

Puerto Rico district court holds that an administrative claim is deemed filed when it is received by an official of the seizing agency, not when the USPS attempts to deliver correspondence. U.S. Customs seized a boat and sent a seizure notice to the claimant, who filed an administrative claim by U.S. Postal Service certified mail, but according to Customs was received one day after the due date, and thus was administratively forfeited. Claimant moved in court for the return of his boat. The court first said that judicial review of an administrative declaration of forfeiture is limited to collateral due process attacks. Here, the claimant's correspondence was received by someone at the designed address belonging to CBP on September 8, 2020, but the receipt showed that delivery was attempted on September 5, 2020. The USPS tracking results showed that on September 5th at 7:58 a.m., a Saturday, a delivery was attempted, but there was "no access to delivery location." As a result thereof, it appeared that USPS retained the letter until its delivery on September 8th, when it was "delivered to an individual at the address." Claimant argued the meaning of the phrase "claim has been filed" in 18 U.S.C. §983(a)(3)(A) is that the claim was received for the agency by the postal service and not when the claim is received by a particular official. According to Claimant, his "administrative claim arrived at CBP's mailbox on September 3, 2020 and must be considered timely filed." The basis of this contention was that when the letter was taken to the USPS for mailing an estimated date of delivery of September 3rd was provided. However, an estimated date of delivery is not necessarily the date in which the mail is delivered. Moreover, nothing on the record suggested the existence of a CBP mailbox where correspondence could have been delivered on September 3rd. The USPS tracking results clearly demonstrated there was no personnel at the CBP office on September 5th. Ultimately, a claim is deemed filed when it is received by an official of the agency, not when the USPS attempts to deliver correspondence. In any event, the phrase "claim has been filed" in 18 U.S.C. § 983(a)(3)(A) has been interpreted by federal courts and 28 C.F.R. § 8.2. specifically provides that an administrative claim is filed on the date when the claim is received by the designated appropriate official. Therefore, the only possible meaning of "receive" is when the claim is delivered to the physical agency address, and that is when the United States first exercises dominion over the claim. Even if the phrase "claim has been filed" were to be interpreted as the date in which the letter was received at the agency's mailbox, although there is no evidence that suggests the existence of a mailbox, the tracking results clearly demonstrated the document was delivered at the agency on September 8th. The court further noted while the inefficiencies of the Postal Service may be a circumstance beyond the claimant's control, the problem was one that his counsel could have avoided by mailing the claim earlier or by using a private delivery service, private courier or even by counsel personally delivering the letter to the agency. Therefore, there were no grounds for equitable tolling here. *In the Matter of the Seizure of: One (1) Vessel (Victoria) Registration Number PR-1268-AC, Hull No. MZ 000(32F202, with two (2) each Suzuki 90 hp engines, 2021 WL 1784409, No. MC 20-420 (DRD) (D.P.R., May 4, 2021).*

Texas district court holds that although the government failed to file forfeiture complaint by statutory deadline, it had independent grounds to maintain custody of the seized firearms. During a search of the home of Claimants, ATF agents seized 222 firearms and accessories allegedly bought or sold in violation of 18 U.S.C. § 922(a)(1)(A), which prohibits any person from "dealing in firearms" without a license. After Claimants filed claims to the property, the U.S. Attorney's Office filed an unopposed motion to extend the filing deadline. But

the United States missed that deadline – and another after that – before it filed its Complaint for Forfeiture. Claimants then filed a motion to dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). The Court granted the motion and dismissed the complaint because the United States, under Section 983(a)(3)(A), failed to file its complaint within the 90-day deadline. The Court entered judgment on the same day, ordering the United States to “promptly release the property pursuant to regulations promulgated by the Attorney General.” Two months later, Claimants filed a motion for enforcement of the judgment and return of the property. The court first observed that the regulations for return of property promulgated by the Attorney General state that if, under 18 U.S.C. §983(a)(3), the United States is required to return seized property, the U.S. Attorney shall immediately notify the appropriate seizing agency, but the United States is not required to return property for which it has an independent basis for continued custody, including but not limited to contraband or evidence of a violation of law. The court held that the United States complied with the judgment because, even though it missed the Section 983 deadline and could not civilly forfeit the property, it had an independent basis to continue to hold the property as evidence and contraband, in accordance with a valid warrant. The United States seized the property as evidence of a crime pursuant to a Rule 41 search and seizure warrant authorized by a magistrate judge, and has stated that the criminal investigation was ongoing and that a criminal indictment was imminent. The property was still needed as evidence to prove Claimants were selling firearms illegally. While Claimants argued that photos of the firearms would suffice, the government asserted that further examination and tests of the defendant firearms might be necessary to determine if they met the statutory definition of “firearm.” So, with more tests needed and an indictment promised shortly, continued retention of the property as evidence was reasonable. The government also showed the weapons properly were held as derivative contraband, because they might have been used in furtherance of a crime. Accordingly, the magistrate judge recommended that the court deny the motion to enforce the judgment. *United States v. Approximately Two Hundred Twenty-Two (222) Firearms and Firearm Accessories*, No. 3:20-CV-1471-M, 2021 WL 1851031 (N.D. Tex., May 6, 2021).

Nevada district court denies defense counsel’s motion to have its lien paid from forfeited funds ordered returned when deceased defendant’s conviction was vacated. Defendant was indicted for, among other things, conspiracy to distribute Oxycodone, including a criminal forfeiture allegation. After a guilty verdict, Defendant’s law firm (“LBBS”) filed a Notice of Lien. The court entered a Preliminary Order of Forfeiture. Before Defendant’s appeal decision was issued, he passed away, so the court vacated the judgment and dismissed the superseding indictment. LBBS then moved to have its lien paid. The court said it was unaware where an attorney recovered forfeited funds from his criminal defendant client after a conviction and sentence were vacated. The authority the parties cited were civil actions, and the party recovering on the charging lien was the plaintiff in each circumstance. Normally, a charging lien cannot attach to the benefit gained for the client by securing a dismissal; it attaches to tangible fruits of the attorney’s services, generally money, property, or other actual proceeds gained by means of the claims asserted for the client in the litigation. The affirmative-recovery requirement entails that a charging lien cannot attach unless the attorney has obtained actual, tangible proceeds. Here, Defendant’s assets were forfeited as part of his sentence. After his conviction was vacated, the return of the forfeited funds is a benefit obtained from a dismissal. There was no recovery gained by means of any claims that Defendant asserted in the litigation, since a charging lien only

applies when a client is entitled to an affirmative monetary recovery. LBBS's defense in the criminal action did not end with an affirmative monetary recovery. Thus, the court found that the return of forfeited funds did not constitute such a recovery and therefore the charging lien did not apply. Criminal forfeiture is part of a sentence, and the return of forfeited funds is merely the reversal of a sentence, not an affirmative recovery. LBBS's defense was more akin to a service rendered for a negative purpose than it was a service in affirmatively asserting a cause of action. Because the charging lien did not apply to this forfeiture of funds, the Court denied LBBS's motion, but noted that without the charging lien, LBBS would still have all the usual tools available to creditors to recover payment of their fees. *United States v. Wetselaar*, No. 211CR00347KJDCWH, 2021 WL 2006292 (D. Nev., May 18, 2021).

Arizona district court dismisses petition for ancillary hearing because it was not signed under penalty of perjury, noting that petitioner had a remedy in parallel civil forfeiture proceedings. Following a change-of-plea hearing, the Court granted a preliminary order of forfeiture as to various firearms and rounds of ammunition. Afterward, non-party Jessica Graham, who apparently was Defendant's ex-wife, filed a pro se petition for the return of six of the firearms. The government opposed. A third party claiming an interest in the property may petition for an ancillary hearing. The petition must be signed under penalty of perjury and shall set forth the nature and extent of the petitioner's interest in the property, the time and circumstances of the petitioner's acquisition of her interest, any additional facts supporting the petitioner's claim, and the relief sought. Here, Graham's petition was not signed under penalty of perjury. This failure, alone, justified dismissal of her petition. This outcome should not have any practical impact on Graham's ability to dispute the government's allegations and seek the ultimate return of the six firearms because the government had initiated a separate in rem civil forfeiture action against them (in which Graham would have every opportunity to participate), conceded Graham's ownership, and disclaimed any intention to forfeit her interest. *United States v. Wasar*, No. CR2008088001PCTDWL, 2021 WL 2002981 (D. Ariz., May 19, 2021).

New York district court denies hearing to modify restraining order, but prohibits government from using in its direct case information contained in Defendant's financial affidavit that was not otherwise available. A grand jury returned a sealed indictment charging Defendants with conspiracy to commit wire fraud and money laundering, for fraudulently inducing donors to contribute millions of dollars to an online crowdfunding campaign known as We Build the Wall. Defendants allegedly took hundreds of thousands of dollars for their personal use. The indictment included a forfeiture count, and the court entered a sealed restraining order regarding the transfer of funds into or out of three We Build the Wall bank accounts. It did not restrain funds acquired after the Restraining Order was issued. According to Defendant Kolfage, prior to the unsealing of the Indictment, and before he was aware of a criminal investigation, We Build the Wall took out a liability insurance policy, which covers up to \$1 million in legal fees and costs with respect to criminal charges brought against We Build the Wall's directors and officers. Under the Policy, a defendant must satisfy an "insurance retention amount," by demonstrating that \$125,000 in valid legal fees and expenses have been incurred and paid on a defendant's behalf from a separate source of funds. Upon his indictment, Kolfage retained counsel, which said it would forgo a retainer. Since beginning its representation, counsel billed substantial legal fees. We Build the Wall committed to paying the \$125,000. Kolfage claimed

that without the restrained funds, We Build the Wall could not afford the payment. Accordingly, the Policy did not take effect, and the insurer did not paid his counsel, who said they would have to withdraw from this action, which Kolfage stated would be a substantial hardship for him to secure other counsel. To satisfy the insurance retention amount, Kolfage thus sought an order modifying the Restraining Order to permit We Build the Wall to access funds. The court said Kolfage must submit evidence showing that without modification of the Restraining Order, his net financial resources and income were insufficient to enable him to obtain qualified counsel. In his declaration, Kolfage simply claimed he could not pay his lawyer without We Build the Wall's insurance. This bare recitation did not meet the required threshold. As Kolfage was seeking to unfreeze We Build the Wall's funds to pay for his defense, the court also required evidence that We Build the Wall needed the restrained funds to pay the \$125,000 and that it would, in fact, use the funds to do so. Kolfage requested he be permitted to submit a financial affidavit ex parte, or, if the court declined, to preclude the government from being able to use, directly or derivatively, any statements in the affidavit against him.. Kolfage contended the government might attempt to use such statements as proof of guilt, and permitting the government to do so would put Kolfage in the untenable position of choosing between his Sixth Amendment right to counsel, and his Fifth Amendment right to not self-incriminate. Defendants are not automatically entitled to make an ex parte submission when demonstrating that CJA eligibility might raise Fifth Amendment concerns. The Second Circuit generally conducts an adversarial proceeding but sets specific limits on the subsequent use of any information presented by the defendant during the inquiry. Courts have almost uniformly denied requests to file a CJA affidavit ex parte, including where the defendants were charged with fraud. Accordingly, Kolfage's request to submit an ex parte affidavit in support of his application for a hearing was denied. However, the court further held that Kolfage's affidavit would be afforded the same scope of use immunity given with respect to CJA affidavits, meaning the protections and limitations of such immunity apply. Therefore, the government was not permitted to use in its direct case information contained in Kolfage's affidavit that was not otherwise available. *United States v. Kolfage*, No. 20 CR. 412 (AT)) 2021 WL 1792052 (S.D.N.Y., May 5, 2021).