense on the merits).

91 See United States v. 1982 Sanger 24' Spectra Boat, 738 F.2d 1043, 1046 (9th Cir. 1984) ("A lesser property interest such as possession creates standing."). Simple possession of the property, standing alone, is not sufficient to establish standing in most courts, but simple possession is sufficient if it is "accompanied by factual allegations regarding how the claimant came to possess the property, the nature of the claimant's relationship to the property, and/or the story behind the claimant's control of the property.") $515,060.42 in U.S. Currency, 152 F.3d at 498. See also United States v. $1,646,000 in Cashiers Checks and Currency, 118 F. Supp. 2d 977, 983 (N.D. Cal.) (holding that possession plus assertion of ownership is sufficient to establish standing to contest forfeiture of cashiers checks and cash), withdrawn, 123 F. Supp. 2d 1186 (N.D. Cal. 2000); United States v. $271,070.00 in U.S. Currency, No. 96 C 239, 1997 WL 94722, at *3 (N.D. Ill. 1997) (holding that claimant need not assert an ownership interest when a possessory interest is sufficient for standing, but explaining that bald assertions of possessory or ownership interest without evidentiary support will not be sufficient); United States v. 47 W. 644 Route 38, 962 F. Supp. 1081, 1085-86 (N.D. Ill. 1997) (holding that simple possession is enough to establish standing, but requiring claimant to be more than an "unknowing custodian") (quoting Mercado v. United States Customs Serv., 873 F.2d 641, 645 (2d Cir. 1989)); Olivo v. United States, No. 96 Civ. 2620, 1997 WL 23181, at *7 (S.D.N.Y. 1997) (concluding that the person's conscious possession of the property seized was sufficient for standing to contest its forfeiture, despite lack of ownership).

92 See United States v. 1998 BMW "I" Convertible, 235 F.3d 397 (8th Cir. 2000) (holding that name on title sufficient to establish standing); United States v.
recently held that a person with no legal interest in real property, but who
would be rendered homeless if the property were forfeited to the
government, had standing to contest the forfeiture.9

Such persons, however, are not "owners" of the property within the
meaning of § 983(d)(2)(A). To be an "owner" of the property, the claimant
must show that she has a legal interest in the property in accordance with
state property law,94 and must exercise dominion and control over the
property.95 Thus, it is entirely possible, and not uncommon, for a person to

Ida, 14 F. Supp. 2d 454, 460 (S.D.N.Y. 1998) (holding that the titled owner of real
property, who used his own money to purchase the property, has standing to file
a claim, even if he is a mere straw person); see also Kadonsky, 246 F.3d at 681
(holding that payee on check has standing to contest forfeiture of check).

93 United States v. 8402 W. 132nd St., 103 F. Supp. 2d 1040, 1043 (N.D. Ill.
2000); see also United States v. 5 S. 351 Tuthill Rd., 233 F.3d 1017, 1023 (7th Cir.
2000) (as amended Mar. 21, 2001) (holding that a failure to exercise dominion and
control does not negate standing if claimant is a beneficiary of a land trust who
would be injured if the property were forfeited). But see United States v. Antonelli
Nov. 2, 1998) (holding that defendant's minor children have no legal interest in
real property held exclusively in the defendant's name, and therefore have no basis
for challenging a criminal forfeiture order, even though the property is their
residence).

94 See United States v. 221 Dana Ave., 239 F.3d 78 (1st Cir. 2001) (holding that
wife's interest in marital property determined by State law of dower rights);
$81,000.00, 189 F.3d at 33 ("State law determines ownership interest in the joint
[bank] account."); United States v. 1980 Lear Jet, 25 F.3d 783, 797 (9th Cir. 1994)
(holding that state law determines existence and extent of lienholder's interest);
United States v. 1512 Lark Drive, 978 F. Supp. 935, 940 (D.S.D. 1997) (holding
that state law determines whether wife has an interest in property held in husband's
name), aff'd, 187 F.3d 644 (8th Cir. 1999); United States v. 2930 Greenleaf St.,
claimant became owner of real property when she recorded deed after lis pendens
was filed); United States v. Eleven Vehicles, 836 F. Supp. 1147, 1160 (E.D. Pa.
1993) (stating that "state law controls the question of whether a person is an owner
or not").

95 See $81,000.00, 189 F.3d at 35 (holding that claimant with legal title to joint
bank account must also show he was not a "nominal or straw owner"); United
States v. 500 Delaware St., 113 F.3d 311, 312 (2d Cir. 1997) (finding that father
who acquired real property from his son for $1 in admitted attempt to avoid
forfeiture was mere straw owner who exercised no dominion or control over the
property); United States v. One 1990 Chevrolet Corvette, 37 F.3d 421, 422 (8th
Cir. 1994) (holding that titled owner did not exercise dominion or control); United
States v. 191 Whitney Place, No. 98-CV-0060 E, 2000 WL 1335748, at *3
have standing to contest a forfeiture yet fail to establish that she has the requisite ownership interest to prevail at trial.\textsuperscript{96}

This issue has become confused in the case law by the unfortunate tendency of some courts to use the term "standing" to refer to both the threshold Article III requirement and the ultimate determination of ownership on the merits. For example, in \textit{United States v. $9,041,598.68},\textsuperscript{97} the District Court for the Southern District of Texas found, at the outset of the case, that a claimant who controlled a family bank account had standing to contest the forfeiture of the defendant's funds.\textsuperscript{98} After a trial on the merits, however, the court reversed itself, finding that the claimant had not established the requisite ownership interest in the property and therefore did not have standing.\textsuperscript{99}

\textsuperscript{96}See \textit{Kadonsky}, 246 F.3d at 681 (concluding that claimant may have standing yet fail to establish ownership on the merits); \textit{United States v. $9,041,598.68}, 163 F.3d 238, 245 (5th Cir. 1998) (explaining that claimant had standing to contest the forfeiture, but that ultimately the jury determined, on the merits, that claimant was not an owner of the property). The same situation occurs in criminal forfeiture cases. See \textit{United States v. Hooper}, 229 F.3d 818, 820 n.4 (9th Cir. 2000) (stating that a spouse in a community property state had a colorable interest in the defendant's property sufficient to establish Article II standing, but did not have the legal interest necessary to prevail on the merits); \textit{United States v. Alcaraz-Garcia}, 79 F.3d 769, 774 n.10 (9th Cir. 1996) (explaining that an allegation of ownership is sufficient to establish standing under 12 U.S.C. § 853(2), but may not satisfy "superior interest" requirements of § 853(6)(A)); \textit{Ida}, 14 F. Supp. 2d at 460; \textit{United States v. BCCI Holdings (Luxembourg), S.A. (Petition of American Express Bank II)}, 961 F. Supp. 287, 294-96 (D.D.C. 1997) (granting motion for summary judgment for failure to establish ownership interest under 18 U.S.C. § 1963(l)(6)(A) or (B), even though claimant had standing).

\textsuperscript{97}\textit{United States v. $9,041,598.68}, 976 F. Supp. 642 (S.D. Tex. 1997), aff'd, 163 F.3d 238 (5th Cir. 1998).

\textsuperscript{98}Id. at 648.

\textsuperscript{99}Id. at 649 (recognizing that control over a "family" bank account may be sufficient to satisfy threshold standing requirements at the onset of trial, but
On appeal, the Fifth Circuit affirmed the district court, but noted that the court’s initial determination of standing was correct and should not have been reconsidered in light of what took place at trial. The district court’s later determination that the claimant had no ownership interest in the defendant property, the panel said, went to the merits of the affirmative defense, not to the claimant’s standing to litigate his claim.¹⁰⁰

Similarly, in *United States v. Hooper*,¹⁰¹ the Ninth Circuit reviewed a decision by the District Court for the Southern District of California in a criminal forfeiture case where the court held that the defendants’ wives lacked standing to contest the forfeiture of certain property that they alleged to be part of their respective marital estates.¹⁰² The Ninth Circuit held that there was “no dispute that Claimants had Article III standing to file their petitions and challenge the forfeitures on their asserted grounds.”¹⁰³ What the district court meant in concluding that the claimants lacked “standing,” the panel said, was “simply another way of stating that Claimants had failed to establish on the merits a property interest entitling them to relief.”¹⁰⁴

To avoid such confusion, the better practice would be to refer to the threshold Article III “case-or-controversy” requirement as one that necessitates a showing by the claimant that he has standing to litigate his or her claim, and to refer to the ultimate question of ownership as part of the claimant’s affirmative defense. That would make clear what has always been the rule: a person with a “colorable interest” in the defendant property is allowed in the courthouse door to litigate his claim, but once inside, the claimant is required to show that he satisfies all of the indicia of ownership as part of his affirmative defense. As the outcome in §9,041,598.68 illustrates, there will be claimants who are able to establish standing to contest a forfeiture at the outset of the proceeding by showing that they have a colorable interest in the property (e.g., by showing that their name

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¹⁰⁰ See §9,041,598.68, 163 F.3d at 245 ("[W]e consider Judge Atlas’ post-verdict discussion of standing as no more than a recognition of the fact that the jury verdict defeated all possible claims of Massieu on the merits, and we find the trial court’s earlier determinations that Massieu had standing to be dispositive of that issue.").

¹⁰¹ *Hooper*, 229 F.3d at 818.

¹⁰² Id. at 823 n.4.

¹⁰³ Id.

¹⁰⁴ Id. (citing as authority §9,041,598.68, 163 F.3d at 245).
is on the title to the property, or that they have possession of it) yet they will be unable to establish the requisite ownership interest under § 983(d)(2)(A) at trial.\footnote{See United States v. 5 S. Tuthill Rd., 233 F.3d 1017, 1026 (7th Cir. 2000) (as amended Mar. 21, 2001) (holding claimant had standing to contest forfeiture but emphasizing that such holding did not determine, on remand, any aspect of the innocent owner defense).}

2. *State v. Federal Law*

The ownership of property is a matter traditionally governed by state property law.\footnote{See United States v. 221 Dana Ave., 239 F.3d 78 (1st Cir. 2001) (holding that wife’s interest in marital property is determined by State dower law); United States v. 1980 Lear Jet, 25 F.3d 793, 797 (9th Cir. 1994) (concluding that state law determines existence and extent of lienholder’s interest under 18 U.S.C. § 981(a)(2)); In re Seizure of $82,000, 119 F. Supp. 2d 1013, 1018-22 (W.D. Mo. 2000) (applying state law to determine if finder of abandoned property is an “owner”); United States v. $9,041,598.68, 976 F. Supp. 633, 639-40 (S.D. Tex. 1997) (applying definition of “gift” under state law to determine if claimant was “owner” of property received from family members and concluding that it was not a “gift” when donor intended to retain access to property), aff’d, 163 F.3d 238 (5th Cir. 1998); United States v. Eleven Vehicles, 836 F. Supp. 1147, 1160 (E.D. Pa. 1993) (stating that “state law controls the question of whether a person is an owner or not”).} In forfeiture cases, however, the claimant must not only show that she has an interest in the property under state law, but also that her interest is protected from forfeiture under federal law.\footnote{See 5 S. 351 Tuthill Rd., 233 F.3d at 1021 (“State law defines and classifies property interests for purposes of the forfeiture statutes, while federal law determines the effect of the property interest on the claimant’s standing.”); United States v. $81,000.00, 189 F.3d 28, 33 (1st Cir. 1999) (“State law determines [the claimant’s] ownership interest in the joint account, but then federal law determines the effect of his ownership interest on his right to bring a claim.”) (citations omitted). The same rule applies in criminal forfeiture cases. See United States v. Kennedy, 201 F.3d 1324, 1334-35 (11th Cir. 2000); United States v. Lester, 85 F.3d 1409, 1412 (9th Cir. 1996) (explaining that when a claim is filed in an ancillary proceeding, the court will look to state law to see what interest the claimant has in the property, and then to the federal statute to see if that interest is subject to forfeiture); United States v. BCCI Holdings (Luxembourg), S.A. (Petition of American Express Bank II), 961 F. Supp. 287, 293 (D.D.C. 1997) (holding that the claimant’s interest in the property is a matter of state law, but the consequences of that interest—i.e., whether that interest results in judgment in

\footnote{State law determines definitively the claimant’s interest in the property; federal law determines the effect of that interest on the claimant’s standing and the regulation of the forfeiture.}
For example, state law is used to determine if the victim of a crime is the owner of the subject property, or is only an unsecured creditor with a generalized claim against the wrongdoer's estate. Federal law is then used to determine whether all categories of victims, including general unsecured creditors, and owner-victims, are able to defeat the government's interest. 109

The consequence of this two-part inquiry is that a third-party claim can fail for either of two reasons: 1) the claimant is unable to establish any interest in the property as a matter of state law,110 or 2) the interest in

favor of claimant in the ancillary proceeding—is a question of federal law).

108 United States v. BCCI Holdings (Luxembourg), S.A. (Final Order of Forfeiture and Disbursement), 69 F. Supp. 2d 36, 57 (D.D.C. 1999) ("The nature of the claimant's interest is determined by reference to applicable state property law, but the determination of whether such an interest defeats the United States' claim to the property . . . is a matter of federal law.").

109 See id. at 58 (explaining that state law determines if a creditor has a secured or an unsecured interest and federal law determines which creditors can recover in the ancillary proceeding).

110 See United States v. O'Brien, 181 F.3d 105 (6th Cir. 1999) (unpublished table decision) (concluding that because claimant did not hold certificate of title to forfeited automobile, she lacked any legal interest as a matter of state law, and so could not challenge the forfeiture); United States v. Weaver, 89 F.3d 848 (9th Cir. 1996) (unpublished table decision) (affirming the district court's dismissal of petition for failure to state a claim because spouse did not have a perfected interest in forfeited property); United States v. Strube, 58 F. Supp. 2d 576, 584-85 (M.D. Pa. 1999) (applying state law, and concluding that wife had no interest in real or personal property titled in husband's name); United States v. Dempsey, 55 F. Supp. 2d 990, 993 (E.D. Mo. 1998) (concluding that under state law, claimant who was owed child support payments by defendant had no lien on defendant's property until she levied on it); United States v. Antonelli (In re 837 Mass. Ave. N.), No. 95-CR-200, 1998 WL 775055, at *1 (N.D.N.Y. 1998) (applying state law to determine if defendant's minor children had a legal interest in real property held exclusively in defendant's name); United States v. Toma, No. 94 CR 333, 1997 WL 467280, at *3 (N.D. Ill. Aug. 6, 1997) (holding that wife lacked standing because, under state law, she had no legal interest in marital property held in husband's name); United States v. 47 W. 644 Route 38, 962 F. Supp. 1081, 1085-86 (N.D. Ill. 1997) (holding that a spouse who has no ownership interest in the other spouse's property under state law has no standing); United States v. 2930 Greenleaf St., 920 F. Supp. 639, 645-46 (E.D. Pa. 1996) (concluding that claimant who failed to record interest
question is not the kind of interest that Congress intended to protect. As will be discussed later, claimants with interests defined by state property law frequently find that the interest is insufficient because it does not satisfy the temporal requirements, or bona fide purchaser provisions, of the federal forfeiture statute.\textsuperscript{111} Claimants may also find that their state law property interests are simply excluded from the ambit of the innocent owner defense because of the way in which the term “owner” is defined in § 983. The most common examples of this include unsecured creditors and persons with nominal title to the defendant property who cannot show that they ever exercised dominion or control over it.\textsuperscript{112}

Again, this is made clear by the definition of “owner” in § 983(d)(6).\textsuperscript{113} Section 983(d)(6)(A) provides that an “owner” is “a person with an ownership interest in the specific property [under state law] sought to be forfeited, including a leasehold, lien, mortgage, recorded security interest, or valid assignment of an ownership interest.”\textsuperscript{114} But § 983(d)(6)(B) provides that the term “owner” does not include—

(i) a person with only a general unsecured interest in, or claim against, the property or estate of another;
(ii) a bailee unless the bailor is identified and the bailee shows a colorable legitimate interest in the property seized; or
(iii) a nominee who exercises no dominion or control over the property.\textsuperscript{115}

Thus, whatever status a creditor, bailee, or nominee might otherwise be accorded under state law, it will be insufficient to establish an ownership interest as part of the affirmative defense under § 983(d).

Note that the exclusion of the three categories of persons from the definition of “owner” in § 983(d)(6)(B) tracks or codifies the majority rule in the property before the government filed lis pendens was not an “owner” under state law).

\textsuperscript{111} See infra Parts III.B.3, III.C.

\textsuperscript{112} See United States v. Morgan, 224 F.3d 339, 343 (4th Cir. 2000) (holding that if a third-party claimant in a criminal forfeiture case exercises no dominion or control over a joint bank account, the court may ignore the claimant’s state law interest in the property and deny his claim for failure to establish legal title or interest under federal law); see also cases cited supra note 95.


\textsuperscript{114} Id. § 983(d)(6)(A).

\textsuperscript{115} Id. § 983(d)(6)(B).
in the pre-CAFRA case law. Under the old law, courts in both civil and criminal forfeiture cases held that victims and other unsecured creditors were not owners of forfeited property within the meaning of the federal forfeiture statute.116 Courts also held, based on the Supplemental Rules for Certain Admiralty and Maritime Claims, which are applicable to civil forfeiture proceedings, that bailees lacked standing as "owners" unless they identified the bailor.117 In addition, courts held that mere title was

116 See United States v. Cambio Exacto, S.A., 166 F.3d 522, 528-29 (2d Cir. 1999) (concluding that a person to whom a money transmitter owes money lacks standing as a general creditor to contest forfeiture of money transmitter's account); United States v. $20,193.39 U.S. Currency, 16 F.3d 344, 346 (9th Cir. 1994) (holding that general unsecured creditors lack standing); United States v. $15,060 in U.S. Currency, No. CIV. 97-1760-FR, 1999 WL 166847, at *1-2 (D. Or. 1999) (granting government's motion for summary judgment because claimant who allegedly loaned money to defendant, not knowing defendant intended to use it to facilitate drug trafficking, was an unsecured creditor with no legal standing to contest the forfeiture of the seized funds); United States v. $3,000, 906 F. Supp. 1061, 1066 (E.D. Va. 1995) (explaining that even though claimant/victim could trace his money to seized bank account, title passed to perpetrator making claimant an unsecured creditor without standing); see also United States v. Ribadeneira, 105 F.3d 833, 836-37 (2d Cir. 1997) (concluding that a person holding check drawn on defendant's forfeited bank account is a general unsecured creditor with no interest in specific funds); United States v. BCCI Holdings (Luxembourg), S.A. (Petition of OAS), 73 F.3d 403, 405 (D.C. Cir. 1996) (concluding that bank depositor was only a general creditor of the defendant bank; therefore it was the defendant's property, not the claimant's, that was forfeited); United States v. Schwimmer, 968 F.2d 1570, 1581 (2d Cir. 1992); United States v. Campos, 859 F.2d 1233 (6th Cir. 1988); United States v. BCCI Holdings (Luxembourg), S.A. (Final Order of Forfeiture and Disbursement), 69 F. Supp. 2d 36, 58-59 (D.D.C. 1999) (holding that a person who voluntarily transfers his property to the defendant is no longer the owner of that property and the ability to trace property to defendant's assets is irrelevant and that, therefore, victims who transferred their property to the defendant were merely unsecured creditors, not owners of the forfeited property); United States v. BCCI Holdings (Luxembourg), S.A. (Petition of Chawla), 46 F.3d 1185, 1191-92 (D.C. Cir. 1995) (holding that unsecured creditors are not owners); Strube, 58 F. Supp. 2d at 581-82 (holding that family members who obtained a judgment lien against defendant were general creditors, and not owners of any interest in a specific parcel of property).

117 See United States v. $557,933.89 in U.S. Funds, No. 95-CV-3978, 1998 WL 817651, at *3 (E.D.N.Y. 1998) (stating that there is no statutory standing under Rule C(6) where bailee failed to identify the bailor); United States v. $205,991.00 in U.S. Currency, No. 97 Civ. 3520, 1997 WL 669839, at *2 (S.D.N.Y. 1997) (dismissing claim because of bailee's failure to identify bailor in compliance with
insufficient to establish an ownership interest if the claimant did not exercise dominion and control over the property. Thus, the pre-CAFRA case law is still applicable in determining whether the claimant has established an ownership interest in the defendant property as part of his affirmative defense.

3. The Temporal Requirement

Next, note that the claimant not only must establish that she has an ownership interest in the property within the meaning of both state law and the federal statute, but also that her interest was "in existence at the time the illegal conduct giving rise to forfeiture took place." This temporal requirement is entirely new to civil forfeiture law, and reflects the distinction now being drawn between claimants with pre-existing interests in the property and those with after-acquired interests. In other words, to qualify for relief under § 982(d)(2), the claimant must satisfy this temporal requirement; otherwise she must recover as a bona fide purchaser under § 983(d)(3).

The temporal requirement was drawn from the criminal forfeiture statute, which, since its inception, has always created separate grounds for relief for claimants whose property interest was in existence at the time the crime giving rise to the forfeiture took place and those claimants who acquired their interest afterwards. Thus, the case law interpreting the temporal requirement in criminal cases is applicable to its parallel requirement in § 983(d)(2). In fact, the Ninth Circuit has already observed that CAFRA has eliminated any distinction between the criminal and civil forfeiture statutes on this point.

Courts interpreting the temporal requirement in criminal forfeiture cases have noted that it gives force and effect to the relation-back doctrine by precluding recovery by third parties who did not acquire an interest in the property until after the government’s interest vested. Hence, only

Rule C(6).

118 See supra note 95.
120 Id. § 983(d)(3).
122 See United States v. Hooper, 229 F.3d 818, 823 (9th Cir. 2000) (stating that § 983(d) divides claimants into the same two categories as does the criminal forfeiture statute and claimant who did not have an interest in the property at the time of the offense must be a bona fide purchaser).
123 Id.
124 See id. at 821-22 (requiring the claimant, pursuant to § 853(n)(6)(A), to show that the property interest was vested at the time the acts giving rise to the
bona fide purchasers, who are covered by § 983(d)(3), can prevail in a forfeiture action involving property in which the claimant had no interest until after the crime giving rise to the forfeiture was completed. This cures the problem created by the Supreme Court’s decision in United States v. 92 Buena Vista Ave. and reestablishes the predominance of the relation back doctrine over the innocent owner defense as Congress originally intended.

The criminal cases provide numerous examples of instances where a third-party claim failed because the claimant did not acquire his interest in the forfeited property until after the crime giving rise to the forfeiture took place. These third-party claimants include banks that did not exercise a right of set-off against a customer’s account until the funds in the account were subject to forfeiture, entities that did not exercise an option to buy property until it was subject to forfeiture, and judgment creditors who did not file a lien on the property until after it was subject to forfeiture.

forfeiture were committed, which prevented the defendant from transferring the forfeitable property to anyone other than a bona fide purchaser; United States v. BCCI Holdings (Luxembourg), S.A. (Final Order of Forfeiture and Disbursement), 69 F. Supp. 2d 36, 60 (D.D.C. 1999) (stating that § 853(n)(6) subparagraphs (A) and (B) are the procedural complements to the relation-back doctrine); United States v. McClung, 6 F. Supp. 2d 548, 552 (W.D. Va. 1998) (concluding that under the relation-back doctrine, the government’s interest in property involved in a drug conspiracy vests when the conspiracy begins and that, therefore, to prevail under § 853(n)(6)(A), claimant must show that his interest was superior at that time).


126 See Hooper, 229 F.3d at 822 (explaining that in 92 Buena Vista, the Supreme Court was interpreting a statute that allowed a third party to recover irrespective of when or how the third party acquired his or her interest in the property, and concluding that the interpretation does not apply to a statute that limits recovery to persons with pre-existing interests and to bona fide purchasers).

127 See United States v. BCCI Holdings (Luxembourg), S.A. (Petition of American Express Bank II), 961 F. Supp. 287, 295 (D.D.C. 1997) (concluding that a bank that did not exercise right of setoff against defendant’s assets until after property was subject to forfeiture could not prevail under 18 U.S.C. § 1963(l)(6)(A), regardless of when order of forfeiture was issued).

128 See United States v. BCCI Holdings (Luxembourg), S.A. (Petitions of People’s Republic of Bangladesh and Bangladesh Bank), 977 F. Supp. 1, 10-11 (D.D.C. 1997) (finding that holder of an option to buy defendant’s property has no legal interest until the option is exercised), aff’d, 159 F.3d 637 (D.C. Cir. 1998).

129 See United States v. Meister, No. 4.97-CR-120-G (N.D. Tex. May 18, 1999) (holding that a victim who did not obtain a judgment lien against defendant’s
Most recently, the temporal requirement has been invoked to dispose of third-party claims arising out of alleged marital interests in criminal proceeds. For example, in United States v. Hooper, the defendant's wife claimed a community property interest in defendant's earnings from selling drugs. The Ninth Circuit held that even if the claimant had a valid property interest under state law, her claim failed under federal law because a property interest in criminal proceeds can only come into existence after the crime giving rise to the forfeiture occurs, and thus her claim was precluded by the temporal requirement. The panel noted that the temporal requirement in the forfeiture statute meant, in all likelihood, that no person could ever assert an interest as a pre-existing owner in criminal proceeds.

property until after it was used to commit the offense could not recover under § 853(n)(6)(A); McClung, 6 F. Supp. 2d at 552 (concluding that a judgment creditor, who filed a lien against defendant's property but had not yet levied against it, had not acquired a superior interest in the property at the time it became subject to forfeiture).

Hooper, 229 F.3d at 818.

Id. at 821-22 (explaining that to prevail under 21 U.S.C. § 853(n)(6)(A), the claimant must have a pre-existing interest in the forfeited property, and since proceeds do not exist before the commission of the underlying offense, § 853(n)(6)(A) can never be used to challenge the forfeiture of proceeds); see also United States v. Martinez, 228 F.3d 587, 590-91 (5th Cir. 2000) (holding that a spouse cannot assert marital interest under § 853(n)(6)(A) in property acquired with criminal proceeds because the relation-back doctrine bars the wife from ever acquiring an interest in criminal proceeds); United States v. Martinez, 228 F.3d 587, 590-91 (5th Cir. 2000) (holding that a spouse cannot assert a superior interest under § 853(n)(6)(A) in property acquired as tenants by the entireties with proceeds from fraudulent activities, because the property was subject to forfeiture before the wife's interest came into existence); United States v. Kennedy, 201 F.3d 1324, 1331 (11th Cir. 2000) (finding that wife does not have a superior interest under § 853(n)(6)(A) in property acquired as tenants by the entireties with proceeds from fraudulent activities, because the property was subject to forfeiture before the wife's interest came into existence); United States v. Brooks, 112 F. Supp. 2d 1035, 1041 (D. Haw. 2000) (concluding that a spouse cannot assert marital interest under § 853(n)(6)(A) in property acquired with criminal proceeds because such property was necessarily acquired after the commission of the act giving rise to the forfeiture); Rashid v. United States, Nos. CIV. A. 96-1987, 95-19326-SR, 1996 WL 421855, at *2 (E.D. Pa. 1996).

Hooper, 229 F.3d at 821-22.

It is true, as the government points out, that this interpretation of § 853(n)(6)(A) leads inevitably to the conclusion that § 853(n)(6)(A) is likely never to apply to proceeds of the crime. Section 853(n)(6)(A) is far better designed to deal with instrumentalities of the crime. If a husband, for example, uses the family car for drug trafficking, his spouse may qualify under § 853(n)(6)(A) by showing that she had an interest in that car that preceded the crime. Proceeds of crime, however, do not precede the crime.

Id.
4. Alternative Grounds for Establishing Innocence

Section 983(d)(2) is clearly disjunctive: a claimant can establish the innocent owner defense by proving either that she did not know that her property was involved in criminal activity or that she did all that reasonably could be expected under the circumstances to terminate such use of the property once she found out about it. This, of course, codifies the approach adopted by the majority of courts under the old law.

5. Knowledge and Willful Blindness

The knowledge prong of § 983(d)(2)(A)(i) is the same as it was under the old innocent owner defenses, thus it is likely that the pre-CAFRA case law defining "knowledge" will apply to the new statute.

Under pre-CAFRA law, the courts were divided over whether "knowledge" meant actual knowledge or constructive knowledge. By the time CAFRA was enacted, however, a large number of courts—including courts in the "actual knowledge" jurisdictions—had held that knowledge includes the concept of "willful blindness." So, although § 983(d) does

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134 See supra notes 33-37 and accompanying text.
136 See United States v. 1813 15th St., N.W., 956 F. Supp. 1029, 1035 (D.D.C. 1997) (noting that the circuits were split on whether to apply an "actual" or "constructive" knowledge test). Compare United States v. $4,255,000, 762 F.2d 895, 906 (11th Cir.1985) (holding that the innocent owner defense hinges upon the claimant's actual, not constructive knowledge), with United States v. 755 Forest Rd., 985 F.2d 70, 72 (2d Cir. 1993) ("[W]here an owner has engaged in ‘willful blindness’ as to activities occurring on her property, her ignorance will not entitle her to avoid forfeiture.").
137 See United States v. 3814 N.W. Thurman St., 164 F.3d 1191, 1196-97 (9th Cir. 1999) (holding that owner who is willfully blind to false statements made on loan application is not an innocent owner under § 981(a)(1)(C) and (a)(2)); United States v. 874 Gartel Drive, 79 F.3d 918, 924 (9th Cir. 1996) (requiring claimant to prove lack of knowledge and equating willful blindness with "knowledge"); 755 Forest Rd., 985 F.2d at 72; United States v. $1,646,000 in Cashiers Checks and Currency, 118 F. Supp. 2d 977, 983 (N.D. Cal.) (following 874 Gartel Drive and concluding that willful blindness is equal to knowledge), withdrawn, 123 F. Supp. 2d 1186 (N.D. Cal. 2000); United States v. 1948 Martin Luther King Drive, 91 F. Supp. 2d 1228, 1246 (C.D. Ill. 2000) (holding that family members who are willfully blind to drug dealer's source of income cannot be innocent owners of property he titles in their names); United States v. 3775 Redcoat Way, No. 1: 98-
not use the term "willful blindness," is it likely that the courts will, just as they did under pre-CAFRA law, find that a person who willfully blinds himself to the use of his property to commit a criminal offense is not an innocent owner. 138

Courts have expressed the concept of willful blindness in different ways. In criminal cases, a person who is willfully blind to the facts has the same state of mind as a person with actual knowledge of those facts. 139 In a leading case, the Seventh Circuit stated that a person is willfully blind if he is aware of suspicious circumstances and takes affirmative steps to assure that he does not acquire full knowledge. 140

In civil forfeiture cases, the Eleventh Circuit adopted an objective due care standard of willful blindness based upon the "all reasonable steps test" set forth in Calero-Toledo. 141 Under this standard, a person would be deemed willfully blind if he failed to exercise due care to ensure that his property had not been used in illegal activity. 142 The Third Circuit,

00124-CV-WBH (N.D. Ga. Mar. 22, 1999) (holding that a claimant's deliberate ignorance of, or "willful blindness" to, the source of monies alleged illegally obtained, is considered the equivalent of knowledge of the source of the monies), aff'd without opinion, No. 99-12309 (11th Cir. Apr. 10, 2000); United States v. $705,270.00 in U.S. Currency, 820 F. Supp. 1398, 1403 (S.D. Fla. 1993) (holding that deliberate ignorance is equated with knowledge of the illegal activity), aff'd, 29 F.3d 640 (11th Cir. 1994); see also United States v. 1977 Porsche Carrera 911, 748 F. Supp. 1180, 1185 (W.D. Tex. 1990) (noting that even if claimant lacked actual knowledge, he was not an innocent owner under 21 U.S.C. § 881(a)(4)(C) if he was willfully blind), aff'd, 946 F.2d 30 (5th Cir. 1991). As noted in the text, § 881(a)(4) was amended in 1988 to include an explicit reference to willful blindness. See supra note 19 and accompanying text.

138 See Franze, supra note 33, at 391 & n.108 (noting that "actual knowledge incorporates the concept of 'willful blindness'" and that under pre-CAFRA law, willful blindness applied to all forfeitures under § 881 even though only § 881(a)(4) (forfeiture of conveyances) made explicit reference to "willful blindness" in its innocent owner provision).

139 Id. at 391 n.106 (citing United States v. Jewell, 532 F.2d 697, 700-03 (9th Cir. 1976)).

140 United States v. Giovanetti, 919 F.2d 1223, 1228 (7th Cir. 1990).


142 See United States v. 1980 Bertram 58' Motor Yacht, 876 F.2d 884, 888-89 (11th Cir. 1989); see also United States v. All Monies ($477,048.62) in Account 90-3617-3, 754 F. Supp. 1467, 1478 (D. Haw. 1991) (requiring claimant to prove that "he did not know of the illegal activity, did not willfully blind himself from the illegal activity, and did all that reasonably could be expected to prevent the illegal use" of his property).
however, rejected the objective due care standard and adopted a subjective standard whereby a person is willfully blind if he is personally aware of a high probability of illegal use of the property and does not take affirmative steps to investigate.¹⁴³

It is more difficult for the government to rebut an innocent owner defense under a subjective standard than it is under an objective standard, because the former requires the government to adduce circumstantial evidence of a claimant’s knowledge of suspicious circumstances regarding the use of his property, whereas the objective standard would be satisfied by demonstrating what a reasonable person would have known. The Third Circuit’s subjective standard, however, is more favorable to the government in some respects than the standards adopted by other circuits. For example, in contrast to the Seventh Circuit’s rule, the Third Circuit places the burden on the person aware of the suspicious circumstances to take affirmative steps to investigate; a person who fails to do so is willfully blind. In the Seventh Circuit, a person apparently has no affirmative duty to investigate; he is willfully blind only if he takes affirmative steps to avoid acquiring guilty knowledge.

Because the innocent owner statute contains no definition of willful blindness, it seems likely that this debate will continue as courts attempt to apply the “knowledge” prong of § 983(d)(2)(A).

¹⁴³ United States v. One 1973 Rolls Royce, 43 F.3d 794, 808 (3d Cir. 1994) (noting that willful blindness involves “a state of mind of much greater culpability than simple negligence . . . and more akin to knowledge”); see also United States v. $1,646,000 in Cashiers Checks and Currency, 118 F. Supp. 2d 977, 985 (N.D. Cal.) (following One 1973 Rolls Royce and explaining that “willful blindness results when one is aware of a high probability of a fact and consciously avoids seeking the truth because he desires to remain ignorant,” and that it is a higher standard than mere negligence), withdrawn, 123 F. Supp. 2d 1186 (N.D. Cal. 2000); United States v. One 1989 Jeep Wagoneer, 976 F.2d 1172, 1175-76 (8th Cir. 1992) ("[W]illful blindness involves an owner who deliberately closes his eyes to what otherwise would have been obvious and whose acts or omissions show a conscious purpose to avoid knowing the truth. This standard is a way of inferring knowledge, whereas the Calero-Toledo standard is more nearly a negligence standard."); All Monies ($477,048.62), 754 F. Supp. at 1477; 1977 Porsche Carrera 911, 748 F. Supp. at 1187-88 (explaining that a lawyer whose fee was paid with drug proceeds was “willfully blind” if he failed to take the basic investigatory steps necessary to determine that his fees were not being satisfied with a major instrumentality of the crime charged against his client).
6. "All Reasonable Steps"

The second part of § 983(d)(2)(A)\(^6\) replaces the old "consent" prong of the innocent owner defense with language that essentially codifies the dicta in the Supreme Court's decision in *Calero-Toledo*.\(^5\) This is a welcome clarification of the law, but it is not altogether new.

Under pre-CAFRA law, most courts interpreted the consent prong of the innocent owner statute to mean that, in order to prove "lack of consent," the owner had to show that she took all reasonable steps to prevent the illegal use of the property.\(^4\) In the circuits that read the innocent owner provisions disjunctively, an owner who could make such a showing was considered innocent, even if she knew that her property was being used for

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\(^{145}\) *Calero-Toledo*, 416 U.S. at 689. See *supra* notes 13-14 and accompanying text for a discussion about the dicta in *Calero-Toledo*.

\(^{146}\) See *Yskamp v. DEA*, 163 F.3d 767, 773 (3d Cir. 1998) (holding that charter aircraft operator and its insurance company were not innocent owners where neither took reasonable steps to ensure that the aircraft was not used for an unlawful purpose); *United States v. 121 Allen Place*, 75 F.3d 118, 121 (2d Cir. 1996); *United States v. 19 and 25 Castle St.*, 31 F.3d 35, 40 (2d Cir. 1994) (concluding that parents of an adult child consented to illegal use of their property when they did not take every reasonable step to prevent such use); *United States v. 1012 Germantown Rd.*, 963 F.2d 1496, 1505 (11th Cir. 1992) (stating that proof of lack of consent "requires a claimant to show that he took all reasonable steps to prevent illegal use of his property"); *United States v. 141st St. Corp.*, 911 F.2d 870, 879 (2d Cir. 1990) (collecting cases and determining that it is appropriate to require landlord to show that he did all that reasonably could be expected to prevent the illegal activity once he learned of it); *United States v. 7079 Chilton County Rd.*, 123 F. Supp. 2d 602, 608 (M.D. Ala. 2000) (following *1012 Germantown Road*); *United States v. 1813 15th St., N.W.*, 956 F. Supp. 1029, 1037 (D.D.C. 1997) (concluding that taking "some" steps to bar drug dealers from property was not sufficient and requiring landlady to take *all* reasonable steps, such as evicting tenants convicted of drug offenses); *United States v. One Parcel Property at Lot 22, No. 94-1264-JTM*, 1996 WL 695404, at *6 (D. Kan. Nov. 14, 1996); *United States v. 152 Char-Nor Manor Blvd.*, 922 F. Supp. 1064, 1069 (D. Md. 1996) (holding that claimant, whose property was used to grow marijuana, could not show lack of consent because she had failed to take "affirmative steps to prevent the property's illegal use" by not cutting down the crop, forbidding boyfriend from using the property, or changing the locks on her house), aff'd, 114 F.3d 1178 (4th Cir. 1997); *United States v. 5.382 Acres*, 871 F. Supp. 880, 884 (W.D. Va. 1994) ("Property owners are required to meet a significant burden in proving lack of consent for they must remain accountable for the use of their property.").
an unlawful purpose." Section 983(d)(2)(A)(ii) adopts that concept: a person is an innocent owner, even if she knew of the illegal use of her property, if "upon learning of the conduct giving rise to the forfeiture, [she] did all that reasonably could be expected under the circumstances to terminate such use of the property."

Because the "all reasonable steps" test was drawn from Calero-Toledo and the cases that applied it to the consent prong of the pre-CAFRA innocent owner defenses, the pre-CAFRA case law is directly applicable to § 983(d)(2)(A)(ii). Note that under those cases, it was not sufficient for the claimant to show that she took just some reasonable steps; rather, the claimant was required to take "every action, reasonable under the circumstances," to curtail the illegal use of her property.

In particular, courts held that it was not sufficient for a landlord, motel owner, or other person who leased her premises to third parties, to show that she had called the police when she learned that someone was committing a criminal offense on the premises. To the contrary, a landlord, motel owner, or other such person is required not only to call the police, but to institute procedures that are likely to be effective in preventing continued criminal activity. Such procedures might include installing locks and other security devices, restricting access to the property to registered motel guests or tenants, restricting access to non-public areas (such as the rear part of a motel site), and evicting persons who are convicted of a criminal offense.

In § 983(d)(2)(B), Congress attempted to flesh out this concept by providing an illustration of what an owner might do to satisfy the "all reasonable steps" test. Under that provision, the finder of fact is

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147 See supra note 36 and accompanying text.
149 5.382 Acres, 871 F. Supp. at 884 (quoting United States v. 418 57th St., 922 F.2d 129, 132 (2d Cir. 1990)).
150 See United States v. 1813 15th St., N.W., 956 F. Supp. 1029, 1037 (D.D.C. 1997) (holding that landlady who called the police but did not evict the tenants or install locks and security devices did not do all that reasonably could be expected); United States v. Lot Numbered One (1) of the Lavaland Annex, No. CIV 98-0295 LH/JHG (D.N.M. Feb. 22, 2000) (holding that motel owner must take "all reasonable steps" to prevent the illegal use of his property and that calling the police, by itself, is not sufficient, because owner could have erected a barrier to prevent vehicles from gaining access to the rear of the motel property, hired a security guard, and restricted occupancy at the motel to actual customers).
151 Section 983(d)(2)(B) provides:

(i) For the purposes of this paragraph, ways in which a person may show that such person did all that reasonably could be expected may include
permitted to find that the person satisfied the requirements of § 983(d)(2)(A)(i) if she: 1) called the police; *and* 2) in a timely fashion, revoked (or made a good faith attempt to revoke) permission for the wrongdoer to use the property, *or* took other reasonable actions to discourage or prevent the illegal use.\(^\text{153}\)

1) demonstrated that such person, to the extent permitted by law—

(I) gave timely notice to an appropriate law enforcement agency of information that led the person to know the conduct giving rise to a forfeiture would occur or has occurred; and

(II) in a timely fashion revoked or made a good faith attempt to revoke permission for those engaging in such conduct to use the property or took reasonable actions in consultation with a law enforcement agency to discourage or prevent the illegal use of the property.

(ii) A person is not required by this subparagraph to take steps that the person reasonably believes would be likely to subject any person (other than the person whose conduct gave rise to the forfeiture) to physical danger.


\(^\text{152}\) Reliance on the illustration is clearly permissive, not mandatory. The language in the statute, as enacted, contrasts with an earlier version of the same provision, which created a "rebuttable presumption" that a person who took the steps set forth in the statute was an innocent owner. That earlier version provided:

There is a rebuttable presumption that a property owner took all the steps that a reasonable person would take if the property owner—

(A) gave timely notice to an appropriate law enforcement agency of information that led [sic] the claimant to know the conduct giving rise to a forfeiture would occur or has occurred; and

(B) in a timely fashion, revoked permission for those engaging in such conduct to use the property or took reasonable steps in consultation with a law enforcement agency to discourage or prevent the illegal use of the property.

The person is not required to take extraordinary steps that the person reasonably believes would be likely to subject the person to physical danger.

H.R. REP. NO. 105-358, pt. 1, at 4 (1997), reprinted in U.S. DEP’T OF JUSTICE, supra note 4, at 221. "The rebuttable presumption signifies the Committee’s belief that—absent unusual circumstances—an owner has taken all steps that a reasonable person would take if he has met the terms of the presumption.” H.R. REP. NO. 105-358, at 31, reprinted in U.S. DEP’T OF JUSTICE, supra note 4, at 245.

The decision to drop the rebuttable presumption in favor of language stating that the ways in which a person could satisfy the "all reasonable steps" test may include the two-part test in § 983(d)(2)(B) signifies that whether a person took all reasonable steps remains a question for the finder of fact, based on all of the attendant circumstances of the case.

This statutory provision is entirely consistent with the pre-CAFRA case law which held that it is not sufficient for a person merely to alert the police to the unlawful activity on her premises. Because § 983(d)(2)(B) has the conjunction "and" between clauses (i)(I) and (II), it is clear that in addition to "calling the cops," the property owner must evict or attempt to evict the non-law abiding tenants or guests (or deny permission for the non-law-abiding boyfriend or family member to continue to use the property), or must take "other reasonable actions," such as changing or installing locks and other security devices, restricting access to the property, and so forth.

Moreover, as § 983(d)(2)(B)(i)(II) indicates, such actions must be "timely" and "in good faith." A drug dealer's girlfriend, for example, cannot avail herself of the innocent owner defense under § 983(d)(2) by showing that she "called the cops" after law enforcement was already aware of the drug dealer's activities. Nor would it be sufficient to revoke permission for the drug dealer to use her car, house or other property after the crime was complete. Finally, it would not be sufficient for the claimant simply to state that she told the wrongdoer to stop whatever it was he was doing. The requirement that the attempt to revoke permission be made in "good faith" means that the property owner must do all that a person in her situation could reasonably have done to prevent the illegal use of the property. Whether the claimant did enough will, of course, be a matter for the finder of fact to decide.

The last sentence in § 983(d)(2)(B)(ii) provides that a property owner is not required to take steps that the person "reasonably believes" would expose the property owner (or someone else) to "physical danger." This, see, e.g., supra note 150. Similarly, if the claimant is advised by the police that the illegal activity is taking place, the claimant must take affirmative steps to stop the illegal activity, and may not rely on the notion that the police are aware of the wrongdoing and that therefore the matter is out of the claimant's hands. See United States v. 7079 Chilton County Rd., 123 F. Supp. 2d 602, 610 (M.D. Ala. 2000) (concluding that claimant who fails to take steps to stop family members from engaging in drug sales after being apprized of situation by police is not an innocent owner).

155 United States v. 19 and 25 Castle St., 31 F.3d 35, 39-40 (2d Cir. 1994) (concluding that parents of adult children could have prevented drug sales from premises); 1813 15th St. N.W., 956 F. Supp. at 1037 (holding that landlady could have evicted drug-dealing tenants); United States v. 152 Char-Nor Manor Blvd., 922 F. Supp. 1064, 1069 (D. Md. 1996) (noting that claimant could have forbidden her boyfriend from using her property for a marijuana-growing operation), aff'd, 114 F.3d 1178 (4th Cir. 1997).

of course, is merely a restatement of the general requirement in § 983(d)(2)(A)(ii) that the property owner do "all that reasonably could be expected under the circumstances" to prevent the illegal use of the property. 157 No one could be reasonably expected to deny a Colombian drug lord holding an automatic weapon the use of her car, if it appeared that the drug lord was prepared to use force to have his way. 158 But the standard is nevertheless an objective one: the belief that there is a threat of physical danger must be reasonable from the point of view of the finder of fact, regardless of what the property owner subjectively believed to be at risk.

C. Persons with "After-Acquired" Interests

1. Bona Fide Purchasers

Section 983(d)(3) deals with claimants whose alleged interest in the property was "acquired after the conduct giving rise to the forfeiture [had] taken place." 159 As stated earlier, having the innocent owner defense for civil forfeiture specifically address "after-acquired" interests represents a major change in the law, and a major improvement for law enforcement. 160

As discussed previously, the Supreme Court's decision in United States v. 92 Buena Vista Ave. 161 allowed criminals to insulate their property from civil forfeiture simply by transferring it to a minor child, girlfriend, or some other innocent owner. 162 This occurred because, unlike the provision protecting third-party rights in criminal forfeiture cases, 163 the civil innocent owner statutes protected any "owner" and were not limited to "bona fide purchasers for value." 164 Thus, an innocent donee could file a successful claim.

Moreover, as interpreted by the Third Circuit in United States v. One 1973 Rolls Royce, 165 the state of mind of the claimant was evaluated as of

157 Id. § 983(d)(2)(A)(ii).
158 Cf. 7079 Chilton County Rd., 123 F. Supp. 2d at 610 (emphasizing that whether a claimant has "taken all reasonable steps" must be viewed in light of claimant's circumstances, but claimant who takes no steps to stop family members from engaging in drug sales after being apprized of situation by police is not an innocent owner).
160 See supra text accompanying notes 72-74.
162 See supra note 53 and accompanying text.
164 See 92 Buena Vista, 507 U.S. at 112.
the time the crime occurred, not the time the claimant became the owner of the property. Thus, all post-illegal act transferees in that circuit were considered innocent owners per se. As mentioned earlier, most other courts have held that the claimant's state of mind must be determined as of the time the property was transferred to the claimant.

Section 983(d)(3)(A) addresses both of these problems by adopting the language of the bona fide purchaser provision in the criminal forfeiture statute and making it applicable to after-acquired interests in civil forfeiture cases. Under § 983(d)(3)(A), a post-illegal act transferee is an innocent owner if, "at the time that person acquired an interest in the property," the person—

(i) was a bona fide purchaser or seller for value (including a purchaser or seller of goods or services for value); and
(ii) did not know and was reasonably without cause to believe that the property was subject to forfeiture.

Notice first that the state of mind of the innocent owner is evaluated at the time that person acquired an interest in the property. This disposes of the One 1973 Rolls Royce problem, and follows the majority rule on this issue.

Second, because the bona fide purchaser requirement is virtually identical to the requirement in the criminal statute, 21 U.S.C. § 853(n)(6)(B), the case law interpreting the bona fide purchaser requirement in criminal forfeiture cases should be applicable to the new statute. In criminal forfeiture cases, the bona fide purchaser provision has been interpreted to have the same meaning it would have in commercial law. That is, to be a "bona fide purchaser," the

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166 Id. at 817.
167 Id.
168 See cases cited supra note 57.
170 Id. § 983(d)(3)(A)(i)-(ii).
171 Section 853(n)(6)(B) provides that a third party may challenge a criminal forfeiture order if "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." 21 U.S.C. § 853(n)(6)(B) (1994).
172 See H.R. REP. NO. 105-358, pt. 1, at 32, reprinted in U.S. DEP'T OF JUSTICE, supra note 4, at 245 ("The term 'bona fide purchaser' is derived from commercial law. It includes any person who gives money, goods or services in exchange for the property subject to forfeiture, but it does not include general unsecured creditors
claimant "must give something of value in exchange for the property."\(^{173}\)

Obviously, this excludes donees who receive the property without giving anything in return,\(^ {174}\) and spouses who obtain an interest in the property through the operation of marital property law or a divorce or separation agreement.\(^ {175}\) It also excludes heirs and others who inherit the property from a decedent,\(^ {176}\) and unsecured credi-

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\(^{173}\) H.R. REP. NO. 105-358, at 32, reprinted in U.S. DEP’T OF JUSTICE, supra note 4, at 245; see United States v. BCCI Holdings (Luxembourg), S.A. (Final Order of Forfeiture and Disbursement), 69 F. Supp. 2d 36, 62 (D.D.C. 1999) (concluding that a judgment creditor who obtains a lien on defendant’s property was not a bona fide purchaser because he gave nothing of value in exchange for the lien, irrespective of how the antecedent debt came into existence); United States v. BCCI Holdings (Luxembourg), S.A. (Petition of American Express Bank II), 961 F. Supp. 287, 295 (D.D.C. 1997) (concluding that the bank’s exercise of a right of setoff against defendant’s account was not a “purchase”); United States v. BCCI Holdings (Luxembourg), S.A. (Petition of Capital Bank), 980 F. Supp. 10, 15 (D.D.C. 1997); United States v. Infelise, 938 F. Supp. 1352, 1368 (N.D. Ill. 1996) (holding that wife was not a bona fide purchaser of property husband placed in her name because she gave nothing of value in exchange for the property), rev’d on other grounds, 159 F.3d 300 (7th Cir. 1998); United States v. Hentz, No. CR.A. 90-00276-03, 1996 WL 355327, at *10 (E.D. Pa. June 20, 1996) (holding that defendant’s mother, who gave no value for property held in her name, and who understood the currency reporting requirements that defendant violated, was not a bona fide purchaser); United States v. Sokolow, No. CRIM. 93-394-01, 1996 WL 32113, at *20 (E.D. Pa. Jan. 26, 1996) (explaining that wife was not a bona fide purchaser if she gave no value for the property and that a separation agreement was not giving value); id. at *21 (explaining daughter was not a bona fide purchaser because she received property as a gift knowing father had been indicted); United States v. BCCI Holdings (Luxembourg), S.A. (Petitions of Trade Creditors), 833 F. Supp. 22, 28 (D.D.C. 1993) (concluding that creditor was not a “purchaser” because nothing was given in exchange for a specific interest in the tangible property).

\(^{174}\) See Infelise, 938 F. Supp. at 1368.

\(^{175}\) See United States v. Brooks, 112 F. Supp. 2d 1035, 1041 (D. Haw. 2000) (holding that wife cannot assert a BFP interest in husband’s criminal proceeds on the ground that she contributed uncompensated services that increased the value of the marital estate); Sokolow, 1996 WL 32113, at *20.

\(^{176}\) An heir is not a “purchaser” because the heir gives nothing of value in exchange for the property. As noted infra note 200, heirs are exempted from the purchaser requirement in certain circumstances where the primary residence is involved. See 18 U.S.C.A. § 983(d)(3)(B)(i) (West Supp. 2000). The exemption only applies, of course, if the heir “did not know and was reasonably without cause
tors, including judgment creditors who obtain an interest in the property by filing a lien against it, or banks that obtain an interest in a depositor’s assets by exercising a statutory right to take a set-off against the customer’s account.

In the case of judgment creditors, banks taking set-offs, and others whose claim against the defendant property is based on an antecedent debt, it makes no difference how the debt arose, or that it arose from an arms-length business transaction. Whatever the nature of that business transaction may have been, all the creditor received in exchange for whatever he gave the debtor was a debt—a cause of action to sue for breach of contract; he did not receive any interest in the specific property subject to forfeiture. That interest, if it exists at all, arose later when the creditor obtained a judgment lien or exercised a right of set-off against the property to believe the property was subject to forfeiture” at the time the heir acquired her interest in the property. Id. § 983(d)(3)(B)(ii). Thus, the rule created by the First Circuit under pre-CAFRA law that a wife may acquire her husband’s interest in the family residence, following the husband’s suicide, even though she knew, at the time of his death, that the residence was subject to forfeiture, would not apply to a pre-CAFRA case. See United States v. 221 Dana Ave., 239 F.3d 78 (1st Cir. 2001).

177 Section 983(d)(6)(B) specifically excludes general unsecured creditors from the definition of owner. 18 U.S.C.A. § 983(d)(6)(B). This codifies the pre-CAFRA case law holding that creditors are not bona fide purchasers. See United States v. Ribadeneira, 105 F.3d 833, 835-36 (2d Cir. 1997) (concluding that person holding check drawn on defendant’s forfeited bank account was not a bona fide purchaser of any specific assets); United States v. Lavin, 942 F.2d 177, 185-87 (3d Cir. 1991) (explaining that tort victims were not bona fide purchasers); United States v. Campos, 859 F.2d 1233, 1238 (6th Cir. 1988) (holding that a trade creditor was not a bona fide purchaser); United States v. McClung, 6 F. Supp. 2d 548, 551 (W.D. Va. 1998) (explaining that hospital that provided medical services to defendant was a general unsecured creditor and not a “purchaser” of defendant’s property, even though the provision of services did constitute giving value); BCCI (Petition of American Express Bank II), 961 F. Supp. at 295; United States v. BCCI Holdings (Luxembourg), S.A. (Petition of Chawla), 46 F.3d 1185, 1191-92 (D.C. Cir. 1995) (explaining that general creditors were not bona fide purchasers); BCCI (Petitions of Trade Creditors), 833 F. Supp. at 28.

178 See BCCI (Final Order of Forfeiture and Disbursement), 69 F. Supp. 2d at 62.


180 See BCCI (Final Order of Forfeiture and Disbursement), 69 F. Supp. 2d at 61-62.
particular asset that is now subject to forfeiture. But placing a judgment lien on a piece of property, or taking a set-off against a bank account, is not a new purchase, and a person who acquires his interest in that fashion is therefore not a bona fide purchaser for value under § 983(d)(3)(A).\textsuperscript{181}

The third thing to notice about § 983(d)(3)(A) is that the bona fide purchaser requirement has two parts. Not only must the claimant be a "purchaser" in the commercial sense, but he must also show that at the time of the purchase he "did not know and was reasonably without cause to believe that the property was subject to forfeiture."\textsuperscript{182} This provision is also taken directly from the criminal forfeiture statute.\textsuperscript{183}

In criminal forfeiture cases, a third party who acquires an interest in the forfeited property after the act giving rise to the forfeiture has been completed must show that he had no reason to know that the property was involved in a crime committed by another person. Thus, if the third party knows at the time he acquires his interest in the property that the previous owner of the property used it to commit a crime, or was accused of having used the property to commit a crime, the third party cannot challenge the forfeiture as a bona fide purchaser.\textsuperscript{184} It is immaterial how the third party became aware of the taint on the property, whether from first-hand

\textsuperscript{181} See BCCI (Final Order of Forfeiture and Disbursement), 69 F. Supp. 2d at 62.

A creditor who attempts to satisfy the debt by obtaining a judgment lien, or exercising a right of set-off, against specific property is not a bona fide purchaser of that property because he has given nothing of value in exchange for the property interest. This is so irrespective of how the antecedent debt came into existence.

\textit{Id.; McClung, 6 F. Supp.} 2d at 551 (holding that hospital that provided medical services to defendant was a general unsecured creditor and not a "purchaser" of defendant’s property, even though the provision of services did constitute giving value); \textit{BCCI (American Express Bank II), 961 F. Supp. at 295} (concluding that bank’s exercise of set-off against defendant’s account was not a "purchase" even though bank was attempting to satisfy debt incurred when it sold property to defendant as part of a foreign exchange transaction).


\textsuperscript{184} See United States v. Hentz, No. CRA 90-00276-03, 1996 WL 355327, at *4 (E.D. Pa. June 20, 1996) (holding that defendant’s mother, who understood the currency reporting requirements that defendant violated, was not a bona fide purchaser); United States v. Sokolow, No. CRIM. 93-394-01, 1996 WL 32113, at *21 (E.D. Pa. Jan. 26, 1996) (concluding that daughter was not a bona fide purchaser because she received property as a gift knowing father had been indicted).
knowledge, from reports in the media, or because the property was specifically named in an indictment, lis pendens, restraining order, or some other action by the government. If the information available to the third party would have put a reasonable person on notice that the property was subject to forfeiture, he cannot claim to be a bona fide purchaser.\(^{185}\)

For example, in the case involving the Bank of Credit and Commerce International ("BCCI"),\(^{186}\) the court held that a U.S. bank which continued to do business with BCCI and acquired an interest in BCCI’s property after the widespread publicity regarding BCCI’s fraudulent banking practices was not a bona fide purchaser of the property subsequently forfeited by BCCI in a criminal case.\(^{187}\)

Similarly, a defense attorney cannot assert an innocent owner defense under § 983(d)(3)(A) to the forfeiture of the fee paid to him by his client, if at the time the attorney accepted the fee he knew that the client was accused of a crime that generated a sum of money as proceeds, and that those proceeds were the likely source of the fee.\(^{188}\)

\(^{185}\) See United States v. Register, 182 F.3d 820, 836 (11th Cir. 1999) (concluding that the government may use a lis pendens to preserve its interest in property subject to forfeiture pending trial, because lis pendens puts potential purchaser on notice that the property is subject to forfeiture, citing United States v. James Daniel Good Real Prop., 510 U.S. 43, 58 (1993)); id. at 837 (explaining that if property was named in an indictment as subject to forfeiture, a person aware of the indictment could not be a bona fide purchaser); In re Moffitt, Zwerling & Kemler, P.C., 846 F. Supp. 463, 472 (E.D. Va. 1994) (requiring third party’s claim that there was no cause to believe property was subject to forfeiture to be “objectively reasonable”), aff’d, United States v. Moffitt, Zwerling & Kemler, P.C., 83 F.3d 660, 665-66 (4th Cir. 1996) (concluding law firm had reason to know that the fee it received was subject to forfeiture). But see United States v. 2659 Roundhill Drive, 194 F.3d 1020, 1028 (9th Cir. 1999) (holding that a purchaser who takes property knowing it is subject to lis pendens may still qualify as innocent owner, because lis pendens only puts purchaser on notice of pending lawsuit and it does not put purchaser on notice that property was used to commit a crime).

\(^{186}\) BCCI (Petition of American Express Bank II), 961 F. Supp. at 287.

\(^{187}\) Id. at 300 (explaining that, given the extensive public record of defendant’s misconduct, claimant knew or should have known that defendant’s assets were subject to forfeiture and noting that the standard is objective reasonableness).

\(^{188}\) See Moffitt, 83 F.3d at 665-66; Register, 182 F.3d at 820; United States v. McCorkle, No. 6:98-CR-52-ORL-19C, 2000 WL 133759, at *3 (M.D. Fla. Jan. 14, 2000) (concluding that defense attorney was not a bona fide purchaser if he was aware that his fee was subject to forfeiture because of the terms of an indictment or from his objective assessment of the law and the facts of the case); United States v. Matta-Timmins, 81 F. Supp. 2d 193, 196 (D. Mass. 2000) (noting in dicta that
The same rule should apply in civil forfeiture cases under § 983(d)(3)(A). The only difference is that because civil forfeitures are broader in scope than criminal forfeitures (not limited to the defendant’s property), what the third party has to show to establish an innocent owner defense will be correspondingly broader as well. Whereas, in a criminal case, it is arguable that the third party only has to show that he had no reason to believe that the previous owner (the criminal defendant) used the property to commit an offense, in a civil case, the claimant must show that he had no reason to believe that anyone had used the property to commit an offense. Again, that is because in a civil forfeiture case the property can be subject to forfeiture on account of the acts of any person who used the property to commit a crime; the act giving rise to forfeiture need not have been committed by the prior owner.

Therefore, if a person buys a car from the sister of a notorious drug dealer, knowing at the time of the purchase that the drug dealer used the car in his drug operation, the buyer is not a bona fide purchaser under § 983(d)(3)(A). In other words, it would be no defense for the buyer to say that the sister—the person who sold him the car—was not, to his knowledge, involved in any criminal act.

2. Bona Fide Sellers

One peculiarity in § 983(d)(3)(A) is that it defines an innocent owner to include a “purchaser or seller for value (including a purchaser or seller of goods or services for value).” What is the difference between a bona fide purchaser for value, and a bona fide seller for value? There is none. For purposes of the forfeiture law, a person who pays money in exchange for goods and services can be a bona fide purchaser, but so can a vendor who sells goods and services in exchange for money. In the latter case, the vendor is a bona fide purchaser of the money that he received in exchange for his goods or services. For example, if Seller sells Buyer a truck for $10,000 in cash, and the government tries to forfeit either the truck or the cash, Buyer can claim to be the bona fide purchaser of the truck, and Seller can claim to be the bona fide purchaser of the cash. Because each gave value in exchange for the property he received, each is protected from forfeiture, as long as he had no reason to believe that the property he acquired was subject to forfeiture.

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189 See cases at supra note 57.
Thus, it was not necessary to make explicit reference to “sellers” in the statute to protect innocent vendors, and a simple protection for “bona fide purchasers” would have been sufficient. The reference to sellers adds nothing to the scope of the innocent owner defense. The reason the explicit reference was included in the statute was that criminal defense lawyers wanted it made clear that they could assert a defense under § 983(d)(3)(A) if the government tried to forfeit their attorneys fees. Like any other vendor, a defense attorney who sells his services in exchange for a fee is considered a purchaser of the fee. Thus, defense attorneys would have been able to assert a “bona fide purchaser” defense under § 983(d)(3)(A) whether the statute referred to “sellers” or not.

The problem defense attorneys have always had in defending against attorney-fee forfeitures in criminal forfeiture cases was not that there is a distinction between “purchasers” and “sellers,” but rather the reality that an attorney for a criminal defendant typically is well aware that the fee received from the client was derived from the crime with which the client had been accused. Thus, the defense attorney could not prove that he “did not know and was reasonably without cause to believe that the property was subject to forfeiture.” With the inclusion of that requirement in § 983(d)(3)(A), it will be just as difficult for an attorney to establish an innocent owner defense under CAFRA as it was under the old law.

3. Black Market Currency Cases

As mentioned earlier, the requirement that the claimant be without any reason to believe that the property was subject to forfeiture was viewed by the drafters of the legislation as essential to the government’s effort to combat the selling of drug proceeds on the black market in South America.

In black market cases, drug dealers sell their cash proceeds to money brokers who, in turn, sell it to South American importers or wealthy persons who need to convert local currency to U.S. dollars. In such cases, law enforcement officials typically trace the drug money into the bank accounts of these black market customers, who claim that they are only

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191 See cases at supra note 188; cf. Caplin & Drysdale, Chartered v. United States, 491 U.S. 617 (1989) (addressing civil forfeiture of attorney’s fees).
193 See supra notes 72-74 and accompanying text.
engaged in the exchange of local currency for U.S. dollars, and thus do not know or care where the dollars come from.\textsuperscript{194}

In fact, it is common knowledge throughout much of Central and South America and the Caribbean that narco-trafficking is the primary—if, indeed, not the only—source of cheap U.S. dollars (i.e., dollars available below the official exchange rate) that are routinely purchased on the black market.\textsuperscript{195} Thus, black market customers are on notice that the money they are receiving is likely to be subject to forfeiture. Under the second part of § 983(d)(3)(A),\textsuperscript{196} such a person would not be considered an innocent owner, even if such a person could show that goods or local currency were exchanged for U.S. dollars, unless he also could show that in light of the circumstances of the transaction he did all that a person would be expected to do to guard against the acquisition of the proceeds of drug trafficking.\textsuperscript{197}


In United States v. $57,443.00, 42 F. Supp. 2d 1293 (S.D. Fla. 1999), aff’d, 240 F.3d 1077 (11th Cir. 2000), the government used the totality of the circumstances to establish that the currency delivered by a known money launderer to a third party in a Black Market Peso Exchange transaction was drug proceeds, but the court allowed the third party to assert an innocent owner defense at trial.\textsuperscript{195} See United States v. Basler Turbo-67, 906 F. Supp. 1332, 1338 (D. Ariz. 1995) (explaining that a person who knows that property was purchased with funds traceable to the black market in Colombia is not an innocent owner, because it is common knowledge that black market funds come from drug dealing in that country), rev’d, 78 F.3d 595 (9th Cir. 1996).


\textsuperscript{196} See United States v. All Monies ($477,048.62), 754 F. Supp. 1467, 1478 (D. Haw. 1991) (holding that Peruvian money exchanger, who deposited drug dollars that he purchased on the black market into a U.S. bank account, had to prove “that he did not know of illegal activity, did not willfully blind himself to illegal activity, and did all that reasonably could be expected to prevent illegal use” of his property); United States v. Cuartas, No. 99-0675-CR-MIDDLEBROOKS (S.D. Fla. Mar. 27, 2001) (report and recommendation of Magistrate Judge); 1996 Hearings,
The relevant circumstances would include the claimant's knowledge of the source of the U.S. dollars on the local black market, the identity and background of the person from whom he obtained the dollars, and the details of the transaction, including the degree to which the dollars were available at a price below the official exchange rate, whether such transactions are legal under local law, whether the dollars were obtained in cash or in bundles of low-value personal checks or travelers checks, or whether the dollars were wired to the claimant from an unknown source.\footnote{For example, if instead of going to a bank to obtain U.S. dollars at the official exchange rate, a South American businessman goes to a money broker and buys dollars at a cheaper rate, and obtains the money in bundles of cash, or in sequentially numbered travelers checks, or in groups of small-denomination third party checks, he would be on notice that the money is likely to be subject to forfeiture, and would be able to defeat a civil forfeiture action only by showing that in light of these circumstances he did everything a reasonable person in his situation would have done to assure himself that the money broker was not selling him drug money. South American importers who purchase dollars on the black market often do so because they need the dollars to pay for the imported goods. Frequently, the importer gives local currency to the money broker and directs the money broker to pay the exporter directly. Thus, in many cases, law enforcement agents trace the drug proceeds not to the importer's bank account, but to an exporter in the United States, Europe or Asia. In such cases, the exporter receives payment on the invoice not from his customer, but from a third party with whom the exporter has had no prior dealing. In such cases, any exporter who is at all familiar with the nature of the black market would be on notice that the payment may consist of funds subject to forfeiture. Thus, if the government brings a civil forfeiture action against the funds in the exporter's account, the exporter would be able to assert an innocent owner defense under § 983(d)(3)(A) only if he took all reasonable steps under the circumstances to determine the source of the third-party payment. In fact, courts might consider a bright-line rule for such cases, holding that no one engaged in international trade with drug producing countries in South America be considered an innocent owner of drug proceeds that were received from an unknown third-party payor.}


4. Exception to the Bona Fide Purchaser Requirement for Residences

There is one substantive difference between the purchaser requirement in § 983(d)(3) and its criminal forfeiture counterpart. The criminal statute, § 853(n)(6)(B), contains no exceptions: persons who are bona fide purchasers are able to file claims while persons who acquire the property by other means are not. The civil statute, however, contains a narrow exception for property used as a primary residence.

In the original version of CAFRA introduced in 1999, Representative Henry Hyde proposed to exempt all innocent heirs of a deceased criminal from the “purchaser” requirement. The notion was that it was “fundamentally unfair” to place an innocent heir in the position of having to rebut the government’s evidence that the property was subject to forfeiture on account of past acts committed by the decedent. Thus, the bill passed by the House in 1999 provided that an innocent owner included both bona fide purchasers and “person[s] who acquired an interest in property through probate or inheritance.”

In his testimony in opposition to the House-passed version of the bill, Deputy Attorney General Eric Holder told the Senate Judiciary Committee that the exception to the purchaser requirement for innocent heirs meant that if a Colombian drug trafficker was killed in a shoot-out with the police, his heirs would be entitled to keep all of his drug proceeds. The Justice

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202 Id.
204 Under the House bill, if a criminal dies, his fortune passes directly to his heirs without fear of forfeiture, even if the money consists entirely of criminal proceeds. A major drug dealer or pornographer could amass a fortune over a lifetime of crime, and pass it on to his heirs without the government’s being able to step in and confiscate the money. The same is true if even the criminal proceeds were taken by fraud from innocent victims, thereby granting the fraud artist’s heirs priority over the victims of his crimes. The heirs of a drug lord killed in a shoot-out with the police or with a rival drug gang should not be free to inherit his drug fortune.

Over the past decade, we have recovered over $70 million from the estate of the notorious drug lord Jose Gonzalo Rodriguez Gacha after he was killed by the Colombian police. Under H.R.1658, Gacha’s heirs would
Department thus offered a counter-proposal, identical to its 1996 and 1997 proposals, that contained no exception to the purchaser requirement.\textsuperscript{205}

Ultimately, the Senate decided upon a compromise based on language from a bill that Mr. Hyde had introduced in 1997 and later abandoned.\textsuperscript{206} That provision created an exception to the "purchaser" requirement that was limited to one narrow situation: where "the property is real property, the owner is the spouse or minor child of the person who committed the offense giving rise to forfeiture, and the owner uses the property as a primary residence."\textsuperscript{207} In such cases, the compromise language provided that "a valid innocent owner claim shall not be denied because the owner acquired the interest through the dissolution of marriage or by operation of law (in the case of a spouse) or by inheritance upon the death of a parent (in the case of a minor child)."\textsuperscript{208} The 1997 House Committee Report emphasized, however, that "[t]o be considered an innocent owner, the spouse or minor child must have been reasonably without cause to believe that the property was subject to forfeiture at the time of the acquisition of his interest in the property."\textsuperscript{209}

The version of the compromise adopted by the Senate in 2000, and ultimately enacted into law, is codified in § 983(d)(3)(B). Though much more complicated in its structure, it says essentially the same thing as the 1997 compromise language discussed above. The provision provides that the claim of a person who would otherwise have a "valid claim" under subparagraph (3)(A)—in other words, a person who would prevail as a bona fide purchaser—cannot be denied on the ground that the person gave nothing of value in exchange for the property, so long as the following criteria are established:

\begin{itemize}
  \item[(i)] the property is the primary residence of the claimant;
  \item[(ii)] depriving the claimant of the property would deprive the claimant of the means to maintain reasonable shelter in the community for the claimant and all dependents residing with the claimant;
\end{itemize}

have been entitled to all his drug money.

\textit{1999 Hearings, supra} note 69 (testimony of Eric Holder), \textit{reprinted in U.S. DEP’T OF JUSTICE, supra} note 4, at 354.
\textsuperscript{205} Id. (material submitted by Eric Holder), \textit{reprinted in U.S. DEP’T OF JUSTICE, supra} note 4, at 358.
\textsuperscript{207} Id. at 32, \textit{reprinted in U.S. DEP’T OF JUSTICE, supra} note 4, at 245.
\textsuperscript{208} Id.
\textsuperscript{209} Id.
(iii) the property is not, and is not traceable to, the proceeds of any criminal offense; and

(iv) the claimant acquired his or her interest in the property through marriage, divorce, or legal separation, or the claimant was the spouse or legal dependent of a person whose death resulted in the transfer of the property to the claimant through inheritance or probate.\textsuperscript{210}

Again, the purpose of this provision is to relieve the claimant of having to satisfy the purchaser requirement: if a person otherwise satisfies all of the criteria set forth in the exception, she may be considered an innocent owner of after-acquired property even though she did not give anything of value in exchange for the property. As mentioned, heirs and spouses generally cannot satisfy the bona fide purchaser requirement because they give nothing of value in exchange for the property. Thus, the provision was intended to expand the scope of the innocent owner defense for the benefit of heirs and spouses where their primary residence is subject to forfeiture. Of course, as discussed previously, eliminating the purchaser requirement in such cases does not relieve the claimant of the burden of having to show, pursuant to § 983(d)(3)(A)(ii), that she did not know, and was reasonably without cause to believe, that the property was subject to forfeiture.\textsuperscript{211}

There are many noteworthy aspects to the exception to the purchaser requirement in § 983(d)(3)(B). First, these requirements are conjunctive and the claimant must prove all of these points. Second, this provision applies only to “the primary residence of the claimant.” There is no exception to the purchaser requirement for vacation properties, second homes, land held for investment, or any other kind of real or personal property. Third, the forfeiture would have to result in the claimant having no other place to live. Clearly, this is designed to avoid causing the drug dealer’s spouse and children to be homeless. If the heirs of the deceased drug lord have alternative means of “maintaining reasonable shelter in the community,” the exception to the purchaser requirement does not apply. Fourth, the exception only applies if the residence is forfeitable because it was property used to facilitate the crime. If the theory of forfeiture is that the residence is property traceable to the proceeds of the crime, the exception does not apply. Forfeiture of criminal proceeds, in other words, is barred only if the claimant is a bona fide purchaser, even if the proceeds have been invested in a primary residence. Fifth, the exception only applies to transfers that occur as a result of the death of the property owner or the


\textsuperscript{211} See supra note 176.
transfer of property rights as a result of marriage, separation, or divorce. Thus, if the drug dealer dies and leaves the primary residence to the innocent spouse and children, and the other criteria are satisfied, the heirs can assert an innocent owner defense. Or, if a woman marries a drug dealer and thereby acquires an interest in his primary residence as community property or otherwise under state law, and the other criteria are satisfied, she can assert the defense. If the drug dealer then divorces his wife, and gives her the primary residence as part of the divorce or separation, and the other criteria are satisfied, she can assert the defense. But there is no exception to the purchaser requirement for property transferred as a gift, or placed in trust, or otherwise conveyed to a family member.

In all of the cases where the exception does apply, the heir or spouse still has to be “innocent” at the time of transfer. That is, because the exception in § 983(d)(3)(B) is only an exception to the “purchaser” requirement in § 983(d)(3)(A)(i), the claimant still has to be “reasonably without cause to believe that the property was subject to forfeiture . . . at the time that person acquired the interest in the property” as required in § 983(d)(3)(A)(ii). Thus, the exception does not permit a criminal to insulate her primary residence from forfeiture by transferring it to a spouse as part of a separation agreement, if the spouse had cause to believe, at the time of the transfer, that the property was subject to forfeiture. Similarly, the heirs of a drug dealer do not get to keep the residence if, at the time of her death, the heirs knew the decedent was a drug dealer who used the house to facilitate crimes.

Even if all of these conditions are satisfied—e.g., there is an innocent spouse who gets the primary residence in a divorce without having any idea that it was used in the past to facilitate drug trafficking—the court still must limit the claimant’s recovery “to the value necessary to maintain reasonable shelter in the community for such claimant and all dependents residing with the claimant.” This was one last provision added by the congressional staff to make sure that no one—however innocent—was able to inherit an opulent estate that had been used to facilitate drug trafficking. In that instance, the court is apparently required to liquidate the property and give the claimant only so much as she needs to find another place in the community affording “reasonable shelter.” The government recovers the balance.

213 For this reason, the holding in United States v. 221 Dana Ave., 239 F.3d 78 (1st Cir. 2001), would not apply to a post-CAFRA case. See supra note 176.
With all of the requirements and limitations in the statute, it is clear that the exception to the purchaser requirement in § 983(d)(3)(B) will apply in only the narrowest and rarest circumstances. Nevertheless, the government can avoid all of the litigation § 983(d)(3)(B) is likely to create simply by undertaking the forfeiture of a primary residence as a criminal forfeiture whenever it is possible to do so. Nothing in § 983(d)(3)(B), in other words, creates any exception to the purchaser requirement in § 853(n)(6)(B).

D. Severing the Property

Finally, § 983(d)(5) contains a provision describing how the court might resolve issues that arise when it finds that the property is forfeitable in part to the United States, but must be returned in part to an innocent owner. This issue has caused no small amount of confusion in the case law.

In the typical case, the court (or jury) might find that a drug dealer used his residence or farm to store, produce or distribute cocaine, marijuana or another controlled substance, but that the drug dealer’s spouse did not know about, or took all reasonable steps to prevent, the illegal use of the property. In that case, while the property would be subject to forfeiture in its entirety on account of the drug dealer’s illegal acts under 21 U.S.C. § 881(a)(7), the court must exempt the property from forfeiture to the extent of the interest of the innocent spouse.

This problem arises with even more frequency in criminal forfeiture cases where only the defendant’s interest in the property is subject to forfeiture. Interests held by spouses or other third parties are automatically

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215 The outcome of criminal forfeiture cases will remain unchanged. See United States v. Infelise, 938 F. Supp. 1352, 1358 (N.D. Ill. 1996) (holding that wife was not a bona fide purchaser of property husband placed in her name because she gave nothing of value in exchange for the property), aff’d in part, rev’d in part, 159 F.3d 300 (7th Cir. 1998); United States v. Sokolow, No. CRIM. 93-394-01, 1996 WL 32113, at *20-21 (E.D. Pa. Jan. 26, 1996) (concluding that wife was not a bona fide purchaser of property she received in a separation agreement and daughter was not a bona fide purchaser because she received property as a gift knowing father had been indicted).


217 Section 881(a)(7) provides: “All real property, including any right, title, and interest . . . in the whole of any lot or tract of land . . . which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission [of a drug offense]” is subject to forfeiture. 21 U.S.C. § 881(a)(7) (1994).
exempted from forfeiture, even if the third party was fully aware of the criminal acts and the way the property was used to facilitate them.  

How the court severs the property so as to allow the government to realize its interest in the portion that is subject to forfeiture, while exempting the interest of the innocent third party, turns, in part, on the manner in which the property was held. If the property owners were partners in a business, each with a fractional interest in the partnership assets, and the interest of only one of the partners is subject to forfeiture, the government succeeds to the “guilty” partner’s interest, and finds itself in partnership with the remaining partners. Similarly, if the property owners are tenants in common, each with an undivided fractional interest in the property, the court may order that the fraction held by the wrongdoer

Thus, in general, a tract of land that is used to facilitate a drug offense is forfeited in its entirety, even if only a portion of the property was involved in the commission of the offense. See 221 Dana Ave., 81 F. Supp. 2d at 191 (declining to sever real property even though drug trafficking was confined to first floor of two-story duplex), rev’d on other grounds, 239 F.3d 78 (1st Cir. 2001). Issues do arise in § 881(a)(7) cases, of course, as to whether a given parcel is in fact a single tract of land, or is really a composite of contiguous tracts. See United States v. 817 N.E. 29th Drive, Wilton Manors, 175 F.3d 1304, 1308-09 (11th Cir. 1999) (explaining that whether real property is forfeitable as a single parcel turns not on description in deed or in land records, but on character of property where criminal activity took place, and whether all of the land is of the same character, and concluding that where two parcels constitute a residence and front yard both are subject to forfeiture), cert. denied sub nom. Howerin v. United States, 528 U.S. 1083 (2000). The division or severance of the property in such cases turns on the nature of the property itself and has nothing to do with exempting the interests of an innocent owner. It is the latter issue, which constitutes an entirely separate reason for severing the property, that is discussed in the text.

2 United States v. Kennedy, 201 F.3d 1324, 1330-31 (11th Cir. 2000) (holding that where husband and wife are tenants by the entitities, only husband’s interest is forfeitable in a criminal case); United States v. Norman, No. Crim. A. 95-86, 1999 WL 959254, at *3 (E.D. La. Oct. 19, 1999) (discussing criminal forfeiture as an in personam action that is part of defendant’s sentence, so that only defendant’s property can be forfeited); United States v. Ida, 14 F. Supp. 2d 454, 459 (S.D.N.Y. 1998) (explaining that the effect of a verdict of forfeiture is to put the government in the shoes of the defendant, to succeed to whatever interest the defendant had in the property and, because third parties are not parties to the criminal case, they cannot be bound by the verdict of forfeiture).

219 See United States v. Johnston, 13 F. Supp. 2d 1316, 1323 (M.D. Fla. 1998) (ordering forfeiture of defendant’s twenty-five percent interest in a general partnership resulting in the government obtaining twenty-five percent interest in partnership assets).
be forfeited to the government, while the innocent parties retain the remaining fraction.\(^{220}\)

In both of those situations, it is clear that the government obtains a specific interest in the property, but it remains a co-owner. This is not an ideal situation, and awkward, to say the least, if the government’s new partners turn out to be unsavory individuals engaged in a less than respectable business, like the operation of a gambling club or a topless bar.

The situation is even more complicated if the property subject to forfeiture is held by a husband and wife as tenants by the entirety, or is subject to an undivided 100% interest in a community property state. Some courts hold that in these circumstances nothing can be forfeited if either the husband or the wife is an innocent owner, because the right of the innocent spouse to enjoy and alienate the property is necessarily changed by the forfeiture of the other spouse’s interest.\(^{221}\) Other courts have converted the tenancy by the entirety to a co-tenancy, substituting the government as a co-tenant.\(^{222}\) Still other courts have attempted to give the government a future interest in the property that arises only if the marriage ends in such a way that the guilty spouse acquires a 100% interest in the property.\(^{223}\) But those

\(^{220}\) See United States v. Dethlefs, 934 F. Supp. 475, 478 (D. Me. 1996) (explaining that if defendant’s part of the property was used to commit an offense, defendant’s undivided one-quarter interest as tenant in common was implicated and may be forfeited if defendant was convicted), aff’d sub nom. United States v. White, 116 F.3d 948 (1st Cir. 1997).

\(^{221}\) See Christunas v. United States, 61 F. Supp. 2d 642, 643 (E.D. Mich. 1999) (holding that no part of the property held by husband and wife as tenants by the entireties can be forfeited in a criminal case unless both husband and wife are convicted or consent to the forfeiture); cf. United States v. Lee, 232 F.3d 556, 560-61 (7th Cir. 2000) (holding that defendant’s interest in property cannot be forfeited as a substitute asset in a criminal case when held by defendant and wife as tenants by the entirety because state law prohibits the transfer of one spouse’s interest without the other spouse’s consent, but suggesting that the federal interest would override state law if the property were directly involved in a crime).

\(^{222}\) See United States v. 1500 Lincoln Ave., 949 F.2d 73, 77-78 (3d Cir. 1991) (converting tenancy by the entireties to co-tenancy, with government substituted as the co-tenant).

\(^{223}\) See United States v. Kennedy, 201 F.3d 1324, 1333-35 (11th Cir. 2000) (explaining that government’s interest in one-half of property held as tenants by the entireties cannot be realized during the marriage, but it can be realized when the marriage ends, notwithstanding the attempt of one spouse to “seamlessly” transfer his interest to the other); United States v. 2525 Leroy Lane, 972 F.2d 136, 138 (6th Cir. 1992) (holding that the government can never realize its interest in property held as tenants by the entireties as long as the marriage continues, and it cannot
courts are split over whether the government has the power to prevent the husband and wife from frustrating the government's future interest by arranging to transfer the property to the "innocent" spouse during the marriage.224

In enacting § 983(d)(5), Congress recognized that the only way to resolve these issues—when physical severance of the property is not feasible, and joint ownership of the property by the government and other third parties is unwise—is to give federal courts the authority, irrespective of state property law,225 to order the liquidation of the property and to distribute the proceeds between the government and the property owners. Thus, § 983(d)(5) gives the court three options: "A) sever the property; B) liquidate the property and order the return of a portion of the proceeds to the innocent party; or C) permit the innocent party to remain in possession of the property, subject to a lien in favor of the government to the extent of the guilty party's interest."226

The first option obviously only works with types of property that can be physically severed, such as a multi-acre farm. The third option gives the court the power to transfer marital property to the innocent spouse, subject to a lien in favor of the government. This makes clear what interest the government has in such property, and it prevents the parties from frustrating the government's future interest in the property by transferring the property to the innocent spouse. However, it leaves both the innocent spouse as well as the guilty one in possession of the property.

The best alternative in most cases will be to order the liquidation of the property and to distribute the proceeds. Only by taking such action can the court simultaneously protect the interest of the innocent spouse, deprive the guilty spouse of any right of access to the property, and allow the government to realize its forfeitable interest.

defeat defendant's attempt to transfer his undivided interest to his spouse during the marriage).

224 See cases cited supra note 223.


IV. CONCLUSION

The uniform innocent owner defense represents a conscientious effort to provide protection for truly innocent property owners whose property was used by another person to commit a criminal offense. Making the defense uniform for all federal forfeiture actions and spelling out the details of the defense as it applies to both pre-existing owners and those who acquire their interest in the property after it is derived from or used to commit the criminal offense will make the defense much easier to apply. In turn, this will eliminate many of the ambiguities that caused a division of judicial authority under pre-CAFRA law. No doubt, new ambiguities lurk in the statutory language, but Congress has produced a fundamentally sound structure that represents an enormous improvement over the old law.