

**Fifth Circuit remands forfeiture money judgment for determination of award based on what defendant himself obtained as a result of fraud conspiracy, but modifies restitution and forfeiture orders to eliminate offset ordered by district court.** After conviction for Medicare fraud, defendants Sanjar, Sajadi, and Main appealed their restitution and forfeiture orders. The government cross appealed, maintaining the district court lacked the power to offset forfeited funds against the ordered restitution. The district court had required Sanjar and Sajadi to pay restitution of \$8,058,612.39 and Main to pay \$4,044,409.70. Main also appealed the forfeiture money judgment issued against him in the same amount: a joint and several obligation of \$4,044,409.70 that represented the gross proceeds the conspiracy. Main originally argued only that the forfeiture judgment violated the Eighth Amendment because the money he received from the fraud – just his wages, which totaled about \$120,000 – was a small fraction of the more than \$4 million in illegal proceeds he was ordered to repay. At the rehearing stage, Main contended for the first time that the forfeiture exceeded what was allowed under the governing statute, 18 U.S.C. § 982(a)(7), because it was based on the proceeds obtained by the entire conspiracy rather than just the proceeds Main received. Because the Supreme Court had held recently in *Honeycutt v. United States* that forfeiture pursuant to the statute governing drug cases, 21 U.S.C. § 853(a)(1), “is limited to property the defendant himself actually acquired as the result of the crime,” the government conceded the same analysis applied to the statute authorizing forfeiture in health care fraud cases, 18 U.S.C. § 982(a)(7). The appeals court thus held that the forfeiture statute does not allow Main to be responsible for any amount beyond the proceeds of the Medicare fraud that he obtained. The court instead questioned whether he could obtain relief based on this statutory argument given that generally speaking, a party may not raise an argument for the first time in a petition for rehearing. There is an exception to this principle when the new argument relies on an intervening Supreme Court decision, so the court forgave Main's failure to raise the statutory argument in his original briefing to this court. Moreover, the magnitude of the difference in the amounts supported Main’s claim the court committed plain error. The court therefore vacated the forfeiture order entered against Main and remanded for a determination of an award based on what Main obtained as a result of the fraud. As for the government's appeal of the offset of defendants' restitution obligations with any amount collected pursuant to the forfeiture order, the district court did so because there was no private victim and decided the government should not receive both the restitution amount and any forfeited proceeds. However, the Mandatory Victim Restitution Act requires courts to order full restitution without an exception for amounts forfeited. It is for the Attorney General to decide whether to offset, per 21 U.S.C. § 853(i)(1). Restitution is remedial in nature, to make the victim whole, whereas forfeiture is punitive, to disgorge any profits or property an offender obtains from illicit activity. Since federal agencies can qualify as a victim under the regulations governing forfeiture, and Congress left it to the executive branch to decide whether to offset, the court modified the restitution and forfeiture orders to eliminate the offset. *United States v. Sanjar*, No. 15-20025, 2017 WL 5896395 (5th Cir. Nov. 30, 2017).

**Oregon district court orders \$600,000 money judgment as what the defendant personally obtained proceeds as a result of his crimes.** Defendant was convicted for sex trafficking offenses, including conspiracy, and the government sought an in personam money judgment of \$600,000. Defendant opposed arguing that was no longer available under *Honeycutt v. United States*, in which a co-conspirator could not be held liable for tainted proceeds that he did not

personally obtain. The government argued *Honeycutt* was factually distinguishable and inapplicable because it turned on an issue of joint and several liability not present in this case. While the Supreme Court did not squarely address whether an in personam money judgment under 18 U.S.C. § 1594(d), the specific criminal forfeiture statute applicable to the defendant's crimes of conviction, remained permissible, the defendant argued *Honeycutt's* holding applied with equal force and effectively overruled the Ninth Circuit's prior precedent to the contrary. The court first found that it was well-established that courts are required to impose money judgments on criminal defendants to ensure that they do not profit from their criminal activity, and the punitive nature of forfeiture is fulfilled by permitting the seizure of future assets. Defendant argued that after *Honeycutt* forfeiture could only be sought against the tainted property itself or substitute property under 21 U.S.C. §853(p). The court disagreed and found that *Honeycutt's* holding was not so broad and was factually and legally. The issue before the Supreme Court was whether §853 supported the imposition of joint and several liability for forfeiture purposes. The Supreme Court considered whether the defendant could be held financially accountable for proceeds from the charged criminal sales that his brother obtained. In that case, however, the proceeds from those sales never passed through the defendant's hands. Accordingly, because the defendant did not personally receive any proceeds from his crime, the Supreme Court held a money judgment against him for those proceeds was improper. Here, by contrast, the defendant personally obtained proceeds as a result of his crimes. *Honeycutt* does not espouse a broad rule categorically barring in personam money judgments; it does not require that Defendant still be in possession of his ill-gotten proceeds, but merely limits forfeiture to proceeds that he obtained at some point from his crimes. Had the defendant in *Honeycutt* obtained money from the illegal sales, then the government could have sought a money judgment against him for that amount. In this case, Defendant obtained proceeds from his sex-trafficking crimes and it was proper for the government to seek a money judgment against him for those proceeds. The court ordered an in personam money judgment against Defendant in the amount of \$600,000 (\$222,700 in proceeds from sex trafficking victims and \$377,300 in facilitating property). *United States v. Taquarius Kaream Ford*, No. 3:14-CR-00045-HZ, 2017 WL 5045644 (D. Or. Nov. 3, 2017).

**Wisconsin district court held that bankruptcy automatic stay did not protect a debtor or property of the estate from preliminary forfeiture order, as government's exercise of its police powers.** Law enforcement authorities pulled over Michael Marks while he was driving a truck owned by Marks Family Trucking, LLC. The truck contained illegal drugs. A grand jury indicted Marks and included a forfeiture allegation against the truck. The LLC filed this Chapter 11 bankruptcy case, and the district court entered a preliminary order of forfeiture against the truck. The LLC objected, claiming that the truck was property of the bankruptcy estate. The United States then dismissed the forfeiture allegation in the criminal case, but filed a civil complaint against the truck and refused to release it. The LLC filed this adversary proceeding to compel turnover of the truck and hold the United States in contempt for violating the automatic stay. The United States moved to dismiss the complaint under Bankruptcy Rule 7012, incorporating Federal Rule of Civil Procedure 12(b). The LLC claimed the truck was property of the bankruptcy estate, and accused the government of violating the stay by pursuing forfeiture of the truck without seeking stay relief. But the court held the automatic stay did not protect a debtor or property of the estate from the government's exercise of its police powers, pursuant to Bankruptcy Code § 362(b)(4). Assuming the police powers exception applied, the government

did not violate the stay by seizing or refusing to return the truck. Moreover, most courts addressing the issue have held that forfeiture proceedings are not stayed. The LLC would have the opportunity to argue in the civil forfeiture action that it was an innocent owner of the truck, i.e., that the LLC, not Marks, owned the truck, and that the LLC and Mrs. Marks did not know of Marks' criminal activity. These arguments would be better addressed to the district court presiding over the civil forfeiture action. Therefore, the motion to dismiss the Complaint was granted. *In re Marks Family Trucking, LLC, Debtor. Marks Family Trucking, LLC, Plaintiff, v. United States of Am., Defendant.*, No. 17-2276, 2017 WL 5956640 (Bankr. E.D. Wis. Dec. 1, 2017).

**Sixth Circuit holds that Anti-Assignment Act invalidates client's assignment of EAJA fee award to attorney (similar to assignments of CAFRA fee awards), since fees are payable to client, unless waived by government.** Hope Kerr filed a civil action seeking judicial review of the final determination of the Social Security Administration that Hope's husband was not disabled and therefore not entitled to any disability insurance benefits prior to the time of his death. Because Hope was living with her husband at the time of his death, she was due to receive any payment owed to Mr. Kerr and was a proper substitute party for him in any proceedings before the Social Security Administration. The parties stipulated to reversal and remand of the Commissioner's decision. After the remand, Hope moved in the district court for an award of \$3,206.25 in attorney fees pursuant to the Equal Access to Justice Act. She specifically requested that any fees awarded be made payable to her attorney, and attached to her motion an "Affidavit and Assignment of EAJA Fee." The Commissioner did not oppose the motion, assuming Hope owed no pre-existing debt subject to offset. The district court declined to honor the assignment and concluded that it was required to order payment of the award to her as the prevailing party per the Anti-Assignment Act (AAA"), however it left it to the Commissioner's discretion to determine whether to waive the Anti-Assignment Act and make the fee payable to counsel. Although the Commissioner agreed to waive application of the AAA to the assignment, Hope filed a motion under Federal Rule of Civil Procedure 59(e) arguing that the district court incorrectly ruled that the AAA applied in EAJA cases, and that her motion was not moot in light of the "capable of repetition yet evading review" and "voluntary cessation" exceptions to mootness. The district court concluded that Hope's motion was moot, and thus it did not consider whether it erred in applying the AAA to the EAJA fee assignment. Hope appealed this ruling. The appeals court held that Hope and her lawyer were not deprived of a property right to engage in attorney fee assignments, no live controversy still existed, and the Commissioner's action of paying the EAJA fee award directly to Hope's lawyer would have, in the normal course, mooted this case. The court, however, held that it should still exercise jurisdiction because the Commissioner's actions were capable of repetition yet evading review. The nearly three-month period between the time the assignment was executed and the time the Commissioner determined both that the AAA applied and that she would waive application of the AAA was too short in duration to be fully litigated. Also, there was a reasonable expectation that these same parties will be subjected to this same action in the future. The court then held that attorney fees ordered under EAJA are to be paid to the prevailing party, and affirmed the district court's decision to void the EAJA fee award assignment. Although Hope had the right to assign her EAJA fee award to her lawyer, the award itself was payable to her and the Commissioner had discretion either to honor or not to honor the assignment. It further concluded that claims for attorney fees under EAJA are

“claims against the United States” within the reach of the AAA. The court noted that the Ninth Circuit held that the AAA invalidates an assignment of attorney's fees under the Civil Asset Forfeiture Reform Act, although it does not prevent an attorney from taking an interest in the fees that is effective against the government; it merely forbids an assignment of the right to be paid directly from the United States Treasury. It concluded that unless the government waives application of the AAA in EAJA cases, fee awards must be paid to the prevailing party, not to the party's lawyer. It said its conclusion was consistent with the purposes of the AAA, one of which is to save to the United States defenses which it has to claims by an assignor by way of set-off, counter claim, etc., which might not be applicable to an assignee. Although it understood the concern that the EAJA's purpose will be undercut if awarding attorney fees to successful parties, rather than to their attorneys, will prevent some successful plaintiffs from paying their lawyers, and ultimately, may prevent future claimants from obtaining counsel in the first place, its conclusion was consistent with precedent and the statutory scheme of EAJA. *Kerr for Kerr v. Comm'r of Soc. Sec.*, 874 F.3d 926, 928–38 (6th Cir. 2017).