New Mexico district court denies motion to strike and exercises discretion to allow claimant 10 days to file claim after filing only answers. The United States Attorney's Office sent, via certified and first class mail, copies of the forfeiture complaint to Haigler, Smith, and Raymond Johnson, the attorney who represented them in the related administrative forfeiture proceeding. It also filed a Notice of Publication. Haigler received the complaint on January 27, 2018, and Johnson received the documents via certified mail, although the return receipt was not dated. The certified mailing to Smith was returned as unclaimed. Although neither claimant filed a verified claim with the court, on February 15, 2018, Claimants filed answers. The government moved to strike Claimants' answers because they lacked statutory standing. The claimants did not file a response or appear for the hearing on the Motion. The court concluded Claimants' administrative claims could not substitute for a claim. Also, the answers could not substitute for verified claims, because they did not satisfy all the requirements that Supplemental Rule G(5)(a) outlines for verified claims. While the Answers identified the specific property claimed, the Claimants, and their interests in the property, the Claimants did not sign under penalty of perjury. Although other courts have permitted standing without a verified claim in special circumstances, since Claimants did not sign their answers under penalty of perjury, they did not safeguard against their falsity as the verification requirement intends. Accordingly, the Answers did not substitute for verified claims as Supplemental Rule G(5) requires. Nevertheless, the court exercised its discretion to allow the Claimants 10 days to cure the deficiencies in their pleadings, which would not thwart the Supplemental Rule's underlying goals. Claimants' answers would have been timely filed had they filed claims. They did not wait to assert an interest in the property until the forfeiture proceedings were completed or near a close. Allowing 10 days to cure deficiencies also would not thwart the purpose of preventing false claims. Instead, the extension would allow a limited period to ensure that Claimants attested to their interests under penalty of perjury. If they did not cure the deficiencies within 10 days, the court said it would strike the Claimants' answer. *United States of America v. $20,000.00 In United States Currency*, No. CIV 17-1236 JB\KBM, 2018 WL 5622594 (D.N.M. Oct. 30, 2018).

Kentucky district court grants summary judgment based on parent claimants' lack of standing as unsecured creditors because no evidence they took security interest or secured collateral for their alleged loan to son. Kyle Dones was flying from Chicago to San Francisco and connecting through Cincinnati. He had purchased a one-way ticket the day before. The characteristics of the ticket purchase, as well as Kyle's prior criminal history (two arrests for trafficking marijuana and a felony firearm charge) and his destination in a "known source city/state" aroused suspicion. Agents asked Kyle if he was carrying large quantities of money, drugs, or other contraband. He said no, but looked nervous during the encounter. A search turned up two cell phones, and stacks of U.S. currency which lined the walls of Kyle's suitcase. Id. He said he was carrying $9,000 to buy a car in San Francisco. An agent claimed Kyle "attempted to erase something from his cell phone" before it was seized. The agents seized $10,493.00 from him. Kyle filed a Seized Asset Claim form with the DEA that was found to be deficient. Paul and Renee Dones, Kyle's parents, filed the same claim form seeking return of the money through the DEA's administrative forfeiture proceedings and claiming that the seized money was a loan they provided Kyle to purchase a car. After the government filed a civil forfeiture complaint, Paul Dones filed a Verified Claim in federal court and an answer. The government moved for summary judgment arguing Claimant did not have standing to claim the

money. Courts throughout the country have consistently held that general, unsecured creditors have no standing to contest forfeiture of assets of their debtors. The court said there were no facts presented by Claimant suggesting he was anything other than an unsecured creditor. He asserted he provided money to his son Kyle to purchase a car but made no mention of securing collateral for the loan or taking a security interest in any of Kyle's specific property. Claimant in fact argued there was no creditor/debtor relationship between him and Kyle, but rather a bailment situation or a constructive trust. However, he presented no evidence to support either theory. In both Kyle and Claimant's Seized Asset Claim Forms, the asset was described as a loan, not a bailment or constructive trust. The court therefore struck the claim. *United States v. $10,493 In United States Currency*, No. CV 18-18-DLB-CJS, 2018 WL 5259455 (E.D. Ky. Oct. 22, 2018).

New York district court denies motion to set aside administrative forfeiture of currency since claimant filed a petition for remission, not a claim. DEA agents entered Paulino's home pursuant to a search warrant and seized $49,950.00 in U.S. currency. The DEA sent written notice of the seizure to the defendant at two separate addresses. Additionally, the DEA posted notice of the seizure of the property on the official government forfeiture website for 30 consecutive days. Counsel for the defendant sent a letter to the DEA enclosing a copy of the notice of seizure mailed to Paulino and requesting "remissions and/or mitigation of the forfeiture." The DEA returned that submission, citing various deficiencies. Counsel submitted additional documents . On October 7, 2015, the DEA issued a "Declaration of Forfeiture" noting that no claim had been filed within the relevant time frame. On October 15, 2015, the DEA confirmed receipt of Paulino's petition for remission or mitigation and indicated that it would review and issue a ruling on the petition. The DEA denied Paulino's and again upon reconsideration of its initial decision. Defendant filed a motion to set aside the declaration of forfeiture and compel the return of the seized property pursuant to Rule 41(g). Paulino argued that the DEA lacked probable cause to seize the property at issue and failed to properly consider "the valid and persuasive evidence before it" during its review of Paulino's petition. Paulino also asserts that the DEA failed to follow the proper procedures in addressing his request for relief. The court found Paulino's procedural arguments unpersuasive, which amounted to nothing more than a belated attempt to re-characterize his petition for remission or mitigation as a properly filed claim under 18 U.S.C. § 983(a). However, a petition and a claim are distinct and alternative requests for relief. The correspondence between Paulino's counsel and the DEA made clear that Paulino opted to file a petition for remission or mitigation and not a claim. As such, the DEA did not ignore Paulino's "claim" before issuing the declaration of forfeiture because Paulino did not file a claim. If he wished to contest the merits of the DEA's seizure and forfeiture in a federal district court, he was required to comply with the procedures set forth in the notice of seizure relating to the filing of a claim. He instead opted to file a petition for remission or mitigation, and while he may regret that decision the court said he must live with its consequences. *United States v. Francisco Paulino*, No. 15 CR 318 (NRB), 2018 WL 5291907 (S.D.N.Y. Oct. 9, 2018).

Wisconsin district court denies motion to dismiss and to return property for untimely administrative seizure notice because government may still commence judicial forfeiture proceedings against the same property without prejudice. After the Secret Service notified Xia that it had seized his vehicle for forfeiture, he filed a claim in the administrative forfeiture proceeding. The government filed a complaint for civil forfeiture, and Xia moved to dismiss

under Federal Rule of Civil Procedure 12(b) for lack of personal jurisdiction. Xia argued the government's complaint was barred because the notice of administrative forfeiture was untimely. The government responded that the notice was timely, and even if it had not been, untimeliness does not prevent the government from pursuing its judicial forfeiture complaint and does not require return of the vehicle. The car was first seized by local authorities on July 7, and then again with a federal warrant on October 20. The government argued 18 U.S.C. §983(a)(1)(A)(I) applied, and the word "seizure" in the statute must be read to mean seizure "for the purpose of federal asset forfeiture." It thus argued that the operative date was October 20.The government thus calculated that the December 7 letter was within the 60-day window, and therefore the notice was timely. The court disagreed that §983(a)(1)(A)(I) applied here. Reading Sections (I) and (iv) together in a common-sense way, they address two different ways property comes into the government's possession for forfeiture: Section (I) concerns property initially seized by the federal government, and Section (iv) concerns property initially seized by the state and then turned over to the federal government. In this case, the property was seized initially by the Wauwatosa Police Department and turned over to the Secret Service, placing it squarely under Section (iv), which explicitly states that the relevant date is when the state agency takes initial custody of the property, not when it is turned over to the federal agency (wherein notice shall be sent not more than 90 days after the date of seizure by the state or local law enforcement agency). Section (iv) makes no distinction as to whether the property is turned over to the federal government voluntarily or in response to a warrant, as occurred in this case. Furthermore, it contains no qualifier about the purpose of the initial state seizure. Thus, the government had 90 days from July 7 in which to notify Xia. Because the government issued notice on December 7, its notice was untimely. Section 983(a)(1)(F) clearly states that return of the property is the proper remedy for untimely notice. However, it also unambiguously states that the government may commence future forfeiture proceedings "without prejudice." Thus, even if an administrative forfeiture notice is untimely, the government may later commence judicial forfeiture proceedings against the same property without prejudice. Thus, where the government has already filed a civil forfeiture complaint, as here, returning the property only to immediately re-seize it would be a meaningless exercise. The court thus denied motion to dismiss. *United States v. One 2017 Mercedes Benz GLC300*, No. 18-CV-264, 2018 WL 4964635 (E.D. Wis. Oct. 15, 2018).

Fifth Circuit holds that $1.825 million forfeiture was not excessive since it was below statutory maximum fine and less than six times greater than the recommended Guidelines maximum. Defendant Haro contended the forfeiture judgment was grossly disproportional to the gravity and scope of her criminal conduct in violation of the Eighth Amendment's prohibition on excessive fines. Haro maintained the $1.825 million forfeiture order here was excessive because it was more than three times the $500,000 statutory maximum fine and because she lacked the resources to pay the amount of the forfeiture. However, the statutory maximum fine was actually $500,000, or twice the property involved in the transaction conducted in violation of 18 U.S.C. §1956(a)(1)(B)(I), (h), which for Haro would have been well over $3 million based on the district court's estimate of the funds she assisted in laundering. The $1.825 million forfeiture was therefore below the statutory maximum fine and less than six times greater than the recommended Guidelines maximum of $350,000. The forfeiture amount was 70 times the amount of the maximum fine authorized by the Guidelines. Moreover, Haro's offense was

serious: she participated in a two-year conspiracy to launder drug proceeds. In light of these factors, the forfeiture judgment was not constitutionally excessive. The government also had argued that the Excessive Fines Clause of the Eighth Amendment does not apply to forfeiture of the corpus of the crime, especially when it also constitutes drug proceeds. However, the forfeiture order in this case, was not limited to proceeds of the unlawful activity, but included the laundered funds themselves (the corpus). An in personam, criminal forfeiture of the corpus is punitive and therefore subject to the Excessive Fines Clause. Alexander, *United States v. Haro*, No. 17-40539, 2018 WL 5046257 (5th Cir. Oct. 16, 2018).

Eleventh Circuit holds that qui tam plaintiff cannot intervene and file petition in criminal forfeiture proceedings because she neither had a legal interest in the property prior to the crime or was a bona fide purchaser for value of the property. When a private person brings a False Claims Act suit—known as a qui tam action—the government may choose to intervene and take over the action. It may also choose to pursue "any alternate remedy available. 31 U.S.C. §3730(c)(5) . If it does so, the False Claims Act gives the qui tam plaintiff the "same rights" in the "alternate" proceeding as she would have had if the qui tam action "had continued." The question here is whether this statute allows a qui tam plaintiff to intervene in criminal forfeiture proceedings when the government chooses to prosecute fraud rather than to intervene in the qui tam plaintiff's action. The court said even if the False Claims Act could be read to allow intervention, the statutes governing criminal forfeiture specifically bar it, with exceptions that do not apply here. Lori Carver worked at Physicians Pain Specialists of Alabama, P.C., a pain management clinic in Mobile, Alabama. Two doctors, Couch and Ruan, ran the clinic. Ms. Carver discovered Couch and Ruan submitted fraudulent claims for payment to federal healthcare programs. She took this information to the U.S. Attorney's office, which encouraged her to bring a qui tam action against the clinic and doctors. That case remained pending. With Ms. Carver's information, the government began investigating Couch and Ruan. Almost two years later, the government criminally charged both doctors with conspiracy to distribute controlled substances and conspiracy to commit healthcare fraud. The charges in the indictment partially overlapped with the allegations in Ms. Carver's qui tam complaint. All three indictments included forfeiture counts. The jury convicted both doctors and the court promptly entered a preliminary forfeiture order. Ms. Carver moved to intervene in the forfeiture proceedings, asserting a right to some of the forfeited assets. She primarily argued the alternate-remedy provision permitted her to intervene to claim the share of the assets she would have been entitled to if the government had intervened in her qui tam action. In the alternative, she petitioned to assert an interest in the forfeited property under 21 U.S.C. §853 and Federal Rule of Criminal Procedure 32.2, however Ms. Carver conceded she neither had a legal interest in the property prior to the crime or was a bona fide purchaser for value of the property. The district court denied Ms. Carver's motion to intervene. It first concluded she had standing to assert that the alternate-remedy provision gave her a right to intervene in criminal forfeiture proceedings so as to claim an interest in the forfeited property. She asserted a statutory procedural right—specifically, a right under the alternate-remedy provision to have her relator's share adjudicated in the criminal forfeiture proceeding. Ms. Carver asserted an interest in property forfeited to the government. A party claiming an interest in such property has suffered a concrete injury. The court first concluded it had jurisdiction to decide whether the alternate-remedy provision conferred a procedural right on Ms. Carver to have her relator's share

adjudicated in the forfeiture proceeding. It then determined, however, that each of the three criminal forfeiture statutes applicable in this case, expressly bars third parties from intervening in forfeiture proceedings to claim an interest in property subject to forfeiture. Although each of the statutes has exceptions to allow third parties to petition a court for the forfeited property if they either had a legal right to the property before the defendant committed the offense or are bona fide purchasers for value, but Ms. Carver conceded neither of these exceptions applied to her. Thus, she had no right to intervene. Nevertheless, Ms. Carver may still recover, because when a defendant is found civilly liable for damages in a False Claims Act suit after being found criminally liable for the same fraud, the defendant may deduct restitution paid to the United States in the criminal proceedings as a credit against the False Claims Act damages award. In such circumstances, a qualified relator is entitled to a share of the full amount of the damages award, including restitution previously paid. We understand this to mean a relator is entitled to a share of the forfeited property to the extent the qui tam defendant can deduct any forfeiture from the qui tam award. *United States v. Couch*, No. 17-13402, 2018 WL 5019480 (11th Cir. Oct. 17, 2018).

Seventh Circuit finds no error for district court's failure to inform defendant of potential forfeiture since he did not provide any evidence he would not have pleaded guilty had the court advised him of any applicable forfeiture. During a plea colloquy, the district court is also required to inform the defendant of "any applicable forfeiture." Fed. R. Crim. P. 11(b)(l)(J). In this case, there was no dispute that the court did not mention forfeiture during the plea colloquy and that neither defense counsel nor the government alerted the court to its omission. Regardless, courts are not required to strictly comply with Rule 11 to ensure that a defendant has knowingly and voluntarily pleaded guilty. The defendant must do more than show that the Rule was technically violated. He must show that his guilty plea was involuntary and that he would not have entered it on the basis of the record as a whole. The defendant argued the totality of circumstances indicated he would not have pleaded guilty had the court explained that he faced forfeiture: the lack of a written plea agreement, the lack of benefit to him to plead guilty, and the rushed, mid-trial plea. The court stated, however, that the lack of a written plea agreement and mid-trial plea were nonstarters; defendants routinely plead guilty without a written plea agreement. While a written plea agreement may include details like an agreed recommended sentence or forfeiture amount, the lack of a written plea agreement itself is not evidence that the defendant would not have pleaded guilty. Nor was the fact that he changed his mind mid-trial: that is not abnormal and does not undermine the integrity of the judicial process. It merely reflects the reality that plea bargains have become central to the administration of the criminal justice system. His argument that he lacked a benefit fared no better. A dismissal of counts can be a benefit to a defendant. Perhaps the defendant saw the writing on the wall after five days of trial and hoped that in exchange for his guilty plea, the court would go easier on him at sentencing. Perhaps he thought he would get credit for accepting responsibility by pleading guilty. The deficiencies he asserted in the plea colloquy did not indicate he would have made a different decision with more information about forfeiture. The defendant did not provide any evidence he would not have pleaded guilty had the court advised him of any applicable forfeiture, other than counsel's argument that he did not understand the consequences of his plea. Thus, the appeals court rejected his unsupported assertion of error. *United States v. Austin*, No. 16-3211, 2018 WL 5318271 (7th Cir. Oct. 29, 2018).

Pennsylvania district court denies defendant's motion for relief from the forfeiture judgment based on Supreme Court *Honeycutt* decision because conviction became final prior to *Honeycutt* rule, which does not apply retroactively to convictions that became final prior to its adoption. Defendant was convicted of conspiracy to distribute cocaine base within 1,000 feet of a school, and murder in furtherance of a continuing criminal enterprise. He was sentenced to a term of life imprisonment. Defendant's sentence and conviction arose from his role in a large-scale cocaine and crack distribution organization; he was "co-owner" of the organization's operation at the corner of Wardoff and Cambria streets in Philadelphia, Pennsylvania, for sixteen months. Defendant's conviction became final in 2007, when the time for seeking certiorari review expired. At defendant's sentencing in 2003, the court imposed a forfeiture judgment of $2.4 million based on the amount of money received by his street corner drug distribution organization. Defendant recently moved for relief from the forfeiture judgment on the ground that its calculation relied upon a theory of joint and several liability rendered invalid in *Honeycutt*, – issued on June 5, 2017 – almost ten years after defendant's conviction became final. Defendant sought a writ of *audita querela* under the All Writs Act. The common law writ of *audita querela* permitted a defendant to obtain relief against a judgment or execution because of some defense or discharge arising subsequent to the rendition of the judgment. Circuit courts have determined that common-law writs can be used to the extent that they fill in the gaps in post-conviction remedies. Because *audita querela* is an "extraordinary remedy," it is appropriate only in compelling circumstances. *Audita querela*, if available, must be brought on "legal" rather than "equitable" grounds, i.e., the petitioner must show something like an intervening change in law, rather than simply argue that the collateral consequences of the conviction have turned out to be unduly harsh. Defendant argued the *Honeycutt* decision, which rendered invalid certain criminal forfeiture calculations based on joint and several liability, announced an intervening change in the law that should apply retroactively to his case in order to prevent a serious miscarriage of justice. The court concluded the defendant's conviction became final prior to the *Honeycutt* rule, which does not apply retroactively to convictions that became final prior to its adoption. Thus, the court denied defendant's motion for resentencing and recalculation of his forfeiture judgment. The rule in *Honeycutt* was not dictated by existing precedent and constituted a new rule. Because *Honeycutt* was decided on June 5, 2017, after defendant's conviction became final, it is applicable to defendant's case only if it is subject to "substantive" or "watershed rule" exceptions, however neither applied to this case. The rule in *Honeycutt* was not substantive because it did not alter the range of conduct punished by federal law, but decided only whether joint and several liability could be imposed as a consequence of that conduct. Likewise, the rule was not a "watershed rule," since it merely clarified the interpretation of a criminal forfeiture statute. *United States v. Potts*, No. CR 01-457-3, 2018 WL 5296376 (E.D. Pa. Oct. 25, 2018).