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Innocent Mortgagees and In Rem Civil Forfeitures

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INNOCENT MORTGAGEES AND IN REM CIVIL FORFEITURES

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I. INTRODUCTION

For the fiscal year ending September 30, 1990, the United States government initiated the forfeiture of Florida and Caribbean property valued at \$166,195,000. During this same period, federal seizures of property in Florida and the Caribbean totalled \$119,888,000. These seizures alone exceeded by \$4,555,000 the total value of all property taken under the same federal authority in the rest of the United States.¹

The intent of this comment is to place in perspective the rights of innocent lienholders of real property subject to forfeiture under federal statutory authority. Toward this end, Part II of this paper reveals how the United States Court of Appeals for the Eleventh Circuit distinguishes seizures from forfeitures in denying procedural due process. Part III examines the evolution of the exigent circumstance exception to due process rights and the controlling Supreme Court precedents. Part IV presents the purposes and scope of the federal civil forfeiture statutes. Part V describes how the Second Circuit's reading of Supreme Court precedent is in direct counterpoise to the Eleventh Circuit's interpretation. Part VI demonstrates how the current federal forfeiture regulations fail to acknowledge an explicit congressional mandate to provide expedited

¹ The 1990 dollar volume of asset forfeitures in the Southern District of Florida represented a 360% increase above the 1987 base year. U.S. ATT'Y., S. DIST. FLA., U.S. DEP'T. OF JUSTICE, INTERESTING FACTS (1991). The Organized Crime/Drug Enforcement Task Forces of the U.S. government effected these seizures.

relief to innocent lienholders. Part VII concludes by recognizing that protection of due process rights benefits both the government and the innocent lienholder of real property.

II. 900 RIO VISTA BOULEVARD, FT. LAUDERDALE, FLORIDA

On August 27, 1979, Heidi of South Florida, Inc. was incorporated in Florida.² The following day this new corporation acquired title to residential real property located at 900 Rio Vista Boulevard in Ft. Lauderdale, Florida.³ In September, 1984, the United States seized that property. It was not until eight months later, in May, 1985, that the government established probable cause for a belief that this residential property constituted forfeitable proceeds traceable to illegal drug trafficking.⁴

The corporate owner challenged the constitutionality of the property forfeiture, alleging that the government's actions constituted a denial of procedural due process.⁵ The United States Eleventh Circuit Court of Appeals held as follows and affirmed: "Under *Calero-Toledo* it is well settled that no prior judicial determination that seizure is justified is required when the government seizes items subject to forfeiture."⁶

The court distinguished the acts of seizure and forfeiture, with seizure evidencing governmental authority to confiscate and hold private property pending the outcome of a forfeiture proceeding. In distinguishing seizure from forfeiture, the court acknowledged "the only time property traceable to drug proceeds is not subject to forfeiture is when the owner of the property establishes that this act connecting the property with a drug transaction was done without the

² United States v. 900 Rio Vista Boulevard, 803 F.2d 625, 627 (11th Cir. 1986).

³ Heidi Hartline, as president, director, and sole shareholder of the corporation, executed the documents corresponding to this transaction. At the time, Ms. Hartline was the girlfriend of Jonathan S. Baldwin. Baldwin was arrested in November of 1982 and pleaded guilty to a drug trafficking conspiracy count. *Id.* at 627-28.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* at 632.

owner's knowledge or consent."⁷ However, "seizure for purposes of forfeiture presents an extraordinary situation justifying postponement of notice and hearing."⁸

Therefore, in the Eleventh Circuit, an innocent owner is entitled to notice and a hearing prior to forfeiture, but not prior to seizure. The court grounded this due process interpretation in federal statutory authority⁹ and the Supreme Court's *Calero-Toledo* holding.¹⁰ To fully appreciate this Eleventh Circuit interpretation, the applicable federal statutes must be viewed within the context of the entire *Calero-Toledo* opinion and its precedents.

III. CALERO-TOLEDO AND THE DUE PROCESS PRECEDENTS

In 1972, the Supreme Court in *Fuentes v. Shevin*¹¹ found certain state pre-judgment replevin statutes to be unconstitutional. The Court took exception to a state authorizing the seizure of a property without a prior hearing. Justice Stewart's opinion quoted *Sniadach v. Family Finance Corp*¹² in acknowledging: "due process is afforded only by the kinds of 'notice' and 'hearing' that are aimed at establishing the validity, or at least the probable validity, of the underlying claim against the alleged debtor before he can be deprived of his property."¹³ Further, under any state authorized seizure, "[t]he Fourteenth Amendment's protection of 'property' . . . has never been interpreted to safeguard only the rights of undisputed ownership. Rather, it has been read broadly to extend protection to 'any

⁷ *Id.* at 631.

⁸ *Id.* at 632.

⁹ *Id.* at 631-32.

¹⁰ *Id.* at 632.

¹¹ 407 U.S. 67 (1972).

¹² 395 U.S. 337, 343 (1969).

¹³ *Fuentes*, 407 U.S. at 97. Justice Stewart's opinion recognized that "for more than a century the central meaning of procedural due process has been clear: Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." *Id.* at 80. "[T]he prohibition against the deprivation of property without due process of law reflects the high value, embedded in our constitutional political history, that we place on a person's right to enjoy what is his, free of governmental interference." *Id.* at 81.

significant property interest'.¹⁴ The Court also established that a temporary denial of a property right "is nonetheless a 'deprivation' in the terms of the Fourteenth Amendment."¹⁵

Fuentes, however, unequivocally established that the right to notice and a hearing prior to any deprivation of a property interest is not inviolate. The Court found that, under exigent circumstances, the government must subordinate certain individual rights to safeguard the general welfare. Such subordination may include the postponing of procedural due process rights.¹⁶ Two years after *Fuentes*, the Supreme Court employed this exigent circumstances standard in deciding *Calero-Toledo*.¹⁷

The postponement of notice and a hearing was deemed necessary by the Court to ensure the seizure of a yacht. Such property "could be removed to another jurisdiction, destroyed, or concealed, if advance warning of confiscation were given."¹⁸ Writing for the majority, Justice Brennan stated that "[t]o the extent that such forfeiture provisions are applied to lessors, bailors, or secured creditors who are innocent of any wrongdoing, confiscation may have the desirable effect of inducing them to exercise greater care in transferring possession of their property."¹⁹ However, before any secured creditor should despair under the impact of this language, Justice Brennan did offer language mitigating the Court's position:

¹⁴ *Id.* at 86 (quoting *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971)). In the *Fuentes* opinion, the Court specifically acknowledged the constitutional due process protection of significant property interests against both state and federal actions. "The right to a prior hearing has long been recognized by this Court under the Fourteenth and Fifth Amendments." *Id.* at 82.

¹⁵ "The Fourteenth Amendment draws no bright line around three-day, 10-day or 50-day deprivations of property. Any significant taking of a property by the State is within the purview of the Due Process Clause." *Id.* at 85-86.

¹⁶ "There are 'extraordinary situations' that justify postponing notice and opportunity for a hearing. . . . These situations, however, must be truly unusual." *Id.* at 90. The criteria for establishing a truly unusual situation were specified by the *Fuentes* Court under a three-pronged test. In order to legally postpone a due process notice and hearing, the seizure must be necessary to protect "an important governmental or general public interest." Second, very prompt action must be necessitated by a "special need." Third, the individual effecting the seizure, under "the standards of a narrowly drawn statute," must be a governmental agent responsible for determining the necessity of the act. *Id.* at 91.

¹⁷ *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 678 (1974).

¹⁸ *Id.* at 679.

¹⁹ *Id.* at 687-88.

This is not to say, however, that the "broad sweep" of forfeiture statutes . . . could not, in other circumstances, give rise to serious constitutional questions. Mr. Chief Justice Marshall intimated as much over a century and a half ago in observing that a "forfeiture can only be applied to those cases in which the means that are prescribed for the prevention of a forfeiture may be employed. It therefore has been implied that it would be difficult to reject the constitutional claim of an owner whose property subjected to forfeiture had been taken from him without his privity or consent."²⁰

The *Calero-Toledo* opinion both expands and delimits the *Fuentes* exigent circumstance standard. Although reinforcing the legitimate privilege of a responsible government agent to postpone procedural due process until after the seizure, the scheduling is not discretionary. Notice must be "reasonably calculated" to inform a party with a significant property interest of the pending forfeiture claim.²¹ *Calero-Toledo* confirms the procedural due process rights guaranteed through the Fourteenth Amendment to a secured creditor threatened by a state's forfeiture claim. While the burden of proof of innocence rests upon the claimant, *Calero-Toledo* requires that the secured creditor be afforded reasonable notice to permit a timely resolution.

In 1983, the Supreme Court expanded the exigent circumstance standard to permit the postponement of due process in federal as well as state confiscations. In the *United States v. Eight Thousand Eight Hundred and Fifty Dollars in United States Currency*,²² the Court found that:

[A]bsent an extraordinary situation a party cannot invoke the power of the state to seize a person's property without a prior judicial determination that the seizure is justified. But we have previously held that such an extraordinary situation exists when the government seizes items subject to forfeiture. . . . *Pearson Yacht* clearly indicates that due process does not require federal customs officials to conduct

²⁰ *Id.* at 688-89.

²¹ *Id.* at 680, n.15.

²² 461 U.S. 555 (1983).

a hearing before seizing items subject to forfeiture. Such a requirement would make customs processing entirely unworkable. The government interests found decisive in *Pearson Yacht* are equally present in this situation: the seizure serves important governmental purposes; a pre-seizure notice might frustrate the statutory purpose; and the seizure was made by government officials rather than self-motivated private parties.²³

Although this language is an adaptation of the exigent circumstances standard of *Fuentes* and *Calero-Toledo*, the emphasis placed upon an "extraordinary situation" is evident.²⁴

Sniadach, *Fuentes*, *Calero-Toledo*, and *\$8,850* identify the transitory nature of wages, chattels, vessels, and currency, respectively. Transitory properties are readily susceptible to concealment, destruction or removal from a jurisdiction. However the property seized in *900 Rio Vista Blvd.* was a single family residence, not a mobile home, and therefore not subject to removal from the jurisdiction. Nevertheless, absent an extraordinary situation, the government seized this real estate. This governmental seizure occurred without a prior notice or hearing. The government found its authority for this act in a warrant issued in accordance with Sections 881(a)(6) and (b)(4) of Title 21 of the United States Code.

Ironically, Section 881(a)(6) provides the "other circumstances, [giving] rise to serious constitutional questions" as Justice Brennan warned in his *Calero-Toledo* opinion.²⁵ Section 881(a)(6)²⁶ codifies Justice Brennan's deference to a "constitutional claim of an owner whose property subjected to forfeiture had been taken from him without his privity or consent" regarding the illegal activity.²⁷

Unlike the state forfeiture statute upheld in *Calero-Toledo*, both of the drug-related federal forfeiture statutes pertaining to real

²³ *Id.* at 562 n.12. (Citations omitted).

²⁴ If notice and a hearing were required prior to all seizures by authorized officials, few customs laws could be effective. Concealable or destructible contraband, its conveyances and proceeds would rarely survive the interval between notice and the hearing "if advance warning of confiscation were given." *Calero-Toledo*, 416 U.S. at 679.

²⁵ *Calero-Toledo*, 416 U.S. at 688-89.

²⁶ 21 U.S.C. § 881 (1981).

²⁷ *Calero-Toledo*, 416 U.S. at 689.

property provide for this innocent owner exception.²⁸ In *900 Rio Vista Blvd.*, the Eleventh Circuit broadly applied a *Calero-Toledo* holding grounded in a state law instead of recognizing the innocent owner exception as provided in the applicable federal statute.

The Supreme Court has included mortgagors within this innocent owner forfeiture exception since deciding the *United States v. Stowell* in 1890.²⁹ There, the Court found that the lender had no knowledge of any prohibited use of the property prior to making the loan. As a result, the mortgage was valid against any interests acquired by the United States. Any forfeiture judgment had to be against the mortgagee's equity of redemption only.³⁰ Coincidentally, the Court acknowledged the Congressional intent that a "forfeiture of land and buildings shall not reach beyond the right, title, and interest of . . . persons as have consented to the carrying on" of the prohibited use of the property.³¹ More recently, the Eleventh Circuit has accepted lienholders as innocent owners under 21 U.S.C. § 881.³²

IV. THE FEDERAL CIVIL FORFEITURE STATUTES

In *900 Rio Vista Boulevard* the government alleged that the property constituted proceeds and was traceable to illegal drug trafficking. Sections 881(a)(6) and (b)(4) provide for the civil forfeiture of proceeds traceable to illegal drug trafficking.³³ In particular, Sec. 881(b) incorporates by reference the seizure

²⁸ 21 U.S.C. § 881 (1981 & Supp. 1992).

²⁹ 133 U.S. 1 (1890).

³⁰ *Id.* at 248.

³¹ *Id.* at 246.

³² Among the courts of appeals, two have recently concluded that a lienholder qualifies as an owner under § 881. *See In re Newport Sav. and Loan Ass'n*, 928 F.2d 472, 476 (1st Cir. 1991); *United States v. Six Parcels of Real Property*, 920 F.2d 798, 799 (11th Cir. 1991) (citing *In re Metmor Financial Inc.*, the court affirmed the district court's finding that an innocent lienholder was entitled to recover interest and principal). "[O]wner should be broadly interpreted to include any person with a recognizable legal or equitable interest in the property seized." Joint Explanatory Statement of Titles II and III, Pub. L. No. 95-633, 95th Cong. 2d Sess., reprinted in 1978 U.S. Code Cong. & Admin. News 9496, 9518, 9522-23). *See also United States v. Federal Nat. Mortg. Ass'n*, 946 F.2d 264, 266 (4th Cir. 1991).

³³ 21 U.S.C. § 881 (1981 & Supp. 1992).

procedures set forth in the Federal Supplemental Rules for Certain Admiralty and Maritime Claims.³⁴ When the government seized 900 Rio Vista Boulevard in 1984, Supplemental Rule C(3) made no provision for a judicial review prior to seizure. A government agent could make an independent determination that certain property was related to illegal drug trafficking and therefore was subject to in rem seizure and forfeiture.³⁵

As of the date of the Eleventh Circuit's holding in *900 Rio Vista Blvd.*, Rule C(3) had been amended to require either a judicial review or the presence of exigent circumstances prior to the in rem seizure of any property by the government.³⁶ However, this 1985 amendment specifically excluded the necessity of judicial review for any forfeiture actions by the United States when authorized by a federal statute.³⁷

The Advisory Committee Notes to this amendment explained two grounds for exempting such authorized seizures from prior judicial review or proof of exigent circumstances. First, the government's criminal case might be prejudiced by the discovery disclosures required in a civil forfeiture action. Second, subjecting the government and the courts to both a civil and a criminal hearing on the same issue was inefficient.³⁸

Yet, despite inefficiency and the risk of discovery disclosures, the Advisory Committee acknowledged Rule C(3)'s subordination to controlling Supreme Court due process precedents: *United States v. Eight Thousand Eight Hundred and Fifty Dollars* and *Calero-Toledo v. Pearson Yacht Leasing Co.*³⁹ To the extent that a conflict exists between Rule C(3) and due process, the Supplemental Rules yield to these Supreme Court precedents.

The first sentence of Rule C(3)⁴⁰ must be read to incorporate the due process holdings of *Calero-Toledo* and \$8,850; otherwise, the

³⁴ *Id.*

³⁵ FED. R. CIV. P. SUPP. C(3).

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ "Except in actions by the United States for forfeitures for federal statutory violations, the verified complaint and any supporting papers shall be reviewed by the court" *Id.*

rule eviscerates all Supreme Court due process precedent. While such Supreme Court precedents have not specifically addressed in rem rights, the holdings are unequivocal. Prior to any seizure, a party whose property interests are to be affected is entitled to be heard, absent a special governmental need necessitating prompt action.⁴¹ Because the amended Rule C(3) already prescribes the postponement of a hearing until after a seizure under exigent circumstances,⁴² the first sentence is redundant, at least as far as the affected interests of those other than the rem are concerned.

In addition to the prior hearing or judicial review requirement, the Supplemental Rules impact the notice provisions of procedural due process.⁴³ With respect to federal statutory violations, the named property is the accused party. Since the property is the defendant, its seizure is actual notice of the government's action. The notice by publication requirement is therefore more of an accommodation to inform any ancillary interests in the seized property. Neither the type of interest in nor the nature of the seized property are distinguished within the due process scope of the Supplemental Rules.

900 Rio Vista Boulevard relies upon the absence of any Rule C(3) distinction between real and personal property.⁴⁴ The court referred to this rule due to a federal statute authorizing the forfeiture of property connected with illegal drugs.⁴⁵ This statute permits the Attorney General to seize such property in accordance with the in rem procedures of Supplemental Rule C(3).⁴⁶

⁴¹ *Fuentes v. Shevin*, 407 U.S. 67, 90-91 (1972).

⁴² "If the plaintiff or the plaintiff's attorney certifies that exigent circumstances make review by the court impracticable, the clerk shall issue a summons and warrant for the arrest" FED. R. CIV. P. SUPP. C(3).

⁴³ FED. R. CIV. P. SUPP. C(4). This rule delimits the necessity of notice to publication in a general circulation newspaper. Those effecting a seizure must provide this form of notice promptly if the seizer has not returned the property within ten days after taking possession. *Id.* This statutory notice requirement finds coherence in the nature of the in rem action. FED. R. CIV. P. SUPP. C(1). The property, rather than an owner, is deemed to be the subject of the action.

⁴⁴ *United States v. 900 Rio Vista Boulevard*, 803 F.2d 625, 632 (11th Cir. 1986).

⁴⁵ 21 U.S.C. § 881 (1981 & Supp. 1992).

⁴⁶ *Id.* at § 881 (b). The rule reads: Rule C(3) Judicial Authorization and Process . . . [I]f the conditions for an action in rem appear to exist, an order so stating and authorizing a warrant for the arrest of the vessel or other property that is the subject of the action shall issue and be delivered to the clerk who shall prepare the warrant and deliver it to the marshall for service. FED. R. CIV. P. SUPP. C(3).

On its face, the rule distinguishes only vessels and "other property." The Advisory Committee Notes to the 1985 rule amendment provide an explanation: "The new provision recognizes that in some situations, such as when a judge is unavailable and the vessel⁴⁷ is about to depart from the jurisdiction, it will be impracticable, if not impossible, to secure the judicial review contemplated by Rule C(3)."⁴⁸ The rule is designed to prevent the removal of property from the district and the accompanying loss of the in rem jurisdiction. The Advisory Committee Notes place rule emphasis upon the risk of loss; not upon the type of property involved. Rule application is specifically identified with property threatened by imminent removal from the jurisdiction.

The Eleventh Circuit in *900 Rio Vista Blvd.* found that the confiscation of a private home required no prior hearing or notice.⁴⁹ The court made no attempt to reconcile the failure to give pre-seizure notice where prior judicial review was neither impracticable nor impossible. The court held that a seizure for the purpose of forfeiture is inherently an exigent circumstance, regardless of the circumstances. The Second Circuit, meanwhile, is in counterpoise to the Eleventh's interpretation of a seizure as an exigent circumstance per se.

V. THE CIRCUIT SPLIT

In 1989, a Second Circuit panel ruled *Calero-Toledo* did not hold that seizure for purposes of forfeiture without more was an extraordinary situation justifying the postponement of notice and an opportunity for hearing until after the seizure. Rather, the Court expressly limited its holding, stating that "pre-seizure notice and hearing are not required in the context of this forfeiture," i.e., a

⁴⁷ A narrow reading of this note would restrict its scope to vessels. However, § 881(d) specifically adopts the seizure provisions of the customs laws as applicable, to those items identified under the statute as subject to forfeiture.
21 U.S.C. § 881(d) (1981 & Supp. 1992).

⁴⁸ FED. R. CIV. P. SUPP. C(3).

⁴⁹ *United States v. 900 Rio Vista Boulevard*, 803 F.2d 625 (11th Cir. 1986).

forfeiture presenting an extraordinary situation under the *Fuentes* criteria.⁵⁰

The Second Circuit also differed from the Eleventh Circuit in construing procedures for the civil forfeiture of property connected with illegal drugs. The Eleventh Circuit found that an in rem action for forfeiture, when grounded in a federal statute, inherently postpones all due process rights.⁵¹ The Second Circuit reads *Calero-Toledo* as requiring a pre-seizure hearing "even in the context of a civil in rem forfeiture proceeding" absent "extraordinary circumstances."⁵² The dispositive issue is whether exigent circumstances exist "warranting the postponement of notice and the opportunity for an adversarial hearing."⁵³ Within the *Calero-Toledo* context, the Second Circuit concluded, "[a]s a general matter, a showing of exigent circumstances seems unlikely when a person's home is at stake, since, unlike some forms of property, a home cannot be readily moved or dissipated."⁵⁴ The court further held that notice and a prior hearing were warranted for the forfeiture of property interests even if a federal statute were violated.⁵⁵

The Second Circuit opinion identifies three summary procedures for property seizures related to federal statutory violations. First, the Attorney General may seize such property pursuant to the Supplemental Rules.⁵⁶ Second, with probable cause to believe

⁵⁰ United States v. 4492 South Livonia Road, 889 F.2d 1258, 1263-64 (2nd Cir. 1989).

⁵¹ 900 Rio Vista Boulevard, 803 F.2d at 632.

⁵² 4492 South Livonia Road, 889 F.2d at 1263. This interpretation merely reflects the *Fuentes* holding that parties with potentially affected property interests have a right to a hearing before any seizure. To enjoy this right, both a notice and a hearing must precede seizure, absent exigent circumstances. Otherwise, the right is illusory because the impacted party has no true opportunity to avoid or mitigate the consequences of the seizure. See *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972).

⁵³ 4492 South Livonia Road at 1265.

⁵⁴ *Id.* This holding assumes that any potential dissipation of property proceeds by transfer or encumbrance could be precluded by a *lis pendens*, bond, restraining order, or similar precaution. The threat of destruction could be met with insurance.

⁵⁵ See *Id.* at 1263.

⁵⁶ After the filing of a verified in rem complaint, Rule C(3) requires the clerk of the appropriate district court to issue a warrant. The warrant shall provide for the seizure of a vessel or other property named as the subject of the complaint. Under exigent circumstances, this procedure is available without a prior hearing by a judicial officer. *Id.* at 1262.

certain statutory violations have occurred, the Attorney General may seize any property involved.⁵⁷ Third, the Attorney General may obtain a seizure warrant under Rule 41 of the Federal Rules of Criminal Procedure.⁵⁸ None of these three alternatives addresses the due process rights of a party with an interest in seized property; however, the Congress of the United States has attempted to resolve this apparent dilemma.

VI. CONGRESSIONAL LETTER AND INTENT

In 1970, Congress decided to attack the increasing drug abuse in the United States by passing the Comprehensive Drug Abuse Prevention and Control Act.⁵⁹ The short title for this law is the Controlled Substances Act.⁶⁰ The Crime Control Act, as passed by Congress in 1984, added real property to the list of items that are subject to forfeiture under the Controlled Substances Act.⁶¹ Of equal importance under this Act was the addition of subsection (h) to the civil forfeiture statutes.

Under this subsection, "all right, title, and interest in property [which is subject to civil forfeiture under section 881(a)] shall vest in the United States upon commission of the act giving rise to the forfeiture. . . ."⁶² As a result of these two amendments, *any* interest in real property involved in a violation of the Controlled Substances Act vests in the United States. The only codified exception to such a forfeiture is based upon an owner's lack of consent to, or knowledge of, such a violation.

⁵⁷ Such a property seizure must follow the procedures set forth under the customs laws. *Id.*

⁵⁸ An ex parte probable cause determination by a judicial officer is a prerequisite to the issuance of such a seizure warrant. *Id.* at 1262-63.

⁵⁹ Act of Oct. 27, 1970, Pub. L. No. 91-513, 1970 U.S.C.C.A.N. (84 Stat.) 1437 (to be codified at 21 U.S.C. §§ 801-971). The Federal Civil Forfeiture Statutes, 21 U.S.C. § 881, originated as Title II, Part E, § 511, Forfeitures, of the Controlled Substances Act. *Id.* at § 511, 1485 (to be codified at 21 U.S.C. § 881).

⁶⁰ *Id.* at § 100, 1444.

⁶¹ Act of Oct. 12, 1984, Pub. L. No. 98-473, § 306, 1984 U.S.C.C.A.N. (98 Stat.) 1837, 2050 (to be codified at 21 U.S.C. § 881(a)(7)).

⁶² *Id.* at 2051 (to be codified at 21 U.S.C. § 881(h)).

In 1988, Congress again amended the civil forfeiture statutes with the passage of the Anti-Drug Abuse Act.⁶³ Section 6079(a) of this act required the Attorney General and the Secretary of the Treasury to prescribe regulations for expedited relief for seizures pursuant to three previous acts: the Controlled Substances Act; the Tariff Act of 1930,⁶⁴ and the Act of August 9, 1939 pertaining to "the possession of personal use quantities of a controlled substance."⁶⁵ Section 6079(a) also prescribes that seizures under three civil forfeiture statutes are subject to expedited administrative relief.⁶⁶

One of these three statutes, 21 U.S.C. § 881(a)(7), authorizes the forfeiture of all real property, including any right, title, and interest, if related to a controlled substance violation.⁶⁷ As mandated by § 6079(a) of the Anti-Drug Abuse Act of 1988, the Justice

⁶³ Act of Nov. 18, 1988, Pub. L. No. 100-690, 1988 U.S.C.C.A.N. (102 Stat.) 4181.

⁶⁴ This Tariff Act essentially constitutes the customs laws of the United States. 19 U.S.C. § 1-3206 (West 1978, 1980 & Supp. 1992).

⁶⁵ Act of Nov. 18, 1988, Pub. L. No. 100-690, § 6079(a), U.S.C.C.A.N. (102 Stat.) 4325. Congress mandated that such regulations shall:

- (1) minimize the adverse impact caused by prolonged detention, and
- (2) provide for a final administrative determination of the case within 21 days of seizure, or provide a procedure by which the defendant can obtain release of the property pending a final determination of the case. Such regulations shall provide that the appropriate agency official rendering a final determination shall immediately return the property if the following conditions are established:
 - (A) the owner or interested party did not know of or consent to the violation;
 - (B) the owner establishes a valid, good faith interest in the seized property as owner or otherwise; and
 - (C) (1) the owner establishes that the owner at no time had any knowledge or reason to believe that the property in which the owner claims an interest was being or would be used in a violation of the law; and
(2) if the owner at any time had, or should have had, knowledge or reason to believe that the property in which the owner claims an interest was being or would be used in a violation of the law, that the owner did what reasonably could be expected to prevent the violation.

An owner shall not have the seized property returned under this subsection if the owner had not acted in a normal and customary manner to ascertain how the property would be used. *Id.*, § 6079(b) at 4326.

⁶⁶ *Id.*, § 6079(a) at 4325.

⁶⁷ The other forfeiture statutes required to provide for the expedited administration of claims against seizures are 21 U.S.C.A. §§ 881(a)(4) and (6). Section 881(a)(4) subjects all property rights in any conveyance to forfeiture if such a means of transportation were involved with illegal drugs. Section 881(a)(6) essentially provides for the forfeiture of all proceeds traceable to illegal drug activity. 21 U.S.C. § 881 (1981 & Supp. 1992).

Department promulgated amended civil seizure procedures to provide expedited administrative relief. However, for some inexplicable reason, these procedures failed to specifically address relief for real property seizures despite the congressional mandate.

Section 1316.90 of Title 21 of the Code of Federal Regulations defines the purpose and scope of Subpart F - Expedited Forfeiture Proceedings for Certain Property.⁶⁸ The section states that expedited forfeiture proceedings are to follow the congressional intent "to minimize the adverse impact on those entitled to legal or equitable relief occasioned by the prolonged detention of property subject to forfeiture due to violations of law involving personal use quantities of controlled substances, and conveyances seized for drug-related offenses."⁶⁹ But no language in either the Anti-Drug Abuse Act of 1988 or the real property civil forfeiture statute, § 881(a)(7), so delimits the explicit congressional intent.⁷⁰

The first sentence of the amended federal regulations, § 1316.90 states that "[t]he following definitions, regulations, and criteria are designed to establish and implement *procedures* required by sections 6079 and 6080 of the Anti-Drug Abuse Act of 1988, Public Law No. 100-690 (102 Stat. 4181).⁷¹ However, § 6079 separately and distinctly requires these expedited relief procedures for real property subject to forfeiture under the Controlled Substances Act.⁷² Title 21 U.S.C. § 881(a)(7) codifies this real property authority. Therefore, § 1316.90 of the federal regulations includes, by

⁶⁸ Drug Enforcement Admin., Justice, 21 C.F.R. § 1316.90 (1991).

⁶⁹ *Id.* at § 1316.90(a).

⁷⁰ The caption of Title VI of the Anti-Drug Abuse Act of 1988 reads "Anti-Drug Abuse Amendments Act of 1988." Act of Nov. 18, 1988, Pub. L. No. 100-690, 1988 U.S.C.C.A.N. (102 Stat.) 4312. The heading for Subtitle B of that Title VI is "Asset Forfeiture Amendments." *Id.* at 4320. § 6079(a) of Subtitle B requires that the Attorney General and the Secretary of the Treasury shall prescribe expedited relief procedures for specified types of seizures. Included in these types of seizures are those pertaining to statutory violations involving personal use quantities of controlled substances. *Id.* at 4325. The current federal regulations may highlight this aspect of Congress' intent, but the language of the 1988 Act provides the scope of the legislative purposes. Among those stated purposes is the expedited relief for interests affected by the government's seizure of real property. See *supra* text preceding note 66.

⁷¹ *Id.*

⁷² *Id.*

reference, real property among those interests afforded expedited relief after a seizure by the government.

While § 881(a)(7) specifically addresses real property, the term "personal use quantities" or the equivalent does not appear in this subsection. Therefore, in accordance with the language of both the 1988 Act and the real property forfeiture statute, any affected owner is entitled to expedited relief. Such relief begins with a timely notice of governmental seizure. Again, the current federal regulations specify notice procedures when implementing these expedited relief measures.

Section 1316.99, Notice provisions, of Title 21 C.F.R. states under subdivision (b): "*Standard notice provision.* The standard notice to the owner as required by title 19, U.S.C. § 1607 and applicable regulations, shall be made at the *earliest practicable opportunity* after determining ownership of the seized *property* or conveyance and shall include the legal and factual basis of the seizure."⁷³

The last sentence referring to notice in the above referenced § 1607 reads: "Written notice of seizure together with information on the applicable procedures shall be sent to *each party who appears* to have an *interest* in the seized article".⁷⁴ By incorporating the referenced provisions of section 1607, the Justice Department's regulations literally require written notice of the seizure. More importantly, this written notice shall be sent at the earliest practicable date to each party appearing to have an interest in the seized property.⁷⁵

Section 1607 pertains to the seizure of items valued at \$500,000 or less.⁷⁶ Although this section fails to define what constitutes an interest in the seized property, Eleventh Circuit case law does. "Full protection of an innocent owner's interest was mandated by

⁷³ Drug Enforcement Admin., Justice, 21 C.F.R. Sec. 1316.99 (1991) (emphasis added).

⁷⁴ 19 U.S.C. § 1607 (Supp. 1992) (emphasis added).

⁷⁵ 21 C.F.R. § 1316.99 (1991).

⁷⁶ 19 U.S.C. § 1607 (Supp. 1991). A literal reading of this statute would not provide for notice to those holding significant interests in affected real property. However, for seizures authorized by 21 U.S.C. § 881(a)(7), 21 C.F.R. 1316.99 employs, by specific reference, the notice provisions of 19 U.S.C. § 1607. See 21 C.F.R. § 1316.99 (1991); Act of Nov. 18, 1988, Pub. L. No. 100-690, § 6079(a), U.S.C.C.A.N. (102 Stat.) 4325.

Congress. . . ."⁷⁷ Full protection must include both substantive and procedural due process rights. Accordingly, absent exigent circumstances, section 1607 protects an innocent owner's right to a pre-seizure notice and hearing regarding property valued at \$500,000 or less.

Section 1610, Seizure; Judicial Forfeiture Proceedings, requires condemnation proceedings be initiated by the United States attorney for any seizure not subject to section 1607.⁷⁸ Rule 71A of the Rules of Civil Procedure govern federal proceedings for the condemnation of real and personal property. Subdivision (c)(2), Complaint Contents, provides that "prior to any hearing involving the compensation to be paid for a piece of property, the plaintiff shall add as defendants all persons having or claiming an interest in that property whose names can be ascertained by a reasonably diligent search of the records."⁷⁹ Therefore, regardless of value, the customs laws acknowledge the due process rights of notice to each party appearing to have an interest in a seized item. More importantly, the customs laws place an affirmative duty upon the government to inform each party in interest of any pending confiscation procedure. No distinctions or exceptions are given for in rem proceedings. Further, the Justice Department's own regulations for drug

⁷⁷ United States v. Six Parcels of Real Property, 920 F.2d 798, 799 (11th Cir. 1991). As referenced in Part III, the Eleventh Circuit includes lienholders among innocent owners under 21 U.S.C. § 881. See *supra* note 31 and the preceding text.

⁷⁸ 19 U.S.C. § 1610 (Supp. 1992).

⁷⁹ FED. R. CIV. P. 71A(C)(2). The Advisory Committee Notes to subdivision (c) of Rule 71A read:

[T]he plaintiff is initially required to join as defendants only the persons having or claiming an interest in the property whose names are then known. This is [sic] no way prejudices the property owner, who must eventually be joined as a defendant, served with process, and allowed to answer before there can be any hearing involving the compensation to be paid for his piece of property. The rule requires the plaintiff to name all persons having or claiming an interest in the property of whom the plaintiff has learned and, more importantly, those appearing of record. By charging the plaintiff with the necessity to make "a search of the records of the extent commonly made by competent searches of title in the vicinity in light of the type and value of the property involved" both the plaintiff and the property owner are protected. *Id.*

enforcement administration require notice at the earliest practicable opportunity regardless of the type of proceedings.⁸⁰

VII. CONCLUSION

Property as the proceeds or situs of illegal drug trafficking is subject to forfeiture. However the drug-related federal forfeiture statutes pertaining to real property provide for an innocent owner exception. The term innocent owner under 21 U.S.C. § 881 includes mortgagees. The knowledge and consent of an owner are the only statutory grounds specifically stated as dispositive for the exception to apply.⁸¹ Congress has mandated full protection of an innocent owner's interests. Therefore "the government can succeed to no greater interest in the property than that which belonged to the wrongdoer whose actions have justified the seizure."⁸² The holder of legal title, including the government, is obligated to an innocent mortgagee for the full amounts provided in the controlling debt

⁸⁰ See *supra* note 71.

⁸¹ See *United States v. One Urban Lot Located at 1 Street A-1*, 865 F.2d 427, 430 (1st Cir. 1989).

⁸² In *re Metmor Financial Inc.*, 819 F.2d 446, 448-49 (4th Cir. 1987). The wrongdoer's "equity was subject to an obligation to repay the borrowed principal and to pay interest on the unpaid balance until all of the principal was repaid." *Id.* at 449. "It is the general rule that a holder of equity of redemption can redeem from the mortgagee only on paying the entire mortgage debt." *Id.* (quoting *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 579 n.7 (1935)). The forfeiture cannot change the nature of an innocent mortgagee's rights. "The government cannot 'deprive mortgagees of substantial incidents of their rights to resort to mortgaged property.'" (quoting *Armstrong v. United States*, 364 U.S. 40, 44 (1960)) (describing the holding in *Radford*, 295 U.S. at 555). *Id.* at 451. "Nor can the government significantly interfere with Metmor's use and enjoyment of its property." *Id.*

"To the extent that 'innocent' owners have a stake in [property that constitutes illegal proceeds of narcotics transactions], no forfeiture can occur. Where . . . that stake encompasses a right to receive continuing interest payments on unpaid principal, . . . the innocent owner is entitled to receive such payments from the government, even after the property has been seized, until the principal is repaid." *Id.*

instruments. These amounts include principal, interest, and the lender's costs and attorneys' fees.⁸³

The current federal regulations provide expedited relief procedures for innocent owners under the civil forfeiture statutes. The applicable federal rules and regulations require written notice of seizure at the earliest practicable opportunity to an affected creditor with a publicly recorded lien. Such relief procedures and notice are in accordance with Supreme Court due process precedent. Parties with significant property interests potentially affected by a seizure are entitled to a hearing. To protect this right to be heard, notice of the hearing must precede seizure absent an extraordinary situation.

Seizures for the purpose of forfeiture are not extraordinary circumstances per se. Extraordinary or exigent circumstances turn on the likely concealment or dissipation of contraband, its conveyances or proceeds. Where transitory properties are involved pre-seizure notice might frustrate the statutory purpose which is to prevent the imminent removal of the affected property and the accompanying loss of jurisdiction. Property susceptible to concealment, destruction or removal would rarely survive the interval between notice and the hearing if the government gave an advance warning of seizure.

Therefore, under such exigent circumstances, the procedural due process rights of all significant interests in the seized property may be postponed.

The government violates its constitutional limits by postponing the procedural due process rights of significant interests in real property affected by a statutory seizure. A *lis pendens* notice, insurance, and other safeguards are available to protect both the innocent lienholder's and the government's interests after a pre-seizure notification.

Typically, the lienholder's interest is protected already with sufficient insurance to restore the property to whatever extent might be necessary. Therefore, any government interest in the

⁸³ *United States v. Six Parcels of Real Property*, 920 F.2d 798, 799 (11th Cir. 1991). Relying upon *In re Metmor Financial, Inc.*, 819 F.2d 446 (4th Cir. 1987), the Eleventh Circuit found that "the loan documents provided lien status for interest payments required until the principal balance was fully paid." *Id.* at 799. Further, the same panel held that "to deny the Bank its costs and attorneys' fees, though provided in its loan documents, would be a deprivation of its rights in the forfeited property." *Id.*

complementary equity portion is also protected. The lienholder and the government have the same interest: to maximize the net proceeds ultimately realized from the property.

An innocent mortgagee's nonforfeitable foreclosure right may appear to conflict with the government's desire for custody to protect the realization of liquidation proceeds. Yet summary foreclosure proceedings permitting early liquidation benefit the respective positions of both parties, particularly in a declining real estate market. The only issue is which party is better prepared to handle the property disposition after forfeiture. After the judicial perfection of a forfeiture action, legal title vests in the government effective with the first occasion of the proscribed act. Since title vests subject to any mortgage, the innocent mortgagee is entitled to recover all amounts due under the debt instruments from the responsible party.⁸⁴ Responsibility accompanies title. Accordingly, the government must pay to the lender all of the amounts accrued under the mortgage since the effective forfeiture date. Where legal title remains with the United States, the government is obligated to the mortgagee for all amounts due under the debt instruments. Such obligations could result in disproportionately reduced proceeds available to the government if liquidation is protracted.⁸⁵ To expedite the liquidation of property, early mortgagee involvement through procedural due process is crucial.

Procedural due process is necessary to determine whose interests are subject to seizure and forfeiture due to an illegal act. More importantly, only due process will reveal whose interests warrant protection from a forfeiture occasioned by an illegal act. Any act contrary would be tantamount to punishing the victim as well as the perpetrator. Undeniably, the innocent mortgagee is a victim of the

⁸⁴ See *supra* note 80.

⁸⁵ "The drug-forfeiture statute does not make the entire piece of physical property 'guilty;' it says that property shall not be forfeited 'to the extent of the interest of an [innocent] owner;' it thereby permits an innocent mortgagee to recover the value of its interest as a matter of right." *In re Newport Sav. and Loan Ass'n*, 928 F.2d 472, 476 (1st Cir. 1991).

wrong-doer's act. Substantive and procedural due process rights identified by Congress and the courts provide protection for that innocent mortgagee

Houston S. Park III