GETTING EVEN:

The Government's Liability for Payment of Property Owners' Attorney Fees in Federal Asset Forfeiture Cases

by Eric Honig

Attorneys who venture for the first time into the complex world of federal civil asset forfeiture litigation often discover quickly that this practice specialty involves one of the most esoteric mixtures of law and procedure. These *in rem* civil proceedings are based on a legal fiction that the property is the offender, and thus are filed with titles such as *United States of America v. One 1985 Mercedes Benz.* Judicial forfeiture actions comprise an unusual blend of the federal admiralty and maritime rules, civil law, federal civil procedure, criminal law (including white collar, money laundering, controlled substance, and customs violations), criminal procedure (including the Fourth and Fifth Amendment Exclusionary rules and informant disclosure rules), constitutional law, and substantive state property law, and state and federal criminal and civil tax consequences, which are sometimes implicated in these cases.. If forfeiture attorneys somehow are able to avoid the numerous pitfalls in navigating through the complicated administrative and judicial forfeiture proceedings, and ultimately prevail against the government, there is a pot at the end of the rainbow, in the form of statutory attorney fees authorized by the Civil Asset Forfeiture Reform Act of 2000 ("CAFRA").

Federal civil forfeitures generally start with a seizure of property by local law enforcement, which then asks a federal agency (*e.g.*, the F.B.I.) to "adopt" the seizure as its own. The feds then initiate administrative forfeiture proceedings by sending a letter to the property owner giving the owner a choice between a) contesting the seizure in court, or b) continuing administrative proceedings and allowing the seizing agency itself decide whether the property should be forfeited. Filing the latter, however, invariably results in a rubber-stamp approval of the seizure. If, for example, the owner chooses to file a "petition for remission or mitigation" with the Drug Enforcement Administration, and the petition is denied, the DEA forfeits the owner's property summarily, with no opportunity for an appeal, and the government then sells the property and kicks back up to 80% of its "winnings' with local law enforcement. If the owner files a "petition for "administrative relief" with U.S. Customs and Border Enforcement, the reviewing official usually takes several months before issuing a decision whether to grant or deny the petition (if it is denied, the owner can then elect to contest the seizure in court). Forfeiture defense attorneys representing property owners should avoid filing either of these petitions at all costs if their clients don't want to lose their property automatically or wait an indeterminate period of time before having the opportunity to contest the seizure in court.

If the forfeiture attorney wisely advises the client to skip the administrative petition process and file a verified claim with the seizing agency, the claim is next referred to the U.S. Attorney's Office for the district in which the property was seized. If the U.S. Attorney does not file an *in rem* judicial complaint for forfeiture within 90 days, forfeiture is prohibited and the

property must be returned . *See* 18 U.S.C. §983(a)(3)(A) (colloquially called the CAFRA "death penalty" by government attorneys). To forfeit real property, the U.S. Attorney files judicial cases automatically without initiating the administrative process. Once a judicial case is filed in federal court and the government serves the complaint by certified mail and by publication, the owner has 30 days to become a contesting party (a "claimant") by filing a "statement of interest." The claimant owner must file an answer or otherwise respond within the following 20 days, and the attorneys then litigate the case like any other civil action in federal court.

Attorney fees always have been available if a claimant eventually secures a judgment in court ordering their property returned. In the past, however, fee awards for a prevailing claimant in a civil forfeiture case were allowed only under the Equal Access to Justice Act ("EAJA"), a fee statute used by all other parties who successfully sue the government. *See* 28 U.S.C. §2412 *et seq*. Unfortunately, this statute limits reimbursement of attorney fees to a rate of only $125 per hour (with a slight cost-of-living adjustment), and authorizes fees only if the court finds that the government's actions were not "substantially justified." *See Gutierrez v. Barnhart*, 274 F.3d 1255 (9th Cir. 2001); and *U.S. v. $12,248 U.S. Currency*, 957 F.2d 1513 (9th Cir. 1992). Although the court can enhance a fee award based on an attorney's expertise in a particular practice specialty, claimants otherwise are limited to fee reimbursement at the $125 per hour statutory rate. *See, e.g., In Re Application of Gerard Mgndichian For Return of Property*, 312 F.Supp.2d 1250 (C.D. Cal. 2003)(only reported case where a court found that expertise in civil forfeiture actions qualifies as a practice specialty requiring distinct knowledge and skills, awarding an expert forfeiture defense attorney enhanced EAJA rates at $350.00/hr.).

Thus, under EAJA, even after claimants won all of their money or other property back and could prove the government was not substantially justified in seizing their property and litigating the case, unless their attorney was a recognized expert, they still ended up in the hole. This was particularly true in the larger metropolitan areas in California such as Los Angeles, San Francisco and San Diego where attorneys' hourly fees are substantially higher than the $125 per hour statutory rate.

In 2000, surprisingly lead by some of the most conservative Republican senators and representatives on Capitol Hill, Congress finally leveled the playing field. Recognizing the numerous abuses perpetrated by government agencies in seizing property without probable cause and forcing owners to spend years and a fortune in attorney fees just to get their property back, legislators in floor debates argued that the old federal civil forfeiture statutes provided insufficient protection to innocent owners' private property. Representative Henry Hyde (R-Ill) declared that "[c]ivil asset forfeiture as allowed in our country today is a throwback to the old Soviet Union, where justice is the justice of the government and the citizen did not have a chance." The House Judiciary Committee report articulated that reform was needed to make civil forfeiture procedures fair to property owners "and to give owners innocent of any wrongdoing the means to recover their property and make themselves whole after wrongful government seizures." *See Ramirez v. U.S.*, 57 Fed.Cl. 240, 250 (2003).

In promoting the reforms in CAFRA, senators cited court opinions decrying the "disregard of due process" and the "constitutional anomal[ies]" that existed in the forfeiture statutes. While introducing the Senate version of the bill that ultimately led to CAFRA, Senator Orrin Hatch (R-Utah) described examples of "imprudent" civil forfeiture actions, including one in which seized money ultimately was finally returned by the government to a restaurant owner four years after the seizure, and another in which the government was ordered to return $14,665 two years after the seizure because of insufficient evidence.

Senator Hatch proffered the government's liability for attorney's fees and costs as a much-needed reform: "The costs of contesting a civil forfeiture of property can be substantial. The award of attorney fees and costs to property owners who prevail against the government in civil forfeiture cases is justified because unlike criminal forfeiture actions, the property owner is not charged with a crime . . . . Given that the government does not sue or indict the property owner, it is unfair for the property owner to have to incur attorney fees and costs when the government does not prevail in civil forfeiture actions." In introducing that same bill, Senator Patrick Leahy (D-Vt) quoted the Eighth Circuit Court of Appeals: ". . . the war on drugs has brought us to the point where the government may seize . . . a citizen's property without any initial showing of cause, and put the onus on the citizen to perfectly navigate the bureaucratic labyrinth in order to liberate what is presumptively his or hers in the first place . . . . Should the citizen prove inept, the government may keep the property, without ever having to justify its actions." *See* CAFRA Legislative History, S.1701 and S.1931, Senators' Introductory Statements.

Congress thus created as one of CAFRA's reforms an attorney fee statute exclusive to federal civil asset forfeiture proceedings. Now, "in any civil proceeding to forfeit property under any provision of Federal law in which the claimant substantially prevails, the United States is liable for reasonable attorney fees and other litigation costs reasonably incurred by the claimant." 28 U.S.C. §2465(b)(1)(A). This statute provides that if a property owner substantially prevails (*e.g.*, gets most of the seized property back), the government must pay the owner's "reasonable" fees and costs incurred in seeking return of the property. Besides more reasonable hourly rates, the other notable change is that the government's claimed justification (as in EAJA) is no longer relevant.

Since Congress enacted the new statute, however, the federal government has hotly contested the fee motions filed by prevailing claimants. In the Central District of California in particular, the government has tried to convince courts that EAJA's low $125 per hour statutory rate still should be applied because §2465(b) did not mention when a fee application must be filed or how an award is to be calculated. To date, the government's efforts have been fruitless. Every judge in the district to determine the issue has rejected that argument, deciding that CAFRA's new "reasonable" fee provision provides for payment of fees based on the higher, market rates charged by attorneys in the Los Angeles metropolitan area. *See U.S. v. 4,432 Mastercases of Cigarettes*, 322 F.Supp.2d 1075 (C.D. Cal. 2004)(nearly $500,000 in fees awarded pursuant to §2465(b)(1)(A) at the market rate of $400.00 per hour); *U.S. v. $60,201.00*

U.S. Currency, 291 F.Supp.2d 1126 (C.D. Cal. 2003)(over $60,000 in fees awarded at $300.00 per hour); *U.S. v. $193,680.00 U.S. Currency*, CV 01-9676-CBM (Mcx)(over $125,000 in fees awarded at $350.00 per hour); *U.S. v. $215,271.00 et al*, No. CV 01-9812-DDP (nearly $80,000 in fees awarded at $300.00 per hour).

In the first published CAFRA attorney fee award, *U.S. v. $60,201.00 U.S. Currency*, Judge Audrey B. Collins emphasized in her decision that the leading treatise on forfeiture, David B. Smith, *Prosecution and Defense of Forfeiture Cases*, ¶10.8 (Dec. 2002), wrote that under CAFRA, fees "are not subject to a statutory hourly limit, in contrast with fee awards under the EAJA." The court then concluded that "[u]ntil CAFRA was passed, claimants routinely proceeded under the EAJA to request an award of attorney fees. If Congress had intended to maintain the status quo with regard to fee awards, it had the option of specifying that hourly rates should be capped, or, alternatively, omitting the attorney fee language from the Act entirely." 291 F.Supp.2d at 1130. Judge Collins thus held that the "reasonable" hourly rate of compensation pursuant to §2465(b)(1)(A) is the prevailing market rate "for similar services by lawyers of reasonably comparable skill, experience and reputation." *Id.; see also U.S. v. 4,432 Mastercases of Cigarettes* at 1078 (although the government has appealed the merits of the court's decision in the latter case, it did not appeal the court's analysis in determining the amount of attorneys' fees awarded).

Congress apparently has achieved what it sought to remedy, least for a few property owners so far within the Central District of California. After federal agents seized their property, and they had to spend even more of their money to hire an attorney to contest forfeiture proceedings, and they finally prevailed after years of fighting the federal government in court, these fortunate few . . . at least broke even.

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