AGENDA
ADVISORY COMMITTEE ON CIVIL RULES
APRIL 15-16, 2004

1. Report on Judicial Conference Session

2. **ACTION** — Approving minutes of October 2-3, 2003, committee meeting

3. **ACTION** — Approving proposed amendments to Rules 6, 24, 27, 45, and new Rule 5 1 and proposed amendments to Admiralty Rules B and C and transmitting them to the Standing Rules Committee

4. **ACTION** — Approving publication of proposed amendments to Rules 16, 26, 33, 34, 45 and Form 35 dealing with discovery of electronically stored information

5. **ACTION** — Approving publication of new Admiralty Rule G and proposed amendments to Admiralty Rules A, C, and E consolidating forfeiture provisions

   A. Civil Forfeiture Reform Act of 2000 (CAFRA)

   B. Notes of conference calls and meeting

   C. Correspondence from the Department of Justice

   D. Correspondence from the National Association of Criminal Defense Lawyers

   E. Analysis of "standing" issues

6. Consideration of proposed new rule governing privacy and security concerns arising from public access to electronic court records in accordance with the E-Government Act

7. Consideration of Style Project

   A **ACTION** — Approving publication of proposed restyled Rules 38 - 63 (except Rule 45, which was acted on earlier)

   B. **ACTION** — Approving publication of noncontroversial style-substantive amendments to Civil Rules arising from style project

   C. **ACTION** — Approving proposed amendments resolving noncontroversial "global" issues arising from style project

8. **ACTION** — Approving publication of proposed amendments to Rule 50 regarding procedures governing a motion for judgment as a matter of law

   - Consideration of proposed amendments to Rule 15

9. Report on Federal Judicial Center survey of class actions

10. Report on Federal Judicial Center study of sealed settlement agreements

11. Next meeting in Charleston, South Carolina, on October 28-29, 2004

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April 2004

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March 24, 2004
Projects

Draft Minutes

Civil Rules Advisory Committee

October 2-3, 2003

The Civil Rules Advisory Committee met on October 2 and 3, 2003, at the Hyatt Regency in Sacramento, California. The meeting was attended by Judge Lee H. Rosenthal, Chair; Sheila Birnbaum, Esq.; Judge C. Christopher Hagy; Justice Nathan L. Hecht; Robert C. Heim, Esq.; Dean John C. Jeffries, Jr.; Hon. Peter D. Keisler; Judge Paul J. Kelly, Jr.; Judge Richard H. Kyle; Professor Myles V. Lynk; Judge H. Brent McKnight; Judge Thomas B. Russell; Judge Shira Ann Scheindlin, and Andrew M. Scherffius, Esq.. Professor Edward H. Cooper was present as Reporter, Professor Richard L. Marcus was present as Special Reporter, and Professor Thomas D. Rowe, Jr., was present as Consultant. Judge David F. Levi, Chair, Judge Sidney A. Fitzwater, and Professor Daniel R. Coquillette, Reporter, represented the Standing Committee. Judge James D. Walker, Jr., attended as liaison from the Bankruptcy Rules Committee. Judge J. Garvan Murtha, chair of the Standing Committee Style Subcommittee, and Style Subcommittee member Dean Mary Kay Kane also attended. Professor R. Joseph Kimble and Joseph F. Spaniol, Jr., Style Consultants to the Standing Committee, also attended. Peter G. McCabe, John K. Rabiej, Robert Deyling, and Professor Steven S. Gensler, Supreme Court Fellow, represented the Administrative Office. Thomas E. Willging, Kenneth Withers, and Tim Reagan represented the Federal Judicial Center. Ted Hirt, Esq., Department of Justice, was present. Stefan Cassella, Esq., also attended for the Department of Justice, with Assistant United States Attorneys Richard Hoffman and Courtney Lind Observers included Judge Christopher M. Klein; Peter Freeman, Esq., and Jeffrey Greenbaum, Esq. (ABA Litigation Section); Stefanie Bernay, Esq.; Brooke Coleman, Esq.; and Alfred W. Cortese, Jr., Esq .

Judge Rosenthal began the meeting by noting that in an unusual twist, no Committee member has become a law school dean — or even migrated to the academy — since the last meeting Judge McKnight has become a District Judge. Sheila Birnbaum is attending her final meeting at the conclusion of her second term as a member, carrying on active involvement in the Committee's work that began several years before appointment as a member and that bids fair to continue into the future. Judge Levi has been appointed chair of the Standing Committee. Both graduates will be suitably recognized at dinner. Frank Cicero, Jr , a new Committee member, attended Style Subcommittee meetings in August but was not able to attend this meeting.

Minutes

The Minutes for the May 1-2, 2003, meeting were approved.

Administrative Office Report

John Rabiej delivered the Administrative Office Report. The Office has focused its legislative attention on three bills.

The E-Government Act of 2002 is law. It requires promulgation of rules through the Enabling Act process to address concerns about privacy and security arising from the conversion to electronic court records. There is no time deadline for adopting these rules. By 2007, all e-court records must be made available to the public. The Judicial Conference is authorized to issue interim rules and interpretive statements. The Standing Committee has taken the lead in implementing the Enabling Act Rules requirement, creating a subcommittee chaired by Judge Fitzwater. All of the advisory committee reporters are members, with Professor Capra as lead reporter. Judge Scheindlin is the Civil Rules Advisory Committee member of the subcommittee. It seems likely that subcommittee proposals will be reviewed by the advisory committees before final Standing Committee action. The Judicial Conference has adopted a privacy policy for some cases, and is working on a policy for criminal cases. Judge Levi plans to invite two members from the Committee on Court Administration and Case Management to serve as liaisons on the subcommittee.

The minimum-diversity class-action bill that passed the House this year includes a mandatory interlocutory appeal provision that would undo the recently adopted Civil Rule 23(f) discretionary appeal provision. The Senate bill has no comparable provision. There had been plans to bring the bill to the Senate floor in September; it may yet be brought to the Senate this session. An earlier version of the House bill included several provisions that would interfere with the Rule 23 amendments slated to take effect this December 1. As passed, the House bill includes a provision that would accelerate the effective date of the Rule 23 amendments if the bill should become law before December 1; that prospect is diminishing. Absent further developments, the pending amendments will take effect on December 1

An asbestos bill has emerged with great effort on all sides. Judge Becker of the Third Circuit has been working hard to find a compromise solution that will be acceptable to all sides. The prospects for success, however, do not appear promising.

There is a bill pending to undo the Lexecon decision, so that a multidistrict consolidation court could retain cases for trial as well as pretrial proceedings.

This Committee had no proposals to present to the Judicial Conference at its September meeting.

The Judicial Conference did resolve to address several removal questions dealing with the time to remove when defendants are served at different times; removal when the diversity amount-in-controversy requirement does not appear on the face of the original state-court complaint but later appears; exceptions to the present requirement that a diversity action be removed no more than one year after filing; and the "separate and independent claim or cause of action" provision in 28 U.S.C. § 1441(c).

Style: Rules 16-25, less 23

Judge Rosenthal observed that the Style Project is successfully meeting the ambitious schedule we have set. The process begins with revision of the "Garner-Pointer" draft by the Style consultants; review by "the professors"; submission of a further-revised draft to the Style Subcommittee; consideration by Subcommittee A or B of a draft annotated with footnote questions; and, with further revisions, consideration by the full Committee. Each rule has a member-in-charge for consideration in the subcommittee and then in the full Committee. Specific difficult issues may be subject to additional research at each step.

The project remains careful to avoid changes in the substance of any rule. Desirable changes of meaning — including resolutions of ambiguities that cannot be corrected as a matter of style without risk of changed meaning — are collected for action on separate tracks. Some of these substantive changes may be published for comment in tandem with the style drafts.

This process has not only managed to stay on schedule but has also worked very well. Style Rules 1 through 15 have been approved by the Standing Committee for publication as part of a larger package. We hope to publish all of Rules 1-37 and 45, minus Rule 23, as a first Style package. At this meeting we have for consideration Rules 16-37, minus Rule 23, plus Rule 45.

The Style Project has produced a long list of "global issues" that must be considered after we have achieved an overview of the contexts in which troubling words and phrases appear. Examples include the choices between "stipulate" and "agree"; between "disobedient" and some other word such as "noncompliant"; between "United States statute" and "federal statute." Some of these choices are likely to be made by adopting a single term to be used consistently throughout the Rules; others likely will lead to use of different terms according to context and history.

We also need to remain aware of the need to adjust Rules amendments made in the ongoing course of business to Style conventions Rules 24, 27, and 45 are on today's Style agenda, for example, and also are the subject of amendments published for comment last August.

Judge Russell began the Subcommittee A presentation by noting that the Standing Committee's Style Subcommittee and those who have worked with it in bringing drafts to the Advisory Committee Subcommittees have done outstanding work in focusing the issues for discussion.

Rule 16 Discussion began with the first part of Style Rule 16(a). The current Style draft adheres to the present rule by referring to "one or more conferences before trial." The Style Subcommittee would prefer to refer only to "pretrial conferences" throughout Rule 16. This recommendation was questioned by noting that bankruptcy courts have an aggressive practice called "pretrial" that occurs immediately after filing It is understood that this event is different from later pretrial conferences "Conferences before trial" is more suitable. Another comment was that in practice it is common to refer to the final conference held to set trial issues as the "pretrial" conference, and that it is better

to refer to other conferences as other conferences. So the first conference often is called the "Rule 16" or "scheduling" conference; later trials are "pretrial conferences," while the trial-setting conference is the "final pretrial conference." And "settlement conferences" are quite distinct from conferences that focus on preparing the case for trial. Rule 26(f), moreover, refers to the Rule 16(b) conference as the scheduling conference. On the other hand, it was noted that the caption of present Rule 16 and the tag-line of present Rule 16(a), refer to "pretrial conferences." At the end, the consensus was to adopt "pretrial conference" throughout if that continues to be the Style Subcommittee preference.

So Style Rule 16(b)(3)(B)(iii) refers to "other conferences"; this will be changed, as the Style Subcommittee recommends, to "pretrial."

Present Rule 16(c)(3) refers to action with respect to "the possibility of obtaining admissions." Style 16(c)(2)(C) refers simply to "obtaining admissions." Some participants are concerned that this form may be read by some eager judges to imply an authority to direct "admissions" that a party resists. But the very concept of "admission" may be so imbued with notions of willing consent that "possibility of" adds no useful restraint. The Style draft will remain as it is.

Separately, it was asked whether the Committee Note should make it clear that a settlement conference is a "pretrial conference" governed by Rule 16. Both present and Style Rules 16(a)(5) refer to facilitating settlement as an object of a pretrial conference. There is no change, and no need for Note comment.

Present Rule 16(e) states that after any Rule 16 conference, "an order shall be entered reciting the action taken." Style Rule 16(d) translates "shall" as "should." "Should" was adopted as an accurate reflection of practice. But does it accurately reflect the original intent? This illustrates the global question whether "must" often seems to change the character of discretion established by present rules into a binding "instruction manual." Does "must enter an order" mean that the court cannot comply by simply stating the results on the record? And what of the frequent occurrence that there is no reporter, no record, and no order?

Further discussion expanded on the general global issue "Shall" may be used in the present rules as a deliberate ambiguity. Working from a presumption that it should be translated as "must" is a mistake. The Rules are aimed primarily at guiding the lawyers, reposing discretion in judges that should not be confined by unnecessary force. The rules should be drafted for the typical judge — that is, for the good judge — and not for the rare bad judge. The choice makes a subtle but powerful difference that can affect the entire rule process into the future. In various places we wind up saying "must" when there is discretion not to act as the rule says the judge must. "Must" is appropriate when there is a nondiscretionary statutory duty, or a duty so clear as to warrant appellate enforcement by extraordinary writ, or some other clearly nondiscretionary duty. Style Rule 16(b)(1), saying that a judge "must" enter a scheduling order, is an example; many times the parties and court have agreed

that the time deadline that Rule 16(b)(2) says "must" be honored is inappropriate and should be deferred.

So Style Rule 16(b)(3)(A) says that the scheduling order must limit the time to complete discovery. But there are many cases in which the court and parties know there will be no discovery. Why must the order include a meaningless time limit?

Professor Kimble noted that this argument is an observation that "shall" has been corrupted, to state only a "soft duty." We do need to pay attention to each use of shall in the present rules to be alert to this possibility, and to translate each use according to present meaning. So we attempt to recognize clearly established discretion by using "may" or "should" rather than "must."

It was observed that Rule 16 took on its present form in 1983 and later. The commands were designed to encourage judges to do things they had not been doing. The command that an order must be entered after every conference made more sense before those changes were adopted. And as time has passed, judges are keeping cases managed and on track. Requiring an order after a settlement conference, for example, may seem inappropriate.

Carrying forward on the global issue, it was suggested that "shall" "is a soft imperative." Changing to "may," which conveys no imperative sense, is a change of meaning even if it reflects practice and good sense. "Should" is not as much of a reduction; it implies an obligation to adhere as an ordinary practice, with room to deviate.

Another general question asked whether it is within the Style Project to adopt changes merely because they reflect current practice. Does practice justify changes of language only when practice reflects interpretive resolution of present ambiguity, or can practice not authorized by clear present language justify new language?

Another suggestion was that the feeling of departure from present "shall" language may be reduced by relying on the passive voice. "An order should be entered." The passive voice suggests flexibility: the lawyer prepares an order to be entered, or the "order" is taken on the record and a "minute" order is entered that simply recites entry of a full order in the record. Professor Kimble responded that this is an "end run." If we indulge this finesse in Rule 16, will it be used elsewhere?

"May" also may be ambiguous — it can be used to express a grant of authority, but it also can be used in a predictive way. The Style Project seeks to avoid the predictive sense, using "may" only in the sense of recognizing authority.

The Committee was reminded that this is the third Style Project. The "shall"-to-"must" presumption has been adopted for the Appellate and Criminal Rules Deviations in the Civil Rules, frequently translating to "may" or "should," could create confusion.

A further source of difficulty arises from the use of "shall" and "may" together in closely related parts of a single present rule. If we render some present "shalls" as "may," we eliminate a contrast that surely has meaning in the present rule. The present contrast implies different levels of discretion; the change will often affect meaning as the former contrast is forgotten.

The discussion was briefly brought back to Style Rule 16(d) by asking whether there was a consensus on the use of "should," and then opened up to the question whether all of Rule 16 should be reexamined for this question.

Support was offered for "should" in Style Rule 16(d). But it was pointed out that Style (b)(2) uses "must" for issuing a scheduling order as soon as practicable, and urged that Style (b)(3)(A) should be changed from "must" limit specific matters to "should." It was pointed out that a single "shall" covers both of these matters in present 16(b), and urged that because this is a global issue the choices might be postponed for later discussion. But it was suggested in response that the Committee should make decisions that are appropriate to each context as it goes through the rules. The eventual global discussion will be better informed by this careful effort to think through each present "shall."

One view is that "should" is the better word when the present "shall" means "should in the normal course, if appropriate." So in Style 16(d), "should" enter an order is better, while in Style 16(e) it is better to say that the final pretrial conference "must" be held as close to the start of trial as is reasonable. But the qualification implied by "as is reasonable" can inform the choice in either of two ways: it shows that "must" does not mean what it says, but by that very token it mollifies the apparent command of "must" and avoids any real mischief. A further difficulty appears, however, in the continuation of the same Style Rule 16(e) sentence, which says that the final pretrial conference must be attended by at least one attorney who will conduct the trial for each party. This truly is a command. Present Rule 16(d) says "shall" in both settings; is it proper to translate one shall as "should," the other as "must"? If we actually mean different levels of command, why not use different words of command?

Another suggestion was that the purpose of the Style Project is to hew as closely as possible to the present rule. "Should" may imply too much discretion to ignore the command that the final pretrial conference be held close to trial. The discretion implied by "as is reasonable" may afford discretion enough; "must" is not burdensome.

A motion to amend Style Rule 16(e) to say. "The [final] pretrial conference must ~~should~~ be held as close to the start of trial as is reasonable" failed by 3 votes in favor, 7 votes against.

It was agreed that Style Rule 16(b)(2) will continue to say that the judge "must" issue the scheduling order as soon as practicable, etc.

Turning back to Style Rule 16(b)(3)(A), which says that the scheduling order "must" limit the time to join parties, and so on, it was noted that a change to "should" or "may" could justify

collapsing subparagraphs (A) and (B) into a single paragraph that lists all subjects as permissive contents of the scheduling order. Adherence to "must" was defended on the ground that a command was intended in 1983, but the defense was weakened by the further observation that "may" or "should" may conform better to actual practice.

An observer commented that courts have been flexible on all these issues, seeing them as a matter of discretionary case management This comment was seconded by agreement and a suggestion that "should" fits the matters described as "required contents" in Style Rule 16(b)(3)(A). If we do adopt "should," perhaps the Committee Note should explain that the translation of "shall" reflects modern practice. But this course is appropriate only if the present rule is ambiguous and current practice is uniform. And it may be difficult to say that the present rule is ambiguous; the first three scheduling orders are listed as "shall," while the next three are listed after "may." But if current practice treats all as a matter of permission, not command, is that enough? Particularly if we retain two subparagraphs — (A) would be "should" include what now is "shall" include, while (B) would continue the present "may."

This discussion led to the suggestion that there seemed to be a consensus that "should" is better for the "required" topics, but that it is a change from the present rule. If so, the change is better left to a parallel noncontroversial-but-substantive change track.

Discussion came full circle to the observation that "shall" has become intrinsically ambiguous wherever it appears in the present rules. If we translate it as "must," we risk increasing the force of the command and adding rigidity. If we translate it as "should," and even more so if we translate it as "may," we risk reducing the force of the behest. So if the present "shall" is treated as a matter of discretion in case management, translating it as "must" may widen the gap from current practice.

The approach of resolving style ambiguities by relying on current practice was then addressed directly by pointing to three possible approaches: (1) The intent of the original drafters can be researched. (2) The interpretive approaches in current cases can be researched to the extent that the decisions have been put into accessible public research resources. (3) We can rely on more impressionistic views of what is current practice. But "the plural of anecdote is not data." The collective experience even of a group as diverse and as experienced as the Committee and those who assist it is great, but not all-encompassing.

One judge observed that the Style 16(b)(3)(A) time limits are set because they can be modified. It is good to have initial targets from the beginning. "Must" keeps the current structure. Another observed that the original drafters wanted the court to address these matters. The structure should be preserved. An observer added that in practice it is important to have closure of pretrial practice, and clarity about deadlines. We should be careful about changes.

Returning to the ambiguity of "shall," it was suggested that it has the virtues that ambiguity at times presents. It preserves discretion, "but with an imperative overtone." "Must," on the other

hand, seems to confer a right on litigants, and does not seem appropriate in the (b)(3)(A) context. There is an existing comfort with "shall" that disappears with "must." No one reads "shall" as a "very strict imperative." "Should," on the other hand, may seem a substantive change — and that is unfortunate.

One modest beginning might be to delete the Style taglines: (b)(3)(A) is "Required Contents," and (B) is "Permitted Contents." But the stylists protested that taglines are used for all subparagraphs unless the subparagraphs are simply items in a list. Perhaps different taglines could be adopted: "Ordinary Contents" and "Additional Contents "

At this point Professor Kimble stated that a review of 1,300 appellate cases shows courts agreeing that "shall" is mandatory. But then many of the opinions go on to recognize qualifications "Over time, there are corruptions; it has been made ambiguous."

A motion to approve the present structure of Style Rule 16(b)(3) with the taglines as is was approved, 7 votes for and 3 votes against.

An attempt was made to capture this discussion by suggesting three things. First, the ambiguity of "shall" cannot be resolved by the strategy used for many other ambiguities. With many ambiguities, present language can be carried forward without change for fear that any change to resolve the ambiguity will bring a change of meaning. But we have forsworn any use of "shall," so we must resolve the ambiguity each time it appears. The discussion shows that many of the resolutions will effect changes of meaning. Second, there is a particular problem when years or even decades of practice demonstrate nearly universal disregard of original intent. It may have been intended that district judges always "must" enter scheduling orders according to a defined schedule, and always "must" address specific topics. But if discretion is widely recognized in practice, we must face two propositions — "shall" is treated as ambiguous, and there almost certainly are good reasons to exercise discretion. Third, the Committee needs to focus again on the recurring uncertainty whether to establish a parallel track for changes that seem too close to substance to be made as a matter of style, but that seem right and noncontroversial. Care must be taken to avoid confusion in the important stage of public comment.

The separate track issue was addressed by the suggestion that a limited number of small substantive changes can be taken up. A large number likely would cause great delay, engender consternation, and defeat any opportunity for Committee consideration of more important things. The best approach is to accumulate a list of possible small substantive changes as the Style process goes on. At the end, the list can be culled, selecting a manageable number of items for substantive revision.

A style suggestion was made for Style Rule 16(b)(4). Style 16(b)(1) says that "the district judge — or a magistrate judge when authorized by local rule — must issue a scheduling order." There is no apparent need to repeat all of this in (b)(4), which might be shortened: "and by leave of

the~~district~~ judge ~~or, when authorized by local rule, of a magistrate judge~~." "[T]he judge" plainly refers to the judge who entered the order.

Style Rule 16 was approved subject to this discussion.

Rule 17. Style Rule 17(a)(2) says that an action under a United States statute for another's use or benefit "must" be brought in the name of the United States. Professor Rowe's research shows that every use-plaintiff statute requires this form. It is a proper rendition of "shall" in present Rule 17(a).

Style Rule 17 was approved.

Rule 18. Present Rule 18 addresses the situation in which "a claim is one cognizable only after another claim has been prosecuted to a conclusion." Extensive discussion in the subcommittee left substantial uncertainty as to the best translation of these antique phrases. Research by Professor Rowe indicates that the best translation is that one claim "is contingent on the disposition of the other."

Style Rule 18 was approved.

Rule 19. Style Rule 19(a)(1)(B) was drafted to require joinder if feasible of a person who "appears to have" an interest relating to the action. This draft rested on a First Circuit decision adopting this phrase as a translation of present Rule 19(a)'s reference to a person who "claims" an interest. This translation seemed a good rendition of probable original intent. Further research by Professor Rowe, however, shows that other courts have found meaning in "claims." Some cases say that joinder is not required if the absent person does not mean to assert the claim that appears. Because the change of language might have substantive consequences, the Style draft presented for approval reverts to "claims an interest." This return to the present rule was approved.

The addition of "either" in Style Rule 19(a)(2) was approved: "a person who refuses to join as a plaintiff may be made either a defendant or * * * a plaintiff." This addition makes it clear that the person must be joined as one or the other, defeating any implication that nonjoinder is available as a third alternative.

When Rule 19(b) was revised in 1966, the drafters retained the familiar reference to an "indispensable" party, but demoted it to the role of mere label. After a court completes the required analysis and concludes that an action should not proceed without a nonparty that cannot be joined, the action is dismissed, "the absent person being thus regarded as indispensable." The Style draft discards "indispensable." Because the word has been used in merely conclusional fashion, no substantive change will follow. And although a few lawyers may encounter some research difficulties in looking for the familiar "indispensable" label, the change will promote clarity. The word "is not necessary."

Style Rule 19 was approved.

Rule 20. Style Rule 20(a)(1)(A) joins two elements in a single subparagraph: the plaintiffs (1) assert any right to relief jointly, severally, or in the alternative; and (2) the right is "with respect to or arising out of the same transaction," etc. It was suggested that here, and again in (b)(2)(A), it would be better to separate these two thoughts into individual subparagraphs. It was agreed that the Style Subcommittee would consider this question.

Style Rule 20 was approved, subject to consideration whether to divide the two (A) subparagraphs into two subparagraphs or to designate the two thoughts as items.

Rule 21. Style Rule 21 was approved.

Rule 22. Style Rule 22 was approved.

Rule 23.1, 23.2. Style Rules 23.1 and 23.2 were discussed together.

The reduced reference in Style 23.1(b)(2) to a "court," rather than "court of the United States," was approved. It is clear from the context that the reference can be only to the court of the United States in which the action is filed.

In subcommittee discussion, the dismissals that require court approval and notice were limited to "voluntary" dismissals. The theory was that Rule 23.2 in particular invokes Rule 23(e) procedures, and on December 1 Rule 23(e) will be amended to require court approval of a class action dismissal only if the dismissal is voluntary. The theory is that court approval inheres in an involuntary dismissal. The voluntary dismissal concept was added to Style Rule 23.1 to keep it parallel with 23.2. But it was suggested that there is a problem. Present Rule 23.1 says that the action shall not be dismissed without court approval, and notice of the proposed dismissal shall be given in such manner as the court directs. What is the parallel to Rule 23(e), which as amended will require court approval of a voluntary dismissal only if the class has been certified? Research could be undertaken on the dismissal question, with perhaps uncertain results, or the references to "voluntary" and "voluntarily" can be stripped from both Style rules. There is no apparent loss in deleting these words. Deletion was approved. The second paragraph of the draft Committee Note will be deleted.

The notice question is different. Present Rule 23.1 says that notice of a dismissal or compromise of a derivative action shall be given to shareholders or members in such manner as the court directs. Style Rule 23.1(c) renders this as "must." "Must" may be important, whether the dismissal is voluntary or involuntary, because notice is an important element in determining whether the dismissal has res judicata effects on nonparty shareholders or members. It was agreed that research would be undertaken to determine whether it is proper to say that notice "must" be given.

Separately, it was complained that the boilerplate Style revision language that constitutes the first paragraph of every Style Rule Committee Note does not accurately reflect the uncertainties that inhere in translating "shall" as "may," "should," or "must."

Finally, it was agreed that further research would be undertaken to verify the belief that there is no meaning in this stylistic difference between present Rules 23.1 and 23.2 Rule 23.1 says a derivative action "may not be maintained if * * *." Rule 23.2 says the action "may be maintained only if * * *." The Style Subcommittee would prefer to adopt a consistent expression, recognizing that the inconsistent expressions were adopted when both rules were created at the same time in 1966.

With these changes and open questions, Style Rules 23.1 and 23.2 were approved.

Rule 24. Style Rules 24(a) and (b) were approved without discussion.

Style Rule 24(c)(1) accurately renders present "shalls" as "must." But it simply provides that a motion to intervene must be served on the parties, eliminating the present rule's "as provided in Rule 5." This may create an ambiguity. One reason for intervening, rather than seeking to amend a complaint to join as an added plaintiff, is to avoid the possible difficulties of effecting Rule 4 service of summons and complaint on one or more defendants. The present rule makes it clear that Rule 4 service is not required. Although Rule 5 states the procedure for serving a motion, elimination of the cross-reference may create uncertainty. It was agreed to restore the reference: "A motion to intervene must be served on the parties under Rule 5." This will provide a useful reassurance.

Style Rule 24(c)(2) and (3) are caught up in the August publication of a proposed Rule 5.1 that would supersede these portions of present Rule 24(c). These provisions address the court's statutory duty to notify the United States Attorney General or a state attorney general when the constitutionality of an Act of Congress or state statute is called in question. The style of Rule 5.1, and its content, will be subject to further discussion after the comment period concludes. One particular point of style contention will be whether the statutory reference to intervention when an "Act of Congress" is challenged should be restyled to some more colloquial term. The Style Subcommittee prefers to use a different phrase.

The Style Rule 24(c)(3) tag line refers to a party's "duty" to call the court's attention to the court's notice duty, but the text refers to the party's responsibility and only says that the party "should" act. Is this a party "duty"? The rule expressly says that failure to act does not waive any constitutional rights otherwise timely asserted. One suggestion was that although the right is not lost, the party might lose the case — that sounds like a duty. Other sanctions might be appropriate for failure to call the court's attention to the court's notice duty. Perhaps the tag line might better be "Party's responsibility," drawing directly from the Style text. The Style Subcommittee will consider this question.

Separately, there was an intimation of questions that will be raised when proposed Rule 5.1 comes back for discussion after the public comment period. Problems were seen in requiring a party to give notice to a nonparty (the attorney general), and in providing for two notices — one from the party, and a second from the court.

Style Rule 24 was approved, after restoring "under Rule 5" to subdivision (a)(1) and subject to the style questions carried forward to the Rule 5.1 discussion.

Rule 25. Present Rule 25(a)(2) says that when, upon death of a party, the action survives only among the surviving parties, the death shall be suggested on the record. Style Rule 25 does not anywhere refer to this requirement. Elimination of a direction to note death on the record has been thought appropriate on the theory that the only function of the suggestion is to trigger the 90-day period for substituting a new party for a deceased party. The treatises describe that as the only function of the statement. That subject is covered by present and Style Rules 25(a)(1). But the suggestion may have other values, helping to defeat strategic choices not to reveal a death. The deletion may have substantive consequences, and restoration is easy. Rule 25(a)(2) would begin "If a party dies, the death must be stated on the record and if the right * * * survives only * * *."

Who, it was asked, must make the statement? There is an awkwardness here. Who is to be sanctioned for failure — presumably it is the person with knowledge. Stating that the death "must" be stated, rather than "should" be stated, may increase the inclination to impose sanctions. And sanctions may be useful because the party who knows may not want to trigger the time to substitute. If the focus is on the party who wants to obtain the benefit of the substitution period, "should" may be a better word.

It was suggested that the obligation to state the death on the record might be moved from (a)(2) to (a)(1), where it fits with the purpose to trigger the substitution period. There may be some difficulty with the question whether present Rule 25(a)(1) recognizes the court's authority to effect substitution without a party motion. Some cases seem to imply that the court lacks this authority, saying that substitution cannot be made and that it "is too bad that no one made a motion" to substitute. There is some ambiguity in the first two sentences of present (a)(1) The first sentence says that the court may order substitution. But the second sentence begins by stating that "the motion for substitution may be made," perhaps implying that a motion must be made. It does seem strange to have a court acting on its own to add parties to an action. But a court can act under Rule 17(c) to appoint a guardian ad litem. A court can extend the Rule 25(a)(1) substitution period if an estate is not formed in time to be substituted.

It was agreed that the behest to state death on the record should be softened to "should". "If a party dies, the death should be stated on the record * * *." And it was agreed that this provision should be restored to some place within Style Rule 25(a)

The question whether to locate the suggestion of death in Rule 25(a)(1) instead of (a)(2) invoked some uncertainty. It is strange that present (a)(1) does not refer to any duty to state death; it merely sets the time to substitute from the suggestion on the record. Present (a)(2) does state a duty to suggest death, but attaches no apparent consequence. The theory that its only function is to operate through (a)(1) implies careless drafting. An alternative view is that (a)(1) leaves the matter to the initiative of any party that wishes to trigger the substitution period, while (a)(2) states a duty in order to make the record clear so that the court will know when the action is concluded by

disposition of all claims among all remaining parties, and perhaps so that the remaining parties are spared the burdens of continuing the action as if procedural duties were owed a person who has become irrelevant by death and the failure of survivorship.

It was agreed that the Style Subcommittee will study the question whether the statement of death provision should remain in (a)(2), or instead should be moved to (a)(1).

Another question was left for further research. Present Rule 25(a)(1) says in the first sentence that the court may order substitution if a party dies and the claim is not extinguished. Standing alone, it seems to imply that the court may act without motion. The second sentence, however, begins: "*The* motion for substitution may be made * * *." This sentence may imply that the court can act only on motion. Style drafts have taken different approaches to this uncertainty. One draft said in the first sentence that "the court may, on motion, order substitution." The current draft deletes "on motion" from the first sentence, and begins the second sentence with "A motion for substitution may be made * * *." Discussion reflected continuing uncertainty. It was suggested that there are no cases that recognize a court's authority to substitute parties without a motion, and that it is unseemly for a court to seek to control the identity of the adversaries who appear before it In addition, cases that deal with untimely motions to substitute often seem to assume that there is no authority to act without motion, expressing regret that no timely motion was made to enable substitution. Research will inform the decision whether to fall back on the earlier draft.

The balance of Style Rule 25 was approved, subject to a determination whether to retain in (a)(2) the provision that death should be stated on the record, or whether instead the provision should be moved to (a)(1).

Style Rules 26-37 and 45, minus 23

Rule 26(a). Judge Kelly, chair of Subcommittee B, launched the discussion of Rule 26.

Mixed references to "agree," "agree in writing," and "stipulate" recur throughout the discovery rules. Choices have been made in reviewing the Style drafts, but it is recognized that this issue is a global issue that will be considered at the spring Advisory Committee meeting

It was noted that Style Rule 26(a)(1)(A) has been changed from referring to exceptions "directed" by the court to refer to exceptions "ordered" by the court. The purpose of the change is to rely on the convention that an "order" is a case-specific event, ousting any implication that a court may direct exceptions by adopting a local rule.

Since the subcommittee meeting, Style Rule 26(a)(2)(B)(i), (ii), and (iii) have been rearranged, raising the question whether "them" at the ends of (ii) and (iii) clearly refers back to the opinions described in (i). This is a question for the Style Subcommittee.

The elimination of present Rule 26(a)(5) as a redundant index was noted without further discussion. The Committee Note should explain the deletion.

Rule 26(b). Style Rule 26(b)(1) carries forward the reference to "books" that appears in the present rule. This has seemed an antiquated reference. Usage in the present rules is not consistent. "Books" does not appear in the Rule 34(a) definition of "documents," but does appear in Rule 45(a)(1)(C) — which is supposed to be the nonparty analogue of Rule 34. No case of recent vintage turns anything on the reference to "books." The Committee concluded that "books" should be deleted from Style Rules 26(b)(1) and 45(a)(1)(A)(iii). The Committee Note should explain that discovery of "books" continues to be permitted.

Present Rule 26(b)(2) says that the court may alter the limits on discovery, and then says that the frequency or extent of use of discovery "shall be limited" if the court determines any of three enumerated things, such as the (iii) determination that the burden outweighs likely benefit. Style (b)(2)(B) renders "shall" as "must." Subcommittee B raised the question whether "should" would be better than "must." Views supporting "should" urged that it is "softer, better." There is so much discretion built into the enumerated factors, which call for balancing judgments of many sorts, that "must" does not fit. Saying "must," further, may discourage the court from making the findings — the conclusion that discovery should not be limited will be expressed by finding that none of these determinations is appropriate. Defense of "must," however, began with the observation that the tag lines of (b)(2)(A) and (B) are useful: "(A) When Permitted," and "(B) When Required." Not long ago Rule 26(b)(1) was amended to include an express but redundant reminder that all discovery is subject to the three (b)(2) factors. We have decided to retain this redundant reminder in Style 26(b)(1) to emphasize the importance of these limits. It would be a mistake to fall back on the softer "should " If one of these findings is made, some limit should be required: "must" expresses the intended command. The Committee did not recommend a change from "must."

To correct a slip of the style pen, it was agreed that 26(b)(2)(B) should refer to local rule in the singular, not to local rules.

It was agreed that the Committee Note to Style 26(b)(3) should explain that the clear provision for obtaining a party's own statement by request fills in an apparent gap in the present rule, which establishes the request procedure for a nonparty but does not describe the procedure for a party.

Another style question was asked of 26(b)(4)(B), which begins: "Generally, a party may not * * *." Generally is ordinarily disfavored. The Style Subcommittee chose to use it here, however, and it will remain.

Rule 26(e). Style Rule 26(e) presented two questions From the beginning in 1970, Rule 26(e) has stated a duty to supplement discovery responses to include "information thereafter acquired." Style 26(e)(1) deletes these words. Attempting to unravel the limiting effect these words might have is difficult. In 1970 Rule 26(e) stated that a party who had responded to a discovery request with a

response that was "complete when made" had a duty to supplement the response only as follows. The "as follows" included the limit to information thereafter acquired, and then complicated matters further by distinguishing between an answer that was "incorrect when made" and an answer that "though correct when made is no longer true." Although nothing in the context or Committee Note indicates it, the underlying assumption may have been that there is a continuing duty to supply information that was available at the time of the initial response but not supplied. The additional information would be a continuing response to the initial request, not a supplemental response. On that reading, "information thereafter acquired" would serve the purpose of distinguishing the narrower duty to supplement from the broader duty to continue the initial response process. The Committee agreed that there should be a duty to supply information that was available at the time of the initial disclosure or discovery response but was not provided. The question is whether that is what the rule means now. There is no obvious reading. There is some natural attraction to the view that the rule only attaches to information acquired after the initial response, rather like the opportunity to engage in supplemental pleading under Rule 15(d) Carrying out the Rule 15 analogy, information available at the time of the initial response would be supplied by amending the initial disclosure or response, not by supplementing. But it was suggested that in practice there is a continuing stream of information as parties provide first responses and then continuing responses. Despite the curious drafting of Rule 26(e) as it began in 1970 and has since been amended, it seems now to mean that there is a continuing duty to supply relevant information, whether it was available but not supplied at the time of the first response or was acquired after that time. Deletion of "to include information thereafter acquired" was approved.

The second Rule 26(e) question arises from the distinction between present (e)(1) and present (e)(2). (e)(1) states a duty to supplement Rule 26(a) disclosures "at appropriate intervals." (e)(2) states a duty "seasonably to amend a prior response to" a discovery request. The distinct expression of the timing requirement in present (e)(1) was deliberately adopted when Rule 26(a) disclosure was adopted in 1993. Whatever the subtle distinction may have been, the cases do not reflect any difference in application. Style Rule 26(e)(1) thus brings disclosure and discovery together, and states a duty to supplement "in a timely manner." The Committee Note will explain that this change reflects the determination that no distinction has been observed in practice.

Rule 26(g). Both present and Style Rules 26(g)(1) require the signature to a disclosure and discovery response to include the signer's address. The temptation to add "and telephone number" was resisted because it might be a substantive change. The issue may, however, be addressed separately as a desirable substantive change.

Style Rule 26(g)(1)(B)(i) brings back a question faced with Rule 11(b)(1) Both present rules refer to "needless increase in the cost of litigation." Style Rule 11(b)(1) changed this to "unnecessary * * * expense." Style Rule 26(b)(1)(B)(i) initially adopted the Style Rule 11 phrase, but the subcommittee changed it back to "needlessly increase the litigation costs." It was agreed that the same expression should be used in both rules, despite the observation that Rule 11 is widely perceived as having real force while Rule 26(g) may be something of a paper tiger In revisiting the question, however, the subcommittee believed that "needlessly increase the litigation costs" has a

clearer focus on something wasteful or bad "Unnecessary expense" is not as pointed. A change to "unnecessary expense," further, could change the result The question whether "litigation costs" might be confused with statutory taxable costs was answered by agreeing that "litigation costs" is not a term of art and does not invoke the limited concept of taxable costs. A motion to change Rule 11 to conform with the current Style Rule 26(g)(1)(B)(i) formulation passed. Style Rule 11 will be changed to adopt the formula "needlessly increase the litigation costs."

Present Rule 26(g)(2)(A) provides that the signature on a discovery request, response, or objection certifies that it is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law. It does not include the provision in present Rule 11(b)(2) that recognizes in addition a nonfrivolous argument for the establishment of new law. Style Rule 11 carries forward the argument to establish new law. The contrast between Rule 26(g) and Rule 11 is troubling. But adding the new-law argument to Rule 26(g) may be a substantive change. The change will not be made in the Style process. The question, however, may deserve separate consideration as a substantive improvement.

Present Rule 26(g)(1) does not say that an unsigned disclosure must be stricken. Present Rule 26(g)(2) does say that an unsigned discovery request, response, or objection must be stricken unless it is signed promptly. Style Rule 26(g)(2) calls for striking an unsigned disclosure. The Committee Note will explain that this extension corrects an obvious drafting oversight that is properly corrected within the scope of the Style Project.

Style Rule 26 was approved with the changes made in the discussion.

Rule 27

Style Rule 27(a)(1) changes "in any court of the United States" in the present rule to "in a United States court." It has been determined that "court of the United States" has been used in the Civil Rules in a sense that does not derive from the definition in 28 U.S.C. § 451. But "court of the United States" might seem to imply that the rule authorizes a petition to perpetuate testimony in a state court. It might be better to say "a United States court," or "a federal court." This is a global issue that recurs throughout the rules. Drafting must be clear that territorial courts are included. Consideration of the choice will carry forward.

Style Rule 27(a)(2) overlaps an amendment that was published for comment in August. The Style Subcommittee will continue work on the published amendment as the amendment continues through the comment and later action periods. Because that process is independent of the Style process, it is possible to make changes that affect meaning subject to the usual tests that determine whether further publication is required.

The Committee Note might state that the reference in Style Rule 27(b)(1) to an appeal that "may be taken" means the same thing as the reference in present Rule 27(b) to the situation in which

the time for appeal has not expired. This period includes the time after expiration of the initial appeal period if the district court retains authority to extend appeal time.

Style Rule 27 was approved.

Rule 28

Present Rule 28(b) states that a notice or commission "may designate the person before whom the deposition is to be taken either by name or descriptive title." Style Rule 28(b)(3) initially changed this to "must" designate, but has reverted to "may designate — by name or descriptive title — the person before whom the deposition is to be taken." "Must" was changed because it could create complications for practitioners. The State Department has expressed a preference for "may." But a question remains. The present rule says "either by name or descriptive title"; does that imply that one or the other must be used? And does the Style draft, by eliminating "either," change the meaning so that the notice or commission may designate by name, designate by descriptive title, or not designate at all? Without "either," the choice not to designate at all seems available. With "either," the present rule is ambiguous. The question whether to restore "either" was left to the Style Subcommittee.

It was agreed that the caption of (b)(3) would be changed by adding "a": "Form of a Request * * *."

Style Rule 28 was approved subject to the questions raised in the discussion.

Rule 29

Style Rule 29 was approved without discussion.

Rule 30

Style Rule 30(b)(5)(A)(iv) refers to administration of the "oath," omitting the present rule's reference to "affirmation." Although Rule 43(d) says that a solemn affirmation may be used whenever a Civil Rule requires an oath, the sensitivities that many feel toward an oath requirement led to agreement that "or affirmation" should be restored to the Style Rule, and also to Style Rule 32(d)(3)(B)(i).

Style Rule 30(f)(2)(A)(ii) resolves an ambiguity in present Rule 30(f). Rule 30(f) now says that a party who produces documents or things for inspection at a deposition may retain "the materials" if, (B), it "offer[s] the originals to be marked for identification, after giving to each party an opportunity to inspect and copy them, in which event the materials may then be used in the same manner as if annexed to the deposition." "Materials" might refer only to the originals, an implication perhaps strengthened by the reference to annexation. But it might refer also to copies. The Style Rule resolves this by saying that "the originals" may be used as if annexed. It was pointed out that

Evidence Rule 1003 allows copies to be used as evidence in many circumstances. And at least in some places, people actually practice by using copies. To refer only to "originals" in the Style Rule may be to narrow the rule. But to refer to "originals or copies" may be to broaden the rule. We cannot adopt either expression without further and perhaps uncertain research. A motion to go back to "materials" passed.

Further discussion of subdivision (f) increased the perplexities Many lawyers faced with voluminous documents or things produced at a deposition react by postponing the deposition to enable a careful examination rather than attempt to depose a witness without understanding the materials. Should that bear on the understanding of "materials" as used in the present rule? Even the need to make copies, much less carefully inspect the originals, may prolong a deposition needlessly (and what of the presumptive 7-hour limit?). And is the uncertainty compounded by the further provision, carried forward in Style 30(f)(2)(B), that a party may move for an order to attach the originals to the deposition? Attaching the originals avoids the need to make copies at the deposition, and reduces the risk that inaccurate copies may be used later if copies may be used.

It was agreed that these aspects of Rule 30(f) need further study.

Separately, it was noted that Style Rule 30(f)(2)(B) omits the statement in the present rule that originals attached to the deposition may be ordered returned to the court. Since Rule 5(d) establishes a general rule that depositions need not be filed, it should be clear that filing the originals occurs only if there is a Rule 5(d) order to file the deposition.

Style Rule 30 was approved subject to this discussion.

Rule 31

Present Rule 31(b) directs the officer who administers a deposition on written questions to "prepare, certify, and file or mail the deposition." Style Rule 31(b)(2) and (3) translate this as "prepare and certify the deposition" and "send it to the party." "File" is deleted in deference to the 2000 amendment of Rule 5(d) that bars filing absent use in the action or court order. "Send it" seems broader than "mail," because it encompasses other methods of delivery. But this makes sense and is appropriate to balance the elimination of the filing alternative.

Discussion of Style Rule 31(c) wound back to the 31(b) discussion in part. Present Rule 31(c) directs the party taking the deposition to give notice to all other parties when the deposition is filed. Until the 2000 amendment of Rule 5(d), the rules contemplated that depositions would be filed; during this time, Rule 31(c) assured notice to all parties that the deposition had been taken. Now that filing occurs only when the deposition is used in the action or when a court orders filing, it is possible that the other parties will never be informed that the deposition has been taken. Style Rule 31(c) fills this gap in part, providing that a party who files a Rule 31 deposition must give notice of the filing to all other parties. Other approaches were considered The most direct alternative would require that the party who noticed the deposition give notice to all other parties

when the deposition is "completed." Given the finite definition of the Rule 31 deposition by the written questions, the concept of "completion" might work without undue uncertainty. But that might be a change greater than a Style Project should undertake.

It was asked why there is any need to give notice of completion. If any party attempts to use the deposition, there will be a motion and the motion will be served on others, providing notice and often excerpts of the deposition. In some courts, it is routine to direct that an entire deposition be filed whenever any part of it is used. One response was that a deposition may be filed in circumstances that do not give notice. And of course a party who does not like the deposition answers may not use the deposition, leaving to other parties the burden of inquiring into the completion and outcome.

Another suggestion was that Style 31(b)(3) could direct the officer to send the deposition to the parties, not only "the party" who noticed the deposition. In some ways it may be a good idea to send it to all parties. But present Rule 31(b) does not direct that the deposition be sent to all parties; this would be a significant change. The change, moreover, requires consideration of payment for the costs of sending copies of the deposition — including any exhibits — to all parties. Although Rule 31 continues to be used in practice, it is difficult to suppose that there is any consistent established practice that we could conform to as a mere Style improvement. And there may be no special need for the change. All parties know that the deposition is to be taken. Any party can arrange with the reporter to get a copy by offering to pay.

It was concluded that Style Rule 31(b)(2) and (3), and Style Rule 31(c), should carry forward as submitted.

Style suggestions were made. It was agreed that Style Rule 31(c) should be changed to refer to "the" deposition: "A party who files ~~a~~ the deposition must * * *." It was further agreed that Rule 31(c) should track the style of Style Rule 30(f)(4): "A party who files the deposition must promptly notify all other parties when it is filed." The reference to "who" was explained on the ground that the choice between "a party who" and "a party that" depends on context. When "party" is used in a generic sense, the choice is "who."

Style Rule 31 was approved with the style changes noted.

Rule 32

Judge Russell opened Subcommittee A's presentation with Style Rule 32.

Present Rule 32(a) applies to "the trial or * * * the hearing of a motion or an interlocutory proceeding." The Committee Note will explain that Style Rule 32(a)(1)'s reference to "any trial or hearing" includes the "interlocutory proceeding" reference In similar fashion, the Note will explain that "hearing" includes disposition of a motion, whether or not there is an oral hearing on the motion

Present Rule 32(a) introduces four numbered paragraphs by stating that a deposition is admissible "in accordance with any of the following provisions." This limit was omitted in earlier Style drafts. Research confirms, however, that the limit is an effective limit. Style Rule 32(a)(1)(C) was added accordingly, limiting use to a use "permitted by paragraphs (2) through (8)."

Present Rules 32 and 33 refer variously to "the rules of evidence" and to "the Federal Rules of Evidence." The Committee Note will explain that the Style Rules carry these usages forward without change, but will not comment further on the perplexities that arise from the distinction.

Style Rule 32(a)(5)(B) presents a style choice — whether to refer, as the Style Draft does, to "a party who demonstrates that" or instead to refer, as pure grammar might require, to "a party that demonstrates that."

The final paragraph of present Rule 32(a) allows use of a deposition "lawfully taken and duly filed" in a former action. The elimination of a general filing requirement by the 2000 Rule 5(d) amendment creates a translation problem. Elimination of the general filing requirement creates a slight risk by reducing the assurance of authenticity. But consistent with the limits of the Style project, it was agreed that the best resolution is that proposed by Style Rule 32(a)(8): A deposition "lawfully taken and, if required, filed * * *" in a prior action may be used in a later action.

It was noted that Style Rule 32(d)(2)(B) changes an earlier style draft reference to "due" diligence back to the "reasonable diligence" used in the present rule. Present Rule 32(d)(4) refers to "due" diligence, and the Style draft had sought uniformity. Uniformity is achieved in the current Style draft by using "reasonable" in both places. "Reasonable" seems the better choice because "due diligence" is a phrase that has acquired special connotations that do not fit this procedural context.

"Affirmation" will be added back to Style Rule 32(d)(3)(B), to accord with the decision made for Style Rule 30(b)(5)(A)(iv).

A style question was raised by asking whether it would be better to refer to a witness's "competence" rather than "competency" in Style Rule 32(d)(3)(A). "Competency" is used in the Evidence Rules. The Style Subcommittee controls this choice

Style Rule 32 was approved with the change in (d)(3)(B).

Rule 33

The Committee Note to Style Rule 33(a)(1) will explain deletion of the present Rule 33(a) cross-reference to the Rule 26(d) discovery moratorium The cross-reference was redundant when added in 1993, but served a purpose as a reminder of the new Rule 26(d) provisions. That purpose has been served. The same Note will be provided for the same point in Style Rules 34(b) and 36(a).

The Committee Note to Style Rule 33(a)(2) also will explain deletion of "not necessarily" from the present Rule 33(c) provision that an interrogatory "is not necessarily objectionable" because it calls for an opinion or contention. Although the deletion may seem a clear change of substance, it is not. Contention and opinion discovery are routinely permitted in practice without pausing to ask what circumstances might make discovery objectionable "merely because it asks for an opinion or contention * * *."

Style Rule 33(b)(3) includes a cross-reference to Rule 29. The use of cross-references is a global issue, but the outcome almost certainly will be that some cross-references are appropriate. This cross-reference is useful because it ensures that a stipulation extending the time to respond to interrogatories must adhere to the restrictions imposed by Rule 29. The Committee recommends that the cross-reference be preserved.

Present Rule 33(d) may seem ambiguous when it refers to an answer that may be ascertained "from an examination, audit or inspection of such business records, including a compilation, abstract or summary thereof." Style Rule 33(d) changes this to an answer that may be determined "by examining, auditing, inspecting, compiling, abstracting, or summarizing a party's business records." This style assumes that an existing compilation, abstract, or summary that is a business record is within the present rule, and that the inquiring party can be put to the chore of compiling, abstracting, or summarizing all records, including existing compilations, abstracts, or summaries. The change was approved. No Committee Note explanation is necessary.

Style Rule 33 was approved.

Rule 34

The era of discovering computer-based information was anticipated in present Rule 34(a)'s definition of "documents" to include "other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form." Translating this definition into a new style is difficult, and overlaps with the ongoing Discovery Subcommittee study of computer-based discovery. Style Rule 34(a)(1)(A) is the most recent effort: "other data compilations from which information can be obtained or can, if necessary, be translated by the responding party into a reasonably usable form." Present Rule 34(a) rather clearly seems to refer to translation of the data compilations, at least if the commas are to be trusted. The Style draft could be read to refer to translation of the information. The Style draft also may be more open to the view that the responding party can produce the data compilation and wait for a request to render it into reasonably usable form. Suggested alternatives included "from which information can be obtained after any necessary translation by the responding party," or — to avoid burying the "translate" verb in "translation" — "from which information can be obtained after the responding party translates the data into a reasonably usable form." The Style Subcommittee will continue to work on this drafting chore.

The reference in Style Rule 34(a)(1)(A) to "sound recordings" is a generalization of the present rule's reference to "phono-records." It clearly includes tape media. But it would reach a video recording only if focus were put on the sound track, ignoring the video. It was suggested that "video recordings" should be added to the Style rule. Everyone understands that video recordings are subject to Rule 34 discovery. It was decided that the better style choice would be to strike "sound," so that the definition of documents will include "recordings."

Style Rule 34(a)(1) allows a requesting party to inspect and copy "and to test or sample" documents. The reference to testing or sampling was brought up from an earlier Style draft that, carrying forward the present rule, referred to testing and sampling only with respect to tangible things. The intention was to reflect the common practice of testing documents for authenticity. But the reference to sampling may venture into the domain of electronic discovery, creating an opportunity to "sample" data in the electronic system where it resides. Rather than push the Style Project into areas that are being explored by the Discovery Subcommittee, it was concluded that " — and to test or sample — " should be deleted from Style Rule 34(a)(1)(A), and restored to (a)(1)(B) as in the next prior Style draft.

The Committee Note will explain deletion of the redundant cross-reference to the Rule 26(d) discovery moratorium that appears in present Rule 34(b), as with Rules 33 and 36.

Style Rule 34 was approved with these changes.

Rule 35

Rule 35(b) presents serious difficulties when read literally. The references to who may demand a copy of a Rule 35 examination report and the statement of the demand's consequences suggest questionable results. There is no indication, however, that these conceptual difficulties have caused any difficulty in practice. Rather than attempt to resolve them as a matter of style, the Committee agreed to carry them forward in Style Rule 35(b) without change.

Style 35(b)(1) does, however, present a question that was referred to the Style Subcommittee for further consideration. Present Rule 35(b)(1) states that on request, the party causing the examination to be made "shall deliver to the requesting party a copy of" the report. Style 35(b)(1) simply says that the party who moved for the examination must deliver a copy of the report, without saying to whom it must be delivered. Perhaps it should say: "must, on request, deliver to the requester a copy * * *."

Style Rule 35 was approved.

Rule 36

Style Rule 36 was approved.

Rule 37

Style Rule 37(b)(2)(B) presents a style question that was deferred for later resolution. Present Rule 37(b)(2)(E) refers to "the party failing to comply." The Style rule refers to "the disobedient party." "Disobedient" seems harsh, almost offensive, to some. Some other expression may be preferable.

The final paragraph of present Rule 37(b) states that "in lieu of or in addition []to" any of the sanctions listed in subparagraphs (A) through (E), "the court shall require" a party failing to obey a discovery order to pay the reasonable expenses caused by the failure. Style Rule 37(b)(2)(C) translates "shall" as "must." In 1970, "shall" was intended to be mandatory, although there are many escapes built into the rule. Great discretion is built into the excuses that the failure was substantially justified or that other circumstances make an expense award unjust. But the structure confirms the mandatory intent. "Must" is the only word that accurately reflects the original intention. At the same time, the original intent has not been honored in practice. Courts seldom award expenses, particularly attorney fees. "Must," moreover, might seem to imply that the court is obliged to make the award — unless it finds an excuse — even though no party has moved for an award. It was concluded that the original intent should be honored by retaining "must" in the Style rule. Even if awards are rare in actual practice, the practice does not reflect a general interpretive conclusion that "shall" really means "should" or "may "

Separately, it was agreed that "require" should be changed to "order" in Style Rule 37(b)(2)(C): "the court must ~~require~~ order the disobedient party * * *."

It also was agreed that Style Rule 37(c)(2) can say that the requesting party "may move that the party who failed to admit pay." There is no need to say "move for an order."

Style Rule 37 was approved with the change of "require" to "order."

Rule 45

Style Rule 45(a)(1)(A)(iii) deletes the reference to "books" from present Rule 45(a)(1)(C). The deletion was approved, adopting the decision made with Style Rule 26(b)(1).

A proposed revision of Rule 45(a)(2) was published for comment in August. The style does not agree in all details with Style Rule 45(a)(2). It was agreed that the style issues can be resolved when the published proposal is considered for adoption next spring.

The heading of Style 45(a)(3), "Issued by Whom," was approved.

Present Rule 45(a)(3) authorizes an attorney to issue a subpoena "on behalf of a court." Style Rule 45(a)(3) authorizes an attorney to issue a subpoena "from" a court. It may seem odd to describe a subpoena issued by an attorney as one "from" a court. But the attorney is acting as an officer of

the court, and it is desirable to maintain a uniform reference to subpoenas as "from" the court. This expression was approved.

Rule 45(b)(1) now says that "[p]rior notice" of a subpoena commanding production of documents or things must be served on each party. It does not say "prior to what." It is clear enough that notice must be given before compliance. Style Rule 45(b)(1) says that a copy of the subpoena must be served "before it issues." Research by Professor Rowe, however, suggests that the cases tend to look for service on other parties before the subpoena is served on the person commanded to produce. "Issuance" does not make much sense as the focus, particularly when the process of generating a copy in the lawyer's office is difficult to distinguish from the process of "issuing" the subpoena. "Before it is served on the witness" may be better

A related question asked why require a copy of the actual subpoena; why not simply require notice of what the subpoena requires? The present rule speaks only of "prior notice of any commanded production," not of a copy of the subpoena. It was agreed that the Style Subcommittee should revise the Style Rule to provide that the notice served on the parties may be a copy of the subpoena, but that the notice also may be in some other form. This approach will be particularly valuable if there can be orders to produce directed to a nonparty by means other than a subpoena.

Returning to the translation of "prior notice," it was suggested that some practitioners serve the subpoena on the witness and notice on other parties at the same time. It also was suggested that in practice parties are not served before the witness is served. "'Prior notice' does not mean before service. That's not how it is done."

So, it was suggested, one strategy might be to "serve" the parties by mail on Thursday, followed by personal service on the witness on Friday in hopes that immediate compliance might be accomplished before the other parties even have notice. The cases show concern about abuse, about deliberate delay in serving notice on the parties who might object to the scope of the subpoena or seek production of other items from the same witness. To carry forward "prior notice" would leave an ambiguity that the cases pretty much reject.

The first vote was to retain "prior notice," to carry forward the ambiguity of the present rule.

Renewed discussion, however, led to a different result. The 1991 Committee Note says that "prior notice" was added to give the parties an opportunity to object to the production, to demand production of other things, and to monitor compliance. One leading treatise says that notice is required before service on the witness; notice before the witness complies does not suffice. No case adopts a "before return time" reading, and several cases expressly reject it. The cases show that the argument seems to arise when there is good-faith misunderstanding, or else when there is wilful cutting of corners. The ability to crank out your own subpoena is a temptation to serve and hope for compliance before other parties do anything. Something specific in the rule would be useful, and need not be a substantive change.

It was observed that notice to the parties before service on the witness should be appraised in light of impending court capacities. Soon it will be possible to serve all parties and the witness simultaneously by electronic means. By the same token, it will be possible to serve all parties at one moment, and to serve the witness a moment later.

The question whether a substantive change would be worked by changing "prior notice" to "before it is served" was addressed by finding that "prior notice" is patently ambiguous, and that the cases pretty much resolve the ambiguity to calling for notice to the parties before service on the witness. This is not perfect because notice may be served on the witness by means more expeditious than the means chosen to serve the parties, but it is within the realm of the Style Project.

A motion to require service of notice on the parties before the subpoena is served was adopted.

The question whether the rule should say "must be served on each party as provided in Rule 5(b) before it is served on the witness" was addressed by observing that Style Rule 45 does not refer to witnesses But it is useful to complete "before it is served" with an explicit reference to the person served. The Style Subcommittee will work on this A rough beginning, along the lines of the discussion, would be:

> * * * If the subpoena commands the production of documents or tangible things or the inspection of premises before trial, then notice of the command[ed production or inspection] must be served on each party as provided in Rule 5(b) before the subpoena is served on the person commanded to [produce]{make the production} or to permit inspection.

Present Rule 45(d)(2) describes the manner of asserting privilege to resist a subpoena. The language differs from the language of Rule 26(b)(5) addressing the same subject. It was agreed that Style Rule 45(d)(2) should adopt the language of Style Rule 26(b)(5), expressing the same thought in the same words. The Committee Note will explain the change in these terms.

Style Rule 45 was approved, subject to the discussion.

Discovery of Computer-Based Information

Judge Rosenthal introduced the discussion of discovering information stored in electronic media. The Committee and the Discovery Subcommittee have been preparing the groundwork for some time now. The question is whether rules changes are necessary, or at least desirable, to address the questions that grow out of efforts to discover information stored in computers or other electronic media. The time seems to have come to engage the issue fully. The practice is growing. Cases are emerging. The results of the cases are not uniform. Even questions familiar from other forms of discovery may become more acute — inadvertent privilege waiver may fall into this category.

The Discovery Subcommittee has been busy and productive. They have prepared drafts to focus discussion at this meeting.

Further work on these questions will be enhanced by a conference planned for next February. Professor Dan Capra, Reporter of the Evidence Rules Committee, has volunteered to sponsor a conference on electronic discovery at Fordham Law School. The format will involve several panel discussions that will include audience participation. The central focus will be to advise the Advisory Committee and the Standing Committee whether we need rules, and if so what the rules might be. All members of both Committees will be invited to attend. Many people are engaged in working through these discovery problems. Several have already shared their views with the Subcommittee. The conference will afford an opportunity for sustained discussion and an exchange of views and experience among panel members and other participants.

Professor Lynk then launched the Discovery Subcommittee Report. After the Subcommittee met in May, it divided proposed rule topics among groups of two subcommittee members for each proposal. Their draft rules were designed to identify the issues: which rules might be used to address electronic discovery. Professor Marcus then integrated these proposals into a single package that was presented to the Subcommittee at a day-long meeting on September 5 The meeting discussed each proposal extensively, and also continued to explore the possible need for rules changes. Several categories of possible change were explored: (1) whether the parties should be encouraged to discuss these questions through changes in Rules 16(b) and 26(f), and also Form 35. (2) whether Rule 34 should define "documents" to include electronic information in terms different from present terms. (3) whether Rule 34(a) should define the form for producing electronic information. (4) whether a safe-harbor for data preservation should be provided, perhaps in Rule 34(a), or Rule 37, or a new Rule "34.1." (5) whether there should be separate sanctions provisions, perhaps subject to a "materiality" limit. And (6) whether inadvertent disclosure of privileged information, a problem familiar from discovering paper documents, is a greater problem with electronic discovery; this question has been addressed in the past, with draft "quick peek" rules, and raises special questions about the 28 U.S.C. § 2074(b) limits on adopting rules that affect privileges.

After the September 5 meeting, Professor Marcus produced the memorandum in the agenda materials. The memorandum includes specific rule drafts. The drafts, however, are not recommendations. Instead they are designed to support Advisory Committee discussion by providing an informed synthesis of Subcommittee deliberations up to now.

Three broad areas are open for discussion: Are there issues that should be addressed in addition to those addressed by these drafts? Should some of the issues addressed by these drafts be dropped from further consideration? Is the general perspective appropriate?

Professor Marcus noted that discovery changes inspire controversy. Many people are paying close attention to discovery of computer-based information. At least three have commented on the agenda materials within days after the agenda book became available. The interest of many establishes the need to take care, but also ensures that help is available

The Subcommittee discussed the possibility of creating initial disclosure obligations with respect to computer-based information. Study of several alternatives, however, led to the conclusion that there is no real need to follow this approach. Comments on the advantages of pursuing it further are welcome. Without addressing initial disclosure, seven topics remain in this set of proposals.

Definition of Electronic Information. The first question is whether to undertake a definition of the subject, including a choice of label — electronic-information? Computer-based information? Digital data? The phrase used for the moment is "electronically stored data." It is used in the Rule 26 draft in a way designed to support its use throughout the discovery rules. But is some other phrase better? It would be good to have a single term to be used throughout, and perhaps a definition of the term. At some point, in rule or Committee Note, it would be useful to provide a comprehensive explanation of the subject. As an example, work is being done to develop non-electronic means of computing by chemical or biological methods.

It was asked whether computer-science experts had been consulted in the effort to define, or at least describe, the subject. Ken Withers of the Federal Judicial Center is a nationally recognized expert on these problems. The first panel at the February conference will present computer experts who will address this question. Even with this help, the question remains open, both whether a workable definition is possible and what it might be. Mr. Withers noted that in his view the proposed language is only a beginning It should be circulated to information managers, information science experts, and others for comments. The definition likely should be more general than specific — no one knows what new technology will emerge. The only common term now available is "digital," referring to information reduced to base-two numeric form.

It was observed that the draft definition would be more effective if the list of examples were changed from "and" to "or" — "the use of electronic technology such as, but not limited to, computers, telephones, personal digital assistants, media players, ~~and~~ or media viewers."

An observer suggested concern that the proposal "will advance the mind-set of electronic discovery." This is an emerging practice. Must we start saving our voice mails? The list will become part of every lawyer's check list. The proposal is "getting out ahead of the bar." It should suffice to say that "electronic data" are discoverable. General terms are better, leaving the way open for case-by-case development and refinement. Practice has moved beyond any question whether electronic data are discoverable as "documents." The fights now are over reasonable relationship to the issues in the case.

It also was stated that there is an entire industry of "information management." The subjects are not merely electronic or digital. "Information is what discovery is about. No one questions the idea you're looking for intelligible information. We should be as generic as possible." The focus should be on discoverability without regard to storage medium It should be up to the responding party to seek protection against undue burdens.

The definition will affect attorney behavior. One participant described a law firm that has directed its attorneys not to discuss conflicts of interest by e-mail or voice mail.

Another observer said that the problems have now been with us for some time. It is essential "to simplify, clarify, and generalize." There is no need for a Rule 26 definition. A definition might be useful in Rule 34, perhaps even in Rule 33. The central point is that electronic information is discoverable on the same terms as all other information.

Raising the profile of this topic may increase discovery activity. The question whether to attempt to draft rules, whether on definition or anything else, remains constantly before the Committee. The question persists because many people say that they want guidelines, not ex post judicial responses.

Yet another observation was that "this is what discovery is about today." Some enterprises do everything on computers. It is not possible to raise the profile of these discovery topics higher than it is now. And it is possible to do something to help. Many lawyers and many enterprises want rational guidance on what they need to do. Such discovery can be a multi-million dollar undertaking even in a single case. A definition is needed somewhere.

At the same time, the Committee was reminded that many cases have no discovery at all. Only limited discovery is undertaken in many others. Rules permitting discovery do not automatically cause discovery. Rules in this area will not foment greater activity.

Prompting Early Discussion. The second set of questions is whether the rules should be amended to prompt early discussion of electronic discovery. The materials include draft amendments of Rules 26(f) and 16(b), and also a revised Form 35. These drafts respond to the common agreement that it is important to talk about these issues before the problems become intractable. Inviting discussion will not impose any new burdens on discovery in cases that will not involve electronic information.

The Rule 26(f) draft adds two items to the discovery plan. The first, written in general terms, addresses whether any party anticipates disclosure or discovery of electronically stored data, and any arrangements that might facilitate management of such disclosure or discovery. General terms were thought better in this provision, leaving more detailed exemplification to the Committee Note or other devices. The second addresses inadvertent privilege waiver, a topic that is involved with all forms of discovery.

Some district courts have adopted local rules addressing discussion of electronic information at the discovery conference. One question is whether such provisions suffice in themselves — need the rules do more than direct attention to discussion and resolution among the parties? Are additional rules helpful to focus the parties on what they can do?

The Form 35 changes are designed to remind the parties of the need to focus on these issues in the discovery conference.

The Rule 16(b) changes similarly are designed to remind the court of the need to attend to these issues.

The first suggestion was that it might be useful to address preservation issues in Rule 26(f), rather than defer them for later rules. We may need to encourage the parties to consider a preservation order at the beginning of the litigation. This approach is illustrated in an elaborated form of Rule 26(f)(3) set out in note 2 on page 6 of the agenda materials.

An observer suggested a cross-reference to Rule 53 to encourage discussion about the possible use of a master to manage discovery. A discovery master can be useful in general, but may be particularly useful in dealing with electronic discovery.

Another value of adopting some provision in Rule 26(f) is to catch up with the local rules. If a national rule is not adopted soon, there will be a patchwork of different rules across many districts. There are at least four local district rules now. They are very specific. But the proposed national rule will not supersede them — the specificity does not seem to be inconsistent with the draft as it stands now.

It also was asked whether the Rule 16 approach would fit better in Rule 16(a), suggesting that electronic discovery is more a general matter within the broad objectives of the pretrial conference structure than a specific matter for a scheduling order. But it was noted that Rule 16(c) seemed inappropriate, and that Rule 16(b) focuses on the time when the judge should be thinking about these issues.

Define "Document". The third question is illustrated by a draft Rule 34(a) definition of "document." It may be that this is the only place where a definition is needed, satisfying the needs that instead might be addressed by a general Rule 26 definition. At least as a first effort, this draft is more abbreviated than the Rule 26 draft. But it includes, as optional material, a controversial provision that includes in the definition "all data stored or maintained on that document." These words describe "metadata" and "embedded data." An extension of this alternative would limit discovery by requiring production of metadata or embedded data only on court order. Production in sanitized form — .pdf or .tiff — does not reveal this information. The "metadata" include information generated by the computer itself when a document is created or a data base is used. This information identifies such matters as when a document was created, what computer was used to create it, what is the history of the document, and so on. Embedded data are previous edits, comments, and the like, created by users but stored in ways that do not "appear on the screen" unless a specific direction is given. Both metadata and embedded data are searchable. Whether they need be produced stirs much debate

Production of metadata and embedded data "is not a small issue." We could define "document" to include only the information that appears on the screen. That is all that is captured in portable document format and like "picture" translations of electronic documents Or we could define "document" to include all the associated information stored in the computer No one will

know which definition is correct unless the rule provides it. The choice is fought out in all big cases. It is not possible to assert that there is a settled or common practice now to provide only .pdf or .tiff format. In some cases, at least, parties are providing the information on discs that include the metadata. Each party wants the metadata because it facilitates electronic searching. A "paper" response is relatively useless in comparison — the chore of visually sorting through 10,000,000 document pages is no longer necessary. The live question is whether to make discovery of metadata and embedded data available only on court order. And an answer can be found in present Rule 34 only by asking a person who takes the view you want.

This view was seconded by the observation that what you want in discovery is intelligible data. A .pdf picture is not enough. Far more information can be pulled out of the electronic file if the metadata are attached.

A caution was sounded in the reminder that the document people consciously create does not show who created it, when, who all got copies, and so on. The question is whether we should compel production of information in addition to the "document" itself. The added information can be useful in a small number of cases. But the cost may be great when large numbers of documents are involved, and often there will be no benefit. We need a better understanding of practical realities before undertaking to draft a rule.

A rejoining observation was that if metadata and embedded data are not included in the definition of a document, discovery will be difficult because the requesting party will need to show relevance. The relevance of hidden information may be hard to establish.

All of this simply frames the issue. Electronic creation and preservation of documents includes information that commonly is not preserved for paper documents. Ordinarily it is easy to produce this information. It may seem as relevant as the visible "document" it attaches to. Should we have a different test of relevance because there was no intent to create or preserve this information? And should the question be addressed only as one of relevance, without attempting to shoehorn it into a definition of "document"?

An observer suggested that it is a trap to try to understand these questions through focusing on the definition of a "document." Metadata and embedded data are not documents. They are data. There are many bits of data that have nothing to do with letters, memoranda, or the like. Emerging best-practice information storage is quite different from the practices that have developed for paper documents The questions should be addressed by means other than the definition of a document.

The question was reframed in direct terms: should a party be able to demand production in a form that can be searched by computer? The document that appears on the screen or that is printed is only part of the file. If we define document to include the whole file, you will get it and be able to search it The issue indeed is more important than this, because databases commonly do not exist in a form that even resembles a "document." Information is put in No document exists until someone directs specific questions that are answered by preparing something that is a document

As more information is put in, the same questions would be answered by creating a different "document." This form of data storage and manipulation may not yield to capture within a definition of "document."

The question of local rules returned briefly if a general national rule is adopted, should more specific local rules be accepted? The intent should be made clear.

Returning to the definition question, it was suggested that we need to cope with what is a document today. The 20th-Century concept of a document no longer avails.

The difficulties were suggested again by asking what you should do when you get a Rule 34 request for documents on specified topics. The information may be stored on thousands of computers. A common approach is to establish a new server specifically for responding to this discovery. Then an electronic search is done of the rest of the system, searching by words, dates, and the like. The information is downloaded and stored on the discovery server. The search process is based on metadata, and captures embedded data. One question is who gets to formulate the search queries. A responding party will seek to formulate the queries, and will assert that the choices made are themselves protected from discovery as work-product material. But if work-product protection is to be made available, there may be a need for some form of judicial review to ensure that the search was undertaken in a manner designed to gather all relevant information.

The values of broad discovery were suggested by observing that discovery is a search for evidence, for truth. The analogue to embedded data in earlier technology is audio dictation that has been erased but may be recoverable. What we decide in addressing these questions will govern what is preserved. But the costs of preservation may not be as great today as they were yesterday, and may shrink still further tomorrow.

The final suggestion was that probably the rules cannot avoid the need for case-by-case analysis. Generally we think of discovery in terms of good litigants who honestly seek to provide existing information and bad-faith litigants who seek to conceal existing information. But new technology makes it possible to generate new information from data even though the person who possesses the data does not know that the data can generate the information. This phenomenon will not readily yield to definition.

Form of Production. The fourth question addressed by the drafts is the form of producing electronically stored information. The first draft presents alternative Rule 34(b) provisions — the first requires that the party requesting discovery specify the form in which electronically stored data are to be produced, while the second alternative simply permits specification of form. The form of production will determine whether metadata and embedded data are produced. The Subcommittee could not decide whether to require, or simply to permit, that the request specify the form of production.

When the request specifies the form of production there must be an opportunity to object to the chosen form. Provision is made in a draft rule that again has several alternative provisions bearing on the need to search for documents that are not reasonably accessible or are not available in the usual course of the producing party's activities.

Finally, the draft provides that a party may produce electronically stored information in the form in which it is ordinarily stored, and need produce in only one form.

Discussion began with an observer's suggestion that the form of production affects two issues. One is the integrity of the data. The other is the utility of the data — production in the form in which the data are maintained may not be best. Production in a form that cannot be changed avoids disputes about who changed the document when competing versions emerge later. Some litigants are driven by the desire to avoid producing useful information. There are neutral, non-alterable formats that can preserve integrity And it is important to provide metadata, which can lead to admissible evidence; this is an important part of the utility of the data, and should be discoverable.

These suggestions were reflected in the suggestion that the form of production is related to the Rule 26 definition of the scope of discovery. Information is made useful by metadata Although this may not fit the traditional sense of leading to the discovery of admissible evidence, it is important for the same reasons. And the metadata or embedded data may be relevant in themselves. Perhaps it is better to capture these elements in the scope of discovery than to relegate them to the definition of a document or the form of responding. Or perhaps there should be an independent provision for the production of "data" that is not anchored in the definition of a "document."

Another observer suggested that the draft should be written in the alternative. Information may be created in one form, stored in another, and protected for integrity in a third. Flexibility should be retained for the producing party. If the procedure is made too rigid, costs will be magnified greatly The form of the response should be addressed by focusing on the needs of the case, beginning with the Rule 26(f) conference. And it will be difficult to define "metadata" or "embedded data." It is better here also to be general, to avoid confining definitions. But the scope of discovery should not be expanded far beyond the present scope.

It was asked how many computer users are even aware that their computers generate and preserve metadata and embedded data. Should we demand that people produce information they were not aware of creating?

In further discussion, an observer asked whether it is wise to allow the inquiring party to specify a form of production. It does happen that the inquiring party may demand paper, not electronic, materials. A reply was that we want to protect against an obligation to produce in two forms. If the responding party chooses the form, the inquiring party may find it more difficult to use and ask for production in another form. Allowing an initial specification avoids that problem.

Another observer suggested that this question shows another aspect of the fallacy of thinking and defining in terms of "documents." The hard copy is an excised version of the information in the electronic file. A responding party may play the game by providing only paper copy. Rather than define "document" the rules should focus on data or information.

This comment was met by the assertion that it is not a game. The paper copy gives what has always been given in discovery. We still need to get better information about the costs and burdens of providing metadata and embedded data. We do not know what will be the effect of requiring that they be produced.

In related fashion, it was noted that good studies have been made of the practices of big business enterprises. In many otherwise sophisticated companies very few people are aware of the reach of discovery. Only a minority of major corporations even have looked into these questions.

The form-of-production issue also affects Rule 33 interrogatory responses. The drafts include a new subdivision (e) that would permit a party to respond to an interrogatory by producing electronically stored data for search by the inquiring party. Rule 33(d) occupies a nether world between Rule 33 answers to interrogatories and Rule 34 document production. An interrogatory can compel a party to create an answer that did not exist before the party investigated the information required to frame an answer. Rule 33(d) enables a responding party to produce business records that enable the inquiring party to undertake the investigation and create the answer. The Rule 33(e) draft builds on analogy to Rule 33(d), permitting a response that provides electronic business records. Since most business records are kept in electronic form today, it seems certain that Rule 33(d) already is being invoked by providing electronic business records.

Providing electronic business records may require use of the responding party's software to enable the inquiring party to determine the answer as readily as the responding party could. That is built into the draft, but could lead to real complications.

It is difficult to know how often this provision will be used. The answer will be informed by the present use of Rule 33(d), remembering that in the present setting a Rule 33(d) response ordinarily must include access to electronic records. The draft can be seen as a way to describe and regulate discovery practice that must be occurring now.

A judge described a case in which a party had to reconstruct a decommissioned computer system, giving access to records through the software it had to recreate

It was suggested that we need much more information about the comparative costs of producing records in different forms. This suggestion was met by the response that the purpose is to create a system in which the burden of determining an answer is equal for both parties. The responding party has a choice it can assume the burden of making the information available in a form that makes access and manipulation equal, or it can undertake to research the information and

provide an answer to the interrogatory. Access to electronic records simply mimics present Rule 33(d); the responding party has a choice of how to respond.

Another tactic has been to use a neutral, perhaps a court-appointed master, to do the search.

Burden of Responding. The fifth set of questions involves the burden of retrieving, reviewing, and producing inaccessible data. The proposed direction of the rule is clear enough: the Subcommittee believes the rule should protect against the burden of producing "inaccessible" data unless a court determines that the burden is justified. The difficulty is in defining or describing the distinction between data that are accessible only with undue effort and data that genuinely are beyond recall. The draft addresses these questions through new Rule 26 provisions, so as to reach all modes of discovery.

One question is whether these provisions should address disclosure as well as discovery. The answer reflected in the draft is that disclosure should not be addressed. As reconstituted, disclosure addresses only information that a party may use in its case. If a party has in fact retrieved information for its own purposes and intends to use it, the information should be disclosed even though the party would not have been required to retrieve it in response to a discovery request. For that matter, once the information has in fact been retrieved, it should be subject to discovery without regard to the burden undertaken to retrieve it and the retrieving party's choice not to use it in its own case.

That leaves the problem of describing the information that need not be retrieved. Much of the problem arises from disaster-recovery systems, designed for business purposes and storing information in a form that can be searched only with great difficulty. But it seems awkward to frame a rule in terms of disaster-recovery systems. A rule could refer in open terms to undue burden or expense, or to the need to migrate the information to a usable form, or to availability in the usual course of business. The draft adds an optional proviso that protects against the undue burdens — however described — only if the responding party preserves a single day's full set of backup data.

One difficulty with relying on access in the ordinary course of business is that there is little apparent reason to protect data that are easily accessible merely because there is no occasion to access them during ordinary business operations. Rule 34 already is expansive, looking for production of documents in a party's possession, custody, or control. There is little reason to cut back on this concept for electronic records, but the translation is not easy.

Even if reliance were to be placed on the "ordinary course of business," some further translation is required to reach parties whose records are not maintained for business purposes. Ordinary people should enjoy the protection of whatever protection is appropriate. And ordinary people should not be able to defeat any production by asserting that because they are not in business, nothing is accessible in the ordinary course of business.

The one-day data backup was suggested as a pragmatic maneuver to protect against data destruction. But it presents serious problems.

However the basic protection comes to be defined, the draft also provides that further discovery can be ordered for good cause. The order may direct that the inquiring party pay part or all of the response expenses. The basic provision that a court may order production of data difficult to access has not been controversial in the Subcommittee. But there is concern about adding explicit cost-bearing provisions. A past proposal to make explicit the cost-bearing authority implicit in Rule 26(b)(2) provoked controversy and was withdrawn from Judicial Conference consideration. It may be better to avoid any repetition of that experience. The draft also suggests that the cost-bearing direction might be limited to paying for "extraordinary efforts." The term is borrowed from Texas practice, where lawyers like it, but the concept may prove elusive.

The short of it is that no one on the Subcommittee favors a duty to "scour the earth" in all discovery requests in all cases, but no one has suggested an easy approach through rule language. There is constant change in what is accessible, what is inaccessible without great effort, what is in fact inaccessible no matter what effort is expended. Accessibility may differ greatly across different information systems.

Returning to the question of disaster-recovery systems, it was suggested that the practical question is back-up tapes. They are designed for disaster recovery, not information retrieval. There should be a presumption that a party need not bear the expense of maintaining back-up tapes indefinitely or searching whatever back-up tapes are available. "Extraordinary" efforts might include that approach, but we should seek a better definition.

Discussion of back-up tapes expanded. A back-up tape is a "data dump" of everything in a straight physical bit-stream order. It does not distinguish deleted data, programs, or anything else. It all can be reloaded on the computer. But it is impossible to retrieve anything without restoring the entire tape to the original system with the same software. Back-up tapes are useless for business purposes after more than a few days. But information technology people refuse to destroy them unless there is a clear and clearly enforced recycling program. That means that many firms are stuck with vast numbers of old back-ups. It costs a minimum of $1,200 per tape to restore. If there are 1,000 tapes the cost is $1,200,000 before you can even start to search the material. Consider a large corporation that has several thousand servers to back up. To order it to suspend recycling tapes inflicts some cost in acquiring ever more tapes, but the cost is not great. The cost of doing anything with the preserved tapes, however, can be enormous.

The back-up tape question is different from the "archive" systems maintained by many firms with systems for managing electronic data. The archive systems often are not "on line," but are "near line." The information is easily accessible. The problem is that perhaps 30% of companies have this. Many information technology people use back-up tapes as a substitute for archive systems.

A pithy summary was that "much has been inadvertently retained "

The one-day "snapshot" of information was first questioned by asking why we should require preservation of information simply because it is no longer in the regular computer system. Why not treat it as destroyed, just as paper documents that have been discarded? Particularly if a system includes archived information, why require a search beyond it into back-up tapes that still may be preserved? Perhaps we should frame a rule that creates an incentive to maintain a good archive system, protecting against discovery of information inadvertently retained only if there is a systematic and thorough preservation system.

The Committee was reminded that "deleted" information often remains available on forensic inquiry. Information generated by the computer on its own also often remains available even though the associated document was deliberately "deleted." The question remains whether any of this material should be discoverable.

The scope of discovery today includes relevant information reasonably calculated to lead to the discovery of admissible evidence. Do these problems suggest a need to reconsider this general scope, as a way to free firms to revamp the way they manage information?

An observer seconded this question, adding that any rule that forces people to design information system behavior in circumstances not directly tied to an actual litigation is outside the Enabling Act. This suggestion met the response that the drafts only tell parties what to do in litigation. If the litigation duties induce people to change their practices to make it easier to comply with litigation duties, that is their affair. Of course many people will not choose to change. Others will change because they have been educated by their lawyers. Lawyers already are telling business firms to recycle their backup tapes. Business firms are changing their information practices in other ways because of the demands of discovery.

The Rule 26(b)(1) question was renewed with the statement that the Committee should not back into expanding the scope of discovery. "Reasonably calculated to lead to the discovery of admissible evidence" takes on a new meaning for information "buried on the hard drive." We have lived in a physical world. We are trying to adjust to a world of plasma and semiconductors But the principles are the same. Perhaps we should not attempt in the rules to address "inaccessible" electronic information any more than we have attempted to address "inaccessible" paper information — which is not addressed at all It seems likely that most people today treat printed information that has been covered by "white-out" as inaccessible. And thirty years of warehoused files are likely treated as inaccessible in many circumstances. How can we address all of these problems?

Privilege Waiver. The sixth problem addressed, inadvertent privilege waiver, exists with respect to paper discovery. The Subcommittee heard a single illustration of a case in which 27 people were used for six weeks to screen paper documents for privilege. Is that worth doing? Privilege protection adds to the burden of screening The need to avoid inadvertent production is greatly increased because production often is held to waive privilege not only for the produced document but for all other privileged communications on the same subject. The drafts submitted for discussion thus go beyond electronic information.

In approaching protection against inadvertent waiver, attention must be paid to 28 U.S.C. § 2074(b), which requires an Act of Congress to approve any rule that creates, modifies, or abolishes an evidentiary privilege. But there is a strong argument that this section does not apply to either of the proposals. Some rules already touch on privilege, including rules adopted after § 2074(b) was enacted. The Committee Note to revised Rule 26(b)(4) says that privilege is waived as to documents used to prepare an expert trial witness. Rule 26(b)(5) requires a privilege log. These rules, and the proposals on inadvertent waiver, regulate the discovery process rather than privileges.

The first proposal has been before the Committee for several years. Characterized as the "quick peek," it draws from practices adopted by many lawyers in cases that involve discovery of large quantities of paper. The parties agree that they can look at everything without any privilege waiver. Specific discovery demands are framed to focus only on the papers the parties actually want; discovery objections are made in response to those demands. These agreements have proved effective between the parties, but it is uncertain whether they protect against nonparty claims that a privilege has been waived by disclosure. The proposal relies on both agreement among the parties and court order. At first blush, however, it may seem that this approach will not work for electronic information. Often "the warehouse" is provided entire in the form of a few compact discs. The requesting party has possession of all the information; how is its search to be restricted to the parts it later specifies as the subject of formal "production"? But if the discovery response takes a different form, the "quick peek" approach still may work. Discovery may take the form of questions addressed directly to the responding party's computer system, often through an intermediary and at times through direct cooperation of the parties.

A second approach is designed to capture the tests that have emerged in the cases that struggle to limit the perils of inadvertent waiver. Mistaken production does not always waive privilege. The general test is to ask whether waiver is fair. This general test is detailed by looking to a number of open-ended factors such as the volume of documents searched in response to the discovery request; the efforts made to avoid disclosure of privileged materials; whether the privilege was identified and asserted promptly after the mistaken production; the extent of the disclosure; and the prejudice to any party that would result from finding or refusing to find a waiver.

These proposals both relate to all forms of discovery, not merely discovery of electronically stored information. The question remains whether it is appropriate to address the problem at all through the Civil Rules.

Discussion began with a new question not addressed by these proposals. Raw electronic data may be produced in response to a discovery request. The party who requested the data may then manipulate the data to produce information that the producing party never intended to come into existence, revealing trade secrets, confidential business information, or the like. The substantive law of trade-secret protection requires diligent efforts to maintain secrecy. Does the discovery response defeat protection? The "quick peek" approach can work in this area as well as in the area of evidentiary privileges.

The Committee was reminded that one reason for approaching the waiver problem by rule is that party agreements for a "quick peek" may not be binding on nonparties The quick peek approach is being used now. It works reasonably well. But the difficulties of attempting to enshrine it in a rule are great.

Despite the difficulties, the Committee has heard that the huge cost of privilege review is the greatest source of expense in document production. And now it is starting to hear that the volume of electronic data further increases the cost. The pressure to do something through the rules increases in measure with the costs. It would be good to know how frequently the "quick peek" approach is used now by party agreement, and whether other forms of party agreements are being used. We should be anxious to get information about approaches that might be incorporated into the rules.

Texas has a simple rule. Inadvertently produced privileged matter must be returned if the producing party asks quickly. But even with this rule, litigators say they routinely negotiate agreements like this.

A long-familiar theme was brought back from other contexts. The draft that summarizes the factors considered in the cases must encounter the tradition that rules should not simply adopt a list of case-developed factors. A rule that requires return of the inadvertently produced document is better; the fighting then will contest whether the document is privileged, not the multiple factors that may limit inadvertent waiver.

An observer noted that there is case law requiring reasonable efforts to protect privilege. Electronic information systems may not be designed to establish reasonable efforts. Waiver may occur outside inadvertent discovery responses.

Preservation The final problem addressed by the proposals is the duty to preserve electronically stored data after the commencement of an action. Two drafts present the same approach as a new Rule 34.1 and as an addition to Rule 26. The rule announces a preservation obligation, but then provides a safe harbor for the good-faith operation of disaster-recovery or other systems. The safe harbor is framed by stating that "nothing in these rules" requires suspension of ordinary systems in order to make it clear that the rule does not address preservation requirements imposed by other law. The Rule 26 draft is more limited than the Rule 34.1 draft, however, because it addresses only electronically stored data. The Rule 34.1 draft also addresses documents and tangible things. Lastly, the drafts include new Rule 37 provisions that prohibit sanctions for failure to preserve electronically stored information unless the party willfully or recklessly destroyed data in violation of Rule 34.1 [or 26(h)(3)], or destroyed data described with reasonable particularity in a discovery request. Sanctions could not be imposed for negligent destruction of data not specifically described in a discovery request. This focus on "willfully or recklessly" responds to concerns raised by the Residential Funding decision.

A drafting question was raised by pointing out that the sanction limit for destroying data described in a discovery request does not state that the discovery request must have been received before the responsive data were deleted. The drafting will be reviewed to make this clear.

A second question asked whether a sanction could be imposed for destruction of data that are not material. The footnotes illustrate a possible approach that requires a showing of material prejudice to the requesting party. This provision was not included in the draft because of a belief that courts exercise restraint in imposing sanctions in ways that make it unnecessary.

An explanation of the link between the sanction provision and the duty to preserve described in Rule 34.1 [or 26(h)(3)] was offered by referring to the common-law duty to preserve information. It is not certain when the common-law duty attaches with respect to information relevant to litigation not yet filed but likely to be brought. Should a party that anticipates being sued be obliged, for example, to preserve backup tapes? It was thought risky to draft a rule that might incorporate these uncertain open-ended obligations.

The Rule 37 sanctions provision reaches a party who "made unavailable" electronically stored information. Does that reach failure to turn over data that continue to exist? As drafted, the rule seems to reach a "failure to produce," and "making unavailable" can easily describe a failure to produce. But the association among "deleted, destroyed, or otherwise made unavailable" may limit the apparent meaning. This drafting question will be considered further.

A direct duty-to-preserve illustration was put as a question. Your computers are leased. The lease runs out and the computers must be returned, hard drives and all Is there an obligation to preserve the information on the hard drives?

This question was addressed by an observer who found it difficult to create preservation requirements by procedural rule. What must be preserved by a huge enterprise with many computer systems? The problem is illustrated by the proviso that would require a party to preserve "a single day's full set of * * * backup data" when an action is commenced A big company is sued every day. The proviso would require it to maintain a full set of backup data covering many years.

So it was asked whether preservation requirements include substantive components beyond Enabling Act reach. There are many substantive statutes and regulations that impose preservation requirements. The Committee has heard many plaintive assertions that there is an acute need for guidance, particularly with respect to electronically stored information. Requesting parties need protection against information loss. But producing parties need assurance that they are protected in the ongoing routine operation of their computer systems, despite an inadvertent failure to preserve data relevant to an ongoing litigation. There is a risk that discovery rules will impose undue costs — itself a "substantive" consequence of great importance. Perhaps in the end the Committee will conclude that preservation guidance is beyond the proper scope of the Enabling Act. But continuing inquiry may at least show some steps that can be taken to provide guidance.

These observations were followed by a reminder that the first formal inquiry made by the Discovery Subcommittee was a conference held at Hastings College of the Law. Both plaintiffs' and defendants' representatives reflected great concern about the problems of preservation and spoliation. The agreement that there are serious problems suggests that there may be ways in which the Committee can help The fact that electronically stored information has generated special sensitivities, however, should not blind the Committee to the risk that rules that address only electronic information may generate unintended inferences as to other forms of information.

Draft Admiralty Rule G

The minutes of the May meeting summarize the review of draft Supplemental Rule G as it then stood. The purpose of this rule is to gather all the forfeiture provisions that are now scattered throughout the Supplemental Rules, separating them from admiralty procedure and placing them together. The draft also addresses many issues that are not addressed by the Supplemental Rules, responding to statutory changes, the great increase in the number of civil forfeiture actions, and even new constitutional developments. The National Association of Criminal Defense Lawyers was asked to provide comments on an earlier draft and responded with detailed criticisms that have been addressed throughout the continuing revision process.

The present discussion does not aim at approval of any part of the current draft. Instead it aims at providing information about the direction of the draft, providing advance notice of one of the difficult issues — standing — that will be presented when a draft is presented for Committee deliberation. With continued hard work and some luck, the draft may be ready for study at the spring meeting.

Judge McKnight described the work of the subcommittee charged to work on developing Rule G. The subcommittee has held five conference calls, running two hours each. It has come a long way in the project to explore every part of the draft. Many issues have been thoroughly researched and discussed. Stefan Cassella, acting for the Department of Justice, and the letters from the National Association of Crminal Defense lawyers, have provided invaluable help and direction. Standing to claim property subject to forfeiture has proved a particularly thorny issue Ned Diver, Rules Clerk for Judge Scirica, prepared a lengthy and excellent memorandum on standing. The central question is whether a possessory interest should suffice to establish claim standing. Once standing is recognized, the claimant can put the government to its proof. The Department of Justice has urged a relatively narrow definition that limits standing to a person who would qualify as an "owner" within the definition of the innocent-owner defense of the Civil Asset Forfeiture Reform Act (CAFRA), 18 U.S C § 983(d)(6). The Department presents compelling arguments for its position. But the issue is not simple The definition of standing affects property rights. Some possessory interests would not be protected. This narrowing may better be a matter for Congress. A further reason for avoiding any attempt to define claim standing is that the problems appear to arise in a relatively small portion of the cases. The subcommittee has concluded that we should aim for a rule that does not undertake to define standing.

The reasons for avoiding a definition of claim standing were stated in greater detail. In part, the reasons go to the limits of the Enabling Act process. In other part, the reasons go to the difficulty of justifying the limits chosen in the drafts

The limits of the Enabling Act process begin with the changes that have made standing a matter of renewed concern to the Department of Justice. Before CAFRA, the government's burden in a civil forfeiture proceeding was to show probable cause to forfeit. Probable cause could be shown even by reliance on hearsay evidence. Once probable cause was shown, the claimant had the

burden either to prove that the property was not forfeitable or to prove a defense. In this setting, courts adopted a "colorable interest" standing test that allowed claim standing on the basis of any interest that, if proved, would satisfy the Article III "injury-in-fact" standing test. The apparent reason was that if the property were indeed forfeitable, the claimant's interest would be resolved at the step of determining ownership as an element of innocent ownership. CAFRA, however, places the burden on the government to prove forfeitability by a preponderance of the admissible evidence. Two difficulties appear. One is that the case for forfeiture often depends on circumstantial evidence; however compelling, reliance on circumstantial evidence is at times chancy. The second is that more direct evidence may be available, but can be produced only at the cost of jeopardizing ongoing criminal investigations or risking the effectiveness and even the lives of confidential informants. Put to the choice of revealing this direct evidence or risking loss of the forfeiture, the government may be compelled to rely on the circumstantial evidence alone. The government believes that it should not be forced to these burdens and risks absent a significant preliminary showing that the claimant has a worthy protectable interest.

Against this background, several reasons urge caution in relying on the Enabling Act process to define claim standing.

First, there is a plausible argument that CAFRA intends to define claim standing by § 983(a)(4), which states that any person claiming an interest in the seized property may make a claim. There are good reasons to doubt that this provision was intended to define claim standing. Ordinarily standing must be established by more than mere assertion; Article III does not recognize standing for anyone who claims to have an interest but cannot point to any concrete interest. The provision seems procedural, designed to invoke the admiralty rule procedures, rather than definitional. But some astute observers believe that the provision may define standing, and the argument that it does define standing will surely be made. An attempt to narrow the definition of standing will be characterized, rightly or wrongly, as an attempt to supersede Congress's recent work.

Second, the very occasion for the attempt to narrow standing arises from the consequences of the amendments that place the burden on the government. The attempt will be seen as an effort to undermine the Reform Act determination that the burden should be increased, quite apart from any theory that CAFRA itself defines standing. It will be argued, and the argument will be carried to Congress with force, that the Enabling Act is being invoked to countermand the consequences of a deliberate legislative choice.

Third, Enabling Act rules are not to abridge, enlarge, or modify any substantive right. As standing doctrine exists today, the protection of claim standing extends to possessory interests and record-title interests that do not qualify as "ownership" within the definition of § 983(d)(6). A person who has possession of an attache case containing $100,000 wrapped in duct tape and surrounded by fabric softener sheets is protected by state substantive law against anyone who takes it from him. The narrow standing definition would defeat that protection against the United States when it claims civil forfeiture. So a person who has record title to real property is protected against the world The narrow standing definition would defeat that protection when the record title is

treated as transparent. These refusals to recognize or protect interests protected by state law can easily be seen as the modification or abridgement of substantive rights.

Finally, and more generally, it is difficult to resolve in the Enabling Act process the policy choices that must be made in deciding whether to supersede the judicially developed claim standing tests. They seem better fit for resolution by Congress.

Taken together, these concerns suggest that a narrow definition of claim standing should be undertaken only for the most compelling reasons.

Even if an attempt is made to define claim standing in Rule G, there are reasons to doubt the wisdom of borrowing the § 983(d)(6) definition of "ownership." Although it is said that Congress looked to the standing decisions in drafting the definition, the definition clearly is narrower than the standing decisions on the books when Congress acted. There is little reason to suppose that the tests should be the same. The innocent-owner defense is relevant only if the property is otherwise forfeitable; the reasons to refuse to protect attenuated interests sustain the policies that establish forfeiture. Claim standing, on the other hand, is also relevant when the property is not forfeitable. More attenuated interests deserve protection — and are protected under current standing law — when the only issue is whether the government must establish forfeitability in order to keep the property.

The difficulty of appraising the arguments for a narrow standing test is most apparent in confronting the pragmatic arguments. It is difficult to know how often the government will fail to establish a worthy forfeiture claim because the only evidence is circumstantial. Accepting the argument that the government may need to withhold evidence to protect ongoing criminal investigations or confidential informants, it is difficult to know how often this happens. Equal difficulties arise in determining how often the risks are run, leading to actual interference with ongoing investigations or loss of confidential informants. So too with nuisance claimants (the prisoner who reads the Wall Street Journal and claims in every published forfeiture), stalking horses who hold nominal record title, and couriers. Claims are made by such people, but it is difficult to know how frequently and with what effect.

The reasons for adopting the § 983(d)(6) definition of ownership as the standing test were stated more succinctly The starting point is that forfeiture is an in rem proceeding. The government does not choose its adversaries. Claimants in fact include couriers, prisoners, and nominal title owners Claims have been made by people who assert that although they possessed the property, they were not aware of the possession — "I did not know that money was in my suitcase" — mere naked possession. Current case law does deny standing to general unsecured creditors and to the naked-unknowing possessor

Claims based on tenuous or fictitious interests are a great problem for the government. The government should be required to prove forfeitability only when a claim is made by someone with an interest. An illustration is presented by a case in which a motorist saw money spilling from

laundry detergent boxes falling from the car in front of him. He stopped to gather the money and was assailed by the driver of the first car. While they were fighting, a passing motorist called the police. The possessory interest of the following motorist surely does not deserve protection. But claim standing was recognized, and the government had to pay a $10,000 settlement in order to avoid putting on proof of forfeitability that would have jeopardized an undercover operation.

Present standing theory evolved when courts saw no harm in it. The government's burden to show probable cause was not onerous. Tenuous relationships could be sorted out and rejected when the proceedings moved to the innocent-owner defense. Now the standing theory works real harm.

CAFRA, in § 983(d)(6), establishes an affirmative defense. The first step requires the claimant to prove ownership, broadly defined. Then the claimant must establish innocence, more narrowly defined. A donee, for example, may not be a bona fide purchaser for value and will fail for that reason. It is better to eliminate the "colorable interest" test of current standing decisions and begin with ownership as defined in § 983(d)(6).

If standing is not to be addressed by Rule G, however, it will be even more important to establish procedures to resolve standing before proceeding to the government's proof of forfeitability. A classic example is the person who claims that the cash is the proceeds of selling a ranch in Mexico. At least there should be a preliminary showing that there was a ranch, that it was sold, and that the selling price can account for the amount of cash involved.

It also is important to clarify the approach to be taken when cross-motions for summary judgment are filed. Both forfeitability and innocent ownership may be addressed. The case for forfeitability may depend on circumstantial evidence that presents questions for trial. But summary judgment for the government may be appropriate on the innocent-owner defense; if so, judgment should be entered for the government without need to try forfeitability.

Adoption of provisions addressing preliminary determinations on standing will require careful drafting to ensure that the court does not resolve triable fact issues that invoke the right to jury trial.

Facing these pressures, and with the help of Ned Diver's excellent memorandum, the subcommittee asked for a draft that excludes a definition of standing. The draft includes procedural protections for the government in addition to those that address pretrial determination of standing. Under G(5)(a), a claim must state the claimant's interest G(5)(c) provides for interrogatories addressing claim standing that must be answered before a motion to dismiss can be granted This limitation on dismissal addresses the experience that objections are made on venue, limitations, and particularized pleading grounds before an answer is filed. The government wants to be able to determine whether the claimant has a real interest, or is only a stalking horse, before being put to address these issues

A reminder of Enabling Act sensitivities was added. One concern is that if Congress allows an Enabling Act rule to take effect by inaction, there is no Act of Congress to provide the President an opportunity to review and perhaps to veto. The Executive Branch shares the interest that the Enabling Act process pay attention to desirable constraints. Even when a particular proposal seems to favor Executive Branch interests, these concerns remain and should be honored.

The relationship between bankruptcy and forfeiture proceedings was addressed. What if a Trustee acquires interests in forfeiture property through § 541: can bankruptcy be used as a tactic to expand standing? What about the automatic stay? The intersection of forfeiture and bankruptcy is very complex. No attempt is made to deal with that in draft Rule G There is a growing body of case law on which goes first, whether the government becomes only a claimant for forfeiture in the bankruptcy proceeding. Some cases say the forfeiture goes first if issue is joined. So if the forfeiture is initiated after the bankruptcy proceeding commences, the Ninth Circuit Bankruptcy Appellate Panel says the forfeiture goes ahead, but some bankruptcy courts reach the opposite conclusion. The Department of Justice has decided not to address these issues in Rule G at this time.

Draft G(7)(d)(ii) says that standing is for the court, not the jury: why? This is the weight of case law. Some cases, however, assume without analysis that the question is for the jury, as part of the ownership question. It was noted that the most recent conference call began to discuss this question and related questions, but did not conclude. They remain open for further subcommittee work.

As a separate question, it was asked whether the Department of Justice intends to ask for CAFRA amendments. Although there are some provisions that it would like have amended, none focus on standing. It does not seem likely that other amendments will be suggested in the near future. Congress exhausted its energies for forfeiture issues during the seven years of dispute that produced CAFRA.

The discussion concluded by observing that many of the provisions in draft Rule G were written by the Department of Justice to improve the position of claimants. This has not been a one-way street. For the first time, for example, the rule provides individual notice to potential claimants in addition to notice by publication. The effort is to produce a balanced rule that fairly weighs competing interests.

Filed, Sealed Settlements

Confidential settlement agreements are common. Much attention has been drawn, however, to the occasional practice of filing a settlement agreement under seal. The District of South Carolina has adopted a local rule that purports to prohibit sealing a filed settlement agreement. The Committee asked the Federal Judicial Center to undertake a study of this practice.

Tim Reagan presented a progress report on the study. The report addressed the frequency of filing sealed settlement agreements, and the circumstances of filing.

The frequency of filed sealed settlement agreements varies from district to district. Docket records have been analyzed for just more than half of all districts. Across this sample, the average rate is slightly less than one in three hundred cases — about 0.3%. About ten percent of the courts examined have no such filings. Another ten percent have filings at twice or more the national rate. The rate in the District of Puerto Rico is about 3%. In the District of Hawaii the rate is about 2%, but that seems to be accounted for by the practice of filing under seal the transcript of a successful settlement conference.

The reasons for filing are obvious in about half the cases. The settlement needs court approval; the filing is the transcript of a settlement conference; the settlement is filed with a motion to enforce. It seems likely that other filings were made to facilitate any enforcement proceeding that might become necessary in the future. For the most part the motive seems to be to protect information about the amount paid.

Looking to what is sealed, with an eye to determining whether important information is closed to public access, it turns out that the complaint is almost never sealed. In a very small number of cases the whole file has been sealed.

It was noted that James Rooks, of ATLA, submitted two papers on court secrecy that were circulated to the Committee for this meeting. The focus is on secrecy in broad terms that reach far beyond filed and sealed settlement agreements.

Another observation was that the FJC study provides valuable fact information to address conjectural fears that sealed settlement agreements filed in court are depriving the public of information needed to protect health and safety. This is a remarkably thorough study. But still further inquiries are being made to determine whether present practices interfere with public access to important information.

The FJC study also includes a survey of court rules on sealing. The docket study seems to suggest that there is no correlation between court rules and the frequency of sealing.

In response to a question why the study has not turned up a greater frequency of sealed settlement conference transcripts, it was noted that the search method reaches only matters that are entered on the docket sheet with "seal." In the District of Hawaii the docket entries are unusually complete, enabling researchers to catch more subtle nuances that may be obscured in other districts. And of course practices vary. Some judges — perhaps many — do not transcribe anything at a settlement conference. Perhaps commonly there is nothing in the record to seal But if the court retains jurisdiction to enforce a settlement, then the agreement is filed and sealed.

The search cannot provide assured information about rejected motions to file under seal. But the sense is that this does not occur frequently. So too, there seem to be few motions to unseal. When there is a motion to unseal, it may be made by a party or by a nonparty — usually the nonparty is the press.

Consideration will be given to the question whether the FJC study has reached a point at which it would be helpful to describe the interim findings to Senator Kohl, who has long expressed interest in access to litigation materials and who has introduced legislation on the topic.

Federal Judicial Center Rule 23 Study

Judge Rosenthal noted that the Class Action Subcommittee has carried forward the question whether to adopt a settlement-class rule. The proposal that was published for comment several years ago generated great controversy. The proposal was withdrawn as the Amchem and Ortiz decisions were anticipated and then handed down. Those decisions emphasized limits imposed by present Rule 23, leaving open the question whether Rule 23 should be amended to reduce rule-based obstacles to settlement classes. Constitutional constraints remain, however, and must inform any rule. A rule must observe constitutional requirements. Wise rulemaking often yields further, accounting for the policies that shape constitutional requirments beyond the limits of compulsion.

The Federal Judicial Center was asked to undertake a study that might show whether there is now a need to pursue a settlement-class rule.

Mr. Willging presented a summary of the present stage of the FJC study. The "bottom line" is that Amchem and Ortiz do not drive plaintiffs' choices between filing in state or federal courts, and do not drive defendants' decisions whether to attempt removal of state-court actions. General class-certification rules and approaches do seem to have some importance, generally in the minds of defendants contemplating removal. Direct questions focused on the Amchem and Ortiz decisions showed that they are not major factors, but at times were among the concerns that influence the choice of forum. The effect is particularly likely to be felt in property damage and personal injury cases.

One finding has been that the cases that were settled in federal courts involved classes much smaller than the classes in cases that settled in state courts. The amount of recovery per individual class member, however, was considerably greater in the federal-court actions. There is no clear explanation of this pattern.

Many of the cases in the study had parallel litigation that also was settled. Again, it is difficult to know what this information might suggest for possible Rule 23 amendments.

It was observed that it is intrinsically difficult for a study like this to gather information about cases that could not be settled because of doubts arising from the Amchem and Ortiz decisions.

The Committee thanked the Federal Judicial Center for undertaking the study. The final report will be ready for the spring meeting.

Rules 15, 50(b)

The Committee has carried forward for some time the inquiry whether Rule 15 should be amended. One particular proposal has been to adjust the relation-back provisions of Rule 15(c)(3). Other questions address the right to amend once as a matter of course and the best means of expressing and perhaps distinguishing the tests for amendment before trial and at trial. The issues are conceptually difficult. The real-world importance of the issues has not yet been examined; if they are primarily theoretical, there may be little reason to wrestle with the conceptual questions. In order to help frame the questions for action, a Subcommittee chaired by Judge Kyle will study the proposals and report to the Committee. It may be that proposals can be pursued in tandem with the Style Project.

A more recent proposal addresses Rule 50(b). The proposal is easily defined. Rule 50(b) continues to allow a post-verdict motion for judgment as a matter of law only if the moving party moved for judgment at the close of all the evidence. Many decisions reflect failures to comply with this requirement, and several decisions have announced approaches that have eroded the requirement at the margins. The question is whether the purposes served by the present rule can be served as well by a rule that is easier to apply and that does not cause inadvertent forfeiture of a deserved judgment. Although easily identified, the question touches Seventh Amendment sensitivities that must be carefully judged. This proposal too is referred to the Subcommittee chaired by Judge Kyle.

Rule 62.1

In response to a proposal by the Solicitor General referred to the Committee by the Appellate Rules Committee, a draft of a new Rule "62.1" has been prepared. The draft seeks to express a procedure adopted by most of the circuits to regulate relationships between district courts and appellate courts when a motion is made to vacate a judgment pending appeal. There are some variations in practice across the country, and many lawyers remain unfamiliar with the proper procedure. Even district courts might benefit from having the procedure spelled out in the rules. This proposal will be carried forward on the agenda.

Next Meeting

The next Committee meeting was tentatively set for April 29 and 30, probably in Washington, D.C.

Respectfully submitted,

Edward H. Cooper
Reporter

Rules Published for Comment: August 2003

The rules published for comment in August 2003 are set out in order below. A summary of the public comments follows each rule. Topics for discussion are presented for Rules 5.1 and 6(e).

Rule 5.1

Rule 5 1 and the Committee Note were published as follows:

Rule 5.1. Constitutional Challenge to Statute — Notice and Certification

(a) Notice. A party that files a pleading, written motion, or other paper that draws in question the constitutionality of an Act of Congress or a state statute must promptly:

(1) if the question addresses an Act of Congress and no party is the United States, a United States agency, or an officer or employee of the United States sued in an official capacity:

(A) file a Notice of Constitutional Question, stating the question and identifying the pleading, written motion, or other paper that raises the question, and

(B) serve the Notice and the pleading, written motion, or other paper that raises the question on the Attorney General of the United States in the manner provided by Rule 4(i)(1)(B);

(2) if the question addresses a state statute and no party is the state or a state officer, agency, or employee sued in an official capacity:

(A) file a Notice of Constitutional Question, stating the question and identifying the pleading, written motion, or other paper that raises the question, and

(B) serve the Notice and the pleading, written motion, or other paper that raises the question on the State Attorney General.

(b) Certification. When the constitutionality of an Act of Congress or a state statute is drawn in question the court must certify that fact to the Attorney General of the United States or to the State Attorney General under 28 U.S.C. § 2403

(c) Intervention. The court must set a time not less than 60 days from the Rule 5.1(b) certification for intervention by the Attorney General or State Attorney General.

(d) No Forfeiture. A party's failure to file and serve a Rule 5.1(a) notice, or a court's failure to make a Rule 5.1(b) certification, does not forfeit a constitutional right otherwise timely asserted

Committee Note

Rule 5.1 implements 28 U.S.C. § 2403, replacing the final three sentences of Rule 24(c). New Rule 5.1 requires a party who files a pleading, written motion, or other paper that draws in question the constitutionality of an Act of Congress or a state statute to file a Notice of Constitutional Challenge and serve it on the United States Attorney General or State Attorney General. The notice must be promptly filed and served. This notice requirement supplements the court's duty to certify a constitutional challenge to the United States Attorney General or the State Attorney General. The notice will ensure that the Attorney General is notified of constitutional challenges and has an opportunity to exercise the statutory right to intervene at the earliest possible point in the litigation. The court's § 2403 certification obligation remains, and is the only notice when the constitutionality of an Act of Congress or state statute is drawn in question by means other than a party's pleading, written motion, or other paper.

Moving the notice and certification provisions from Rule 24(c) to a new rule is designed to attract the parties' attention to these provisions by locating them in the vicinity of the rules that require notice by service and pleading.

Rule 5.1 goes beyond the requirements of § 2403 and the former Rule 24(c) provisions by requiring notice and certification of a constitutional challenge to any Act of Congress or state statute, not only those "affecting the public interest." It is better to assure, through notice, that the Attorney General is able to determine whether to seek intervention on the ground that the Act or statute affects a public interest.

The 60-day period for intervention mirrors the time to answer set by Rule 12(a)(3)(A). Pretrial activities may continue without interruption during this period, and the court retains authority to grant any appropriate interlocutory relief. But to make this period effective, the court should not make a final determination sustaining a challenge before the Attorney General has responded or the

period has expired without response. The court may, on the other hand, reject a challenge at any time. This rule does not displace any of the statutory or rule procedures that permit dismissal of all or part of an action — including a constitutional challenge — at any time, even before service of process.

Discussion Topics. The comments suggest two revisions.

The first revision seems a good idea. Rule 5.1(a)(1) and (a)(2) would be revised by deleting "sued" in each place:

> **(1)** if the question addresses an Act of Congress and no party is the United States, a United States agency, or an officer or employee of the United States ~~sued~~ in an official capacity * * *.
>
> **(2)** if the question addresses a state statute and no party is the state or a state officer, agency, or employee ~~sued~~ in an official capacity * * *.

The theory is direct. There is no need to give Rule 5.1 notice if an officer or employee is a plaintiff in an official capacity. The statute that requires court certification, 28 U.S.C. § 2403, does not employ the "sued" restriction. "to which the United States or any agency, officer or employee thereof is not a party * * *." The parallel Appellate Rule 44, is similar: "in which the United States or its agency, officer, or employee is not a party in an official capacity * * *." (The expressions as to state statutes and state officers are similar)

The second possible revision would specify a method to serve the State Attorney General in subdivision (a)(2)(B):

(B) serve the Notice and the pleading, written motion, or other paper that raises the question on the State Attorney General by certified or registered mail.

The argument for adding these words is that without them, service can be made by ordinary mail under Rule 5(b)(2)(B). State Attorneys General may experience the same problem that the Department of Justice has described: notice by ordinary mail may not be treated with an appropriate degree of reverence by mailroom workers, delaying delivery of notice to a person situated to respond.

The opposing argument is one encountered in deliberating on proposed Supplemental Rule G. Specifying the details of service, rule-by-rule, can become outdated.

The competing considerations are clear. The balance can be weighed by those with a good sense of practical realities.

Finally, it may be useful to remark on comment 03-CV-10, Bill Lockyer, Attorney General of California Expressing strong support for Rule 5.1, the comment notes: "It is this office's experience that the clerk's-notice requirements of current Rule 24(c) often go unsatisfied." The requirement of party notice "increases the likelihood that an Attorney General will be notified of such litigation * * *."

Summary of Comments: August 2003 Rule 5.1

03-CV-005, Hon Geraldine Mund: As to style, it is better to say "A party who" rather than "A party that." This rule should be incorporated in the Bankruptcy Rules "as we receive constitutional challenges to both state and federal statutes and there is no requirement here that notice be given in a bankruptcy case."

03-CV-008, State Bar of California Committee on Federal Courts: (1) Creating a new Rule 5.1 "seems likely to highlight the notice requirement in a way the current rules fail to do." The Committee supports this. (2) Rather than set a minimum 60-day period for intervention, the period should be set in the district court's discretion. Action is likely to be frozen for the 60 days, and that can thwart timely relief. Rule 24 requires timely intervention; that suffices There is no indication that state or federal governments have suffered for lack of an explicit time period for intervention. The analogy to the 60-day answer period in Rule 12(b)(3)(A) is not persuasive; the statutory challenge may arise later in the litigation, and for that matter some statutes require the government to answer in less than 60 days. (3) Literally, Rule 5.1 may require multiple notices; a party should be required to file only one notice in a single case.

03-CV-005, State Bar of Michigan Committee on Federal Courts: (1) Delete "sued" from both (a)(1) and (a)(2): "and no party is the United States, a United States agency, or an officer or employee of the United States ~~sued~~ in an official capacity." Notice should not be required if an officer or employee of the United States is a plaintiff in an official capacity Appellate Rule 44 reads: "in which the United States or its agency, officer, or employee is not a party in an official capacity." (2) There is no reason to require the party to give notice; notice from the court clerk, required by statute, suffices. (3) But if the rule does provide that the party give notice, (a)(2)(B) should specify the method of serving notice on the State Attorney General: "serve * * * the State Attorney General by sending copies by registered or certified mail."

03-CV-010, Bill Lockyer, Attorney General of California: Supports the proposal. "It is this office's experience that the clerk's-notice requirements of current Rule 24(c) often go unsatisfied. As a

result, we are frequently ignorant of pending litigation in district court that involves the constitutionality of a state statute. Proposed Rule 5.1 increases the likelihood that an Attorney General will be notified of such litigation * * *." And it is good to reach all statutes, not only those that affect the public interest.

03-CV-011, Peter D. Keisler, Assistant Attorney General, Civil Division, U. S. Department of Justice: Expresses the Department of Justice's "strong support of the final proposal." (1) Despite § 2403 and Civil Rule 24(c), "there have been many instances in which the Attorney General has not been provided with notice of constitutional challenges or has received informal notice at a late stage of a proceeding." Requiring notice by a party in addition to the court certification "will ensure that the Attorney General is made aware of constitutional challenges in a timely manner." The incremental burden on the parties is slight — Rule 24(c) now requires the party to call the court's attention to the duty to certify. (2) The 60-day intervention period recognizes "the Department's internal administrative procedures that must be followed upon receipt of a notice." But the Committee Note should state that Rule 5.1 does not itself restrict the Attorney General's opportunity to intervene more than 60 days after the Rule 5.1(b) certification, and that the rule does not limit the opportunity to intervene after final judgment if a party or the court fails to comply with the duty to give notice or certify (3) After considering other possible methods of serving the party's notice, the Department has concluded that service in the manner provided by Civil Rule 4(i)(1)(B) "will best ensure timely and proper processing of notices." (4) The differences between Civil Rule 5.1 and Appellate Rule 44 are justified. It is important that the government have an opportunity to be present "as a party in district court, where the factual record is made and constitutional arguments are

developed." In addition, notice "under Appellate Rule 44 functions more smoothly given the nature of the appeals process and the centralized circuit court structure." (This comment also expresses approval of several other features of proposed Rule 5.1 that have not drawn adverse comment by other participants.)

03-CV-013, Federal Magistrate Judges Assn., by Hon. Louisa S Porter: Supports Rule 5.1, and specifically mentions (1) moving this out from Rule 24(c); (2) placing the burden of notification on the party that brings constitutionality into question; (3) addressing the "interface with" the § 2403 certification requirement; and (4) establishing a 60-day intervention period.

Rule 6(e)

Rule 6(e) and the Committee Note were published as follows:

Rule 6. Time

* * * * *

(e) Additional Time After Certain Kinds of Service ~~Under Rule 5(b)(2)(B), (C), or (D)~~. Whenever a party ~~has the right or is required to do some act or take some proceedings~~ must or may act within a prescribed period after ~~the service of a notice or other paper upon the party and the notice or paper is served upon the party~~ service and service is made under Rule 5(b)(2)(B), (C), or (D), 3 days ~~shall be~~ are added ~~to~~ after the ~~prescribed~~ period.

Committee Note

Rule 6(e) is amended to remove any doubt as to the method for extending the time to respond after service by mail, leaving with the clerk of court, electronic means, or other means consented to

by the party served. Three days are added after the prescribed period expires. All the other time-counting rules apply unchanged.

One example illustrates the operation of Rule 6(e). A paper is mailed on Wednesday. The prescribed time to respond is 10 days. Assuming there are no intervening legal holidays, the prescribed period ends on Wednesday two weeks later. Three days are added, expiring on the following Saturday. Because the last day is a Saturday, the time to act extends to the next day that is not a legal holiday, ordinarily Monday.

Other changes are made to conform Rule 6(e) to current style conventions.

Discussion Topics. The comments summarized below, and the Appellate Rules Committee proposal to publish a parallel Appellate Rule 26(c) for comment set out below, suggest two topics for discussion. One is familiar: the time-counting rules are too complex. The Standing Committee should establish a process that will lead to uniform and simpler counting rules for all procedures, Appellate, Bankruptcy, Criminal, and Civil. The system that seems to draw the greatest favor relies on calendar-week counting. This will be an important project, and is likely to confront conflicting pressures at the point of selecting the time periods to substitute for present periods. Many present periods are unrealistically short, and there will be pressure from the bar to lengthen even the periods that are realistic. The desire to expedite litigation is also strong, however, and the outcome will have to be worked through carefully for each time period.

The other topic goes to an ambiguity that remains in Rule 6(e) as published. Two tasks are presented One is the drafting chore: how do we clearly express a clear answer. The other is the choice: just how much time do we want to add with the 3 days?

The ambiguity arises from referring to adding 3 days "after the period." The common illustration is a time period that ends on Saturday. Is Sunday the first of the 3 days? Or is Monday the first of the 3 days — or, if Monday is a legal holiday, is Tuesday the first?

The Appellate Rules Committee believes that the 3 days should be added only after the last day of the time that would be allowed without adding the 3 days. Thus if the 30th day of a 30-day period is a Saturday, the period ends on Monday (or Tuesday if Monday is a legal holiday), and the first day of the 3 added days is Tuesday (or Wednesday). Their expression, adapted to Civil Rule 6(e), would be:

> **(e) Additional Time after Certain Kinds of Service.** Whenever a party must or may act within a prescribed period after service and service is made under Rule 5(b)(2)(B), (C), or (D), 3 calendar days are added after the prescribed period would otherwise expire under subdivision (a).

(The Appellate Rules refer to "calendar" days. Apparently many day-counters draw the same distinction between real — "calendar" — days and "business days." Business days do not include Saturdays, Sundays, or legal holidays. We should think carefully about introducing a new term that would appear only in Rule 6(e), and also about the alternative of sweeping through all of the rules to specify calendar or business days.)

The Appellate Rules Committee also adds an explanation and an example to the Committee Note, and urges that the same example be added to the Note for Civil Rule 6(e):

Under the amendment, a party that is required or permitted to act within a prescribed period should first calculate that period, without reference to the 3-day extension provided by Rule 6(e), but with reference to the other time-computation provisions of the Civil Rules. (For example, if the prescribed period is less than 11 days, the party should exclude intermediate Saturdays, Sundays, and legal holidays, as instructed by Rule 6(a).) After the party has identified the date on which the prescribed period would expire but for the operation of Rule 6(e), the party should add 3 calendar days. The party must act by the third day of the extension, unless that day is a Saturday, Sunday, or legal holiday, in which case the party must act by the next day that is not a Saturday, Sunday, or legal holiday.

To illustrate further: A paper is served by mail on Thursday, August 11, 2005. The prescribed time to respond is 30 days. Whether or not there are intervening legal holidays, the prescribed period ends on Monday, September 12 (because the 30th day falls on a Saturday, the prescribed period extends to the following Monday). Under Rule 6(e), three calendar days are added — Tuesday, Wednesday, and Thursday — and thus the response is due on Thursday, September 15, 2005.

Some of the comments suggested the opposite approach, reducing the effect of the Rule 6(e) extension. On this approach, the original period to act is counted out, and the added 3 days begin with the next day without regard to the character of the next day. If the next day is a Saturday, Sunday, or legal holiday, it counts. There will be more than 3 extra days only if the third and final day of the extension falls on a Saturday, Sunday, or legal holiday.

The argument for reducing the effect of the extension is the ever-present argument for expedition. The original proposal was not to provide any additional time for electronic service; the

added time was provided to recognize the occasional snafus that may occur with electronic service, and also as a means of not discouraging consent to electronic service.

The choice would be easier if it were possible to identify general present practice with confidence. One of the reasons for tacking the 3 days onto the end of the period, not the beginning, was the representations of many practicing lawyers that they have added Rule 6(e) time at the end. But those representations did not provide clear information as to the means of calculating the end of the initial period. If many lawyers have been in the habit of counting as the Appellate Rules Committee suggests, adoption of that practice makes sense. If they have been generally confused and uncertain, the choice might be made on the basis of more abstract principles.

If the choice is to go for the lesser extension, the most cogent suggestion in the comments is to delete the reference to a "period" and substitute day counting:

> **(e) Additional Time after Certain Kinds of Service.** Whenever a party must or may act within a prescribed ~~period~~ number of days after service and service is made under Rule 5(b)(2)(B), (C), or (D), 3 days are added after the last-numbered day.

The Committee Note would adapt the Appellate Rules Note to the opposite conclusion.

No recommendation is made as to the better choice.

Materials from the Appellate Rules Committee

Regarding Proposed Amendments to Appellate Rule 26(c)

MEMORANDUM

DATE: October 14, 2003

TO: Advisory Committee on Appellate Rules

FROM: Patrick J. Schiltz, Reporter

RE: Item No. 01-03

At its Spring 2002 meeting, this Committee decided to refer to the Advisory Committee on Civil Rules the proposal of attorney Roy H. Wepner that Appellate Rule 26(c) and Civil Rule 6(e) be amended to eliminate uncertainty about how their "three-day provisions" are applied. Attached is a copy of my memorandum of March 27, 2002, which explains one aspect of this problem in detail and recommends referral to the Civil Rules Committee.

In August, the Civil Rules Committee published for comment an amendment to Rule 6(e) that would resolve the uncertainties that have arisen about the application of the "three-day rule" by district courts. The proposed amendment and accompanying Committee Note are attached. Also attached is an excerpt from a memo by Prof. Edward Cooper, the Reporter to the Civil Rules Committee, in which excerpt Prof. Cooper describes the reasoning behind the proposed amendment.

The proposal of the Civil Rules Committee seems sound, except that, as I have discussed with Prof. Cooper, I believe that the Committee Note to the amendment to Rule 6(e) needs to be expanded slightly to make sure that there is no ambiguity regarding the following situation: A paper is served by mail. The prescribed period is 30 days. The 30th day falls on a Saturday. Are the three days counted beginning on that Saturday — thus making the paper due on Tuesday —

or are the three days counted beginning on Monday (when the prescribed period would expire under the time calculation provisions of the Civil Rules, in the absence of the three-day extension) — thus making the paper due on Thursday? Prof. Cooper and I discussed this at length, eventually agreeing that amended Rule 6(e) is not entirely clear on this point.

I have attached a draft amendment to Rule 26(c). The amendment and accompanying Committee Note would resolve the ambiguity in the Appellate Rules in the same manner as the proposed amendment to Civil Rule 6(e) resolves the ambiguity in the Civil Rules. I have put the phrase "would otherwise expire" in brackets, because I cannot decide whether the phrase would be helpful. (The phrase is not in the amended Civil Rule, but perhaps it should be.) The Committee Note that I have drafted is somewhat longer than the Committee Note to the amendment to Civil Rule 6(e), so as to address the issue described in the preceding paragraph — and, I hope, so as to leave less room for future misunderstandings.

Rule 26. Computing and Extending Time

* * * * *

(c) **Additional Time after Service.** When a party is required or permitted to act within a prescribed period after a paper is served on that party, 3 calendar days are added ~~to~~ after the prescribed period [would otherwise expire] unless the paper is delivered on the date of service stated in the proof of service. For purposes of this Rule 26(c), a paper that is served electronically is not treated as delivered on the date of service stated in the proof of service.

Committee Note

Subdivision (c). Rule 26(c) has been amended to eliminate uncertainty about application of the 3-day extension. Civil Rule 6(e) was amended in 2004 to eliminate similar uncertainty in the Civil Rules, uncertainty that was described at length in 4B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1171, at 595-601 (2002).

Under the amendment, a party that is required or permitted to act within a prescribed period should first calculate that period, without reference to the 3-day extension provided by Rule 26(c), but with reference to the other time computation provisions of the Appellate Rules. (For example, if the prescribed period is less than 11 days, the party should exclude intermediate Saturdays, Sundays, and legal holidays, as instructed by Rule 26(a)(2).) After the party has identified the date on which the prescribed period would expire but for the operation of Rule 26(c), the party should add 3 calendar days. The party must act by the third day of the extension, unless that day is a Saturday, Sunday, or legal holiday, in which case the party must act by the next day that is not a Saturday, Sunday, or legal holiday.

To illustrate: A paper is served by mail on Wednesday, June 1, 2005. The prescribed time to respond is 10 days. Assuming there are no intervening legal holidays, the prescribed period ends on Wednesday, June 15, 2005. (See Rules 26(a)(1) and (2).) Under Rule 26(c), three calendar days are added — Thursday, Friday, and Saturday. Because the last day is a Saturday, the time to act extends to the next day that is not a Saturday, Sunday, or legal holiday. Thus, the response is due on Monday, June 20, 2005.

To illustrate further. A paper is served by mail on Thursday, August 11, 2005. The prescribed time to respond is 30 days. Whether or not there are intervening legal holidays, the prescribed period ends on Monday, September 12 (because the 30th day falls on a Saturday, the

prescribed period extends to the following Monday) Under Rule 26(c), three calendar days are added — Tuesday, Wednesday, and Thursday — and thus the response is due on Thursday, September 15, 2005.

Rule 26. Computing and Extending Time

* * * * *

(c) **Additional Time after Service.** When a party is required or permitted to act within a prescribed period after a paper is served on that party, 3 calendar days are added ~~to~~ after the prescribed period would otherwise expire under Rule 26(a) unless the paper is delivered on the date of service stated in the proof of service. For purposes of this Rule 26(c), a paper that is served electronically is not treated as delivered on the date of service stated in the proof of service.

Committee Note

Subdivision (c). Rule 26(c) has been amended to eliminate uncertainty about application of the 3-day extension. Civil Rule 6(e) was amended in 2004 to eliminate similar uncertainty in the Civil Rules, uncertainty that was described at length in 4B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1171, at 595-601 (2002).

Under the amendment, a party that is required or permitted to act within a prescribed period should first calculate that period, without reference to the 3-day extension provided by Rule 26(c), but with reference to the other time computation provisions of the Appellate Rules. (For example, if the prescribed period is less than 11 days, the party should exclude intermediate Saturdays, Sundays, and legal holidays, as instructed by Rule 26(a)(2).) After the party has identified the date on which the prescribed period would expire but for the operation of Rule 26(c), the party should add 3 calendar days. The party must act by the third day of the extension, unless that day is a Saturday, Sunday, or legal holiday, in which case the party must act by the next day that is not a Saturday, Sunday, or legal holiday.

To illustrate: A paper is served by mail on Wednesday, June 1, 2005. The prescribed time to respond is 10 days. Assuming there are no intervening legal holidays, the prescribed period ends on Wednesday, June 15, 2005. (See Rules 26(a)(1) and (2).) Under Rule 26(c), three calendar days are added — Thursday, Friday, and Saturday. Because the last day is a Saturday, the time to act extends to the next day that is not a Saturday, Sunday, or legal holiday. Thus, the response is due on Monday, June 20, 2005.

To illustrate further: A paper is served by mail on Thursday, August 11, 2005. The prescribed time to respond is 30 days. Whether or not there are intervening legal holidays, the prescribed period ends on Monday, September 12 (because the 30th day falls on a Saturday, the prescribed period extends to the following Monday). Under Rule 26(c), three calendar days are added — Tuesday, Wednesday, and Thursday — and thus the response is due on Thursday, September 15, 2005.

MEMORANDUM

DATE: March 27, 2002

TO: Advisory Committee on Appellate Rules

FROM: Patrick J. Schiltz, Reporter

RE: Item No. 01-03

Attorney Roy H. Wepner has called the Committee's attention to an ambiguity in the way that Rule 26(a)(2) interacts with Rule 26(c). (A copy of Mr. Wepner's letter is attached.)

Rule 26(c) provides that "[w]hen a party is required or permitted to act within a prescribed period after a paper is served on that party, 3 calendar days are added to the prescribed period unless the paper is delivered on the date of service stated in the proof of service." For example, under Rule 31(a)(1), the appellee must serve and file a brief within 30 days after the appellant's brief is served. If the appellant serves its brief by mail, the appellee's brief must be served and filed within 33 days — the 30 days prescribed in Rule 31(a)(1) plus the 3 days added to that prescribed period by Rule 26(c).

Rule 26(a)(2) currently provides that, in computing any period of time, intermediate Saturdays, Sundays, and legal holidays are excluded when the period of time is less than 7 days, and included when the period of time is 7 days or more. This Committee has proposed amending Rule 26(a)(2) so that the demarcation line is changed from 7 days to 11 days. The purpose of the proposed amendment is to make time calculation under the Appellate Rules consistent with time calculation under the Civil Rules and Criminal Rules.

The ambiguity is this: In deciding whether a deadline is less than 7 days or 11 days, should the court "count" the 3 days that are added to the deadline under Rule 26(c)? Suppose, for example, that a party has 5 days to respond to a paper that has been served upon her by mail. Is she facing a 5-day deadline — that is, a deadline "less than 7 days" for purposes of current Rule 26(a)(2) — and therefore a deadline that should be calculated by excluding intermediate Saturdays, Sundays, and legal holidays? Or is she facing an 8-day deadline — that is, a deadline that is *not* "less than 7 days" for purposes of current Rule 26(a)(2) — and therefore a deadline that should be calculated by including intermediate Saturdays, Sundays, and legal holidays?

This question never arises under the current version of Rule 26(a)(2). The question would arise only with respect to 4-, 5-, or 6-day deadlines, as only then would including the 3 extra days provided by Rule 26(c) change the deadline from one that is less than 7 days to one that is 7 days or more. But there are no 4-, 5-, or 6-day deadlines in the Appellate Rules.

This question will arise under the *amended* version of Rule 26(a)(2). (The amendment will take effect on December 1, 2002, barring Supreme Court or Congressional action.) Under amended Rule 26(a)(2), the question will arise with respect to 8-, 9-, and 10-day deadlines. There are no 8- or 9-day deadlines in the Appellate Rules, but there are several 10-day deadlines.

A lot turns on this question. Suppose that a party has 10 days to respond to a paper that has been served by mail If the 3 days *are* added to the deadline before asking whether the deadline is "less than 11 days" for purposes of amended Rule 26(a)(2), then the deadline is *not* "less than 11 days," intermediate Saturdays, Sundays, and legal holidays do count, and the party would have at least 13 calendar days to respond. If the 3 days are *not* added to the deadline before asking whether the deadline is "less than 11 days" for purposes of amended Rule 26(a)(2),

then the deadline *is* "less than 11 days" for purposes of Rule 26(a)(2), intermediate Saturdays, Sundays, and legal holidays do *not* count, and the party would have at least 17 calendar days to respond.

Mr. Wepner is correct that this problem should be fixed. But it is difficult to know exactly how the problem should be fixed or by whom.

The district courts have wrestled with this problem under the Civil Rules for 17 years, yet they have failed to agree on a solution. Professor Arthur Miller devotes 7 pages to this problem in the new edition of Volume 4B of *Federal Practice & Procedure*.[1] Professor Miller's discussion outlines three possible ways of solving the problem (actually four, as the second option has two "sub-options"), but cites disadvantages to each. The problem is a complicated one.

The problem is also one that should not be addressed only by the Appellate Rules Committee. After December 1, the identical issue will arise under the Appellate Rules, the Civil Rules, and the Criminal Rules. If time is to be calculated the same under all three sets of rules, the issue will have to be resolved at the same time and in the same manner by the three advisory committees. One of those committees will have to take the lead.

Judge Alito and I believe — and the Reporter to the Civil Rules Committee agrees — that the Civil Rules Committee should take the lead on this matter. The Civil Rules Committee is, if you will, the "biological parent" of this issue; this Committee is only the "adoptive parent." The Civil Rules Committee has 17 years' experience with this issue; this Committee has none. And

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[1] *See* 4B CHARLES ALAN WRIGHT & ARTHUR R MILLER, FEDERAL PRACTICE & PROCEDURE § 1171, at 595-601 (2002). A copy of this section is attached.

this issue is a bigger problem for the Civil Rules than for the (amended) Appellate Rules. The problem does not arise unless a party is required to act within a prescribed period of 8, 9, or 10 days after a paper is *served* on that party. The Appellate Rules contain no 8- or 9-day deadlines and only a handful of 10-day deadlines that are triggered by *service* (as opposed to by the filing of a paper or the entry of an order). Only one of these 10-day deadlines is of any real consequence — the deadline in Rule 27(a)(3)(A) regarding responding to motions.[2] By contrast, the Civil Rules appear to contain at least a dozen 10-day deadlines that are triggered by service

I recommend that the Committee refer Mr. Wepner's letter to the Civil Rules Committee.

[2]This Committee has proposed amending Rule 27(a)(3)(A) so that it provides 8 days to respond to a motion, rather than 10. But the change will not eliminate the problem cited by Mr. Wepner.

03-CV-001, Thomas J. Yerbich (Court Rules Attorney, D.Alaska): (1) Suggests that Rule 6(a) should be amended to ensure that the three days added by Rule 6(e) do not convert all 10-day periods to 13-day periods: "**(a)** * * * When the period of time prescribed or allowed is less than 11 days determined without regard to subdivision (e), intermediate Saturdays * * *"

(2) Urges that a further change should be made to ensure that time is not extended too much, and computations are not complicated too much, for situations in which the period ends on a Saturday, Sunday, or legal holiday. If the period ends on a Saturday, for example, the three Rule 6(e) days should begin on Sunday, not Monday or the next day that is not a legal holiday. Possible confusion arises from referring to a "period" to act — the period ends not on Saturday but on Monday, implying that the three days are added after Monday. To fix this problem, substitute "number of days" for "period":

> Whenever a party must or may act within a prescribed ~~period~~ number of days after service and service is made under Rule 5(b)(2)(B), (C), or (D), 3 days are added after the ~~period~~ number of days [expires?].

(This comment includes several examples of ways to calculate in "business days" and "calendar days.")

(3) Offers a proposal for the "counting backward" question — what happens if you must act "10 days before" a defined day and the tenth day before is a Saturday, Sunday, or legal holiday. May you file on Monday, or the next day that is not a legal holiday, even though it is less than 10 days

before the defined day? The proposal relies on "not later than" to say that you must file before the 10th day:

> **(f)** Whenever a party has the right or is required to do some act or take some proceedings within a period of time before a specified date or event prescribed or allowed by these rules, by the local rules of any district court, or by order of court, or by any applicable statute, the right must be exercised, the required act performed or the proceedings taken, not later than the prescribed time preceding the specified date or event.

03-CV-003, Professor Patrick J. Schiltz: Professor Schiltz describes a draft Committee Note for the parallel amendment of Appellate Rule 26(c), recommending the opposite answer to the question addressed by Comment 03-CV-001:

> Under the amendment, a party that is required or permitted to act within a prescribed period should first calculate that period, without reference to the 3-day extension provided by Rule 26(c), but with reference to the other time computation provisions of the Appellate Rules. (For example, if the prescribed period is less than 11 days, the party should exclude intermediate Saturdays, Sundays, and legal holidays, as instructed by Rule 26(a)(2). After the party has identified the date on which the prescribed period would expire but for the operation of Rule 26(c), the party should add 3 calendar days. The party must act by the third day of the extension, unless that day is a Saturday, Sunday, or legal holiday, in which case the party must act by the next day that is not a Saturday, Sunday, or legal holiday.

To illustrate further: A paper is served by mail on Thursday, August 11, 2005. The prescribed time to respond is 30 days. Whether or not there are intervening legal holidays, the prescribed period ends on Monday, September 12 (because the 30th day falls on a Saturday, the prescribed period extends to the following Monday). Under Rule 26(c), three calendar days are added — Tuesday, Wednesday, and Thursday — and thus the response is due on Thursday, September 1, 2005.

(If the Appellate Rules version is adopted, it should be in the form approved by the Appellate Rules Committee.)

03-CV-007, S. Christopher Slatten, Esq.: Amended Rule 6(e) remains ambiguous. Do we add 3 "calendar days" or 3 "business days"? It would be good to emulate appellate Rule 26(c) by providing that "3 calendar days are added after the period." If the period ends on Friday, for example, Saturday, Sunday, and Monday are the 3 days.

03-CV-008, State Bar of California Committee on Federal Courts: Supports the clarification.

03-CV-009, State Bar of Michigan Committee on United States Courts: (1) Federal time-counting rules are too complicated. A uniform set of rules, based on calendar weeks, should be substituted for Civil, Criminal, and Appellate Rules. (2) The Committee Note rejects the argument that the 3 added days are an independent period of less than 11 days, so that Saturdays, Sundays, and legal holidays are excluded. But the Rule remains ambiguous. It should say: "3 consecutive calendar days are added after the period " (3) The rule remains ambiguous as to the time when the "prescribed period" ends. If the last day is a Saturday, Sunday, or legal holiday, does it end only on the next day

that is none of those? Clarity can be achieved by saying: "The 3 days must be added before determining whether the last day of the period falls on a day that requires extension under Rule 6(a)."

03-CV-011, Peter D. Keisler, Assistant Attorney General, Civil Division, U.S. Department of Justice: Suggests one addition: "3 calendar days are added after the period." "[T]his addition will make absolutely clear the Committee's intention that parties include weekends and holidays when counting the three extra days."

03-CV-012, Alex Manners, CompuLaw: Ambiguities remain. First, the 3 additional days should be described as "calendar days," to ensure that Saturdays, Sundays, and legal holidays are counted. Second, it may be uncertain when a period ends if the last day is a Saturday, Sunday, or legal holiday. Are the 3 days added after the last day to act if there were no extension? This can be made clear by adding this at the end: "If the original period is less than 11 days, the original period is subject to Rule 6(a), whereby holidays and weekends are excluded from the computation, and then three calendar days are added."

03-CV-013, Federal Magistrate Judges Assn , by Hon. Louisa S Porter: Supports the proposal. But time calculations under Rule 6 are still "rather complex," and indeed "border on being labyrinthian and require 'finger counting,' a very fallible method." The Standing Committee and Advisory Committee should "revisit Rule 6 in its entirety with an eye toward promulgating a rule based in 'running time' tied to a calendar week or multiples thereof."

Rule 24(c)

Rule 24(c) and the Committee Note were published as follows:

Rule 24. Intervention

* * * * *

(c) Procedure. A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene. ~~When the constitutionality of an act of Congress affecting the public interest is drawn in question in any action in which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in Title 28, U.S.C., § 2403. When the constitutionality of any statute of a State affecting the public interest is drawn in question in any action in which that State or any agency, officer, or employee thereof is not a party, the court shall notify the attorney general of the State as provided in Title 28, U.S.C. § 2403. A party challenging the constitutionality of legislation should call the attention of the court to its consequential duty, but failure to do so is not a waiver of any constitutional right otherwise timely asserted.~~

Committee Note

New Rule 5.1 replaces the final three sentences of Rule 24(c), implementing the provisions of 28 U.S.C.A. § 2403. Section 2403 requires notification to the Attorney General of the United States when the constitutionality of an Act of Congress is called in question, and to the state attorney general when the constitutionality of a state statute is drawn in question.

Discussion Topics. There were no independent comments on the Rule 24(c) amendments, which were designed to complement adoption of Rule 5.1 to supersede the court-certification portion of Rule 24(c). Discussion of this topic should be in conjunction with Rule 5.1.

Rule 27(a)(2)

Rule 27. Depositions Before Action or Pending Appeal

(a) Before Action.

* * * * *

~~**(2) Notice and Service.** The petitioner shall thereafter serve a notice upon each person named in the petition as an expected adverse party, together with a copy of the petition, stating that the petitioner will apply to the court, at a time and place named therein, for the order described in the petition. At least 20 days before the date of hearing the notice shall be served either within or without the district or state in the manner provided in Rule 4(d) for service of summons; but if such service cannot with due diligence be made upon any expected adverse party named in the petition, the court may make such order as is just for service by publication or otherwise, and shall appoint, for persons not served in the manner provided in Rule 4(d), an attorney who shall represent them, and, in case they are not otherwise represented, shall cross-examine the deponent. If any expected adverse party is a minor or incompetent the provisions of Rule 17(c) apply.~~

(2) Notice and Service. At least 20 days before the hearing date, the petitioner must serve each expected adverse party with a copy of the petition and a notice stating the time and place of the hearing on the petition. The notice may be served either inside or outside the district or state in the manner provided in Rule 4. If service cannot be made with due diligence on an expected adverse party, the court may order service by publication or otherwise. The court must appoint an attorney to represent persons not served in the manner provided by Rule 4 and to cross-examine the deponent on behalf of persons not served and not otherwise represented. Rule 17(c) applies if any expected adverse party is a minor or is incompetent.

Committee Note

The outdated cross-reference to former Rule 4(d) is corrected to incorporate all Rule 4 methods of service. Former Rule 4(d) has been allocated to many different subdivisions of Rule 4. Former Rule 4(d) did not cover all categories of defendants or modes of service, and present Rule 4 reaches further than all of former Rule 4. But there is no reason to distinguish between the different categories of defendants and modes of service encompassed by Rule 4. Rule 4 service provides effective notice. Notice by such means should be provided to any expected adverse party that comes within Rule 4.

Other changes are made to conform Rule 27(a)(2) to current style conventions.

Discussion Topics. The comments all support the proposal as published. No new issues have appeared.

Summary of Comments: August 2003 Rule 27

03-CV-002 Jack E. Horsley, Esq.: The Rule 27 amendment is prudent.

03-CV-008, State Bar of California Committee on Federal Courts: Supports the published amendment.

03-CV-013, Federal Magistrate Judges Assn., by Hon. Louisa S Porter: Supports the changes. The style changes bring "much greater clarity."

Rule 45(a)

Rule 45. Subpoena

(a) Form; Issuance.

* * * * *

~~(2) A subpoena commanding attendance at a trial or hearing shall issue from the court for the district in which the hearing or trial is to be held. A subpoena for attendance at a deposition shall issue from the court for the district designated by the notice of deposition as the district in which the deposition is to be taken. If separate from a subpoena commanding the attendance of a person, a subpoena for production or inspection shall issue from the court for the district in which the production or inspection is to be made.~~

(2) A subpoena must issue as follows:

(A) for attendance at a trial or hearing, in the name of the court for the district where the trial or hearing is to be held;

(B) for attendance at a deposition, in the name of the court for the district where the deposition is to be taken, stating the method for recording the testimony; and

(C) for production and inspection, if separate from a subpoena commanding a person's attendance, in the name of the court for the district where the production or inspection is to be made.

* * * * *

Committee Note

This amendment closes a small gap in regard to notifying witnesses of the manner for recording a deposition. A deposition subpoena must state the method for recording the testimony.

Rule 30(b)(2) directs that the party noticing a deposition state in the notice the manner for recording the testimony, but the notice need not be served on the deponent. The deponent learns of the recording method only if the deponent is a party or is informed by a party. Rule 30(b)(3) permits another party to designate an additional method of recording with prior notice to the deponent and the other parties. The deponent thus has notice of the recording method when an additional method is designated. This amendment completes the notice provisions to ensure that a nonparty deponent has notice of the recording method when the recording method is described only in the deposition notice.

A subpoenaed witness does not have a right to refuse to proceed with a deposition due to objections to the manner of recording. But under rare circumstances, a nonparty witness might have a ground for seeking a protective order under Rule 26(c) with regard to the manner of recording or the use of the deposition if recorded in a certain manner. Should such a witness not learn of the manner of recording until the deposition begins, undesirable delay or complication might result. Advance notice of the recording method affords an opportunity to raise such protective issues.

Other changes are made to conform Rule 45(a)(2) to current style conventions.

Discussion Topics. One comment suggests that notice to a nonparty deponent is better effected by requiring that the deposition notice be served on the deponent. On balance, it may be better to adhere to the published proposal. Service of one instrument, the subpoena, confronts the deponent with one thing to read, not two.

Summary of Comments: August 2003 Rule 45

03-CV-006, Eugene F. Hestres, Esq.: The notice of taking the deposition states the method of recording and normally is served on a nonparty deponent. "Requiring that the Notice of the deposition be also served upon the non-party deponent would eliminate the need to amend Rule 45." Requiring that the subpoena state the method may create problems when a last-minute change is made in the method of recording. The deponent can always object.

03-CV-008, State Bar of California Committee on Federal Courts: Supports the published proposal.

03-CV-013, Federal Magistrate Judges Assn., by Hon. Louisa S Porter: Supports the proposal.

Supplemental Rules B, C

Rule B. In Personam Actions: Attachment and Garnishment

(1) When Available; Complaint, Affidavit, Judicial Authorization, and Process. In an in personam action:

(a) If a defendant is not found within the district when a verified complaint praying for attachment and the affidavit required by Rule B(1)(b) are filed, a verified complaint may contain a prayer for process to attach the defendant's tangible or intangible personal property — up to the amount sued for — in the hands of garnishees named in the process.

* * * * *

Committee Note

Rule B(1) is amended to incorporate the decisions in *Heidmar, Inc. v. Anomina Ravennate di Armamento Sp.A. of Ravenna*, 132 F.3d 264, 267-268 (5th Cir. 1998), and *Navieros Inter-Americanos, S.A. v. M/V Vasilia Express*, 120 F.3d 304, 314-315 (1st Cir. 1997). The time for determining whether a defendant is "found" in the district is set at the time of filing the verified complaint that prays for attachment and the affidavit required by Rule B(1)(b). As provided by Rule B(1)(b), the affidavit must be filed with the complaint. A defendant cannot defeat the security purpose of attachment by appointing an agent for service of process after the complaint and affidavit are filed. The complaint praying for attachment need not be the initial complaint. So long as the defendant is not found in the district, the prayer for attachment may be made in an amended complaint; the affidavit that the defendant cannot be found must be filed with the amended complaint.

Rule C. In Rem Actions: Special Provisions

* * * * *

(6) Responsive Pleading; Interrogatories.

* * * * *

(b) Maritime Arrests and Other Proceedings. In an in rem action not governed by Rule C(6)(a):

(i) A person who asserts a right of possession or any ownership interest in the property that is the subject of the action must file a verified statement of right or interest

(A) within 10 days after ~~the earlier of (1)~~ the execution of process, ~~or (2) completed publication of notice under Rule C(4),~~ or

(B) within the time that the court allows;

(ii) the statement of right or interest must describe the interest in the property that supports the person's demand for its restitution or right to defend the action;

(iii) an agent, bailee, or attorney must state the authority to file a statement of right or interest on behalf of another; and

(iv) a person who asserts a right of possession or any ownership interest must serve an answer within 20 days after filing the statement of interest or right.

* * * * *

Committee Note

Rule C(6)(b)(i)(A) is amended to delete the reference to a time 10 days after completed publication of notice under Rule C(4). This change corrects an oversight in the amendments made in 2000. Rule C(4) requires publication of notice only if the property that is the subject of the action is not released within 10 days after execution of process. Execution of process will always be earlier than publication.

Discussion Topics. The only comment supported the published proposals. No new issues have appeared.

Summary of Comments: August 2003 Supplemental Rules B, C

03-CV-013, Federal Magistrate Judges Assn., by Hon. Louisa S Porter: Supports both the Rule B and Rule C proposals.

THE MATERIALS FOR AGENDA ITEM #4 WILL BE

DISTRIBUTED TO YOU IN A SUBSEQUENT MAILING

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March 30, 2004

MEMORANDUM TO ADVISORY COMMITTEE ON CIVIL RULES

SUBJECT: *Proposed Forfeiture Supplemental Rule "G" and Conforming Amendments to Supplemental Rules "A," "C," and "E," and Rule 26(a)(1)(E)*

The attached materials include an introductory memorandum describing the background and principal issues arising from a proposed new Supplemental Rule "G," which consolidates various forfeiture provisions. The text of the draft new rule, conforming amendments, committee notes, and a copy of the Civil Asset Forfeiture Reform Act of 2000 (CAFRA) follow the introductory memorandum.

Notes of seven lengthy subcommittee conference calls and one meeting are attached, describing the subcommittee's consideration of the proposed amendments and new rule. Background materials also include letters and memoranda from the Department of Justice and representatives of the National Association of Criminal Defense Lawyers (NACDL). The Justice Department submitted the original proposal, and NACDL expressed concerns with some of its provisions. The attached correspondence from both the Justice Department and NACDL sets out the history of the subcommittee's actions addressing the concerns of both organizations. Finally, the materials include a memorandum analyzing the standing issues arising from forfeiture actions under the proposed new rule prepared by Ned Diver, the law clerk to Judge Anthony Scirica, former chair of the Standing Rules Committee.

John K. Rabiej

Attachments

SUPPLEMENTAL RULE "G"

Against the backdrop of a significant and growing amount of civil forfeiture litigation, the Forfeiture Subcommittee proposes draft Supplemental Rule G for publication. This introduction offers a brief history and review of issues. It is not intended here, even were it possible, to set out all the twists and turns of what has been a long and complex discussion over two years, numerous conference calls and a full meeting, not to mention the substantial and much appreciated contributions throughout of the Department of Justice (DOJ) and the National Association of Criminal Defense Lawyers (NACDL). For a full treatment, see Professor Cooper's excellent notes.

I

Although there have been numerous revisions to legal handling of forfeiture proceedings, two in particular led to discussions resulting in the proposed Supplemental Rule. The first is the amendment to Supplemental Rule C adding a subsection specifically addressing civil forfeiture. Until the 2000 amendments, the Rule prescribed a single set of provisions for civil forfeiture and in rem admiralty proceedings Recognizing the desirability of some differences in procedure, the 2000 amendments to this Rule changed subdivision (6), adding a new paragraph (a) for civil forfeiture proceedings and recasting the existing rule as paragraph (b) for *in rem* admiralty proceedings. *See,* Advisory Committee Note, Supplemental Rule C, 2000 Amendment, Subdivision 6. The second is the Civil Asset Forfeiture Reform Act of 2000, 18 U.S.C. § 983 *et seq.* (CAFRA), which introduced further procedural uniformity as well as some new defenses to forfeiture. Among other changes,.CAFRA raised the standard of proof required of the government in proving forfeitability, 18 U.S.C. § 983(c), and created a uniform innocent-owner defense, 18 U.S.C. § 983(d).

In light of these changes, DOJ argued that the time had come to organize existing forfeiture rules into a single, coherent, Supplemental Rule. Moreover, it can fairly be said that the frequency of forfeiture proceedings dwarfs the frequency of traditional admiralty or maritime proceedings. The sheer volume of such cases argues for bringing the forfeiture provisions into a Rule distinct from the admiralty rules As matters stood, the rules were scattered over several Supplemental Rules and statutes. Statutes governing litigation of the merits of a civil forfeiture action made reference to provisions of the Supplemental Rules. *See, eg,* 28 U.S.C. § 2461(b), 18 U.S C § 981(b)(2)(A), 18 U.S.C. § 983(a)(3), 18 U.S.C. § 983(a)(4). Added to this was a developed body of case law interpreting the statutes in light of requirements articulated by the Supreme Court regarding the Fourth Amendment, the Due Process Clause of the Fifth Amendment, the jury trial right of the Seventh Amendment, and the Excessive Fines Clause of the Eighth Amendment.

DOJ urged that the Supplemental Rules should be amended to resolve conflicts between the statutory procedures governing civil judicial forfeitures and the provisions of the current Rule C DOJ argued that new provisions are needed to fill gaps in the existing rules that had become apparent

in the course of litigation or have arisen due to the enactment of new forfeiture statutes, such as CAFRA. Moreover, DOJ contended that new rules are needed to address issues unique to civil forfeiture cases that arise out of the application of constitutional requirements identified by the courts, such as the requirement that direct notice of the forfeiture action be sent to each person appearing to have an interest in the property subject to forfeiture. DOJ further argued that the current rules fail to address problems that arise out of the application of the forfeiture laws to new situations not contemplated by traditional admiralty procedures, such as forfeiture actions directed against assets located in foreign countries. The current rules should also be updated to take advantage of advances in technology such as the possibility of providing notice on the Internet.

Moreover, DOJ sought to consolidate all of the rules governing civil forfeiture cases in one place to aid in the administration of justice. Now the rules applicable to civil forfeitures are interspersed with rules applicable only in traditional admiralty cases and scattered through the Supplemental Rules. The current mixture of rules could be distracting, and could detract from effective use of the Supplemental Rules in both forfeiture and traditional admiralty proceedings.

Finally, DOJ urged that separating the rules governing civil forfeitures from those governing traditional admiralty cases, over and beyond the separation already achieved in Supplemental Rule C(6), would avoid the confusion and unintended consequences of admiralty language being applied in civil forfeiture. It would tend to avoid the confusion to admiralty proceedings which could occur from modifying of traditional admiralty terms and concepts in non-admiralty situation.

In light of these considerations, this subcommittee was assigned to consider DOJ's proposed Rule G. The new Rule is intended to bring together the specific forfeiture provisions in the Supplemental Rules, particularly Rules C and E. It addresses Constitutional requirements for notice and for excessive fines. It responds to the requirements of CAFRA. It modernizes provisions for foreign country and out-of-district forfeitures and provides for publication on the Internet.

The subcommittee sought out NACDL's reactions to DOJ's proposals. These were carefully considered and extensively debated in the course of arriving at the draft Rule G. Some of DOJ's proposals were not accepted. An example was the proposal to depart from recent decisions that adopt an Article III minimum threshold for standing to file a claim. DOJ contended that the standard should be stricter in order to address the problem of filing a claim through a strawman or nominee, enabling the wrongdoer to conceal his identity. The subcommittee rejected this proposal as it was an attempt to define substantive rights, which is outside its authority. Throughout this process the concern was with whether a proposed rule would change existing law or substantive rights.

The draft Rule G is the outcome of those long deliberations It collects the rules in one place and provides a more complete procedural system for forfeitures without making substantive changes in the law or established rights After much work, the subcommittee feels it is ready for publication.

II

In its deliberations on draft Rule G the Advisory Committee might particularly wish to focus on the following key points and issues, outlined by reference to subdivisions of the proposed Rule:

Subdivision (1). Anything specific in G prevails over the general provisions of the other supplemental rules and the Civil Rules. For example, Subdivision (6) interrogatories are not subject to the Rule 26(d) discovery moratorium.

Subdivision (2). The restatement of the pleading standard in (2)(d) reflects developed case law

Subdivision (3). This is the first time the rules have required that a judge find probable cause to issue an arrest warrant in some circumstances. For discussion, two things: First, and relatively minor, is that the rule does not say anything precise about how and when a warrant is executed after it is transmitted to an appropriate authority in a foreign country. Second, and important, is that the court may order that the warrant not be executed "as soon as practicable" when the complaint is sealed or the action is stayed. NACDL contended that this provision could be used as "backdoor" authority to issue sealing orders and stays. The Committee Note responds by saying that the rule does not address the propriety of a seal or stay. It only reflects what happens when the court seals or stays.

Subdivision (4)(a). Note that the Government is given an option to publish newspaper notice – it may not be published where the action was filed, or not where the property was seized, or where property not seized is located. The reason is that circumstances will dictate which place is most likely to work. Note further that the Rule provides for publication on a Government forfeiture web site. The web site does not yet exist. But a well-designed web site likely will be a more effective means of notice than newspaper publication.

Subdivision (4)(b). This is the first-ever provision in the Rules for direct notice to potential claimants. NACDL thinks we should require formal Rule 4 service of process. The draft says that it is enough to "send" notice "by means reasonably calculated to reach the potential claimant." That choice may warrant discussion. The draft also provides detailed guidance for specific recurring situations. As to an imprisoned potential claimant, it requires that notice be sent to the prison. The Committee Note observes that the Rule does not address the due-process questions that may arise from inadequate prison procedures for delivering the notice to the inmate.

Subdivision (5). Note in 5(b) the provision, in line with pre-CAFRA authority, that a claimant may file a Rule 12 motion within the time to answer, suspending the time to answer. DOJ wants an answer to help prepare a motion to strike the claim for lack of standing. The subcommittee believes that the claim and regular motion practice, together with subdivision (6) interrogatories, will provide all that the Government needs

Subdivision (6). The special interrogatories addressed to the elements of claim standing are much narrower than the wide-open interrogatories that can be served with the complaint in an admiralty action. This provision is one illustration of the reasons to separate forfeiture practice. The only remaining pont of contention seems to be the time the Government is given to serve the interrogatories after a claimant moves to dismiss, and the time it is given to respond to the motion to dismiss after answers to the interrogatories are served.

Subdivision (7). Section (7)(b)(i)(C) provides that one ground to sell the property before deciding on forfeiture is that there is a default on mortgage or tax obligations. This is an addition to the admiralty model. The competing concerns are addressed in the Committee Note.

Subdivision (8). These provisions address the Government's interest in resolving claim standing before being forced to prove the forfeiture claim. The question raised by subdivision (7) have been hotly contested. The draft and Committee North take a neutral stance with respect to several questions. As compared to earlier drafts, the rule does not take or imply any position on at least these questions: (1) whether hardship release can be ordered in a case not governed by § 983(f); (2) whether Criminal Rule 41(g) has any role to play; and (3) whether there is a remedy to return property held for forfeiture on the ground that it was unlawfully seized – either in a case covered by the § 983 hardship-return provisions or in a case that is outside § 983(f).

Subdivision (9). Jury trial must be demanded under Rule 38.

Draft Supplemental Rule G

G. Forfeiture Actions In Rem

(1) Application. This rule governs a forfeiture action in rem arising from a violation of a federal statute To the extent that this rule does not address an issue, Supplemental Rules C and E and the Federal Rules of Civil Procedure also apply.

(2) Complaint. The complaint must:

(a) be verified,

(b) state the grounds for subject-matter jurisdiction, in rem jurisdiction over the defendant property, and venue;

(c) describe the property with reasonable particularity, and if the property is tangible~~;~~ state its location when any seizure occurred and ~~—~~if different — its location when the action is filed; and

(d) identify the statute under which the forfeiture action is brought~~;~~; and

(e) state sufficiently detailed facts to support a reasonable belief that the government will be able to meet its burden of proof at trial.[1]

(3) Judicial Authorization and Process.

(a) Real Property. If the defendant is real property, the government must proceed under 18 U.S.C. § 985.

(b) Other Property; Arrest Warrant. If the defendant is not real property:

(i) the clerk must issue a warrant to arrest the property, if it is in the government's possession;

(ii) the court – on finding probable cause – must issue a warrant to arrest the property if it is not in the government's possession and is not subject to a judicial restraining order; and

(iii) no warrant is necessary if the property is subject to a judicial restraining order.

[1]Should the "state sufficiently detailed facts" part be broken out as a separate paragraph (e)? It seems separate from identifying the statute

(c) Execution of Process.

(i) The warrant and any supplemental process must be delivered to a person or organization authorized to execute it, who may be: (A) a marshal; (B) someone under contract with the United States; (C) someone specially appointed by the court for that purpose; or (D) any United States officer or employee.

(ii) The person or organization authorized under (c)(i) must execute the warrant and any supplemental process upon property in the United States as soon as practicable unless·

(A) the property is in the government's possession or

(B) the court orders a different time when the complaint is under seal, the action is stayed before the warrant and supplemental process are executed, or the court finds other good cause.

(iii) The warrant and any supplemental process may be executed within the district or, when authorized by statute, outside the district.

(iv) If execution of a warrant on property not in the United States is required, the warrant may be transmitted to an appropriate authority for serving process where the property is located.[2]

(4) Notice.

(a) Notice by Publication.

(i) When Publication is Required. No judgment of forfeiture may be entered unless the government has published notice of the action within a reasonable time after filing the complaint, or at a time the court orders. But notice need not be published if:

(A) the defendant property is worth less than $1,000 and direct notice is sent under subdivision (4)(b) to every person the government can reasonably identify as a potential claimant; or

[2]What is shown as (iv) here was (ii) in earlier drafts Marcus suggested the relocation, and asked whether words should be added to (i) to make clear that (i), (ii), and (iii) apply to property located in the United States "(i) If the property is in the United States, ~~T~~the warrant * * * "

(B) the court finds that the cost of publication exceeds the property's value and that other means of notice would satisfy due process.

(ii) Content of the Notice. Unless the court orders otherwise, the notice must:

(A) describe the property with reasonable particularity;

(B) state the times under subdivision (5) to file a claim and to answer; and

(C) name the government attorney to be served with the claim and answer.

(iii) Frequency of Publication. Published notice must appear

(A) once a week for three consecutive weeks, or

(B) only once if, before the action was filed, notice of nonjudicial forfeiture of the same property was published on an authorized internet government forfeiture site for a period of not less than 30 days, or in a newspaper of general circulation for three consecutive weeks in a district where publication is authorized under subdivision (4)(a)(iv).

(iv) Means ~~and Method~~ of Publication. The government should select from the following options a means ~~and method~~[3] of publication reasonably calculated to be most effective to notify potential claimants of the action

(A) if the property is in the United States, notice must be published in a newspaper generally circulated in ~~a~~ the district where the action is filed, where the property was seized, or where property that was not seized is located;

(B) if the property is not in the United States, notice must be published in a newspaper generally circulated in a district where the action is filed, in a newspaper generally circulated in the country where the property is located, or in legal notices published and generally circulated in the country where the property is located, or

[3] Do we need both "means" and "method"? Why does not one or the other encompass both the medium, the form of presentation, and the message? (We use "means" in (4)(a)(i)(B))

(C) in lieu of (A) and (B), the government may post notice on a designated internet government forfeiture site for not fewer than 30 consecutive days.

(b) Notice to Known Potential Claimants.

(i) Direct Notice Required. The government must send notice of the action and a copy of the complaint to any person who, on the facts known to the government at any time before the time for filing a claim under subdivision (5)(a)(ii)(B) expires, reasonably appears to be a potential claimant.

(ii) Content of the Notice. The notice must state:

(A) the date when the notice is sent;

(B) a deadline for filing a claim, at least 35 days after the notice is sent;

(C) that an answer must be filed no later than 20 days after filing the claim;[4] and

(D) the name of the government attorney to be served with the claim and answer.

(iii) Sending Notice.

(A) The notice must be sent by means reasonably calculated to reach the potential claimant~~, including first-class mail, commercial carrier, or electronic mail~~.

(B) Notice may be sent to the potential claimant or to counsel representing the potential claimant with respect to the seizure of the property or in a related investigation, administrative forfeiture proceeding, or criminal case.

(C) Notice to a potential claimant who is incarcerated must be sent to the place of incarceration ~~[by certified mail, return receipt requested]~~.

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[4]Do we need to adjust this to reflect the change in (5)(b) that recognizes the right to file a motion within the time provided to answer? "that an answer or a motion under Rule 12 must be filed no later than 20 days * * *"? [Marcus would add these words]

(D) Notice to a person arrested in connection with an offense giving rise to the forfeiture,[5] who is not incarcerated when notice is sent, may be sent to the address that person last gave to the agency that arrested or released the person.

(E) Notice to a person from whom the property was seized, who is not incarcerated when notice is sent, may be sent to the last address that person gave to the agency that seized the property.

(iv) When Notice is Sent. ~~The n~~Notice sent by the following means[6] is sent on the date when it is placed in the mail, delivered to a commercial carrier, or ~~sent~~ transmitted by electronic mail.

(v) Failure to Send Notice. A potential claimant who had actual notice of a forfeiture action may not oppose or seek relief from forfeiture for the government's failure to give the notice this subdivision requires.

(5) Responsive Pleadings.

(a) Filing a Claim.

(i) A person who asserts an interest in the defendant property may contest the forfeiture by filing a claim in the court where the action is pending. The claim must:

(A) identify the specific property claimed;

(B) identify the claimant and state the claimant's interest in the property;

(C) be signed under penalty of perjury by the person making the claim; and

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[5]commas are used in (E). Some of us would prefer to delete them in both (D) and (E) But we should do the same thing each place

[6]We need to adjust somehow for deletion of the reference to first-class mail, commercial carrier, or electronic mail from (iii)(A) This is one possibility It leaves "following" fulfilled only by implication Alternatives "Notice sent by these means is complete * * * " Or — much longer — "Notice sent by first-class mail is sent on the date when it is placed in the mail, notice send by commercial carrier is sent on the date when it is delivered to the carrier, and notice sent by electronic mail is sent on the date when it is transmitted " The Committee Note is designed to cover for the manifest incompleteness of this list of means

(D) be served on the government attorney designated under subdivision (4)(a)(ii)(C) or (b)(ii)(D).

(ii) Unless the court for good cause sets a different time, the claim must be filed:

(A) by the time stated in a direct notice sent under subdivision (4)(b),

(B) if notice was published but direct notice was not sent to the claimant or claimant's counsel, no later than 30 days after final publication of notice under subdivision (4)(a), or

(C) if direct notice was not sent and notice was not published:[7]

(1) if the property was in government possession when the complaint was filed, no later than 60 days after the complaint was filed, not counting any time when the complaint was under seal[8]; or

(2) if the property was not in government possession when the complaint was filed, no later than 60 days after the government complied with 18 U.S.C. § 985(c) as to real property, or after process was executed on the property under subdivision (3).

(iii) A claim filed by a person asserting an interest as a bailee must identify the bailor.

(b) Answer. A claimant must serve and file an answer to the complaint or a motion under Rule 12 within 20 days after filing the claim. A claimant waives an objection

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[7]Would this be better as. "If notice was not published and direct notice was not sent to the claimant "? That would parallel (B), which begins "if notice was published " And it would make it clear that this provision applies claimant-by-claimant If direct notice is sent to potential claimant A, but not to potential claimant B, potential claimant B should be able to claim the benefit of this provision [Marcus agrees that this change would improve the rule]

[8]A tough question (3)(c)(iii)(B) authorizes the court to order that the warrant not be executed when the complaint is sealed or when the action is stayed before the warrant is executed Should we have a parallel provision here, on the theory that if the action is stayed before execution of the warrant we are deprived of the alternative means of notice that frequently arises from execution? I think we can say that without much difficulty "not counting any time when the complaint was under seal or when the action was stayed before execution of a warrant issued under subdivision (3)(b) " (This formula accounts for cases where a warrant is not required — the property is real, or is subject to a judicial restraining order)

to in rem jurisdiction or to venue that is not ~~stated~~ made by motion[9] or stated in the answer.

(6) Special Interrogatories.

(a) Time and Scope. The government may serve special interrogatories under Rule 33 limited to the claimant's identity and relationship to the defendant property, the claimant's relationship to any bailor identified by the claimant, and such bailor's relationship to the defendant property.[10] The government may serve the interrogatories without leave of the court at any time after the claim is filed and before discovery is closed. But if the claimant serves a motion to dismiss the action, the government must serve the interrogatories within 20 days after the motion is served.[11]

(b) Answers, Objections. Answers or objections to these interrogatories must be served within 20 days after the interrogatories are served.

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[9]Do we need anything more elaborate to say that the practice is the same as it is for a personal jurisdiction objection. if you make a motion and do not include in rem jurisdiction, you waive it If you begin by answer and do not include in rem jurisdiction, you waive it unless salvaged by an amendment available as a matter of course, see Rules 12(g) and (h)(1)? This same question is noted in the draft Committee Note

[10]This part appeared for the first time after the December 19 draft Where it came from I do not know We could say it in the Committee Note, without saying it so elaborately in the rule. The rule allows interrogatories limited to the claimant's identity and relationship to the property Surely that should include an interrogatory that calls for full description of a relationship by way of bailment Remember that a bailee claimant must identify the bailor, (5)(a)(iii) If we do leave it in the rule, we should make at least these modest edits "and ~~such~~ the bailor's relationship to the ~~defendant~~ property "

Marcus points out that if we delete the shaded language, we can efficiently combine the first two sentences: "The government may serve special interrogatories under Rule 33 limited to the claimant's identity and relationship to the defendant property without leave of court at any time after the claim is filed and before discovery is closed."

[11]Marcus asks whether we should do something to make it clear that the government can serve regular, not "special," interrogatories after the 20-day window closes. We seem to need to say three things· (1) special interrogatories can be served during the Rule 26(d) discovery moratorium, (2) the "special" interrogatory right cuts off 20 days after the claimant serves a motion to dismiss, and (3) interrogatories on these subjects may be served at any time before the close of the discovery period

Perhaps this

At any time after a claim is filed the government may, without leave of court, serve special interrogatories under Rule 33 limited to the claimant's identity and relationship to the defendant property But if the claimant serves a motion to dismiss the action, the government must serve the [special] interrogatories within 20 days after the motion is served, after that time interrogatories addressed to these questions must be served as regular Rule 33 interrogatories

(c) Response Deferred. The government need not respond to a claimant's motion to dismiss the action under subdivision (8)(b) until 20 days after the claimant has answered these interrogatories.

(7) Preservation and Disposition of Property; Sales.

(a) Preservation of Property. When the government does not have actual possession of the defendant property or of property subject to precomplaint restraint,[12] the court, on motion or on its own, may enter any order necessary to preserve the property and to prevent its removal or encumbrance.

(b) Interlocutory Sale or Delivery.

(i) Order to Sell. On motion by a party or a person having custody of the property, the court may order all or part of the property sold, if.

(A) the property is perishable or at risk of deterioration, decay, diminution in value,[13] or injury by being detained in custody pending the action;

(B) the expense of keeping the property is excessive or disproportionate to its fair market value;

(C) the property is subject to a mortgage or to taxes on which the owner is in default; or

(D) the court finds other good cause.

(ii) By Whom Sale Made. A sale must be made by an agency of the United States that has custody of the property or the agency's contractor, or by any person the court designates

(iii) Sale Proceeds Sale proceeds are a substitute res subject to forfeiture in place of the property that was sold. The proceeds must be held in an interest-

[12]The subcommittee indicated that a committee note will explain that "pre-complaint restraint" includes pre-complaint restraining orders, notices of lis pendens, posting, and any other device intended to preserve property for anticipated forfeiture proceedings "

[13]The draft Committee Note observes that the subcommittee voted to delete "diminution in value " It seems never to have come out The Committee Note offers advice on administration of this provision The cogency of that advice, as it may be improved, may bear on the desirability of retaining this provision

bearing account maintained by the Attorney General pending the conclusion of the forfeiture action.

(iv) Sale Procedures. The sale is governed by Chapter 127 of title 28, United States Code (28 U.S.C. §§ 2001 et seq), unless all parties, with the court's approval, agree to the sale, aspects of the sale, or different procedures.

(v) Delivery. The court, on a claimant's motion, may order that the property be delivered to the claimant pending the conclusion of the action if the claimant shows circumstances that would permit sale under (i) and gives security under these rules.

(c) Disposition of Forfeited Property. Upon entry of a forfeiture judgment, the property or proceeds from selling the property must be disposed of as provided by law.

(8) Motions.

(a) Motion to Suppress Use of the Property as Evidence. If the defendant property was seized, a party with standing to contest the lawfulness of the seizure under the Fourth Amendment[14] may move to suppress use of the property as evidence. Suppression does not affect forfeiture of the property based on independently derived evidence.

(b) Motion to Dismiss the Complaint.

(i) A claimant who establishes standing to contest forfeiture may move to dismiss the action under Rule 12(b).

(ii) A complaint may not be dismissed on the ground that the government did not have adequate evidence at the time the complaint was filed to establish

[14] "under the Fourth Amendment" is new from the December 19 draft Probably it is meant to invoke Fourth Amendment standing tests If so, and if we want to keep it — an uncertain point — it might better be "with standing under the Fourth Amendment to contest the lawfulness of the seizure " (Heim would delete the reference to the Fourth Amendment if the Fourth Amendment is the only source of suppression-standing, we do not need the reference If there is some other basis for standing, this could be confusing [Note, anticipating the Criminal Rule 41(g) question, that there might be a difference between Fourth Amendment standing to suppress and Fourth Amendment standing to recapture An owner of property always ought to have standing to demand return I am not clear whether an owner always has standing, based on a reasonable expectation of privacy, to seek suppression There is no apparent need to face that question]

the forfeitability of the property. The adequacy of the complaint is governed by the requirements of subdivision (2)(b).[15]

(c) Motion to Strike a Claim or Answer.

(i) At any time before trial, the government may move to strike a claim or answer:

(A) for failure to comply with subdivisions (5) or (6); or

(B) because the claimant lacks standing to contest the forfeiture.

(ii) The government's motion must be decided before any motion by the claimant to dismiss the action

(iii) If, because material facts are in dispute, a motion under (i)(B) cannot be resolved on the pleadings, the court must conduct a hearing. The claimant has the burden of establishing standing based on a preponderance of the admissible evidence.

(d) Petition[16] for Release of Property ~~Pending Trial.~~[17]

(i) If an agency of the United States or an agency's contractor holds property for judicial or nonjudicial forfeiture under a statute governed by 18 U.S.C. § 983(f),[18] a person who has filed a claim to the property may petition for its release under ~~18 U.S.C.~~ § 983(f).

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[15]This sentence is new from the December 19 draft It does not seem to pass the Style tests that at times of real convenience permit a redundant cross-reference. But if we keep it, we should at least delete a few words "The adequacy of the complaint is governed by ~~the requirements of~~ subdivision(2)(b) "

[16]Earlier drafts referred to this as a "motion " "Petition" appears in the Civil Rules, see Rule 27, but Rule 7(b) tells us that an application to the court for an order shall be by motion The only reason for using "petition" here is that § 983(f) uses the term

[17]The rule applies to a petition for return before a complaint is filed "Pending trial" seems misleading We could say "Before Filing or Pending Trial," but that does not seem necessary [Heim favors deleting "pending trial "]

[18]These words are added to support elimination of (iv) Paragraph (d) applies only to a § 983(f) petition It says nothing about actions exempt from § 983(f)

(ii) If a petition for release is filed before a judicial forfeiture action is filed against the property, the petition may be filed either in the district where the property was seized; or in the district where a warrant for the seizure of the property issued. If a judicial forfeiture action against the property is later filed in another district – or if the government shows that the action will be filed in another district – the petition may be transferred to that district ~~in accordance with~~ under 28 U.S.C. § 1404

(iii) In an action to which 18 U.S.C. § 983(f) applies, a petition under § 983(f) is the sole means to seek return of lawfully seized[19] property to the claimant's custody pending trial. ~~Federal Rule of Criminal Procedure 41(g) does not apply.~~[20]

~~**(iv) No petition for release may be made under this subdivision in an action exempted from the Civil Asset Reform Act of 2000 by 18 U.S.C. § 983(i).**~~

(e) Excessive Fines. A claimant may seek to mitigate a forfeiture under the Eighth Amendment Excessive Fines Clause by motion for summary judgment or by motion made after entry of a forfeiture judgment if:

(i) the claimant has pleaded the defense under Rule 8~~(c)~~,[21] and

(ii) the parties have had the opportunity to conduct civil discovery on the defense

(9) Trial.

Trial is to the court; unless any party ~~makes a timely~~ demands ~~for a~~[22] trial by jury under Rule 38

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[19]These words are intended to prevent any argument that (8)(d) has anything to say about remedies for unlawful seizure A brief statement should be in the Committee Note

[20]All participating members of the Subcommittee voted to delete this sentence on March 12

[21]The reference to subdivision (c) should have been stricken Rule 8(b) also requires that the answer state defenses to the claim

[22]Invoking Rule 38 suffices to include the "timely demand" part

Committee Note

Rule G is added to bring together the central procedures that govern civil forfeiture actions. Civil forfeiture actions are in rem proceedings, as are many admiralty proceedings As the number of civil forfeiture actions has increased, however, reasons have appeared to create sharper distinctions within the framework of the Supplemental Rules. Civil forfeiture practice will benefit from distinctive provisions that express and focus developments in statutory, constitutional, and decisional law. Admiralty practice will be freed from the pressures that arise when the needs of civil forfeiture proceedings counsel interpretations of common rules that may not be suitable for admiralty proceedings.

Rule G generally applies to actions governed by the Civil Asset Forfeiture Reform Act of 2000 (CAFRA) and also to actions excluded from it. The rule refers to some specific CAFRA provisions; if these statutes are amended, the rule should be adapted to the new provisions during the period required to amend the rule.

Rule G is not completely self-contained. Subdivision (1) recognizes the need to rely at times on other Supplemental Rules and the place of the Supplemental Rules within the basic framework of the Civil Rules.

Supplemental Rules A, C, and E are amended to reflect the adoption of Rule G.

Subdivision (1)

Rule G is designed to include the distinctive procedures that govern a civil forfeiture action. Some details, however, are better supplied by relying on Rules C and E. Subdivision (1) incorporates those rules for issues not addressed by Rule G. This general incorporation is at times made explicit — subdivision (7)(b)(v), for example, invokes the security provisions of Rule E. But Rules C and E are not to be invoked to create conflicts with Rule G. They are to be used only when Rule G, fairly construed, does not address the issue.

The Civil Rules continue to provide the procedural framework within which Rule G and the other Supplemental Rules operate. Both Rule G(1) and Rule A state this basic proposition. Rule G, for example, does not address pleadings amendments. Civil Rule 15 applies, in light of the circumstances of a forfeiture action.

Subdivision (2)

Rule E(2)(a) requires that the complaint in an admiralty action "state the circumstances from which the claim arises with such particularity that the defendant or claimant will be able, without moving for a more definite statement, to commence an investigation of the facts and to frame a responsive pleading." Application of this standard to civil forfeiture actions has evolved to the standard stated in subdivision (2)(d). The complaint must state sufficiently detailed facts to support

a reasonable belief that the government will be able to meet its burden of proof at trial. See *U.S. v. Mondragon*, 313 F.3d 862 (4th Cir.2002). Subdivision (2)(d) carries this forfeiture case law forward without change.

Subdivision (3)

Subdivision (3) governs in rem process in a civil forfeiture action.

Paragraph (a). Paragraph (a) adopts the provisions of 18 U.S.C. § 985 for all civil actions to forfeit real property. [It is desirable to adhere to these provisions as a uniform procedure for actions that are not directly covered by the statute.][23]

Paragraph (b). Paragraph (b) addresses arrest warrants when the defendant is not real property. Subparagraph (i) directs the clerk to issue a warrant if the property is in the government's possession. If the property is not in the government's possession and is not subject to a restraining order, subparagraph (ii) provides that a warrant issues only if the court finds probable cause to arrest the property This provision departs from former Rule C(3)(a)(i), which authorized issuance of summons and warrant by the clerk without a probable-cause finding. The probable-cause finding better protects the interests of persons interested in the property. Subparagraph (iii) recognizes that a warrant is not necessary if the property is subject to a judicial restraining order. The government remains free, however, to seek a warrant if it anticipates that the restraining order may be modified or vacated.

Paragraph (c). Subparagraph (ii) reflects the uncertainty surrounding service of an arrest warrant on property not in the United States. It is not possible to identify in the rule the appropriate authority for serving process in all other countries. Transmission of the warrant to an appropriate authority, moreover, does not ensure that the warrant will be executed. At times, indeed, a foreign authority's representation that service has been made is followed by a showing that service was not made. The rule requires only that the warrant be transmitted to an appropriate authority.

Subparagraph (iii) requires that the warrant and any supplemental process be served as soon as practicable unless the property is already in the government's possession. But it authorizes the court to order a different time. The authority to order a different time recognizes that the government may have secured orders sealing the complaint in a civil forfeiture action or has won a stay after filing. The seal or stay may be ordered for reasons, such as protection of an ongoing criminal investigation, that would be defeated by prompt service of the warrant. Subparagraph (iii) does not reflect any independent ground for ordering a seal or stay, but merely reflects the consequences for execution when sealing or a stay is ordered. A court also may order a different time for service if good cause is shown for reasons unrelated to a seal or stay.

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[23]This sentence makes sense only if the actions that are exempted from other CAFRA provisions also are exempted from § 985

Subdivision (4)

Paragraph (a). Paragraph (a) reflects the traditional practice of publishing notice of an in rem action.

Subparagraph (i) recognizes two exceptions to the general publication requirement. Publication is not required if the defendant property is worth less than $1,000 and direct notice is sent to [all] potential claimants as required by subdivision (4)(b).[24] Publication also is not required if the cost would exceed the property's value and the court finds that other means of notice would satisfy due process. Publication on a government-established internet forfeiture site, as contemplated by subparagraph (iv), would be at a low marginal publication cost, which would likely be the cost to compare to the property value.

Subparagraph (iv) states the basic criterion for selecting the means and method of publication. The purpose is to adopt a means reasonably calculated to reach potential claimants A good-faith choice of the means most likely to reach potential claimants at a cost reasonable in the circumstances suffices.

If the property is in the United States and newspaper notice is chosen, publication may be where the action is filed, where the property was seized, or — if the property was not seized — where the property is located. Choice among these places is influenced by the probable location of potential claimants.

If the property is not in the United States, account must be taken of the sensitivities that surround publication of legal notices in other countries. A foreign country may forbid local publication. If potential claimants are likely to be in the United States, publication in the district where the action is filed may be the best choice. If potential claimants are likely to be located abroad, the better choice may be publication by means generally circulated in the country where the property is located

Newspaper publication is not a particularly effective means of notice for most potential claimants. Its traditional use is best defended by want of affordable alternatives Paragraph (iv)(C) contemplates a government-created internet forfeiture site that would provide a single easily identified means of notice. Such a site could allow much more direct access to notice as to any specific property than publication provides. As with other forms of published notice, internet publication should not be the sole means of publication if the government believes that there are potential claimants who lack ready access and who will not receive notice under subdivision (4)(b).[25]

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[24]This seems the sense of (4)(a)(1)(A) Notice should be sent to every person the government can reasonably identify as a potential claimant If the government knows of more than one potential claimant and sends (4)(b) notice to fewer than all, it should not get a pass on publication Should the text be made more explicit?

[25]Is this undesirable advice?

Paragraph (b) Paragraph (b) is entirely new. For the first time, Rule G expressly recognizes the due process obligation to provide notice to any person who reasonably appears to be a potential claimant.

Subparagraph (i) states the obligation to send notice. Most potential claimants will be known to the government because they have filed claims during the administrative forfeiture stage. Notice must be given, however, no matter what source of information makes it reasonably appear that a person is a potential claimant. The duty to give notice terminates when the time for filing a claim expires.

Notice of the action does not require formal service of summons in the manner required by Rule 4 to initiate a personal action. The process that begins an in rem forfeiture action is addressed by subdivision (3). This process commonly gives notice to potential claimants. Publication of notice is required in addition to this process. Due process requirements have moved beyond these traditional means of notice, but are satisfied by practical means that are reasonably calculated to accomplish actual notice.[26]

Subparagraph (ii)(B) directs that the notice state a deadline for filing a claim that is at least 35 days after the notice is sent. This provision applies both in actions that fall within 18 U.S.C. § 983(a)(4)(A) and in other actions. Section 983(a)(4)(A) states that a claim should be filed no later than 30 days after service of the complaint. The variation introduced by subparagraph (ii)(B) reflects the procedure of § 983(a)(2)(B) for nonjudicial forfeiture proceedings. The nonjudicial procedure requires that a claim be filed "not later than the deadline set forth in a personal notice letter (which may be not earlier than 35 days after the date the letter is sent) * * *." This procedure is as suitable in a civil forfeiture action as in a nonjudicial forfeiture proceeding. Thirty-five days after notice is sent ordinarily will extend the claim time by no more than a brief period, a claimant anxious to expedite proceedings can file the claim before the deadline, and the government has flexibility to set a still longer period when circumstances make that desirable.[27]

Subparagraph (iii) begins by stating the basic requirement that notice must be sent by means reasonably calculated to reach the potential claimant. No attempt is made to list the various means that may be reasonable in different circumstances.[28] It may be reasonable, for example, to rely on

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[26]Should we say, here or elsewhere, that the means chosen must be at least as likely to be effective as other feasible and customary alternatives?

[27]Should the Note say something defensive to the effect that the incidental reference to "service" in § 983(a)(4)(B) should not be taken to mandate that notice to "served," not "sent"? The July 15 discussion noted that (a)(4)(B) does not say what "service" is, nor about how it should be accomplished "Service" of a complaint by mail is familiar, "service" of papers after the complaint ordinarily is accomplished by mail or more newfangled means

[28]The January 2004 draft carried forward "including first-class mail, commercial carrier, or electronic mail " Deletion of these examples seems to moot another unfinished chore The July 15 notes reflect a determination to consider an alternative that would permit e-mail notice only with the potential claimant's consent

means that have already been established for communication with a particular potential claimant. The government's interest in choosing a means likely to accomplish actual notice is bolstered by its desire to avoid post-forfeiture challenges based on arguments that a different method would have been more likely to accomplish actual notice. Flexible rule language accommodates the rapid evolution of communications technology.

Notice may be directed to a potential claimant through counsel, but only to counsel already representing the claimant with respect to the seizure of the property, or in a related investigation, administrative forfeiture proceeding, or criminal case. This provision should be used only when notice to counsel reasonably appears to be the most reliable means of notice.

Subparagraph (iii)(C) reflects the basic proposition that notice to a potential claimant who is incarcerated must be sent to the place of incarceration Notice directed to some other place, such as a pre-incarceration residence, is less likely to reach the potential claimant. This provision does not address due process questions that may arise if a particular prison has deficient procedures for delivering notice to prisoners. See *Dusenbery v. U.S.*, 534 U.S. 161 (2002).

Items (D) and (E) of subparagraph (iii) authorize the government to rely on an address given by a person who is not incarcerated. The address may have been given to the agency that arrested or released the person, or to the agency that seized the property. The government is not obliged to undertake an independent investigation to verify the address. But if the government has a reasonable basis for believing that a different address is likely to be better, the government should use the different address.

Subparagraph (iv) identifies the date on which notice is considered to be sent for some common means, without addressing the circumstances for choosing among the identified means or other means. The date of sending should be determined by analogy for means not listed. Facsimile transmission, for example, is sent upon transmission. Notice by personal delivery is sent on delivery.[29]

The March 12 discussion began by suggesting that the Note should discuss the use of first-class mail, commercial carriers, e-mail, and the advantages of return receipts The ensuing discussion was more ambiguous If something is to be added, it might look like this: "The circumstances of a particular action affect the suitability of various means of notice Ordinarily notice by postal mail or commercial carrier should be attempted by means that require a return receipt, recognizing that some recipients will refuse to accept delivery and that ordinary mail may be a reasonable fallback E-mail may be suitable if there is a good current address and reason to believe that the recipient relies on e-mail to conduct important affairs " [LHR This may be useful, but could become dated]

[29]This paragraph reflects the incompleteness of (4)(b)(iv) Use of the Note to reflect obvious gaps in the rule is always awkward, but we cannot expect to draft a rule free of all gaps

It would be possible to refer to § 983(a)(2)(B), which provides that a personal notice letter of a nonjudicial forfeiture proceeding may set a time to file a claim not earlier than 35 days after the letter is mailed (The statute continues to say that if the letter is not received, the claim may be filed up to 30 days after final publication of notice of seizure Compare G(5)(a)(ii), which provides alternative times only if notice was not sent)

Subparagraph (v), finally, reflects the purpose to effect actual notice by providing that a potential claimant who had actual notice of a forfeiture proceeding cannot oppose or seek relief from forfeiture because the government failed to comply with subdivision (4)(b).

Subdivision (5)

Paragraph (a). Paragraph (a) establishes that the first step of contesting a civil forfeiture action is to file a claim. A claim is required by 18 U.S.C. § 983(a)(4)(A) for actions covered by § 983. Paragraph (a) applies this procedure as well to actions not covered by § 983. "Claim" is used to describe this first pleading because of the statutory references to claim and claimant. It functions in the same way as the statement of interest prescribed for an admiralty proceeding by Rule C(6), and is not related to the distinctive meaning of "claim" in admiralty practice.[30]

[The contents of the claim specified by subparagraph (i) are similar to the contents of a claim in a nonjudicial forfeiture proceeding. See 18 U S.C. § 983(a)(2)(C).]

[If the claimant states its interest in the property to be as bailee, the bailor should be identified.][31]

The claim must be signed under penalty of perjury by the person making it An artificial body that can act only through an agent may authorize an agent to sign for it. Excusable inability of counsel to obtain an appropriate signature may be grounds for an extension of time to file the claim.

Paragraph (a)(ii) sets the time for filing a claim. Item (C) applies in the relatively rare circumstance in which notice is not published and the government did not send direct notice to the claimant because it did not know of the claimant or did not have an address for the claimant.

Paragraph (b). Under 18 U.S.C. § 983(a)(4)(B), which governs many forfeiture proceedings, a person who asserts an interest by filing a claim "shall file an answer to the Government's complaint for forfeiture not later than 20 days after the date of the filing of the claim." Paragraph (b) recognizes that this statute works within the general procedures established by Civil Rule 12. Rule 12(a)(4) suspends the time to answer when a Rule 12 motion is served within the time allowed to answer. Continued application of this rule to proceedings governed by § 983(a)(4)(B) serves all of

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[30]The MLA has been anxious for years that we protect against confusion arising from the distinctive admiralty meaning of "claim "

[31]This requirement was in earlier rule drafts Do we want to mention it in the Note? [LHR suggests that if it remains, it might be addressed with the discussion of subdivision (6) interrogatories Heim suggests the sentence be retained]

the purposes advanced by Rule 12(a)(4),[32] permits a uniform procedure for all civil forfeiture actions, and recognizes that a motion under Rule 12 can be made only after a claim is filed that provides background for the motion.

Failure to present an objection to in rem jurisdiction or to venue by timely motion or answer waives the objection. Waiver of such objections is familiar. An answer may be amended to assert an objection initially omitted. But Civil Rule 15 should be applied to an amendment that for the first time raises an objection to in rem jurisdiction, by analogy to the personal jurisdiction objection provision in Civil Rule 12(h)(1)(B). The amendment should be permitted only if it is permitted as a matter of course under Rule 15(a).[33]

A claimant's motion to dismiss the action is further governed by subdivisions (6)(c), (8)(b), and (8)(c).

Subdivision (6)

Subdivision (6) illustrates the modification of an admiralty procedure to the different needs of civil forfeiture. Rule C(6) permits interrogatories to be served with the complaint in an in rem action without limiting the subjects of inquiry. Civil forfeiture practice does not require such an extensive departure from ordinary civil practice. It remains useful, however, to permit the government to file limited interrogatories at any time after a claim is filed, to gather information that bears on the claimant's standing. Subdivisions (8)(b) and (c) allow a claimant to move to dismiss only if the claimant has standing, and recognize the government's right to move to dismiss a claim for lack of standing. Subdivision (6) interrogatories are integrated with these provisions in that the interrogatories are limited to the claimant's identity and relationship to the defendant property.[34] The claimant can accelerate the time to serve subdivision (6) interrogatories by serving a motion to dismiss — the interrogatories must be served within 20 days after the motion is served. Integration

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[32]If so minded, we could cite the 3d Circuit decision U S v $8,221,877 16, 330 F 3d 141 (3d Cir 2003) We also could point out that the claim and motion to dismiss together should provide all the information the government needs to oppose the motion, particularly since under (6)(c) the government need not respond to the motion to dismiss until 20 days after answers to its interrogatories on standing [Heim would cite the 3d Circuit and go no further]

[33]To be thorough, we should amend Rule 12(b) to refer to an objection to in rem jurisdiction, and carry on through Rule 12 A less heroic measure to accomplish a safe rule foundation would be an elaborate addition to G(5)(b) "A claimant waives an objection to in rem jurisdiction or to venue that is not stated by motion, ~~or~~ in the answer, or in an amended answer permitted to be made as a matter of course " [Or however we have Styled Rule 12(h)(1)]

[34]This may be made more explicit if we retain the newly added language that covers the claimant's relationship to any bailor identified by the claimant, etc

Paragraph (d)(iii) reflects the venue provisions of 18 U.S.C. § 983(f)(3)(A) as a guide to practitioners. In addition, it makes clear the status of a civil forfeiture action as a "civil action" eligible for transfer under 28 U.S.C. §1404. A transfer decision must be made on the circumstances of the particular proceeding. The district where the forfeiture action is filed has the advantage of bringing all related proceedings together, avoiding the waste that flows from consideration of the different parts of the same forfeiture proceeding in the court where the warrant issued or the court where the property was seized. Transfer to that court would serve consolidation, the purpose that underlies nationwide enforcement of a seizure warrant. But there may be offsetting advantages in retaining the petition where it was filed. The claimant may not be able to litigate, effectively or at all, in a distant court. Issues relevant to the petition may be better litigated where the property was seized or where the warrant issued. One element, for example, is whether the claimant has sufficient ties to the community to provide assurance that the property will be available at the time of trial. Another is whether continued government possession would prevent the claimant from working — whether seizure of the claimant's automobile prevents work may turn on assessing the realities of local public transit facilities.[43]

Paragraph (e). The Excessive Fines Clause of the Eighth Amendment forbids an excessive forfeiture. *U.S. v. Bajakajian*, 524 U.S. 321 (1998). 18 U.S.C. § 983(g) provides a "petition" "to determine whether the forfeiture was constitutionally excessive" based on finding "that the forfeiture is grossly disproportional to the offense." Paragraph (e) describes the procedure for § 983(g) mitigation petitions, and adopts the same procedure for forfeiture actions that fall outside § 983(g). The procedure is by motion, either for summary judgment or for mitigation after a forfeiture judgment is entered.[44] The claimant must give notice of this defense by pleading, but failure to raise the defense in the initial answer may be cured by amendment under Rule 15. The issues that bear on mitigation often are separate from the issues that determine forfeiture For that reason it may be convenient to resolve the issue by summary judgment before trial on the forfeiture issues. Often, however, it will be more convenient to determine first whether the property is to be forfeited. Whichever time is chosen to address mitigation, the parties must have had the opportunity to conduct civil discovery on the defense. The extent and timing of discovery are governed by the ordinary rules.

Subdivision (9)

Subdivision (9) serves as a reminder of the need to demand jury trial under Rule 38.

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[43]Remember the subcommittee was not certain whether Rule G should address venue provisions at all The only apparent purpose is to provide a ready answer to the question whether § 1404 is available

[44]We could note that although the statute speaks of a "petition," the full setting indicates that the application is part of the civil forfeiture action "Motion" better describes the application for relief

Rule 26. General Provisions Governing Discovery; Duty of Disclosure.

(a) Required Disclosures; Methods to Discover Additional Matter.

(1) Initial Disclosures. * * *

(E) The following categories of proceedings are exempt from initial disclosures under Rule 26(a)(1): * * *

(ii) A forfeiture action in rem arising from a violation of a federal statute; * * *

Committee Note

Civil forfeiture actions are added to the list of exemptions from Rule 26(a)(1) disclosure requirements. These actions are governed by new Supplemental Rule G. Disclosure is not likely to be useful.

Supplemental Rules A, C, E Amended To Conform to G

Rule A. Scope of Rules

(1) These Supplemental Rules apply to:

(A) the procedure in admiralty and maritime claims within the meaning of Rule 9(h) with respect to the following remedies:

(i1) Maritime attachment and garnishment,;

(ii2) Actions in rem,;

(iii3) Possessory, petitory, and partition actions,and;

(iv4) Actions for exoneration from or limitation of liability;;

(B) forfeiture actions in rem arising from a violation of a federal statute; and

(C) ~~These rules also apply to~~ the procedure in statutory condemnation proceedings analogous to maritime actions in rem, whether within the admiralty and maritime jurisdiction or not. Except as otherwise provided, references in these Supplemental Rules to actions in rem include such analogous statutory condemnation proceedings.

(2) The general Rules of Civil Procedure for the United States District Courts ~~are~~ also ~~applicable to~~ apply to the foregoing proceedings except to the extent that they are inconsistent with these Supplemental Rules

Committee Note

Rule A is amended to reflect the adoption of Rule G to govern procedure in civil forfeiture actions

Rule C. In Rem Actions: Special Provisions

(1) An action in rem may be brought:

(a) To enforce any maritime lien;

(b) Whenever a statute of the United States provides for a maritime action in rem or a proceeding analogous thereto.[45] * * *

(2) Complaint. In an action in rem the complaint must:

(a) be verified;

(b) describe with reasonable particularity the property that is the subject of the action; and

(c) ~~in an admiralty and maritime proceeding~~ state that the property is within the district or will be within the district while the action is pending;

~~**(d)** in a forfeiture proceeding for violation of a federal statute, state:~~

~~**(i)** the place of seizure and whether it was on land or on navigable waters;~~

~~**(ii)** whether the property is within the district, and if the property is not within the district the statutory basis for the court's exercise of jurisdiction over the property; and~~

~~**(iii)** all allegations required by the statute under which the action is brought.~~

(3) Judicial Authorization and Process.

(a) ***Arrest Warrant.***

~~**(i)** When the United States files a complaint demanding a forfeiture for violation of a federal statute, the clerk must promptly issue a summons and a warrant for the arrest of the vessel or other property without requiring a certification of exigent circumstances, but if the property is real property the United States must proceed under applicable statutory procedures.~~

(iii)~~**(A)** In other actions, t~~The court must review the complaint and any supporting papers * * *

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[45] Do we need to change this to conform to G? (b) includes a civil forfeiture action It could be amended to reflect the adoption of (G) But the amendment would be somewhat awkward for the reason that suggests we do not need an amendment All that C(1)(b) says is that an in action in rem may be brought, etc That remains true after adoption of G The redundancy may be tolerable

(iiB) If the plaintiff or the plaintiff's attorney certifies that exigent circumstances make court review impracticable, * * *

(b) *Service.* ~~**(i)**~~ If the property that is the subject of the action is a vessel or tangible property on board a vessel, the warrant and any supplemental process must be delivered to the marshal for service.

~~**(ii)** If the property that is the subject of the action is other property, tangible or intangible, the warrant and any supplemental process must be delivered to a person or organization authorized to enforce it, who may be: (A) a marshal; (B) someone under contract with the United States; (C) someone specially appointed by the court for that purpose; or (D) in an action brought by the United States, any officer or employee of the United States.~~[46] * * *

(6) Responsive Pleading; Interrogatories.

~~**(a)** *Civil Forfeiture.* In an in rem forfeiture action for violation of a federal statute:~~

~~**(i)** a person who asserts an interest in or right against the property that is the subject of the action must file a verified statement identifying the interest or right:~~

~~**(A)** within 30 days after the earlier of (1) the date of service of the Government's complaint or (2) completed publication of notice under Rule C(4), or~~

~~**(B)** within the time that the court allows.~~

~~**(ii)** an agent, bailee, or attorney must state the authority to file a statement of interest in or right against the property on behalf of another; and~~

~~**(iii)** a person who files a statement of interest in or right against the property must serve and file an answer within 20 days after filing the statement.~~

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[46] This suggested amendment presents two puzzles. First, is it clear that former (i) covers all of the subjects of an in rem admiralty action? Or may an admiralty action include property other than a vessel or tangible property on board a vessel? [C(3)(c) refers to "freight" as the subject of the action, "freight" is not the tangible cargo but the money due for carrying the cargo. It looks as if freight can be attached. C(5) refers to an in rem action in which the subject of the action is intangible property.] We can delete (ii) only if it never applies to an in rem admiralty proceeding. Come to think of it, the Supplemental Rules apply not only in admiralty but also to "statutory proceedings analogous to maritime actions in rem, whether within the admiralty and maritime jurisdiction or not." Surely those proceedings can include property other than a vessel or tangible property on board a vessel. Deletion of (ii) seems a bad idea, subject to further advice. Second, if indeed we can delete (ii), do we need to do more surgery on (i)? If it applies only in admiralty, and admiralty reaches only a vessel or tangible property on board a vessel, why not delete the redundant words "~~If the property that is the subject of the action is a vessel or tangible property on board a vessel, t~~The warrant and any supplemental process must be delivered * * * "?

(ab) *Maritime*[47] *Arrests and Other Proceedings* ~~In an rem action not governed by Rule C(6)(a)~~

(i) * * *

(bc) *Interrogatories.* * * *

Committee Note

Rule C is amended to reflect the adoption of Rule G to govern procedure in civil forfeiture actions.

Rule E. Actions in Rem and Quasi in Rem: General Provisions

* * *

(3) Process.

(a) In admiralty and maritime proceedings[48] process in rem or of maritime attachment and garnishment may be served only within the district.

~~**(b)** In forfeiture cases process in rem may be served within the district or outside the district when authorized by statute.~~

(bc) *Issuance and Delivery.* * * *

(5) Release of Property.

(a) *Special Bond.*[49] ~~Except in cases of seizures for forfeiture under any law of the United States, w~~Whenever process of maritime attachment and garnishment or process in rem is issued the execution of such process shall be stayed, or the property released, on the giving of security * * *.

(9) Disposition of Property; Sales.

~~**(a)** *Actions for Forfeitures.* In any action in rem to enforce a forfeiture for violation of a statute of the United States the property shall be disposed of as provided by statute.~~

(ab) *Interlocutory Sales; Delivery.* * * *

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[47] Can we delete "maritime"? Or is it better kept because of the condemnation applications?

[48] Is "in admiralty and maritime proceedings" made redundant by adopting G? Or, once again, should we retain this language because there may be a different rule in condemnation actions?

[49] This rule was not on the list of conforming amendments, but seems a natural change

(ii) In the circumstances described in ~~Rule E(9)~~ subdivision (a~~b~~)(1), the court * * *.

(b~~c~~) *Sales, Proceeds.* * * *

Committee Note

Rule E is amended to reflect the adoption of Rule G to govern

14 of 100 DOCUMENTS

*** CURRENT THROUGH P.L. 108-204, APPROVED 3/02/04 ***
*** WITH A GAP OF 108-203 ***

TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART I. CRIMES
CHAPTER 46. FORFEITURE

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

18 USCS § 981 (2004)

§ 981. Civil forfeiture

(a) (1) The following property, real or personal, is subject to forfeiture to the United States:

(A) Any property, real or personal, involved in a transaction or attempted transaction in violation of section 1956, 1957 or 1960 of this title, or any property traceable to such property.

(B) Any property, real or personal, within the jurisdiction of the United States, constituting, derived from, or traceable to, any proceeds obtained directly or indirectly from an offense against a foreign nation, or any property used to facilitate such an offense, if the offense--

(i) involves the manufacture, importation, sale, or distribution of a controlled substance (as that term is defined for purposes of the Controlled Substances Act), or any other conduct described in section 1956(c)(7)(B);

(ii) would be punishable within the jurisdiction of the foreign nation by death or imprisonment for a term exceeding 1 year; and

(iii) would be punishable under the laws of the United States by imprisonment for a term exceeding 1 year, if the act or activity constituting the offense had occurred within the jurisdiction of the United States.

(C) Any property, real or personal, which constitutes or is derived from proceeds traceable to a violation of section 215, 471, 472, 473, 474, 476, 477, 478, 479, 480, 481, 485, 486, 487, 488, 501, 502, 510, 542, 545, 656, 657, 842, 844, 1005, 1006, 1007, 1014, 1028, 1029, 1030, 1032, or 1344 of this title or any offense constituting "specified unlawful activity" (as defined in section 1956(c)(7) of this title), or a conspiracy to commit such offense.

(D) Any property, real or personal, which represents or is traceable to the gross receipts obtained, directly or indirectly, from a violation of--

(i) section 666(a)(1) (relating to Federal program fraud);

(ii) section 1001 (relating to fraud and false statements);

(iii) section 1031 (relating to major fraud against the United States);

(iv) section 1032 (relating to concealment of assets from conservator or receiver of insured financial institution);

(v) section 1341 (relating to mail fraud); or

(vi) section 1343 (relating to wire fraud),

if such violation relates to the sale of assets acquired or held by the Resolution Trust Corporation, the Federal Deposit Insurance Corporation, as conservator or receiver for a financial institution, or any other conservator for a financial institution appointed by the Office of the Comptroller of the Currency or the Office of Thrift Supervision or the National Credit Union Administration, as conservator or liquidating agent for a financial institution.

(E) With respect to an offense listed in subsection (a)(1)(D) committed for the purpose of executing or attempting to execute any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent statements, pretenses, representations or promises, the gross receipts of such an offense shall include all property, real or personal, tangible or intangible, which thereby is obtained, directly or indirectly.

(F) Any property, real or personal, which represents or is traceable to the gross proceeds obtained, directly or indirectly, from a violation of--

(i) section 511 (altering or removing motor vehicle identification numbers);

(ii) section 553 (importing or exporting stolen motor vehicles);

(iii) section 2119 (armed robbery of automobiles);

(iv) section 2312 (transporting stolen motor vehicles in interstate commerce); or

(v) section 2313 (possessing or selling a stolen motor vehicle that has moved in interstate commerce).

(G) All assets, foreign or domestic--

(i) of any individual, entity, or organization engaged in planning or perpetrating any act of domestic or international terrorism (as defined in section 2331) against the United States, citizens or residents of the United States, or their property, and all assets, foreign or domestic, affording any person a source of influence over any such entity or organization;

(ii) acquired or maintained by any person with the intent and for the purpose of supporting, planning, conducting, or concealing an act of domestic or international terrorism (as defined in section 2331) against the United States, citizens or residents of the United States, or their property; or

(iii) derived from, involved in, or used or intended to be used to commit any act of domestic or international terrorism (as defined in section 2331) against the United States, citizens or residents of the United States, or their property.

(H) Any property, real or personal, involved in a violation or attempted violation, or which constitutes or is derived from proceeds traceable to a violation, of section 2339C of this title.

(2) For purposes of paragraph (1), the term "proceeds" is defined as follows:

(A) In cases involving illegal goods, illegal services, unlawful activities, and telemarketing and health care fraud schemes, the term "proceeds" means property of any kind obtained directly or indirectly, as the result of the commission of the offense giving rise to forfeiture, and any property traceable thereto, and is not limited to the net gain or profit realized from the offense.

(B) In cases involving lawful goods or lawful services that are sold or provided in an illegal manner, the term "proceeds" means the amount of money acquired through the illegal transactions

resulting in the forfeiture, less the direct costs incurred in providing the goods or services. The claimant shall have the burden of proof with respect to the issue of direct costs. The direct costs shall not include any part of the overhead expenses of the entity providing the goods or services, or any part of the income taxes paid by the entity.

(C) In cases involving fraud in the process of obtaining a loan or extension of credit, the court shall allow the claimant a deduction from the forfeiture to the extent that the loan was repaid, or the debt was satisfied, without any financial loss to the victim.

(b) (1) Except as provided in section 985, any property subject to forfeiture to the United States under subsection (a) may be seized by the Attorney General and, in the case of property involved in a violation investigated by the Secretary of the Treasury or the United States Postal Service, the property may also be seized by the Secretary of the Treasury or the Postal Service, respectively.

(2) Seizures pursuant to this section shall be made pursuant to a warrant obtained in the same manner as provided for a search warrant under the Federal Rules of Criminal Procedure, except that a seizure may be made without a warrant if--

(A) a complaint for forfeiture has been filed in the United States district court and the court issued an arrest warrant in rem pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims;

(B) there is probable cause to believe that the property is subject to forfeiture and--

(i) the seizure is made pursuant to a lawful arrest or search; or

(ii) another exception to the Fourth Amendment warrant requirement would apply; or

(C) the property was lawfully seized by a State or local law enforcement agency and transferred to a Federal agency.

(3) Notwithstanding the provisions of rule 41(a) of the Federal Rules of Criminal Procedure, a seizure warrant may be issued pursuant to this subsection by a judicial officer in any district in which a forfeiture action against the property may be filed under section 1355(b) of title 28, and may be executed in any district in which the property is found, or transmitted to the central authority of any foreign state for service in accordance with any treaty or other international agreement. Any motion for the return of property seized under this section shall be filed in the district court in which the seizure warrant was issued or in the district court for the district in which the property was seized.

(4) (A) If any person is arrested or charged in a foreign country in connection with an offense that would give rise to the forfeiture of property in the United States under this section or under the Controlled Substances Act, the Attorney General may apply to any Federal judge or magistrate judge in the district in which the property is located for an ex parte order restraining the property subject to forfeiture for not more than 30 days, except that the time may be extended for good cause shown at a hearing conducted in the manner provided in rule 43(e) of the Federal Rules of Civil Procedure.

(B) The application for the restraining order shall set forth the nature and circumstances of the foreign charges and the basis for belief that the person arrested or charged has property in the United States that would be subject to forfeiture, and shall contain a statement that the restraining order is needed to preserve the availability of property for such time as is necessary to receive evidence from the foreign country or elsewhere in support of probable cause for the seizure of the property under this subsection.

(c) Property taken or detained under this section shall not be repleviable, but shall be deemed to be in the custody of the Attorney General or the Secretary of the Treasury, as the case may be, subject only to the orders and decrees of the court or the official having jurisdiction thereof. Whenever property is seized under this subsection, the Attorney General, the Secretary of the Treasury, or the Postal Service, as the case may be, may--

(1) place the property under seal;

(2) remove the property to a place designated by him; or

(3) require that the General Services Administration take custody of the property and remove it, if practicable, to an appropriate location for disposition in accordance with law.

(d) For purposes of this section, the provisions of the customs laws relating to the seizure, summary and judicial forfeiture, condemnation of property for violation of the customs laws, the disposition of such property or the proceeds from the sale of such property under this section, the remission or mitigation of such forfeitures, and the compromise of claims (19 U.S.C. 1602 et seq.), insofar as they are applicable and not inconsistent with the provisions of this section, shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under this section, except that such duties as are imposed upon the customs officer or any other person with respect to the seizure and forfeiture of property under the customs laws shall be performed with respect to seizures and forfeitures of property under this section by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General, the Secretary of the Treasury, or the Postal Service, as the case may be. The Attorney General shall have sole responsibility for disposing of petitions for remission or mitigation with respect to property involved in a judicial forfeiture proceeding.

(e) Notwithstanding any other provision of the law, except section 3 of the Anti Drug Abuse Act of 1986 [21 USCS § 801 note], the Attorney General, the Secretary of the Treasury, or the Postal Service, as the case may be, is authorized to retain property forfeited pursuant to this section, or to transfer such property on such terms and conditions as he may determine--

(1) to any other Federal agency;

(2) to any State or local law enforcement agency which participated directly in any of the acts which led to the seizure or forfeiture of the property;

(3) in the case of property referred to in subsection (a)(1)(C), to any Federal financial institution regulatory agency--

(A) to reimburse the agency for payments to claimants or creditors of the institution; and

(B) to reimburse the insurance fund of the agency for losses suffered by the fund as a result of the receivership or liquidation;

(4) in the case of property referred to in subsection (a)(1)(C), upon the order of the appropriate Federal financial institution regulatory agency, to the financial institution as restitution, with the value of the property so transferred to be set off against any amount later recovered by the financial institution as compensatory damages in any State or Federal proceeding;

(5) in the case of property referred to in subsection (a)(1)(C), to any Federal financial institution regulatory agency, to the extent of the agency's contribution of resources to, or expenses involved in, the seizure and forfeiture, and the investigation leading directly to the seizure and forfeiture, of such property,

(6) as restoration to any victim of the offense giving rise to the forfeiture, including, in the case of a money laundering offense, any offense constituting the underlying specified unlawful activity, or

(7) In [in] the case of property referred to in subsection (a)(1)(D), to the Resolution Trust Corporation, the Federal Deposit Insurance Corporation, or any other Federal financial institution regulatory agency (as defined in section 8(e)(7)(D) of the Federal Deposit Insurance Act [12 USCS § 1818(e)(7)(D)]).

The Attorney General or the Secretary of the Treasury, as the case may be, shall ensure the equitable transfer pursuant to paragraph (2) of any forfeited property to the appropriate State or local law enforcement agency so as to reflect generally the contribution of any such agency participating directly in any of the acts which led to the seizure or forfeiture of such property. A decision by the Attorney General or the Secretary of the Treasury pursuant to paragraph (2) shall not be subject to review. The United States shall not be liable in any action arising out of the use of any property the custody of which was transferred pursuant to this section to any non-Federal agency. The Attorney General or the Secretary of the Treasury may order the discontinuance of any forfeiture proceedings under this section in favor of the institution of forfeiture proceedings by State or local authorities under an appropriate State or local statute. After the filing of a complaint for forfeiture under this section, the Attorney General may seek dismissal of the complaint in favor of forfeiture proceedings under State or local law. Whenever forfeiture proceedings are discontinued by the United States in favor of State or local proceedings, the United States may transfer custody and possession of the seized property to the appropriate State or local official immediately upon the initiation of the proper actions by such officials. Whenever forfeiture proceedings are discontinued by the United States in favor of State or local proceedings, notice shall be sent to all known interested parties advising them of the discontinuance or dismissal. The United States shall not be liable in any action arising out of the seizure, detention, and transfer of seized property to State or local officials. The United States shall not be liable in any action arising out of a transfer under paragraph (3), (4), or (5) of this subsection.

(f) All right, title, and interest in property described in subsection (a) of this section shall vest in the United States upon commission of the act giving rise to forfeiture under this section.

(g) (1) Upon the motion of the United States, the court shall stay the civil forfeiture proceeding if the court determines that civil discovery will adversely affect the ability of the Government to conduct a related criminal investigation or the prosecution of a related criminal case.

(2) Upon the motion of a claimant, the court shall stay the civil forfeiture proceeding with respect to that claimant if the court determines that--

(A) the claimant is the subject of a related criminal investigation or case;

(B) the claimant has standing to assert a claim in the civil forfeiture proceeding; and

(C) continuation of the forfeiture proceeding will burden the right of the claimant against self-incrimination in the related investigation or case.

(3) With respect to the impact of civil discovery described in paragraphs (1) and (2), the court may determine that a stay is unnecessary if a protective order limiting discovery would protect the interest of one party without unfairly limiting the ability of the opposing party to pursue the civil case. In no case, however, shall the court impose a protective order as an alternative to a stay if the effect of such protective order would be to allow one party to pursue discovery while the other party is substantially unable to do so.

(4) In this subsection, the terms "related criminal case" and "related criminal investigation" mean an actual prosecution or investigation in progress at the time at which the request for the stay, or any

subsequent motion to lift the stay is made. In determining whether a criminal case or investigation is "related" to a civil forfeiture proceeding, the court shall consider the degree of similarity between the parties, witnesses, facts, and circumstances involved in the two proceedings, without requiring an identity with respect to any one or more factors.

(5) In requesting a stay under paragraph (1), the Government may, in appropriate cases, submit evidence ex parte in order to avoid disclosing any matter that may adversely affect an ongoing criminal investigation or pending criminal trial.

(6) Whenever a civil forfeiture proceeding is stayed pursuant to this subsection, the court shall enter any order necessary to preserve the value of the property or to protect the rights of lienholders or other persons with an interest in the property while the stay is in effect.

(7) A determination by the court that the claimant has standing to request a stay pursuant to paragraph (2) shall apply only to this subsection and shall not preclude the Government from objecting to the standing of the claimant by dispositive motion or at the time of trial.

(h) In addition to the venue provided for in section 1395 of title 28 or any other provision of law, in the case of property of a defendant charged with a violation that is the basis for forfeiture of the property under this section, a proceeding for forfeiture under this section may be brought in the judicial district in which the defendant owning such property is found or in the judicial district in which the criminal prosecution is brought.

(i) (1) Whenever property is civilly or criminally forfeited under this chapter [18 USCS § § 981 et seq.], the Attorney General or the Secretary of the Treasury, as the case may be, may transfer the forfeited personal property or the proceeds of the sale of any forfeited personal or real property to any foreign country which participated directly or indirectly in the seizure or forfeiture of the property, if such a transfer--

(A) has been agreed to by the Secretary of State;

(B) is authorized in an international agreement between the United States and the foreign country; and

(C) is made to a country which, if applicable, has been certified under section 490(a)(1) of the Foreign Assistance Act of 1961 [22 USCS § 2291j(a)(1)].

A decision by the Attorney General or the Secretary of the Treasury pursuant to this paragraph shall not be subject to review. The foreign country shall, in the event of a transfer of property or proceeds of sale of property under this subsection, bear all expenses incurred by the United States in the seizure, maintenance, inventory, storage, forfeiture, and disposition of the property, and all transfer costs. The payment of all such expenses, and the transfer of assets pursuant to this paragraph, shall be upon such terms and conditions as the Attorney General or the Secretary of the Treasury may, in his discretion, set.

(2) The provisions of this section shall not be construed as limiting or superseding any other authority of the United States to provide assistance to a foreign country in obtaining property related to a crime committed in the foreign country, including property which is sought as evidence of a crime committed in the foreign country.

(3) A certified order or judgment of forfeiture by a court of competent jurisdiction of a foreign country concerning property which is the subject of forfeiture under this section and was determined by such court to be the type of property described in subsection (a)(1)(B) of this section, and any certified recordings or transcripts of testimony taken in a foreign judicial proceeding concerning such order or judgment of forfeiture, shall be admissible in evidence in a proceeding

brought pursuant to this section. Such certified order or judgment of forfeiture, when admitted into evidence, shall constitute probable cause that the property forfeited by such order or judgment of forfeiture is subject to forfeiture under this section and creates a rebuttable presumption of the forfeitability of such property under this section.

(4) A certified order or judgment of conviction by a court of competent jurisdiction of a foreign country concerning an unlawful drug activity which gives rise to forfeiture under this section and any certified recordings or transcripts of testimony taken in a foreign judicial proceeding concerning such order or judgment of conviction shall be admissible in evidence in a proceeding brought pursuant to this section. Such certified order or judgment of conviction, when admitted into evidence, creates a rebuttable presumption that the unlawful drug activity giving rise to forfeiture under this section has occurred.

(5) The provisions of paragraphs (3) and (4) of this subsection shall not be construed as limiting the admissibility of any evidence otherwise admissible, nor shall they limit the ability of the United States to establish probable cause that property is subject to forfeiture by any evidence otherwise admissible.

(j) For purposes of this section--

(1) the term "Attorney General" means the Attorney General or his delegate; and

(2) the term "Secretary of the Treasury" means the Secretary of the Treasury or his delegate.

(k) Interbank Accounts.

(1) In general.

(A) In general. For the purpose of a forfeiture under this section or under the Controlled Substances Act (21 U.S.C. 801 et seq.), if funds are deposited into an account at a foreign bank, and that foreign bank has an interbank account in the United States with a covered financial institution (as defined in section 5318(j)(1) of title 31), the funds shall be deemed to have been deposited into the interbank account in the United States, and any restraining order, seizure warrant, or arrest warrant in rem regarding the funds may be served on the covered financial institution, and funds in the interbank account, up to the value of the funds deposited into the account at the foreign bank, may be restrained, seized, or arrested.

(B) Authority to suspend. The Attorney General, in consultation with the Secretary of the Treasury, may suspend or terminate a forfeiture under this section if the Attorney General determines that a conflict of law exists between the laws of the jurisdiction in which the foreign bank is located and the laws of the United States with respect to liabilities arising from the restraint, seizure, or arrest of such funds, and that such suspension or termination would be in the interest of justice and would not harm the national interests of the United States.

(2) No requirement for Government to trace funds. If a forfeiture action is brought against funds that are restrained, seized, or arrested under paragraph (1), it shall not be necessary for the Government to establish that the funds are directly traceable to the funds that were deposited into the foreign bank, nor shall it be necessary for the Government to rely on the application of section 984.

(3) Claims brought by owner of the funds If a forfeiture action is instituted against funds restrained, seized, or arrested under paragraph (1), the owner of the funds deposited into the account at the foreign bank may contest the forfeiture by filing a claim under section 983.

(4) Definitions. For purposes of this subsection, the following definitions shall apply:

(A) Interbank account. The term "interbank account" has the same meaning as in section 984(c)(2)(B).

(B) Owner.

(i) In general. Except as provided in clause (ii), the term "owner"--

(I) means the person who was the owner, as that term is defined in section 983(d)(6), of the funds that were deposited into the foreign bank at the time such funds were deposited; and

(II) does not include either the foreign bank or any financial institution acting as an intermediary in the transfer of the funds into the interbank account.

(ii) Exception. The foreign bank may be considered the "owner" of the funds (and no other person shall qualify as the owner of such funds) only if--

(I) the basis for the forfeiture action is wrongdoing committed by the foreign bank; or

(II) the foreign bank establishes, by a preponderance of the evidence, that prior to the restraint, seizure, or arrest of the funds, the foreign bank had discharged all or part of its obligation to the prior owner of the funds, in which case the foreign bank shall be deemed the owner of the funds to the extent of such discharged obligation.

*** CURRENT THROUGH P.L. 108-204, APPROVED 3/02/04 ***
*** WITH A GAP OF 108-203 ***

TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART I. CRIMES
CHAPTER 46. FORFEITURE

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

18 USCS § 982 (2004)

§ 982. Criminal forfeiture

(a) (1) The court, in imposing sentence on a person convicted of an offense in violation of section 1956, 1957, or 1960 of this title, shall order that the person forfeit to the United States any property, real or personal, involved in such offense, or any property traceable to such property.

(2) The court, in imposing sentence on a person convicted of a violation of, or a conspiracy to violate--

(A) section 215, 656, 657, 1005, 1006, 1007, 1014, 1341, 1343, or 1344 of this title, affecting a financial institution, or

(B) section 471, 472, 473, 474, 476, 477, 478, 479, 480, 481, 485, 486, 487, 488, 501, 502, 510, 542, 545, 842, 844, 1028, 1029, or 1030 of this title,

shall order that the person forfeit to the United States any property constituting, or derived from, proceeds the person obtained directly or indirectly, as the result of such violation.

(3) The court, in imposing a sentence on a person convicted of an offense under--

(A) section 666(a)(1) (relating to Federal program fraud);

(B) section 1001 (relating to fraud and false statements);

(C) section 1031 (relating to major fraud against the United States);

(D) section 1032 (relating to concealment of assets from conservator, receiver or liquidating agent of insured financial institution);

(E) section 1341 (relating to mail fraud); or

(F) section 1343 (relating to wire fraud),

involving the sale of assets acquired or held by the Resolution Trust Corporation, the Federal Deposit Insurance Corporation, as conservator or receiver for a financial institution or any other

conservator for a financial institution appointed by the Office of the Comptroller of the Currency or the Office of Thrift Supervision, or the National Credit Union Administration, as conservator or liquidating agent for a financial institution, shall order that the person forfeit to the United States any property, real or personal, which represents or is traceable to the gross receipts obtained, directly or indirectly, as a result of such violation.

(4) With respect to an offense listed in subsection (a)(3) committed for the purpose of executing or attempting to execute any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent statements, pretenses, representations, or promises, the gross receipts of such an offense shall include any property, real or personal, tangible or intangible, which is obtained, directly or indirectly, as a result of such offense.

(5) The court, in imposing sentence on a person convicted of a violation or conspiracy to violate--

(A) section 511 (altering or removing motor vehicle identification numbers);

(B) section 553 (importing or exporting stolen motor vehicles);

(C) section 2119 (armed robbery of automobiles);

(D) section 2312 (transporting stolen motor vehicles in interstate commerce); or

(E) section 2313 (possessing or selling a stolen motor vehicle that has moved in interstate commerce);

shall order that the person forfeit to the United States any property, real or personal, which represents or is traceable to the gross proceeds obtained, directly or indirectly, as a result of such violation.

(6) (A) The court, in imposing sentence on a person convicted of a violation of, or conspiracy to violate, section 274(a), 274A(a)(1), or 274A(a)(2) of the Immigration and Nationality Act [8 USCS § § 1324(a), 1324a(a)(1), or 1324a(a)(2)] or section 1425, 1426, 1427, 1541, 1542, 1543, 1544, or 1546 of this title, or a violation of, or conspiracy to violate, section 1028 of this title if committed in connection with passport or visa issuance or use, shall order that the person forfeit to the United States, regardless of any provision of State law--

(i) any conveyance, including any vessel, vehicle, or aircraft used in the commission of the offense of which the person is convicted; and

(ii) any property real or personal--

(I) that constitutes, or is derived from or is traceable to the proceeds obtained directly or indirectly from the commission of the offense of which the person is convicted; or

(II) that is used to facilitate, or is intended to be used to facilitate, the commission of the offense of which the person is convicted.

(B) The court, in imposing sentence on a person described in subparagraph (A), shall order that the person forfeit to the United States all property described in that subparagraph.

(7) The court, in imposing sentence on a person convicted of a Federal health care offense, shall order the person to forfeit property, real or personal, that constitutes or is derived, directly or indirectly, from gross proceeds traceable to the commission of the offense.

(8) The court, in sentencing a defendant convicted of an offense under section 1028, 1029, 1341, 1342, 1343, or 1344, or of a conspiracy to commit such an offense, if the offense involves telemarketing (as that term is defined in section 2325), shall order that the defendant forfeit to the United States any real or personal property--

(A) used or intended to be used to commit, to facilitate, or to promote the commission of such offense; and

(B) constituting, derived from, or traceable to the gross proceeds that the defendant obtained directly or indirectly as a result of the offense.

(b) (1) The forfeiture of property under this section, including any seizure and disposition of the property and any related judicial or administrative proceeding, shall be governed by the provisions of section 413 (other than subsection (d) of that section) of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 853).

(2) The substitution of assets provisions of subsection 413(p) [21 USCS § 853(p)] shall not be used to order a defendant to forfeit assets in place of the actual property laundered where such defendant acted merely as an intermediary who handled but did not retain the property in the course of the money laundering offense unless the defendant, in committing the offense or offenses giving rise to the forfeiture, conducted three or more separate transactions involving a total of $ 100,000 or more in any twelve month period.

1 of 100 DOCUMENTS

*** CURRENT THROUGH P.L. 108-204, APPROVED 3/02/04 ***
*** WITH A GAP OF 108-203 ***

TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART I. CRIMES
CHAPTER 46. FORFEITURE

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

18 USCS § 983 (2004)

§ 983. General rules for civil forfeiture proceedings

(a) Notice; claim; complaint.

(1) (A) (i) Except as provided in clauses (ii) through (v), in any nonjudicial civil forfeiture proceeding under a civil forfeiture statute, with respect to which the Government is required to send written notice to interested parties, such notice shall be sent in a manner to achieve proper notice as soon as practicable, and in no case more than 60 days after the date of the seizure.

(ii) No notice is required if, before the 60-day period expires, the Government files a civil judicial forfeiture action against the property and provides notice of that action as required by law.

(iii) If, before the 60-day period expires, the Government does not file a civil judicial forfeiture action, but does obtain a criminal indictment containing an allegation that the property is subject to forfeiture, the Government shall either--

(I) send notice within the 60 days and continue the nonjudicial civil forfeiture proceeding under this section; or

(II) terminate the nonjudicial civil forfeiture proceeding, and take the steps necessary to preserve its right to maintain custody of the property as provided in the applicable criminal forfeiture statute.

(iv) In a case in which the property is seized by a State or local law enforcement agency and turned over to a Federal law enforcement agency for the purpose of forfeiture under Federal law, notice shall be sent not more than 90 days after the date of seizure by the State or local law enforcement agency.

(v) If the identity or interest of a party is not determined until after the seizure or turnover but is determined before a declaration of forfeiture is entered, notice shall be sent to such interested

party not later than 60 days after the determination by the Government of the identity of the party or the party's interest.

(B) A supervisory official in the headquarters office of the seizing agency may extend the period for sending notice under subparagraph (A) for a period not to exceed 30 days (which period may not be further extended except by a court), if the official determines that the conditions in subparagraph (D) are present.

(C) Upon motion by the Government, a court may extend the period for sending notice under subparagraph (A) for a period not to exceed 60 days, which period may be further extended by the court for 60-day periods, as necessary, if the court determines, based on a written certification of a supervisory official in the headquarters office of the seizing agency, that the conditions in subparagraph (D) are present.

(D) The period for sending notice under this paragraph may be extended only if there is reason to believe that notice may have an adverse result, including--

(i) endangering the life or physical safety of an individual;

(ii) flight from prosecution;

(iii) destruction of or tampering with evidence;

(iv) intimidation of potential witnesses, or

(v) otherwise seriously jeopardizing an investigation or unduly delaying a trial.

(E) Each of the Federal seizing agencies conducting nonjudicial forfeitures under this section shall report periodically to the Committees on the Judiciary of the House of Representatives and the Senate the number of occasions when an extension of time is granted under subparagraph (B).

(F) If the Government does not send notice of a seizure of property in accordance with subparagraph (A) to the person from whom the property was seized, and no extension of time is granted, the Government shall return the property to that person without prejudice to the right of the Government to commence a forfeiture proceeding at a later time. The Government shall not be required to return contraband or other property that the person from whom the property was seized may not legally possess.

(2) (A) Any person claiming property seized in a nonjudicial civil forfeiture proceeding under a civil forfeiture statute may file a claim with the appropriate official after the seizure.

(B) A claim under subparagraph (A) may be filed not later than the deadline set forth in a personal notice letter (which deadline may be not earlier than 35 days after the date the letter is mailed), except that if that letter is not received, then a claim may be filed not later than 30 days after the date of final publication of notice of seizure.

(C) A claim shall--

(i) identify the specific property being claimed;

(ii) state the claimant's interest in such property; and

(iii) be made under oath, subject to penalty of perjury.

(D) A claim need not be made in any particular form. Each Federal agency conducting nonjudicial forfeitures under this section shall make claim forms generally available on request, which forms shall be written in easily understandable language

(E) Any person may make a claim under subparagraph (A) without posting bond with respect to the property which is the subject of the claim.

(3) (A) Not later than 90 days after a claim has been filed, the Government shall file a complaint for forfeiture in the manner set forth in the Supplemental Rules for Certain Admiralty and Maritime Claims or return the property pending the filing of a complaint, except that a court in the district in

which the complaint will be filed may extend the period for filing a complaint for good cause shown or upon agreement of the parties.

(B) If the Government does not--

(i) file a complaint for forfeiture or return the property, in accordance with subparagraph (A); or

(ii) before the time for filing a complaint has expired--

(I) obtain a criminal indictment containing an allegation that the property is subject to forfeiture; and

(II) take the steps necessary to preserve its right to maintain custody of the property as provided in the applicable criminal forfeiture statute,

the Government shall promptly release the property pursuant to regulations promulgated by the Attorney General, and may not take any further action to effect the civil forfeiture of such property in connection with the underlying offense.

(C) In lieu of, or in addition to, filing a civil forfeiture complaint, the Government may include a forfeiture allegation in a criminal indictment. If criminal forfeiture is the only forfeiture proceeding commenced by the Government, the Government's right to continued possession of the property shall be governed by the applicable criminal forfeiture statute.

(D) No complaint may be dismissed on the ground that the Government did not have adequate evidence at the time the complaint was filed to establish the forfeitability of the property.

(4) (A) In any case in which the Government files in the appropriate United States district court a complaint for forfeiture of property, any person claiming an interest in the seized property may file a claim asserting such person's interest in the property in the manner set forth in the Supplemental Rules for Certain Admiralty and Maritime Claims, except that such claim may be filed not later than 30 days after the date of service of the Government's complaint or, as applicable, not later than 30 days after the date of final publication of notice of the filing of the complaint.

(B) A person asserting an interest in seized property, in accordance with subparagraph (A), shall file an answer to the Government's complaint for forfeiture not later than 20 days after the date of the filing of the claim.

(b) Representation.

(1) (A) If a person with standing to contest the forfeiture of property in a judicial civil forfeiture proceeding under a civil forfeiture statute is financially unable to obtain representation by counsel, and the person is represented by counsel appointed under section 3006A of this title in connection with a related criminal case, the court may authorize counsel to represent that person with respect to the claim.

(B) In determining whether to authorize counsel to represent a person under subparagraph (A), the court shall take into account such factors as--

(i) the person's standing to contest the forfeiture; and

(ii) whether the claim appears to be made in good faith.

(2) (A) If a person with standing to contest the forfeiture of property in a judicial civil forfeiture proceeding under a civil forfeiture statute is financially unable to obtain representation by counsel, and the property subject to forfeiture is real property that is being used by the person as a primary residence, the court, at the request of the person, shall insure that the person is represented by an attorney for the Legal Services Corporation with respect to the claim.

(B) (i) At appropriate times during a representation under subparagraph (A), the Legal Services Corporation shall submit a statement of reasonable attorney fees and costs to the court.

(ii) The court shall enter a judgment in favor of the Legal Services Corporation for reasonable attorney fees and costs submitted pursuant to clause (i) and treat such judgment as payable under section 2465 of title 28, United States Code, regardless of the outcome of the case.

(3) The court shall set the compensation for representation under this subsection, which shall be equivalent to that provided for court-appointed representation under section 3006A of this title.

(c) Burden of proof. In a suit or action brought under any civil forfeiture statute for the civil forfeiture of any property--

(1) the burden of proof is on the Government to establish, by a preponderance of the evidence, that the property is subject to forfeiture;

(2) the Government may use evidence gathered after the filing of a complaint for forfeiture to establish, by a preponderance of the evidence, that property is subject to forfeiture; and

(3) if the Government's theory of forfeiture is that the property was used to commit or facilitate the commission of a criminal offense, or was involved in the commission of a criminal offense, the Government shall establish that there was a substantial connection between the property and the offense.

(d) Innocent owner defense.

(1) An innocent owner's interest in property shall not be forfeited under any civil forfeiture statute. The claimant shall have the burden of proving that the claimant is an innocent owner by a preponderance of the evidence.

(2) (A) With respect to a property interest in existence at the time the illegal conduct giving rise to forfeiture took place, the term "innocent owner" means an owner who--

(i) did not know of the conduct giving rise to forfeiture; or

(ii) upon learning of the conduct giving rise to the forfeiture, did all that reasonably could be expected under the circumstances to terminate such use of the property.

(B) (i) For the purposes of this paragraph, ways in which a person may show that such person did all that reasonably could be expected may include demonstrating that such person, to the extent permitted by law--

(I) gave timely notice to an appropriate law enforcement agency of information that led the person to know the conduct giving rise to a forfeiture would occur or has occurred; and

(II) in a timely fashion revoked or made a good faith attempt to revoke permission for those engaging in such conduct to use the property or took reasonable actions in consultation with a law enforcement agency to discourage or prevent the illegal use of the property.

(ii) A person is not required by this subparagraph to take steps that the person reasonably believes would be likely to subject any person (other than the person whose conduct gave rise to the forfeiture) to physical danger.

(3) (A) With respect to a property interest acquired after the conduct giving rise to the forfeiture has taken place, the term "innocent owner" means a person who, at the time that person acquired the interest in the property--

(i) was a bona fide purchaser or seller for value (including a purchaser or seller of goods or services for value); and

(ii) did not know and was reasonably without cause to believe that the property was subject to forfeiture.

(B) An otherwise valid claim under subparagraph (A) shall not be denied on the ground that the claimant gave nothing of value in exchange for the property if--

(i) the property is the primary residence of the claimant;

(ii) depriving the claimant of the property would deprive the claimant of the means to maintain reasonable shelter in the community for the claimant and all dependents residing with the claimant;

(iii) the property is not, and is not traceable to, the proceeds of any criminal offense; and

(iv) the claimant acquired his or her interest in the property through marriage, divorce, or legal separation, or the claimant was the spouse or legal dependent of a person whose death resulted in the transfer of the property to the claimant through inheritance or probate,

except that the court shall limit the value of any real property interest for which innocent ownership is recognized under this subparagraph to the value necessary to maintain reasonable shelter in the community for such claimant and all dependents residing with the claimant.

(4) Notwithstanding any provision of this subsection, no person may assert an ownership interest under this subsection in contraband or other property that it is illegal to possess.

(5) If the court determines, in accordance with this section, that an innocent owner has a partial interest in property otherwise subject to forfeiture, or a joint tenancy or tenancy by the entirety in such property, the court may enter an appropriate order--

(A) severing the property;

(B) transferring the property to the Government with a provision that the Government compensate the innocent owner to the extent of his or her ownership interest once a final order of forfeiture has been entered and the property has been reduced to liquid assets; or

(C) permitting the innocent owner to retain the property subject to a lien in favor of the Government to the extent of the forfeitable interest in the property.

(6) In this subsection, the term "owner"--

(A) means a person with an ownership interest in the specific property sought to be forfeited, including a leasehold, lien, mortgage, recorded security interest, or valid assignment of an ownership interest; and

(B) does not include--

(i) a person with only a general unsecured interest in, or claim against, the property or estate of another;

(ii) a bailee unless the bailor is identified and the bailee shows a colorable legitimate interest in the property seized; or

(iii) a nominee who exercises no dominion or control over the property.

(e) Motion to set aside forfeiture.

(1) Any person entitled to written notice in any nonjudicial civil forfeiture proceeding under a civil forfeiture statute who does not receive such notice may file a motion to set aside a declaration of forfeiture with respect to that person's interest in the property, which motion shall be granted if--

(A) the Government knew, or reasonably should have known, of the moving party's interest and failed to take reasonable steps to provide such party with notice; and

(B) the moving party did not know or have reason to know of the seizure within sufficient time to file a timely claim.

(2) (A) Notwithstanding the expiration of any applicable statute of limitations, if the court grants a motion under paragraph (1), the court shall set aside the declaration of forfeiture as to the interest of the moving party without prejudice to the right of the Government to commence a subsequent forfeiture proceeding as to the interest of the moving party.

(B) Any proceeding described in subparagraph (A) shall be commenced--

(i) if nonjudicial, within 60 days of the entry of the order granting the motion; or

(ii) if judicial, within 6 months of the entry of the order granting the motion.

(3) A motion under paragraph (1) may be filed not later than 5 years after the date of final publication of notice of seizure of the property.

(4) If, at the time a motion made under paragraph (1) is granted, the forfeited property has been disposed of by the Government in accordance with law, the Government may institute proceedings against a substitute sum of money equal to the value of the moving party's interest in the property at the time the property was disposed of.

(5) A motion filed under this subsection shall be the exclusive remedy for seeking to set aside a declaration of forfeiture under a civil forfeiture statute.

(f) Release of seized property.

(1) A claimant under subsection (a) is entitled to immediate release of seized property if--

(A) the claimant has a possessory interest in the property;

(B) the claimant has sufficient ties to the community to provide assurance that the property will be available at the time of the trial;

(C) the continued possession by the Government pending the final disposition of forfeiture proceedings will cause substantial hardship to the claimant, such as preventing the functioning of a business, preventing an individual from working, or leaving an individual homeless;

(D) the claimant's likely hardship from the continued possession by the Government of the seized property outweighs the risk that the property will be destroyed, damaged, lost, concealed, or transferred if it is returned to the claimant during the pendency of the proceeding; and

(E) none of the conditions set forth in paragraph (8) applies.

(2) A claimant seeking release of property under this subsection must request possession of the property from the appropriate official, and the request must set forth the basis on which the requirements of paragraph (1) are met.

(3) (A) If not later than 15 days after the date of a request under paragraph (2) the property has not been released, the claimant may file a petition in the district court in which the complaint has been filed or, if no complaint has been filed, in the district court in which the seizure warrant was issued or in the district court for the district in which the property was seized.

(B) The petition described in subparagraph (A) shall set forth--

(i) the basis on which the requirements of paragraph (1) are met, and

(ii) the steps the claimant has taken to secure release of the property from the appropriate official.

(4) If the Government establishes that the claimant's claim is frivolous, the court shall deny the petition. In responding to a petition under this subsection on other grounds, the Government may in appropriate cases submit evidence ex parte in order to avoid disclosing any matter that may adversely affect an ongoing criminal investigation or pending criminal trial.

(5) The court shall render a decision on a petition filed under paragraph (3) not later than 30 days after the date of the filing, unless such 30-day limitation is extended by consent of the parties or by the court for good cause shown.

(6) If--

(A) a petition is filed under paragraph (3); and

(B) the claimant demonstrates that the requirements of paragraph (1) have been met,

the district court shall order that the property be returned to the claimant, pending completion of proceedings by the Government to obtain forfeiture of the property.

(7) If the court grants a petition under paragraph (3)--

(A) the court may enter any order necessary to ensure that the value of the property is maintained while the forfeiture action is pending, including--

(i) permitting the inspection, photographing, and inventory of the property;

(ii) fixing a bond in accordance with rule E(5) of the Supplemental Rules for Certain Admiralty and Maritime Claims; and

(iii) requiring the claimant to obtain or maintain insurance on the subject property; and

(B) the Government may place a lien against the property or file a lis pendens to ensure that the property is not transferred to another person.

(8) This subsection shall not apply if the seized property--

(A) is contraband, currency, or other monetary instrument, or electronic funds unless such currency or other monetary instrument or electronic funds constitutes the assets of a legitimate business which has been seized;

(B) is to be used as evidence of a violation of the law;

(C) by reason of design or other characteristic, is particularly suited for use in illegal activities; or

(D) is likely to be used to commit additional criminal acts if returned to the claimant.

(g) Proportionality.

(1) The claimant under subsection (a)(4) may petition the court to determine whether the forfeiture was constitutionally excessive.

(2) In making this determination, the court shall compare the forfeiture to the gravity of the offense giving rise to the forfeiture.

(3) The claimant shall have the burden of establishing that the forfeiture is grossly disproportional by a preponderance of the evidence at a hearing conducted by the court without a jury.

(4) If the court finds that the forfeiture is grossly disproportional to the offense it shall reduce or eliminate the forfeiture as necessary to avoid a violation of the Excessive Fines Clause of the Eighth Amendment of the Constitution.

(h) Civil fine.

(1) In any civil forfeiture proceeding under a civil forfeiture statute in which the Government prevails, if the court finds that the claimant's assertion of an interest in the property was frivolous, the court may impose a civil fine on the claimant of an amount equal to 10 percent of the value of the forfeited property, but in no event shall the fine be less than $ 250 or greater than $ 5,000.

(2) Any civil fine imposed under this subsection shall not preclude the court from imposing sanctions under rule 11 of the Federal Rules of Civil Procedure.

(3) In addition to the limitations of section 1915 of title 28, United States Code, in no event shall a prisoner file a claim under a civil forfeiture statute or appeal a judgment in a civil action or proceeding based on a civil forfeiture statute if the prisoner has, on three or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous or malicious, unless the prisoner shows extraordinary and exceptional circumstances.

(i) Civil forfeiture statute defined. In this section, the term "civil forfeiture statute"--

(1) means any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense; and

(2) does not include--

(A) the Tariff Act of 1930 or any other provision of law codified in title 19;

(B) the Internal Revenue Code of 1986 [26 USCS § § 1 et seq.];

(C) the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 et seq.);

(D) the Trading with the Enemy Act (50 U.S.C. App. 1 et seq.) or the International Emergency Economic Powers Act (IEEPA) (50 U.S.C. 1701 et seq.); or

(E) section 1 of title VI of the Act of June 15, 1917 (40 Stat. 233; 22 U.S.C. 401).

(j) Restraining orders; protective orders.

(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of satisfactory performance bonds, create receiverships, appoint conservators, custodians, appraisers, accountants, or trustees, or take any other action to seize, secure, maintain, or preserve the availability of property subject to civil forfeiture--

(A) upon the filing of a civil forfeiture complaint alleging that the property with respect to which the order is sought is subject to civil forfeiture; or

(B) prior to the filing of such a complaint, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that--

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered.

(2) An order entered pursuant to paragraph (1)(B) shall be effective for not more than 90 days, unless extended by the court for good cause shown, or unless a complaint described in paragraph (1)(A) has been filed.

(3) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when a complaint has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought is subject to civil forfeiture and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than 10 days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time and prior to the expiration of the temporary order.

(4) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.

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TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART I. CRIMES
CHAPTER 46. FORFEITURE

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

18 USCS § 984 (2004)

§ 984. Civil forfeiture of fungible property

(a) (1) In any forfeiture action in rem in which the subject property is cash, monetary instruments in bearer form, funds deposited in an account in a financial institution (as defined in section 20 of this title), or precious metals--

(A) it shall not be necessary for the Government to identify the specific property involved in the offense that is the basis for the forfeiture; and

(B) it shall not be a defense that the property involved in such an offense has been removed and replaced by identical property.

(2) Except as provided in subsection (b), any identical property found in the same place or account as the property involved in the offense that is the basis for the forfeiture shall be subject to forfeiture under this section.

(b) No action pursuant to this section to forfeit property not traceable directly to the offense that is the basis for the forfeiture may be commenced more than 1 year from the date of the offense.

(c) (1) Subsection (a) does not apply to an action against funds held by a financial institution in an interbank account unless the account holder knowingly engaged in the offense that is the basis for the forfeiture.

(2) In this subsection--

(A) the term "financial institution" includes a foreign bank (as defined in section 1(b)(7) of the International Banking Act of 1978 (12 U.S.C. 3101(b)(7))); and

(B) the term "interbank account" means an account held by one financial institution at another financial institution primarily for the purpose of facilitating customer transactions.

(d) Nothing in this section may be construed to limit the ability of the Government to forfeit property under any provision of law if the property involved in the offense giving rise to the forfeiture or property traceable thereto is available for forfeiture.

*** CURRENT THROUGH P.L. 108-204, APPROVED 3/02/04 ***
*** WITH A GAP OF 108-203 ***

TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART I. CRIMES
CHAPTER 46. FORFEITURE

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

18 USCS § 985 (2004)

§ 985. Civil forfeiture of real property

(a) Notwithstanding any other provision of law, all civil forfeitures of real property and interests in real property shall proceed as judicial forfeitures.

(b) (1) Except as provided in this section--
(A) real property that is the subject of a civil forfeiture action shall not be seized before entry of an order of forfeiture; and
(B) the owners or occupants of the real property shall not be evicted from, or otherwise deprived of the use and enjoyment of, real property that is the subject of a pending forfeiture action.
(2) The filing of a lis pendens and the execution of a writ of entry for the purpose of conducting an inspection and inventory of the property shall not be considered a seizure under this subsection.

(c) (1) The Government shall initiate a civil forfeiture action against real property by--
(A) filing a complaint for forfeiture;
(B) posting a notice of the complaint on the property; and
(C) serving notice on the property owner, along with a copy of the complaint.
(2) If the property owner cannot be served with the notice under paragraph (1) because the owner--
(A) is a fugitive;
(B) resides outside the United States and efforts at service pursuant to rule 4 of the Federal Rules of Civil Procedure are unavailing; or
(C) cannot be located despite the exercise of due diligence,constructive service may be made in accordance with the laws of the State in which the property is located.

(3) If real property has been posted in accordance with this subsection, it shall not be necessary for the court to issue an arrest warrant in rem, or to take any other action to establish in rem jurisdiction over the property.

(d) (1) Real property may be seized prior to the entry of an order of forfeiture if--

(A) the Government notifies the court that it intends to seize the property before trial; and

(B) the court--

(i) issues a notice of application for warrant, causes the notice to be served on the property owner and posted on the property, and conducts a hearing in which the property owner has a meaningful opportunity to be heard; or

(ii) makes an ex parte determination that there is probable cause for the forfeiture and that there are exigent circumstances that permit the Government to seize the property without prior notice and an opportunity for the property owner to be heard.

(2) For purposes of paragraph (1)(B)(ii), to establish exigent circumstances, the Government shall show that less restrictive measures such as a lis pendens, restraining order, or bond would not suffice to protect the Government's interests in preventing the sale, destruction, or continued unlawful use of the real property.

(e) If the court authorizes a seizure of real property under subsection (d)(1)(B)(ii), it shall conduct a prompt post-seizure hearing during which the property owner shall have an opportunity to contest the basis for the seizure.

(f) This section--

(1) applies only to civil forfeitures of real property and interests in real property;

(2) does not apply to forfeitures of the proceeds of the sale of such property or interests, or of money or other assets intended to be used to acquire such property or interests; and

(3) shall not affect the authority of the court to enter a restraining order relating to real property.

*** CURRENT THROUGH P.L. 108-204, APPROVED 3/02/04 ***
*** WITH A GAP OF 108-203 ***

TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART I. CRIMES
CHAPTER 46. FORFEITURE

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

18 USCS § 986 (2004)

§ 986. Subpoenas for bank records

(a) At any time after the commencement of any action for forfeiture in rem brought by the United States under section 1956, 1957, or 1960 of this title, section 5322 or 5324 of title 31, United States Code, or the Controlled Substances Act, any party may request the Clerk of the Court in the district in which the proceeding is pending to issue a subpoena duces tecum to any financial institution, as defined in section 5312(a) of title 31, United States Code, to produce books, records and any other documents at any place designated by the requesting party. All parties to the proceeding shall be notified of the issuance of any such subpoena. The procedures and limitations set forth in section 985 of this title shall apply to subpoenas issued under this section.

(b) Service of a subpoena issued pursuant to this section shall be by certified mail. Records produced in response to such a subpoena may be produced in person or by mail, common carrier, or such other method as may be agreed upon by the party requesting the subpoena and the custodian of records. The party requesting the subpoena may require the custodian of records to submit an affidavit certifying the authenticity and completeness of the records and explaining the omission of any record called for in the subpoena.

(c) Nothing in this section shall preclude any party from pursuing any form of discovery pursuant to the Federal Rules of Civil Procedure.

(d) Access to records in bank secrecy jurisdictions.
(1) In general. In any civil forfeiture case, or in any ancillary proceeding in any criminal forfeiture case governed by section 413(n) of the Controlled Substances Act (21 U.S.C. 853(n)), in which--
(A) financial records located in a foreign country may be material--
(i) to any claim or to the ability of the Government to respond to such claim; or
(ii) in a civil forfeiture case, to the ability of the Government to establish the forfeitability of the property; and

(B) it is within the capacity of the claimant to waive the claimant's rights under applicable financial secrecy laws, or to obtain the records so that such records can be made available notwithstanding such secrecy laws,

the refusal of the claimant to provide the records in response to a discovery request or to take the action necessary otherwise to make the records available shall be grounds for judicial sanctions, up to and including dismissal of the claim with prejudice.

(2) Privilege. This subsection shall not affect the right of the claimant to refuse production on the basis of any privilege guaranteed by the Constitution of the United States or any other provision of Federal law.

5-B

NOTES OF

CONFERENCE CALLS AND MEETING

Notes: Rule G Conference Calls & Meetings

25 March 2003

Participants in the 25 March conference call included Cassella, Cooper, Heim, Jeffries, Kyle, Levi, Marcus, McCabe, McKnight, and Rabiej.

Setting the Scene

The first questions addressed were the reasons for adopting a Rule G, and for doing it now.

Background. Cassella noted that civil forfeiture statutes have been adopted over a period of many years. The Civil Asset Forfeiture Reform Act of 2000 is only the most recent legislation. CAFRA overlays "some procedural uniformity" from the initial investigation to filing a civil proceeding. It also creates some new defenses.

Without a new Rule G, procedure will continue to be governed by the supplemental rules. The forfeiture statutes generally do not provide the details of procedure, but instead refer procedure to the supplemental rules.

The draft Rule G is intended to do several things. It picks up the specific forfeiture provisions in the supplemental rules, particularly Rules C and E. It addresses issues that never have been addressed in the supplemental rules. It is a parallel to the exercise that consolidated the procedures for criminal forfeiture in Criminal Rule 32.2.

Rule G is consistent with CAFRA both in letter and in spirit. CAFRA sets time limits for some procedures, but has few other specific procedure provisions. Some forfeitures, including traditional customs and tax forfeitures, are exempted from CAFRA. Although the current draft attempts to carve these CAFRA-exempt forfeitures out of Rule G, there a few instances where that cannot be done. G(7) covers those. But it may be better to bring all forfeitures back into Rule G, so as to have a uniform procedure that can be relied on. (Rule G(7)(c) has a hardship exception procedure for release of property, modeled on § 983(f); that would not apply in customs forfeitures. That does not, however, create any need to continue to apply Rules C or E to forfeiture proceedings. In the 9th Circuit, the pre-CAFRA rule regarding a probable cause requirement for filing a forfeiture complaint applies only to non-CAFRA cases.)

If we delete the exceptions made in the current draft for forfeitures that are exempt from CAFRA, the result will be that, through G(1), Rule G applies to all civil forfeitures.

Rule G responds to difficulties in present practice. C and E have provisions designed for admiralty cases that at best apply awkwardly in forfeiture. The 2000 supplemental rules amendments were a bit of a band-aid, adopted because admiralty lawyers did not like to have forfeiture decisions that stretch the admiralty concepts to fit forfeiture needs, at the cost of distorting admiralty proceedings.

Beyond that, the supplemental rules do not address several topics that should be addressed by rule. Constitutional requirements have developed for notice, and for excessive fines. CAFRA dictates some changes. And it is desirable to modernize to provide for forfeiture of property in other countries; for other cases where the property is outside the district where the forfeiture is being conducted; and for publication on the internet.

Some parts of Rule G react to developing case law. Generally the draft provisions reflect the developing law. But G(5) seeks to depart from recent decisions that adopt an Article III minimum threshold for standing to file a claim. The area of greatest concern is the ability to file a claim through a strawman or nominee, enabling the wrongdoer to conceal his identity.

Fit With Supplemental Rules. The basic plan is to carve out from Rules A through F, most particularly C and E, all provisions that focus specifically on forfeiture. If we see something in A through F that is not in G, we should put it in G. If something is missed, G(1) allows incorporation of A through F to fill the gaps. This is a "belt and suspenders" approach. G remains located in the supplemental rules because many statutes over the years have adopted the admiralty rules to govern forfeiture proceedings.

It was observed that it would be helpful if G could be made entirely self-contained. A reader then would know that all procedure in forfeiture proceedings, to the extent governed by court rule, is to be found in Rule G and the Civil Rules. If there is any leakage, those involved in forfeiture proceedings will feel a need to become familiar with all of the Supplemental Rules. That task is not always easy.

As G stands now, it is not entirely self-contained. Draft G(6)(b)(ii), for example, calls for giving security "under these rules." This language draws from the parallel language in E(9)(b)(ii); general security provisions appear at least in E(5).

Incorporation of Rule A ensures the further incorporation of the Civil Rules. The supplemental rules, for example, say very little about discovery and nothing about discovery sanctions

But there may be inconsistencies What happens if Rule G says one thing, and somewhere in Rules A through F there is an inconsistent provision?

This discussion suggests that work remains to be done on the second sentence of G(1): "Rules A through F also apply unless inconsistent with Rule G." The admiralty bar is concerned that so long as any part of Rules A through F may apply in civil forfeiture proceedings, the meaning of those rules may be strained to fit the needs of forfeiture at the cost of distorting admiralty practice. And whatever happens, it will be important to be sure that the excisions from A through F are matched by careful reconstruction of the parts that remain. (An illustration is provided by the March 26 discussion of serving interrogatories with the complaint. If Rule G departs from Rule C, it must be made clear that Rule G governs forfeiture practice.)

Substantive Rights. There was brief discussion of the possibility that some G provision might transgress the Enabling Act by abridging, enlarging, or modifying a substantive right. It was agreed that this concern must be addressed on a case-by-case basis. Procedural changes often have a

profound impact on the enforcement of substantive rights, but do not for that reason alone violate the Enabling Act. But there may be more directly substantive effects, including effects on constitutional rights.

Even apart from the Enabling Act, Rule G touches on often sensitive issues. We must be particularly careful. This is not the first setting in which it is not easy to choose between rulemaking and waiting for Congress to act. Some of the issues are controversial. Thoughtful disposition by Congress might be the best approach. But deferring to Congress runs the risk that Congress may never become involved — there is a feeling that enacting CAFRA absorbed all the energy Congress has for this topic. And there is always a risk that a lack of time for serious work may lead to hasty legislation that produces ineffective rules.

Controversial issues must be identified for the Advisory Committee. That does not mean that they will not be taken on, but the decision whether to take them on should be informed by all sides of the controversy Criminal Rule 32.2 took on controversial issues, and resolved them — one example is the question whether criminal forfeiture is a matter to be decided by the jury, or is a sentencing matter.

Statutory Incorporation. Draft Rule G frequently invokes CAFRA provisions by explicit statutory reference. There is always a risk that these references will be superseded, leaving the rule in a confusing relationship to new statutes until the amending process takes note and effects a change. But as a practical matter, it does not seem likely that the statute will be changed soon. Congress took seven years to adopt CAFRA, and was exhausted at the end. "No one wants to revisit it."

CAFRA was enacted without contemplating creation of a new Rule G. That idea arose later. Exhaustion had set in by the point of considering legislation on such procedural details as what a claim must say. They just referred to the supplemental rules and for the most part let it go at that. At a few points CAFRA does address the details of judicial forfeiture procedure, it may be that it went too far with some of these provisions.

What Rule G is intended to do is to fill in gaps, to create procedures addressing things that Congress clearly decided to put over. Nothing in the draft is inconsistent with the statute or with the deals made in Congress. Having a comprehensive Rule will help spot the possible inconsistencies.

G(5): Claim Standing

Dean Jeffries began the discussion by noting that on a first pass, there seem to be two prominent issues: Must an answer be filed before a claimant may make a motion to dismiss? And, as a matter of still greater difficulty, should standing to claim require a showing of ownership? Will a "possessory" interest do? Why should the United States be put to the burden of justifying forfeiture if the claimant is not entitled to the property?

Part of the difficulty arises from the proposition that the government does have the burden to prove forfeiture — it is not entitled to keep the property unless it proves forfeitability.

Approaching these questions by rule seems an aggressive use of the Enabling Act. If we are to take them on, we must become thoroughly familiar with what the cases have done and where they seem to be going.

It was pointed out that it seems too late to think that the courts are divided. In the last three years, they seem to have reached a consensus that any colorable interest supports standing ownership is not required. So a person who finds money in the road; money found in a car titled in a drug owner's mother's name — she did not buy the car, never controlled it, but has title. "Ownership" itself is defined in CAFRA, § 983(d)(6), but in general terms that are given content by incorporating state law CAFRA is incorporated in Rule G(5)(a)(i)(B).

And so Rule G(5) undertakes to elevate the standing threshold. G(5)(a)(i) requires an "ownership interest." Should we undertake this change in judicial doctrine? What are the policy grounds for disapproving what courts have done?

The course of forfeiture proceedings was described. A bundle of money is seized from a locker in a Port of New York Authority facility. Notice must be published, and sent at least to the person who rented the locker. A possessory interest suffices to file a claim. Once a claim is filed, the government has to establish forfeitability by a preponderance of the evidence. The cases say, in effect, "so what"? Once forfeitability is established, the claimant will win only by proving both ownership and innocence. But the government must establish forfeitability as soon as a claim is made by someone who asserts a bare possessory interest. And it may be very difficult to establish the forfeitability of the money. Proofs will involve testimony as to sniffs by drug dogs, analysis for drug residue in the locker, and so on. This is hard and at times chancy work. The government should not be put to this work on the basis of a flimsy possessory interest. One case, for example, recognized standing for a claimant whose only showing was that the keys to the seized automobile had once passed through his hands. Remember that if the government fails to establish forfeitability, the property goes to the claimant.

One part of the concern is that claims are often filed by straw men acting on behalf of the actual owners. If standing is limited, the result at times will be to force disclosure of the owner. The "real bad guy" commonly has notice, because the government knows of his interest, but fails to come forward. The problem occurs most frequently with respect to seizures of cash — money found in a vehicle, carried by a courier, and so on. At the same time, "it is rare for a claim to open an investigational lead."

A major concern is that proof of forfeitability often requires disclosure of an informant, wiretap evidence, or like sensitive information. The concomitant risks should not be incurred at the instance of a claimant who lacks an ownership interest.

In something like 85% of seizures, no one files an administrative claim and no judicial forfeiture proceeding is initiated. But in cases in which the crook does not make a claim, we are now seeing claims by "nominees."

These questions tie to draft G(7)(b), which allows the United States to move at any time before trial to strike a claim and answer for failure to establish an ownership interest in the property subject to forfeiture.

These questions were not identified as issues in dealing with Congress during the enactment of CAFRA. It was in the late 90s that courts started down the path of recognizing standing under liberal rules, saving the ownership inquiry until the government had established forfeitability.

Before CAFRA was enacted, the burden of proof was taken from the customs statutes. The government had to establish probable cause; then the claimant had to show nonforfeitability. In Congress, the Department of Justice agreed to the § 983(c) allocation of the burden to the government. That makes the standing question more important.

An analogy might be found in the old 4th and 5th amendment cases dealing with the problem that a criminal defendant might need to incriminate himself in order to establish standing to challenge a search and seizure. These problems are controversial. There is a Supreme Court ruling that a showing made to establish standing cannot be used against a defendant during the case in chief. The Department of Justice would not object to including a feature like that in Rule G.

It was suggested that in many ways G(7)(b) is the key provision, since it allows the government to move to strike the claim for failure "to establish an ownership interest." The G(5)(a)(i)(B) incorporation of § 983(d)(6) ownership definitions simply puts the claimant on notice.

In considering whether to "choose sides," or instead leave these problems to Congress, it should be noted that the decisions do not address the practical problems encountered by the government when it is put to the burden of proving forfeitability. The cases are mainly pre-CAFRA cases, decided when the government had only the lower burden of showing probable cause. The Second Circuit has applied the relaxed standing rules in a CAFRA case ($557,000).

As an illustration, a person driving the car in which the money was found has standing to make a claim even though the car was registered to someone else. That puts the government to the burden of proving forfeitability.

The Enabling Act does authorize rules that overtake what courts have done. But a decision to do that requires a careful study of the question, and a deliberate choice by the full Advisory Committee.

It may be possible to find an intermediate solution that allows standing to claim on the basis of a "real" possessory interest. A right to possession at the time of the seizure might do it. One illustration is provided by the case in which a box of Tide detergent fell out of an automobile. The driver of the following car stopped, picked up the box, and then engaged in a fight for possession with the driver of the car the box fell from. The driver of the following car should not have standing; the brief physical possession, good against the rest of the world, was not good against the driver of the car the box fell from

Rule G(5) also ties to G(7)(d), which requires that a claimant file an answer before being entitled to move to dismiss. The case law has not really focused on this issue. At times it has been assumed that there must be an answer, at other times this possible requirement has been overlooked. The question arises when the government wants the answer, and responses to interrogatories, before consideration of a motion to dismiss. A case illustrating the problems is now pending in the Third Circuit. $8,000,000 was seized from A's bank account. A was a convicted money launderer. The account was held in the name of one money exchange service. B, another money exchange service, filed claims asserting that A was its nominee, who would pay the money to B through "another Virgin Islands corporation," and filed a motion to dismiss. If the government has a right to dismiss the claim of a non-owner (G(7)(b)), then the information provided by an answer and by responses

to interrogatories can be helpful. The government won in the district court with its argument that an answer must be filed to support a motion to dismiss. The case is on appeal; at oral argument, at least one judge expressed skepticism whether present Rule C(6) can trump Rule 12(a)(4), which permits a motion to dismiss before answering. But there are two district-court decisions in the government's favor.

There is no inevitable sequence to set for a government motion to dismiss a claim for lack of standing, a claimant's answer, and a claimant's motion to dismiss the complaint. A motion to dismiss the complaint turns only on what is in the complaint, for example the particularity requirement. Some defense lawyers argue that probable cause must be established in the complaint: if they are right, the government would have a serious problem with revealing the sources of information. The government does not believe that it should be forced to defend the complaint against all 12(b)(6) grounds unless the claimant is a "real party in interest." One consequence of dismissing the complaint is that the arrest warrant is released and the property goes to the claimant, unless the government is able to start over. These questions are analogous to the standing question, but standing is more important. The arguments that support a pre-answer motion to dismiss in ordinary civil procedure do have some force in civil forfeiture proceedings.

G(5): Waiver of Objections

Discussion turned to the provision in G(5)(b) that objections to in rem jurisdiction or venue are waived if not stated in the answer. NACDL objects to this approach. But Rule 15 should be available to amend an answer that omits the objections. Waiver of similar objections is familiar from Rule 12(b)(1) There is a problem with objections made very late in the game. The purpose of G(5)(b) is to ensure that the 12(b)(1) principle applies to in rem jurisdiction. If there is doubt about the ability to retrieve a lost opportunity to answer, redrafting to invoke Rule 15 should not be a problem.

G(5): Exemption of CAFRA-Exempt Forfeitures

G(5)(a)(iv) exempts from the claim-filing times of (ii) any case exempted from CAFRA by § 983(i). But on second or third thought, it would be better to strike the exemption. A uniform filing time for all types of civil forfeiture proceedings is desirable. The statutes that govern proceedings exempted from CAFRA all refer to the supplemental rules for procedure. A check will be made to be sure that they do not have their own independent times for filing claims. If the statutes have separate times, it might prove confusing to exercise the supersession power — claimants who check the statute may be misled. If that problem does not arise, the (iv) exemption will be deleted.

G(5): Identify Claimant

It has been suggested that perhaps G(5)(a)(i) should include a requirement that the claim identify the claimant. This would be useful, but may be a matter of some delicacy. On the other hand, the caption of the claim might do that.

March 26, 2003

Participants in the March 26 conference included Cassella, Cooper, Heim, Levi, Kyle, McCabe, McKnight, Marcus, and Rabiej.

G(1)

The first question is whether it is useful to attempt to draw all of the civil forfeiture provisions out of the current supplemental rules, and to join them with additional new provisions in a new Rule G. That question has been discussed. Questions of implementation remain. The incorporation of Rules A through F to fill the gaps in G may need to be accomplished by subtler means. This sentence will be worked over.

A related question, touched on yesterday, is what approach should be taken to any inconsistencies that might appear between Rule G and the forfeiture proceedings that are exempted from CAFRA. Customs, tax, and some other proceedings are non-CAFRA proceedings. Rule G could be drafted to supersede inconsistent statutory provisions, or the inconsistent provisions could be expressly incorporated. If supersession is not the answer, express incorporation will help to avoid confusion — confusion both as to whether there is an intent to supersede and as to the need to consult the non-CAFRA statutes. Still a third approach is simply to carve the non-CAFRA statutes out of Rule G, leaving them to be governed by the other supplemental rules. That approach has a clear disadvantage — we could not strip the forfeiture provisions from the present rules, but would have to leave them in place to govern these other proceedings. (Or we could leave the non-CAFRA forfeiture proceedings to be governed by the real admiralty rules, unsatisfactory experience with that approach is what led to the 2000 amendments that added explicit forfeiture provisions to the supplemental rules.)

It was noted that if a decision is made to supersede a statutory provision, it might be desirable to consult Congress. Congress tends to be concerned only if a proposal is controversial, but some of these issues will be controversial with the bar.

G(2)(b)(v)

Draft G(2)(b)(v) requires that the complaint state the circumstances with such particularity that a claimant will be able to commence an investigation of the facts and to frame a responsive pleading. NACDL protests that this incorrectly represents how much evidence is required. The government says it is not changing how much particularity is required. NACDL wants details of facts sufficient to form a belief that the government will be able to prove forfeitability.

The intention was to reproduce, as nearly verbatim as possible, current Rule E(2)(a). The explanation cites the case law, noting that the cases are not consistent in the words they use. The difference with NACDL is their view that the present rule requires more than it does. The government is content to leave development of the particularity requirement to the case law so long as the rule says that it has always said. Pleading is deliberately set apart from other civil pleading. The complaint is followed by an arrest warrant; motions to recover property are held in abeyance. The defendant's avenue to relief is a motion to dismiss, claiming the government has not enough facts to go forward. There should be facts to show a reasonable basis to believe the government will

be able to establish forfeitability at trial. Very few cases are dismissed for want of particularity. The allegations of the complaint have nothing to do with ownership. The challenges to the complaint do not seek to identify the property. NACDL seeks a higher standard of pleading than the government thinks appropriate. This ties to G(7)(d)(ii), which in turn is based in § 983(a)(3)(D) — a complaint may not be dismissed on the ground that the government did not have adequate evidence at the time the complaint was filed to establish forfeitability.

It was suggested that Rule E(2)(a) includes the standard that the claimant be able to investigate and frame a responsive pleading "without moving for a more definite statement." Deletion of these words from G might easily be read to reduce the required level of particularity. The initial draft retained them, on the theory that deletion might invite controversy. No substantive change was intended. Perhaps the words should be restored, despite the argument that they are surplusage. (Without making it express, there seemed to be a consensus to restore "without moving for a more definite statement." The next draft will restore these words. There was also some discussion of diluting the particularity requirement by demanding only "reasonable" particularity, but this suggestion seemed to be rejected.)

G(2)(b)(ii)

It was noted that "or" in the draft should be changed to "and" — "subject-matter jurisdiction over the action ~~or~~ and in rem jurisdiction over the property."

G(2)(c): Interrogatories with Complaint

G(2)(c) carries forward C(6)(c) — interrogatories may be served with the complaint (G(5)(c) requires that answers to the interrogatories be served with the answer to the complaint) NACDL argues that the special needs that justify this practice in admiralty do not apply to civil forfeiture. They further urge that the practice encourages abuse — that the government demands much unnecessary information, going beyond what is needed to go forward with the proceeding. Unrepresented claimants may be overwhelmed. The government, on the other hand, says that this is standard practice, and that it needs to know at the beginning whether the claimant has standing to contest the forfeiture. It is important to know whether there is a proper party before motions are filed and discovery begins The need to act quickly arises here as well as in admiralty, as when assets held by a foreign person are seized.

It was conceded that at times lengthy sets of interrogatories may be served with the complaint, going far beyond what the government needs to know at the outset. In some courts the government is discouraged from serving interrogatories with the complaint. The practice is routine in other courts, at least with respect to questions addressed to who the claimant is and what is the claimant's relationship to the property.

It would be possible to limit complaint interrogatories to questions addressed to the claimant's identity and interest in the property. For that matter, there is no particular need to serve even these interrogatories with the complaint, so long as they can be served and answered "before motions practice." This question ties to the G(7)(d) bar on moving to dismiss before filing an answer. A claim, for example, may state simply "I am the owner." We want to know what is the basis for that statement

Remember that under G(4)(b) the government will serve the complaint on any person appearing to have an interest in the property. It is administratively convenient to serve the interrogatories with the complaint. Generally the claimant has filed in the administrative forfeiture — that is the reason why a judicial proceeding has been initiated. There is no litigation in the administrative procedure: if a claim is filed, the government has to go to court to effect forfeiture. (The government is now pursuing the "interesting issue" whether it has to go to court in response to a claim that clearly is bogus.)

It was pointed out that serving interrogatories with the complaint may discourage claims, including legitimate claims. Of course the government does not see the claims that are not filed; what it sees are responses that file a claim and a motion attacking the interrogatories as burdensome.

In ordinary civil practice, Rule 26(d) bars interrogatories before the Rule 26(f) conference.

It was asked why the courts that frown on the complaint-interrogatory practice disapprove it. The response was that the government could wait until a claim is filed. Many people are served who do not file claims; in practice, interrogatories go only to the real party in interest.

G(7)(b): the interrogatory discussion moved into a discussion of Rule G(7)(b), which allows the government to move to strike a claim and answer for "failure to establish an ownership interest in the property." The government understands that this motion, as a motion to strike, goes to the sufficiency of the claim and answer pleading, not to actual proof. But it may also want the motion to address the sufficiency of the fact evidence, to go beyond the face of the pleading. It is much like a Rule 56 summary-judgment motion. Interrogatory answers could be used to support the motion. For example, a claimant may rely on the proposition that the owner of the property owes money to the claimant; that is not sufficient, because an unsecured creditor lacks standing to challenge a forfeiture. This question is separate from the question whether there must be an "ownership" interest, or whether some form of possessory interest may support a claim.

If there are cross-motions, one to dismiss the complaint and one to dismiss the claim and answer, there is no priority that requires decision of one before the other.

It was suggested that if dismissal of the complaint has priority, interrogatories should come later.

G(7)(d)(ii): Rule G(7)(d)(ii) addresses a motion based on lack of evidence needed to plead with particularity. It tracks CAFRA. The government still must plead with particularity the circumstances from which the action arises. The only basis to dismiss the complaint is failure to plead with particularity; § 983(a)(3)(D) overrules a 9th Circuit rule that the government must have facts sufficient to establish probable cause at the time it files the complaint

Turning back to complaint interrogatories, it was said that the government could accept a rule that permits government interrogatories at any time after a claim is filed. But a rule still is needed to accomplish this, because the defense bar otherwise will continue to argue that under the Rule 26(d) moratorium there can be no discovery until after the Rule 26(f) conference.

It was asked whether this rule should be bilateral — should the claimant be able to address interrogatories to the government with the claim? The response was no. The ordinary discovery rules should apply, with the one exception to permit the government to serve interrogatories addressed to the ownership interest issues after a claim is filed.

It was noted that this sort of discovery is discouraged in other civil litigation. The first wave of form interrogatories often proves inadequate to the case as it develops. We are trying to cut back on the extent and burden of discovery. And it is difficult to draft a rule that confines post-claim interrogatories to ownership interest issues. We could rely on a rule that requires court permission — but that is what Rule 26(d) already does.

A draft will be prepared that limits G(5)(c) interrogatories to those addressing a claimant's ownership interest, and that permits them to be asked only after a claim is filed.

This drafting effort will raise anew the question of integrating Rule G with the other supplemental rules. C(6)(c) provides for interrogatories with the complaint. We will need to be careful to be sure that the admiralty practice does not supplement the forfeiture practice, both in restructuring C(6) to remove forfeiture proceedings and in crafting the G(1) provision that invokes Rules A through F to fill in gaps in the balance of Rule G. This task deserves further attention.

G(3)(a)

Rule G(3)(a)(i) directs the clerk to issue a warrant to arrest property described in a forfeiture complaint. NACDL argues that this provision violates due process. The government responds that generally the property is already in the government's possession If the property is not already in the government's possession, and is not subject to a judicial restraining order, G(3)(a)(iv) requires that a judge determine that there is probable cause for the arrest.

It was pointed out that G(3)(a)(iv) goes beyond present Rule C(3)(a)(i) in requiring a probable-cause determination by a judge when the property is not already restrained or in government possession. CAFRA dispenses with a warrant as to real property, and also provides for restraint. Although § 985 does not require it, the government practice in real-property forfeitures is to record notice of the forfeiture proceedings.

As a matter of drafting, it may be useful to integrate the judge-determination provisions of (iv) with the clerk-issued warrant provisions of (i). That approach may defuse due process objections that arise from reading (i) without moving on to consider (iv).

It was asked whether the reference to "a neutral and detached magistrate" in (iv) reflects a need to rely on state judges to make probable-cause determinations. The government experience is that emergencies rarely arise, and that they can be resolved by getting a seizure warrant under Criminal Rule 41. The advantage of the G(3) arrest warrant is that it establishes in rem jurisdiction. (It was noted that a state judge can issue a seizure warrant, but not the arrest warrant that establishes federal court in rem jurisdiction.) The warrant is a formality in most cases — those in which the government already has possession of the property The warrant also is useful to establish in rem jurisdiction when the property is seized by local officers and turned over to federal officials; this often happens.

The concern with a clerk-issued warrant is that it is a seizure without a determination of probable cause. Government attorneys now are advised to go to a judge in the circumstances covered by G(3)(a)(iv), the rule is designed to codify and reaffirm actual practice.

It was decided that the probable cause determination should be made only by a federal judge. As a matter of style, cutting across the Civil Rules, it must be decided whether it is better to say "judge," "federal judge," "magistrate judge or district judge," or conceivably some other term. And it must be decided whether to establish a preference for going first to a magistrate judge: "only after a magistrate judge, or a district judge if a magistrate judge is not (reasonably) available, has determined that there is probable cause for the arrest."

G(3)(b)(ii)(A), (C)

Rule G(3)(b)(ii) requires that the warrant be executed as soon as practicable, unless the court directs a different time in any of three circumstances. The first circumstance, (A), is that the complaint is under seal. NACDL assails this provision on the ground that there is no authority to seal the complaint, and on the further ground that there is an abuse when the government seeks to file under seal as a strategy to satisfy limitations periods while delaying further proceedings indefinitely. The same protest is made as to the third circumstance, (C), that allows delay in executing the warrant if the action is stayed prior to execution. (§ 983(a)(3)(A), with several complications, requires that within 90 days after a claim is filed in an administrative forfeiture proceeding the government file a civil-forfeiture action, or return the property.)

It is not clear how often the government seeks to delay execution of the warrant. Present Rule E(4)(a) directs that the marshal "forthwith execute the process." NACDL likes this requirement. (But note that Rule E(3)(c) provides that issuance and delivery of process in rem shall be held in abeyance if the plaintiff so requests.) The "forthwith execute" provision has caused problems for the government. There are three cases in the Central District of California — two of them now on review in the Ninth Circuit — that dismiss the complaint as a sanction for failure to serve "forthwith." That approach is inconsistent with sealing to protect sources of information, and is inconsistent with a stay issued to protect sources of information. It also is inconsistent with the problems that arise when the property is located abroad, where the government must rely on foreign officials for execution.

NACDL's concerns seem to arise with respect to the CAFRA 90-day filing requirement and statutes of limitations. One "limitations" illustration arises from the statute providing that electronic funds are fungible for one year, but after that forfeiture of a present electronic fund is permitted only if it can be traced to the original forfeitable fund. It is important to file within that year. Another limitations problem arises in money-laundering; funds laundered long ago may be protected against forfeiture, even though involved in a continuing scheme.

Satisfying these requirements without letting the claimants know is a legitimate concern. But delay is authorized by Rule G only if the court is persuaded to seal the complaint or stay execution.

These provisions need to be contrasted with Civil Rule 4 provisions for serving the summons and complaint in an ordinary civil action. In a forfeiture proceeding, the arrest warrant is served only on the property, the "defendant" res. Statutory time limits are not geared to service of the arrest

warrant. The complaint is served on identifiable potential claimants under G(4)(b), triggering the times to claim and to answer. G(4) does not set any time for serving the notice. It may be necessary to tend to the integration of G(4) with Civil Rule 4(m) Rule 4(m) addresses the time for serving summons and complaint on a defendant. On its face, it does not apply to the different system in forfeiture proceedings where the only defendant is the property, and notice (not summons) and complaint are served on "any person who, appearing to have an interest in the property, is a potential claimant." But these distinctions may prove confusing. If nothing else, it might help to have a Committee Note stating that Rule 4(m) does not apply But thought also should be given to the question whether to adapt something like Rule 4(m) to Rule G(4), perhaps as a parallel to G(3)(b)(ii) requiring notice "as soon as practicable," with exceptions for sealed complaints, property abroad, or stays

15 July 2003

Participants in the July 15 conference call included Cassella, Cooper, Heim, Jeffries, Marcus, McCabe, McKnight, and Rabiej.

Rule G(4)

Discussion, led by Heim, focused entirely on Rule G(4). Particular concern was expressed as to five topics: How should notice be accomplished for unknown claimants — the questions involve modes of publication, including reliance on the internet; whether e-mail should be permitted as a means of direct notice under (4)(b); whether notice addressed to an inmate at a prison always satisfies "Mullane" requirements; and what point should be used to measure the time to file claims — whether the date when notice is sent or the date when it is received. These topics were woven into discussion of each paragraph of subdivision (4).

(4)(a)(i)(C): As drafted (4)(a)(i)(C) allows newspaper publication in any one of three places — where the action is filed, where the property was seized, or where the property is located. It was pointed out that NACDL believes that notice always should be published where the action is filed. In addition, if the action was filed in a different place, notice should be published either where the property was seized or — in case of real property that was not seized — where the property is located. Is that too much of a burden? In response, it was pointed out that the current rule and statute refer only to publication where the action is filed. That is antiquated — it dates from a time when the action could be filed only where the property is located. But venue has expanded, and the purpose of the draft rule is to provide an opportunity to publish notice in a place that is most likely to reach potential claimants. At the same time, notice is costly: the minimum cost is $1,000 in the least expensive locations, and $2,000 is common. The government as a matter of practice does publish in multiple locations when that seems appropriate. And it may make no sense to publish where the action is filed if the property, seizure, or likely claimants are located elsewhere

It was suggested that these difficulties could be met by requiring publication both where the action is filed and also — if different — in the place of seizure or the location of non-seized real property, but also by permitting publication in only one place if the court grants relief. But it was responded that publication usually is "immediate"; the need to seek relief from the court would

involve thousands of applications in cases and at a time when the judge has no other reason to become involved. And in more than 90% of forfeiture proceedings, there will be direct notice under (4)(b) to at least some one potential claimant. Usually the property was seized from someone, or there is a record owner or lienholder.

A different question addressed the NACDL concern that property may be moved away from the place of seizure to justify publication in an unlikely place as the "location." The purpose of referring to the place where property is located was to address real property that has not been seized — an action may be filed in one district to forfeit real property in another district. This can be made clearer by drafting the rule to refer to the location of property that was not seized.

Further drafting suggestions were made. One was to require publication in whichever of the alternative places is most likely to reach claimants. Another is to say something in more general precatory terms about the need for notice by means best calculated to reach potential claimants. This chore will be addressed.

(4)(a)(iii) provides that publication is not required if the value of the property is less than $1,000 and direct notice is sent under (4)(b). It was asked how the rules should approach the drafting problem that $1,000 may be an appropriate threshold now, but become too low with future inflation. $1,000 is about the minimum cost of notice in the least expensive districts. It seems inappropriate to require costly publication when the value of the property — perhaps a cheap handgun or a "dirty magazine" — is far less than the cost of notice. One possibility would be to discard any specific dollar figure, relying instead on a provision for court permission to dispense with publication when there is direct (4)(b) notice and the cost is unreasonable in light of the value of the property (or the cost exceeds the value of the property). The alternative of providing a value index did not seem attractive, although the Bankruptcy Rules do use indexing.

As part of this discussion, it was asked whether the provision in (4)(a)(i) describing notice "unless the court orders otherwise" was intended to permit the court to order variations from the requirements of (ii), (iii), and perhaps (iv). That was not the intent.

(4)(a)(iv) addresses publication when the forfeiture property or a potential claimant is in a foreign country. The action may be filed in Miami because that is where the property is, or it may be filed in Miami even though the property is in Spain. It allows publication in the place where the action is filed because that may be where potential claimants are located — the property is in Spain, but the action is filed in Miami It allows publication where the property is located, because the claimants may be in Spain, not Miami. It provides for notice in a newspaper published outside the country where the property is located, but circulated within it, because some countries forbid publication in domestic newspapers. In one action, notice was published in the International Herald Tribune because the "victims" were located in 72 countries. It was asked whether here too there should be a double notice requirement. always in the place where the action is filed, and also in the country where the property is located or where potential claimants are likely to be found? It was answered that often that would be an unnecessary burden; often there is only one "obvious" place to publish Here too, precatory language will be added to parallel the language to be added to (iii).

As a separate matter, it was pointed out that (iv) refers to a person "believed to be located in a foreign country." Whose belief counts? It was agreed that this should be shifted to an active voice — if the attorney for the government believes, or something like that. Part of the purpose is to avoid any requirement that a court make a finding on this question.

(4)(a)(v) would permit notice on the Internet to substitute for newspaper publication in the discretion of the Attorney General. The obvious question is whether this should be permitted only as a supplement to newspaper publication, not as a substitute. Again, publication is expensive. And it is seldom effective. Rather than convey notice to plausible claimants who otherwise would not have notice, newspaper publication tends to draw cranks There is no point in adding Internet posting if newspaper notice has to be published anyway. Indeed, the Department of Justice does not now have the technology for Internet notice. It would have to establish a suitable "window" on the Department or Marshal's web page. The window would reach notices of forfeiture by several alternative methods — the date and place of seizure, description of the property seized, and so on. One compromise approach would be to authorize the court to approve Internet notice as a substitute for newspaper publication; if the device proved effective, it might become necessary to amend the rule.

Further discussion pointed out that Internet notice has the potential to be far more effective than newspaper publication. Much depends on the design of the web site. Accepting that view, it still remains to decide whether Internet notice should be confided to government discretion. What we really want is for the Department to design a web site that works, and then approve its use for all cases. But there may not be sufficient incentive for the Department to construct the site on a trial basis. Among other risks, a trial may show that the nature of internet notice draws many more cranks than newspaper publication, and does little to find real claimants.

This provision will be revised. It may say that Internet notice can be substituted for newspaper notice if in the circumstances it seems more likely to be effective. Some other functional concept may be found. But something will be required to replace simple reliance on the Attorney General's discretion.

4(a) Structure: It was agreed that the structure of 4(a) would be improved by separating provisions dealing with the content of the notice from the provisions dealing with the method of giving notice. The content provisions are now (a)(1)(A) and (B). The rest is method. As to contents, we should add a provision — similar to the pleading requirement in (2)(a) — requiring a description of the property subject to forfeiture.

4(b) is a first-ever provision for direct notice to any person who, appearing to have an interest in the property, is a potential claimant. There is no provision setting the time when notice must be sent. The forfeiture statutes do not have any such requirement. Although it would be possible to set some time limit from the time the action is filed, the limit would be one more complication. And the limit would serve little purpose The government cannot move the case along until notice is sent: it is the sending of notice that establishes the time to claim, and, after claiming, to answer.

NACDL raises a broader question It would prefer that instead of notice, potential claimants be served in the manner of Civil Rule 4. But the "defendant" in an in rem forfeiture action is the property; service is made by executing the arrest warrant or restraining order, or by the distinctive

procedures established for real property. The Department of Justice believes that claimants are entitled to due process notice, but not formal service

It was pointed out that CAFRA refers to filing a claim 30 days from "service" of the complaint. Yet this reference to service appears in conjunction with provisions that invoke the Admiralty Rules. The Department reads this reference to service to mean "receiving" a copy of the complaint, not to imply that technical service is required.

(b)(ii): One of the methods of notice authorized by (b)(ii) is service on counsel representing a potential claimant. The representation need not be with respect to the seizure; it may be representation in a related investigation, administrative forfeiture proceeding, or criminal case. The representation must be in a related proceeding, reducing the concern that counsel in some quite different matter (such as family-law, personal-injury, or other typical human problems) should not be expected to assume responsibility even for notice in a forfeiture proceeding. But real questions remain whether it can be presumed that counsel is authorized to receive notice in a separate proceeding, and whether counsel will believe that one authorization authorizes representation in separate forfeiture proceedings. Counsel may not wish or even be willing to undertake representation in the forfeiture proceeding. The Department, however, relies on case law saying that service can be made on counsel Service on counsel is in fact more effective because counsel understands the notice and the importance of responding to the notice. The claimant may choose to ignore the notice At times counsel is the only person who can be located. Generally the Department tries to serve both counsel and claimant, but needs a safe procedure for cases where it has no address — or a wrong address — for the potential claimant. It was asked whether the rule should be amended to require an effort to give notice to both potential claimant and counsel when that is reasonably possible. This question was supported by observing that diligent efforts should be made to send notice to the potential claimant. An effort will be made to draft an amendment that requires appropriate efforts to send notice to the potential claimant, but that accepts service on counsel in a related proceeding as sufficient when that is all that can reasonably be accomplished.

A separate question was asked about the mode of notice. The draft allows electronic mail to substitute for postal mail or private carrier. Why not always require post or private carrier, allowing supplementation by electronic mail? It was observed that when the government has an active e-mail address, that should suffice, particularly when the potential claimant has asked for notice by that means. Electronic mail would be used only when the government is confident that it can generate adequate proof of notice, akin to proof of service. Electronic mail is a convenient back-up when postal mail is returned, or the addressee refuses to sign a return receipt. The rule might require that the government show that notice was sent to a working e-mail address and was reasonably calculated to effect actual notice. But an alternative draft will be prepared that allows e-mail notice only with the consent of the potential claimant. As a starting point, Civil Rule 5(b)(2)(D) will be considered — Rule 5 authorizes service of papers after the summons and complaint by electronic means "consented to in writing by the person served."

The relationship between (b)(ii) and (b)(iii) and (iv) was addressed. The intention was that (i) state the requirement of notice. (ii) describes the general means for giving notice (iii) describes the particular means for addressing an incarcerated person (iv) allows — but does not require —

notice to be sent to the address given by a person who was arrested in connection with the offense giving rise to the forfeiture but who is not incarcerated. It may be that some revisions should be made to make this relationship clear to all readers.

It was agreed that the final sentence of (b)(ii) stating that notice is sent on the date it is mailed or given to a commercial carrier should be made a separate paragraph. (It might be added that this provision does not state the date of sending notice by electronic means.)

(b)(iii): (b)(iii) provides notice to a potential inmate who is incarcerated by sending to the incarceration facility. It says nothing of a return receipt. Given the uncertainties of internal mail distribution systems, it was suggested that a return receipt should be required. Requiring this proof would relieve the government, courts, and rule drafters of the need to police the reliability of internal distribution systems. And proof of actual receipt also would protect against failures by the unreliable systems. But it was pointed out that the receipt will be signed by the jailer, not the potential claimant. In the Dusenbery case the Supreme Court ruled that due process is satisfied by addressing notice to a person at a prison address; it refused to require proof that the prison distribution system actually got notice to the inmate, but accepted proof that the prison has a generally reliable distribution system. This ruling reflects the problem that potential claimants are incarcerated in every type of facility known in this country, including local lock-ups. The United States cannot assure the reliability of internal delivery systems in all of these facilities. Neither will it work to draft a rule that defines suitable internal distribution facilities. But as a matter of comfort, (b)(iii) can be amended by adding to it the "magic words" the Supreme Court used to describe due-process requirements.

It was observed that if the potential claimant's lawyer is served under (b)(ii), that gives additional protection against possible failures of a prison's internal mail distribution system. This observation led back to the question whether notice should be required both to counsel and to the potential claimant. Again it was noted that the Department believes it wrong to require notice to both; at most, an attempt to send notice to the potential claimant should be required if the Department seeks to rely on notice to counsel.

(b)(iv): It was noted that (b)(i) says the Attorney General "must" send notice (b)(iii) says that notice to an incarcerated person "must" be sent to the incarceration facility. But (b)(ii) says that notice "may" be sent to the potential claimant or to counsel, and (b)(iv) says that notice "may" be sent to a person arrested but not incarcerated at the address given at the time of arrest or release from custody unless a different address has been given later. Why this alternation of "must" and "may"? The basic notice requirement in (i) is indeed a requirement, a "must " "May" is used in (ii) to express the option — either notice to the potential claimant or notice to counsel. "Must" is used in (iii) to make clear the obligation to address notice to the claimant at the place of incarceration, defeating any attempt to rely on notice to another address such as home, a relative's home, or the like. And "may" is used in (iv) because the government may in fact know of a better address than the address given by the potential claimant at the time of arrest or release.

(b)(v): The first question addressed the relationship between (b)(v), setting the time to file a claim after notice is sent, and Civil Rules 5 and 6, which describe the time of service and the time to respond after service by mail, carrier, or electronic means. Rule 5(b) sets the time of service by mail

as mailing; service by carrier occurs at the time of delivery to the agency designated to make delivery; service by electronic means at the time of transmission (but this is undone if the party making service learns that the transmission did not reach the person to be served).

(b)(v) sets the time to claim to run from the time notice is sent by analogy to CAFRA. Section 983(a)(2)(B) describes the notice procedure for administrative forfeiture, setting the time to respond from the date the letter is mailed. Section 983(a)(4), addressing judicial forfeiture proceedings, sets the time to claim as 30 days from "service" of the complaint. But it does not say what "service" is, nor how it is accomplished. The question is parallel to the fundamental question addressed with (b)(i): should we require formal "service," or only notice?

NACDL objects to the provision that the notice sets the time for filing a claim from the time the notice is sent. It would prefer that the time be set from the time notice is received. But a specific date cannot be set in the notice if the time must be measured from the time of receipt; the government cannot know the time of receipt when it sends the notice.

One possible compromise would be to lengthen the time to claim measured from sending the notice. If the time is set at 35 days, 5 days longer than the statutory period, the result almost always should be more time than would be allowed by 30 days measured from actual receipt. (The most frequent occasions in which 30 days from actual receipt would allow more time are likely to arise from delays in prison mail distribution systems.)

The consequence of filing a claim late is that the claimant lacks "statutory standing." But the failure is not jurisdictional. Courts have authority to grant relief, and will grant relief if there is a good reason. Failure to get timely notice often would be good reason to grant relief.

General: It was suggested that the taglines introducing paragraphs (a) and (b) should be more helpful. Perhaps (a) should be "Notice by Publication," and (b) "Notice to Potential Claimants."

The present draft repeatedly places responsibilities on "the Attorney General." CAFRA repeatedly refers to the "government." The Criminal Rules carefully define "attorney for the government." There is a risk in referring to the Attorney General — acts by an Assistant United States Attorney may be held ineffective if there is not a sufficiently detailed delegation of authority. This is a general issue that must be considered further with respect to all parts of Rule G

19 August 2003

Participants in the August 19 conference call included Cassella, Cooper, Diver, Heim, Ishida, Jeffries, Kyle, Marcus, McKnight, Rabiej, and Rosenthal

Ned Diver's August 18 memorandum on standing was distributed on August 18. The standing issues pervade draft Rule G(7), one of the two subdivisions slated for this conference, and also are embodied in Rule G(5). It was decided that the broad standing question should be deferred to permit discussion of the topics that subcommittee members had a better opportunity to prepare

Judge Kyle led the discussion of G(6) and (7). To help frame the discussion, subcommittee members had a memorandum describing the issues prepared by Cassella.

Rule G(6)

Subdivision (6) deals with preservation and disposition of property subject to a forfeiture proceeding. NACDL objects to some of its provisions, particularly (b)(i)(A) and (C).

Much of (b)(1), including subparagraphs (A) and (B), is drawn from Rule E(9)(b). (A), however, adds a new ground for ordering sale — that the property is subject to diminution in value. (C), allowing sale of property subject to a mortgage or taxes on which the owner is in default, is new. (D), allowing sale for "other good cause," also is new.

The provision for sale of property subject to declining value was explained to involve a variety of circumstances. The property may be a current model automobile, subject not only to storage costs but to inevitably falling value. It may be stock, subject to market fluctuations. A going business loses all value unless it is operated. A home may deteriorate if not occupied. The injury arises because the property is being detained in custody pending resolution of the action.

It was asked what property falls outside the diminution-in-value provision if market risk is treated as diminution in value. The response was that a pile of cash is outside, and so is a bank account.

Interlocutory sales are fairly routine, but do not occur in a large percentage of cases. The Department of Justice believes that current practice allows sale to protect against diminution in value, and seeks sale orders on these grounds, even though present Rule E does not expressly provide for it.

It was asked whether any need to protect against diminution in value is better served by the provision in (D) that allows sale for other good cause. The value of adding an express reference in the rule is that it avoids the need to establish that this is among the grounds that can be good cause for sale. Courts allow sale on this ground now; it is helpful to incorporate the practice in explicit rule text. When we are sure we mean it, it is better to put the provision in the rule than to relegate it to a Committee Note

Yet almost all property is subject to diminution in value over time, with exceptions for rare items — a 2003 Jaguar is likely to depreciate for the foreseeable future, while a 1953 Jaguar may appreciate.

The concern about fluctuating market values was addressed from a style perspective. There are many commas in the draft. It seems to be intended that the final four categories are all qualified by "being detained in custody pending the action" — it is the court's custody that increases the risk of diminished value, not market fluctuations. But it may be argued that custody causes an inability to take advantage of market fluctuations, and thus causes a diminution in value. And "when there is a market, there is fluctuation."

At times the parties agree to a sale order. But party agreement is not inevitable even when declining value is inevitable. Some owners really want to regain possession of this particular automobile, Often the inability to agree arises from sheer obstreperousness Usually courts order sale without difficulty in such circumstances.

This discussion concluded by agreeing that "diminution in value" should be deleted. "It covers too many possibilities." This may be described in the Committee Note as one illustration of good cause for ordering sale.

Turning to (6)(C), it was noted that NACDL protests that sale of property subject to a defaulted mortgage or tax liens could exacerbate erroneous deprivations of property. But the reason for adding this provision — there is no analogue in present E(9)(b) — is that "almost always the owner stops paying on the mortgage." The Department prefers to ask the lender not to foreclose. A foreclosing lender is interested only in realizing the amount of its claim. The Department has an established policy of asking lenders to forgo foreclosure, including a practice of requesting authorization for a judicial sale that may yield a better price than a foreclosure sale. The sale proceeds are held in escrow pending completion of the forfeiture proceeding. If the property is not forfeited, the owner and mortgage lender divide the sale price according to their interests. If the property is forfeited, the lender (if innocent) gets the amount of its security interest. When a lender balks at this arrangement, the Department at times has been able to enjoin a foreclosure sale, or to remove a state-court proceeding and win a stay in federal court, or to invoke some statutes that allow it to force the mortgagee to make its claim in the forfeiture proceeding.

The court sale and escrow arrangement better protects the owner and the government by improving the prospect that the sale will yield an amount greater than the mortgagee's security interest. But courts are divided on the lender's ability to recover penalties, attorney fees, and like amounts when the sale proceeds are distributed. If the government loses its forfeiture claim, there is no federal law addressing the question whether the lender can recover penalties for late payment and the like — but the same questions arise when the property is not sold under federal-court order.

It was noted that the owner may stop making payments on mortgaged property because unable to pay, and that the seizure of property for forfeiture may be the cause. But the Department believes that ordinarily the failure to pay is because the owner concludes that further payments would only be throwing good money after bad. Whatever the reason, the Department believes that state-law obligations to make payments on a mortgage loan are not subject to a defense of impossibility or similar defenses based on the argument that government seizure of the debtor's assets caused the failure to pay. Although these arrangements are easily made when all parties agree, claimants often oppose everything at every turn It is helpful to have an express rule provision as support for persuading the lender that its interests can be effectively protected in this way. The Department has a published policy covering this practice.

NACDL has protested that the government often is the cause of mortgage defaults because it seizes all assets. But the court makes a balancing judgment. It may refuse to order sale if the claimant shows good reason for avoiding sale — it is the "family farm" — and good excuse for not continuing payments — the forfeiture proceeding has locked up available assets, and past payment history is good.

As with the diminution-in-value issue, this ground for sale could be covered by the residual "good cause" provision. But there may be an advantage in an explicit provision.

It was suggested that the rule should make clear the court's duty to look at all issues on all sides. This can be accomplished by adding a "good cause" requirement to all grounds for sale in (6)(b)(1): " * * * the court for good cause may order all or part of the property sold * * *." A generic "good cause" provision could be retained as (D), modified to avoid pure redundancy — "(D) other circumstances establish good cause" (or something like that).

The generic good-cause requirement would emphasize the interests of the owner who is not simply avoiding payment. The party moving for a sale order would have the burden in any event; adding "good cause" would not much change the weight of the burden.

It was pointed out that this introduction of "good cause" as a predicate for all sale orders would add another departure from present E(9)(b), and might raise questions whether sale may be ordered under E(9)(b) without showing good cause. But there are many divergences between draft G(6)(b) and E(9)(b), reducing the risk that any implication would be read back into E(9)(b).

It was pointed out that the provision for delivering property to the claimant, G(6)(b)(ii) is not an answer for all of these problems. Some property is itself a likely tool of crime, even though not unlawful in itself — an airplane specially designed to carry drugs, a drug house, or the like. In other circumstances, however, the government is pleased to release property to the claimant — a load of fish subject to forfeiture for unlawful harvesting, for example, is often better returned to the claimant for prompt disposition.

It was agreed to add "good cause" to preface all grounds for sale described in (6)(b)(i), retaining a modified residual good-cause provision as (D).

Finally, NACDL believes that an express stay provision should be added to draft (6)(d), which provides for disposing of the property or sales proceeds upon completion of the forfeiture proceeding by entry of an order of forfeiture. But it was agreed that stay provisions do not have to be included in every rule provision that addresses what is done after final judgment. There are statutory stay provisions in 28 U.S.C. § 1355, Civil Rule 62, and Appellate Rule 8.

Rule 6(d) should be revised, however, to refer to a "judgment of forfeiture" (or "forfeiture judgment), rather than an "order of forfeiture."

A related style question was noted. Draft 6(a), taken verbatim from present E(10), refers to "any order necessary to preserve the property." Should this be "any order necessary for preservation of the property"?

Rule G(7)

Subdivision (7)(a)

Rule G(7)(a) deals with standing to suppress property as evidence, not standing to claim. Standing to contest the lawfulness of the seizure turns generally on having an expectation of privacy that was invaded by the seizure.

The draft describes a motion "to suppress use of the property as evidence at the forfeiture trial." Suppression would extend to use on a summary-judgment motion, since only evidence admissible at trial can be considered on summary judgment.

Suppression as evidence of the property subject to forfeiture does not automatically defeat forfeiture. If the property is money, for example, the money and the results of drug-residue tests on the money would be excluded, but independently derived evidence might establish forfeitability.

The "at trial" limitation on forfeiture does not appear to address the "fruits of the poisonous tree" issue, the draft addresses only suppression of unlawfully seized property subject to forfeiture, leaving related issues to general practice.

It was pointed out that no one has identified any advantage from including the "at trial" limitation. And there may be disadvantages. It would be necessary to remind the court that suppression at trial entails suppression for summary judgment. And there might be an inference that a ruling granting suppression would be denied the ordinary issue-preclusion effects.

It was agreed to delete the "at the forfeiture trial" phrase.

Subdivision 7(b)

Draft (7)(b)(i) limits a claimant's right to make any Civil Rule 12(b) motion by requiring that the claimant file both claim and answer before moving to dismiss. It is intended to reach all 12(b) motions, particularly lack of subject-matter jurisdiction, lack of property jurisdiction, improper venue, and failure to state a claim.

The claim-and-answer requirement was included "to level the playing field." The government should be able to cross-move to dismiss the claim for lack of standing when the claimant moves to dismiss the forfeiture proceeding. The government "should not risk losing property to someone without standing." But the government cannot make the cross-motion unless it knows who the claimant is. That requires an answer that shows the basis for making the claim and responses to Rule G(5)(c) interrogatories that inquire into the identity of the claimant and the claimant's relationship to the property. The government should not be forced to litigate even Rule 12(b) questions with "just anyone who learns of the forfeiture proceeding and seeks to take advantage."

This provision is intended to "overrule" the Third Circuit decision in U.S. v $8,221,877.16, 2003, 330 F.3d 141 The Third Circuit ruled that a claimant may move to dismiss for failure to state a claim before filing an answer, relying on the general provisions of Rule 12(a), which are not inconsistent with the Supplemental Rules. It also found a pre-answer motion to be good policy because it holds the government to the heightened pleading standards now set out in Rule E(2) and incorporated in draft Rule G(2). In addition, it expressed concern that it would be a waste of resources to require the claimant to answer extensive interrogatories if a motion to dismiss would succeed. At the same time, it recognized what it characterized as the "efficiency" argument made by the government

A first observation was that as drafted, (7)(b) provides for a motion to dismiss only by "a party with standing." That seems to imply that a movant has the burden of establishing standing. Why is that not enough? If the motion is made before the answer, the movant will be obliged to reveal at least as much information as would appear in claim and answer. This also may be linked to draft 7(d)(ii), which states that standing is a matter to be determined by the court, not a jury. Despite the link, however, there is an independent question — although the court surely would offer

opportunities for discovery and argument before deciding the standing question, should the government have the advantages of claim, answer, and "standing interrogatories" to facilitate filing a cross-motion to dismiss the claim at the same time as a motion is made to dismiss the forfeiture?

Although the draft provisions that seek to define standing may be questioned on Enabling Act grounds, and alternatively as a matter better left to Congress, the proposed 7(b) procedure is independent of the standing definition. It would have meaning even if no attempt is made to define standing to claim in Rule G.

The burden of answering G(5)(c) interrogatories addressed only to standing is less than the burden of answering comprehensive interrogatories that concerned the Third Circuit. And the government wants to know when, from whom, and in what circumstances the claimant acquired the property interest that is asserted. A typical claim may be that "the cash you seized belongs to me" — even though the claimant was not present at the seizure and has no apparent connection to the place of seizure.

Draft 7(c) provides that the government may move at any time before trial to strike a claim and answer for failure to comply with Rule G(5) requirements, including the "pleading" requirements for claim and answer. But a motion to dismiss on these grounds, as compared to lack of standing, is likely to fail. "It's easy to plead a claim." The "standing interrogatories" call for better information, requiring the claimant to articulate facts just as the government must plead in detail in the forfeiture complaint. Draft 5(c)(2) requires that the interrogatories be answered before a 7(b) motion can be made to dismiss the complaint.

It was observed that judgment about this proposed procedure is affected by characterization of the claimant. One view is that the claimant is like a plaintiff, and should be subjected to plaintiff-like pleading obligations. The original plaintiff is the government, the original defendant is the property, and the claimant is in effect an intervenor seeking to assert a claim just as a plaintiff does. The other view is that we should not be blinded by the fiction that the "defendant" is the property. The government is a real plaintiff, asserting a real claim to take property. What it wants to do is to cut off all interests of all people in the property. When an interested person appears, that person is a real defendant in every sense. The government remains obliged to carry any plaintiff's burden — including the initial responsibility to pick a proper court and plead a sufficient claim. Failing that, the government is properly put out of court before the claimant is required to do anything more than point out the government's failings.

(As related observations, it was noted that many courts draw a "statutory standing" concept from the claim requirements set out in present C(6). They are established to avoid the abuse that inheres in an in rem proceeding.)

The Department wants to equate "standing" with the CAFRA definition of "ownership" for the "innocent owner" defense. In addressing the rule, it is necessary to separate two questions: (1) what interest suffices to establish standing; and (2) what showing of that interest must be made, and when, by a claimant

As a brief summary, the sequence contemplated by 7(b) is this: the government files a forfeiture complaint The claimant appears The government files standing-only interrogatories.

The claimant answers the complaint and also answers the interrogatories. After that point, the government can move to strike the claim and answer, and the claimant can move to dismiss the complaint. The court is free to decide which motion to decide first, but it cannot dismiss the complaint without determining that the claimant has standing.

25 September 2003

Participants in the September 25 conference call included Cassella, Cooper, Diver, Gensler, Heim, Ishida, Kyle, Marcus, McKnight, Rabiej, and Rosenthal.

Judge McKnight framed the subject by suggesting that the time had come to focus on the standing provisions in draft Supplemental Rule G. The first discussion of these topics led to Ned Diver's excellent research memorandum on current claim standing doctrine. The issues framed by the August conference call were distilled in a series of notes by Cooper. Judge Kyle, who is charged with leading the discussion of the draft G(7) standing provisions, invited Cassella — only recently returned to the office — to provide the very helpful response that states the government's support for the draft provisions.

The standing questions involve two quite separate issues. The first is whether it is wise to attempt to adopt claim standing standards in Rule G. The second is whether Rule G should adopt specific procedures for raising and resolving standing issues even if the definition of standing is abandoned. These two issues are better discussed separately.

Define Standing?

The central standing definition appears in draft G(7)(d)(i): "A party has standing to contest a forfeiture action if the party has an ownership or possessory interest in the property as defined by 18 U.S C. § 983(d)(6)."

Initial Statement of Doubt The question whether Rule G should adopt this definition of standing, or any other definition, was launched by a summary of the arguments that it is unwise to attempt any definition. The arguments divide into two sets. The first set suggests that it is unwise to attempt any definition. The second set suggests that the proposed definition is too narrow.

As a general matter, claim standing is a sensitive issue. Any definition will provoke dissent in the organizations of lawyers who have experience with civil forfeiture. The disputes may distract attention from other issues. The occasion for reconsidering standing, moreover, arises from changes in forfeiture procedure made by the Civil Asset Forfeiture Reform Act in 2000. Congress may believe, or be persuaded to believe, that any attempt to narrow standing is an attack on this recent legislation.

More pointedly, it may be argued that CAFRA itself has defined claim standing. § 983(a)(4) states that once a civil forfeiture complaint is filed, "any person claiming an interest in the seized property may file a claim asserting such person's interest in the property." Professor Gensler believes that this provision could easily be read as a somewhat narrower version of the "citizen" or "person aggrieved" standing provisions frequently adopted by Congress. Others are more confident that this

provision seems too open-ended to be a standing provision. Standing must be established, not merely claimed; there must in fact be an interest in the property. And there is no apparent definition of what qualifies as an "interest." Nonetheless, the argument will be made, and might persuade either courts or Congress. If this indeed counts as a statutory definition of standing, it would not be wise to attempt to supersede such recent legislation absent truly compelling reasons.

The standing question remains tightly tied to CAFRA even if it be assumed that § 983(a)(4) does not define standing. CAFRA substantially changed the government's burden in forfeiture proceedings. Before CAFRA, the government needed only to show probable cause, and could rely on hearsay for the showing. The burden then fell on the claimant to show that the property is not forfeitable (or to establish an innocent owner defense in the forfeiture systems that recognized it). After CAFRA, the government must carry the burden of proving forfeitability. The desire to heighten the claim standing threshold grows directly out of this change. The need to prove forfeitability has two serious consequences First, proof often is difficult — there may be strongly suggestive circumstances, but little direct evidence. Second, disclosing available direct evidence may jeopardize ongoing criminal investigations or even endanger confidential informants. The government believes it should not be forced into these difficulties until a claimant has established a sufficient interest in the property. That argument, however, may be seen as an indirect attempt to diminish the effect of the CAFRA reform. It will be argued that Congress acted against the background of established standing doctrine, and that an attempt to heighten standing requirements is an attack on CAFRA.

Finally, questions of Enabling Act authority add force to the doubts whether it is wise to use the Enabling Act process to define standing. The two concerns are not entirely independent. The resources available to the Advisory Committee, the Standing Committee, and the Judicial Conference may not be fully adequate to support the advice the Supreme Court should have before adopting a rule that can be appraised only with full knowledge of the civil forfeiture world. This information need may suggest that the question trenches on substantive rights. More directly, the proposed definition is designed to defeat standing in some situations where standing now is recognized. Property interests that have been protected no longer would be protected. For want of standing to claim, the property may be forfeit when, had standing been recognized, forfeiture would fail. This consequence affects substantive rights. Although procedure is designed to affect substantive rights, the tie is so direct and so clearly focused on disqualifying some substantive rights that the rule may fail as one that abridges, or at least modifies, substantive rights.

The arguments that the proposed definition is too narrow build out from the argument that Congress did not mean to define standing when it defined ownership for purposes of the innocent-owner defense. To be sure, most of the claimants who had standing under pre-CAFRA law would qualify as "owners" under this definition. It is said that Congress studied the standing cases in formulating the definition. But it is clear that the definition excludes some interests that supported claim standing under pre-CAFRA law, and there is no direct evidence that Congress thought it was simultaneously restricting standing. If anything, the open-ended claiming provision in § 983(a)(4) looks the other way Nor is there any reason to connect the innocent owner defense to standing. An owner is protected, if innocent, even though the property is forfeitable. If the property is not

forfeitable, there is no need to face the question of innocence and there is no reason to deny protection of interests broader than those that warrant return of forfeitable property.

This argument is most pointed with respect to possessory interests that do not qualify as ownership under § 983(d)(6). A person who has $100,000 in an attache case is protected against anyone in the world who tries to take it by force or fraud. That interest also should be protectable to the extent of requiring that the government prove forfeitability or return the property after seizing it. So too, a person who has record title to real property is protected against ouster, occupancy, or damage by anyone else; protection should extend to requiring the government to prove forfeitability before taking control and making disposition of the property.

The pragmatic arguments in favor of a narrower definition are more difficult to counter, but may not be compelling. The Department recognizes that most civil forfeiture proceedings are resolved without any claim being filed, and that many claims can be defeated even under current standing doctrine without any need to try the forfeiture issue. Nuisance claimants undoubtedly appear — the prisoner who reads published forfeiture notices and routinely files claims in every action he reads of. "Stalking horse" nominal record title owners surely appear. Couriers who assert ignorance of drug organization figures are familiar. Letting property go in circumstances that promise enrichment of criminals is galling. But it has not been shown that the cumulative effect of these problems justifies the adoption of the innocent-owner definition of ownership for standing purposes.

Initial Justification The defense of the standing definition began with a reminder that this issue is separate from the draft provisions addressing procedures to raise and resolve standing. Revision or abandonment of the definition need not affect the other procedural provisions.

The argument that § 983(a)(4) defines claim standing is not persuasive. The statute refers to a person "claiming" an interest, not a person "with" an interest. A bare claim of standing cannot establish standing. The interest must be substantiated. The statute is only procedural, aimed at invoking the supplemental rules and providing a specific time (later adopted into present Rule C(6)(a)(i)) for filing a claim. It means only to recognize a procedural threshold. Rather than write a provision permitting "any person" to file a claim, implicitly abandoning any standing requirement and risking an Article III encounter, Congress meant only that the claim itself must identify an interest that supports standing.

The argument that a standing definition would undercut the CAFRA decision that the government must carry the burden of proving forfeitability also fails. The standing definition will affect only a small portion of civil forfeiture cases. There are thousands of uncontested proceedings Claims are struck for lack of standing in many other cases under current standing tests. The government is not required to prove forfeitability in these cases, and that result does not undermine the CAFRA reforms. A case with a claim filed by a person who has no interest cannot be distinguished from a case in which there is no claim at all, or a case in which the claim is untimely — in none of these cases does the purpose of CAFRA require that the government prove forfeitability.

The question of Enabling Act authority can be resolved without discomfort about running counter to Congress. Congress defined both "innocence" and "owner" in CAFRA. It is easier to be an owner than to be innocent. Recognizing standing as an owner simply opens the path to litigating innocence. The fact that Congress borrowed from standing cases in defining ownership supports reliance on the definition for standing purposes as well. What the draft rule does is to collapse three elements into two. Current law uses a "colorable interest" test for claim standing, defines "ownership" for substantive purposes but without any procedural consequence, and also defines innocence. The draft proposes to abandon the colorable interest test, adopting the definition of ownership for standing purposes in addition to its present substantive role.

That leaves the question of the simple possessory interest, or bare legal title. A possessor who is willing to identify a bailor is an owner within the statutory definition. The government is now litigating in Iowa the standing question raised by a claimant who had possession but who refuses to identify the owner. The government believes that current law does not clearly resolve the question whether a claim of possession without more suffices for claim standing.

So for a named title owner. The title may have been fraudulently procured, or not real. But if state law protects you, you are an owner. An answer must be given for the problem of distinguishing between a "real owner" and a mere "front." It is better to answer this question as part of the standing inquiry, not to defer it to proof of the innocent-owner defense.

Discussion. Discussion began by pointing to § 983(f)(1)(A), which authorizes "immediate release of seized property" pending resolution of forfeiture proceedings to a "claimant [who] has a possessory interest in the property." Why, it was asked, does this not clearly reflect recognition that a possessory interest supports claim standing? The response was that this provision is addressed to the hardship of depriving a person who had possession of continuing possession while forfeiture proceedings wend along the road to conclusion. But it was rejoined that it would be strange to defeat this protective device by adopting a standing definition that defeats the right to make the claim that leads to protecting possession. The surrejoinder was that usually the (f)(1)(A) question arises in nonjudicial forfeiture proceedings, before a civil forfeiture action is filed. The statute does not help to decide who has standing. So a bailee-possessor is not an owner if unwilling to identify the bailor, and should lack standing.

Another CAFRA provision was pointed out. Section 983(b)(1)(A) and (2)(A) address appointment of counsel for "a person with standing to contest the forfeiture." Does this define standing? The answer was that the original draft of this statute did not refer to standing. The government objected that counsel should not be appointed for a person who lacks standing to claim; this narrowing language was adopted without making any attempt to define standing tests.

Apart from CAFRA provisions, it was suggested that forfeiture is like a great many other settings in which you look to case law for standing rules. The government agrees that if Rule G adopts the § 983(d)(6) definition of owner as a standing definition, at best the rule would be making explicit what now is only implicit in the statute There is no other definition of standing If Rule G defines standing, the definition would then carry back to define standing for purposes of appointing counsel under § 983(b). But there will be no impact on appointment under (b)(2)(A), which addresses only the situation in which forfeiture seeks to reach real property that the claimant is using

as a primary residence. Standing clearly exists. Nor is there likely to be much impact on standing under (b)(1)(A), which addresses a claimant who is represented by appointed counsel in connection with a criminal case related to the forfeiture.

Looking the other way, it was suggested that the definition of "ownership" in (d)(6) is fairly broad. Perhaps adopting it into Rule G would not defeat standing in many circumstances that should cause concern. One common problem remains with possessory interests. Another is "nominees," who are excluded from (d)(6). A mere squatter also would lack standing to challenge forfeiture of a home owned by someone else.

Returning to the (d)(6) provision that a bailee is an owner only if the bailor is identified, it was asked why the government wants the bailor to be identified. At times, the information is useful for further investigation. But the government interest often is to protect law-enforcement intelligence and ongoing investigations. If the bailee does identify a bailor — "my brother gave it to me" — there would be a hearing to establish the truth of the matter.

The government prefers to limit possessor standing to the bailee who identifies the bailor. Present case law denies claim standing when property is taken from the possession of a person who claims not to have been aware of the possession — "I did not know the money was in my suitcase." That is "naked possession." Beyond that, the government wants to avoid litigating forfeiture when the claimant asserts only knowing possession. There are not many of these cases, but they are troubling ones. Commonly they involve couriers or mere straw owners. It was pointed out that mere possession is protected against taking by others: why not protect against the government as well? The government believes that protection should not go this far, and that current standing decisions do not recognize the policy concerns that underlie the government position.

Current standing decisions look for a "colorable interest," or recognize "a very low threshold," or say that "the law is very forgiving." The government urged that these standards were too low before CAFRA was adopted, but did not much focus on the distinction between standing and ownership until a few years ago. The distinction was less of an issue when the government's initial burden was only to show probable cause, based on hearsay; the ownership question was reached quickly in the course of the litigation.

We are seeing cases in which couriers are accorded standing. This has not been litigated in every court The reason it is being tested now in Iowa is that the Eighth Circuit has said that possession is not ownership.

To prove that seized cash is drug money, the government commonly relies on a four-point circumstantial test. (1) The explanation of possession is ludicrous. (2) A dog alerted on the cash. (3) The money was packaged in the manner typical of drug money — duct tape and all. (4) The amount is inconsistent with identified legitimate income. These circumstantial showings do not always carry the day. Some courts are not impressed by "dog sniffs." The Third Circuit wants some additional circumstances, such as prior drug arrests or convictions. And there are proceedings that involve couriers in which the government has more and better evidence but dares not use it. Even when there is nothing more, the government believes it should be able to forfeit money carried by a courier.

Of course there is no problem with standing if a claimant appears who asserts ownership. The problem is the claimant who has little or no interest; he should not win without saying that it is his There are cases in which the upper-level drug dealers put someone else forward to make the claim.

The government is concerned not only to protect ongoing investigations and confidential informants. It also is concerned to keep drug money out of drug dealers' hands.

It was asked whether the risk of putting on all available evidence can be reduced by protecting against disclosure of confidential information. The government must prove forfeitability. It can, if it chooses, rely solely on circumstantial evidence, risking loss on forfeitability and protecting ongoing investigations and confidential information. Or it can choose to reveal some information to enhance its proof of forfeitability, but still protect confidentiality interests in information it chooses not to use. The confidential-informant privilege in fact operates effectively to defeat attempts to discover information that would jeopardize informants when the government chooses not to advance related evidence.

The government's choice, then, often is between protecting law-enforcement interests and producing the most persuasive case of forfeitability. A heightened standing test would reduce the number of occasions on which the government must make the choice.

It might be possible to adopt a sliding-scale standing test that demands an enhanced interest when there is a law-enforcement need But there is no indication of any such test in the cases, and it would be difficult to draft.

This discussion prompted a return to the opening query: Are these questions fit for resolution by the Advisory Committee and the full Enabling Act process, or are they better left to Congress? If we accept the view that § 983(d)(6) was intended to define standing, we have no problem. Even if not, the government believes that adopting it into Rule G would not cut off substantive rights established by statute. But adoption would cut off some claimants recognized by current case law.

The importance of procedures to resolve the standing question was noted again as a matter independent of definition. It can make sense to require resolution of standing before the government is put to its proof of forfeitability, and even before motions to dismiss. The Third Circuit now allows a Rule 12(b) motion to dismiss after a sufficient pleading of standing, but before discovery that could support a fact hearing on the standing question. That should be changed

The materials for this conference call include illustrations of the ways in which the Rule G draft could be amended to excise the standing definition while retaining procedures that direct resolution of standing questions before addressing a motion to dismiss or proceeding to the merits. They provide a suitable basis for working toward a new draft if the standing definition is deleted.

The question whether to delete the standing definition came on for final discussion. It was recognized that the question is one that should be reported to the full Advisory Committee; the issue is whether to advise for or against adoption of a definition The precise immediate question, indeed, is whether to go forward with a definition borrowed from the definition of "owner" in § 983(d)(6).

A negative recommendation will defeat any present definition, while leaving open the possibility that some other definition might be attempted in the future.

On those terms, all participating subcommittee members voted to delete the definition of standing in draft G(7)(d)(i).

Procedural Incidents

Discussion of the procedural provisions in draft G began with an observation that earlier discussions have seemed to reflect uncertainty about the better characterization of a forfeiture claimant. Clearly the government is plaintiff. The property is cast as "defendant," but that is a transparent fiction. The claimant could easily be seen as a defendant, closely similar to a person who is named in a complaint on a personal claim. If the claimant is viewed as closely similar to a defendant, the claimant should have procedural rights similar to an ordinary defendant. Among those rights is to make a motion to dismiss at the beginning of the proceedings, forcing the plaintiff to justify the choice of court and the sufficiency of the claim as pleaded. All that need be required is filing a claim that sufficiently states interests that confer standing. But a claimant also might be seen as more similar to a plaintiff, making a demand to recover property. On this view, it is appropriate to require the claimant to justify its standing before it is entitled even to challenge the court's jurisdiction or the sufficiency of the claim.

The government views the claimant as like a plaintiff. The claimant is not served with process. A claimant is given notice of right to file a claim, if the government can identify a potential claimant, or may have notice by other means such as publication. Current case law characterizes a claimant as one who invokes the court's jurisdiction to protect the claimant's property right. So a claimant can be forced, as a plaintiff can be, to travel to the forfeiture district for deposition. CAFRA has adopted a fugitive disentitlement provision requiring that a claimant surrender to be able to make a claim. Framing the proceeding as an in rem action asserts that the property is forfeitable as the instrument or fruits of crime and invites all the world to participate in this single proceeding as the sole opportunity to contest the issue So even the Third Circuit does not say that a claimant can challenge jurisdiction without standing; it says only that a claimant can challenge jurisdiction before being obliged to answer or respond to discovery. Some cases, further, describe the claimant as if an intervenor.

Discussion turned to the proposed draft edits that adjust for deleting the definition of standing from G(7)(d)(i). It was agreed that draft (7)(b)(i) can retain the express reference to standing "(i) A party with *standing to contest the forfeiture action* may * * *." Apart from that, changing many of the references to a "potential claimant" to other words seems agreeable to the government.

Deleting the definition of standing leaves another question. Draft G(7)(d)(i) will continue to provide for a government motion to resolve standing at any time before trial, to provide that the claimant has the burden to establish standing, and to provide that standing is a matter to be determined by the court How will the court's resolution relate to the right to jury trial?

The jury-trial question was framed by an illustration. In a proceeding to forfeit cash, a claimant asserts ownership of the cash as the proceeds of selling her ranch. Draft G(7)(d)(i) calls for a determination on "evidence in the record" whether the claimant has standing. The question resembles the familiar question that arises when transactional personal jurisdiction is asserted over a defendant who protests that he did nothing, or that what he did was not wrongful. The issues raised by the jurisdictional inquiry also are issues on the merits. If the showing as to standing would support summary judgment for the government rejecting ownership, there is no problem. But if there is a jury issue by summary-judgment standards, what does it mean that the court "finds" the standing issue on "evidence in the record following a hearing"? Is the court to "find" only whether there is sufficient evidence to support a jury finding of ownership? This would be to find "standing," but not to find either way on the ownership issue.

The government view is that by stripping out the definition that equates standing with ownership, the rule will come to mean that issues common to an innocent owner defense and to standing will be resolved by the court only for purposes of standing to claim. The illustration is a claimant who appears and says that the money seized from a courier was the proceeds of selling her ranch. The standing inquiry will require evidence that she sold her ranch, realized an amount sufficient to account for the cash, received cash or converted the proceeds into cash, and so on. But the finding will not be that the claimant is not the owner If standing is found, the ownership question will be left to the jury. The court only determines whether there is standing to get into the courthouse door. It may be desirable to consider further revision of the Rule G(7)(d)(i) language, or at least strong Committee Note language, to assure this reading.

A final note on style was raised. The draft that edits out the standing definition uses this tag line for G(4)(b): "Notice to Apparently Interested Persons." The tag line reflects the text of (b)(1), which refers to any person who "reasonably appears to have an interest in the property." This language reflects the statute. But it seems unusual as a rule tag line. An effort should be made to find something better.

1 December 2003

Participants in the 1 December 2003 conference call included Cassella, Cooper, Heim, Jeffries, Kyle, Marcus, McKnight, Rabiej, Rosenthal, and Administrative Office staff.

Discussion was framed by the November 12 "styled" draft Rule G.

Rule G(8)(d): Motion To Release Property. The first issues were raised by G(8)(d), as designated in the November 12 draft, dealing with a motion to release property. This paragraph reflects the remedy provided by CAFRA in 18 U S.C. § 983(f). Section 983(f) establishes a right to "immediate release of seized property" pending a final forfeiture judgment based on hardship to the claimant. Release may be sought only by a claimant — there at least must have been a claim addressed to the agency that holds the property. Typical hardship grounds are reflected in § 983(f)(1)(C): continued government possession will prevent the functioning of a business, prevent an individual from working, or leave an individual homeless. Although § 983(f) creates the remedy, it does not describe appropriate procedures.

One issue arose from this style change: "a ~~party~~ person with standing to seek release * * * may move for release * * * " It was pointed out that release is available only to a claimant, who is a "party" if there is a judicial proceeding. But an administrative claimant may not be a "party" in common rules understanding. The statute and rule both include judicial action to release property before a judicial forfeiture proceeding is filed. It seems better to refer to a "person" than to a "party."

A related question was whether the proceeding should be described as a "motion." Section 983(f)(3)(A) describes it as a "petition." That seems a better word to describe a request filed when there is no pending forfeiture complaint. "Petition" will be substituted for "motion" in the rule.

Another style change was: "holds property ~~subject to~~ for * * * forfeiture." The change reflected a concern that "subject to" may imply that the property in fact is forfeitable. The discussion showed that some participants were more comfortable with "subject to," finding "for" an unusual and vague expression. The issue appears elsewhere in the Rule and will be ironed out

Paragraph (d)(ii) addresses venue. As drafted it is an incomplete reflection of § 983(3)(A). The statute says that a petition for release filed before a forfeiture complaint has been filed may be filed "in the district court in which the seizure warrant was issued or in the district court for the district in which the property was seized." If the rule is to address venue, it should reflect both alternatives. It might be desirable to go beyond the exact statutory language If property is seized without a warrant, venue lies where the property was seized. But if it is seized with a warrant, it might be desirable to require that the petition for release be filed in the district that issued the warrant — the complaint for forfeiture almost always will be filed in the district where the warrant issued. Congress has established nationwide enforcement in part for the purpose of bringing all of the forfeiture questions before a single court. It is better to direct the petition for release to that court than to allow it to be filed in a different court that has no other occasion to become familiar with the proceeding and that may well transfer the proceeding. But this argument was met by framing a single objection in different ways: if the statute now means that the petition must be filed in the district that issued the warrant, why do we need to repeat the statute in the rule? And more pointedly, why should we sharpen the statute by making it say explicitly what it may now imply? And what if the statute actually means what it seems to say to most Subcommittee members — the petitioner has a choice? Should the rule attempt to narrow the statutory venue choice?

This discussion became intertwined with a second provision that would require a petition for release to be transferred to another district if the forfeiture action is — or will be — filed in another district. This provision would apply even to a petition filed in the district that issued the warrant if the forfeiture action is filed in a different district. But the overwhelming practice is to secure the warrant from the court that will be the court for the forfeiture action. Usually only one United States Attorney has any interest in the forfeiture. Transfer will be sought to the district that issued the warrant and that is — or will be — the district of the forfeiture action. The transfer question has come up a few times since CAFRA was enacted. It has been addressed through the general transfer provision in 28 U.S.C. § 1404(a). In most circumstances the case for transfer is compelling But a petition to release property before a civil forfeiture action is filed is not a familiar proceeding. Section 1404(a) provides for transfer of "any civil action." To win transfer, the government must persuade the court that the petition is a civil action.

The argument for transfer is that it is better to have all forfeiture-related issues resolved in one court. It is easier for the court and for the government. If the warrant issues in Kansas and the claimant files a release petition in Nebraska or North Dakota, the judge in the petition district must become familiar with the dispute, wasting time that will not be repaid in later stages of the forfeiture action. Transfer, moreover, supports the purposes that underlie the statutory provisions enabling nationwide execution of seizure warrants. The hope is to consolidate all related proceedings in one court.

An argument against a mandatory provision was made in response. The property was seized in Nebraska. The claimant may have great difficulty in pursuing a petition in Kansas. The factors to be considered in acting on the petition, moreover, include matters that may be better resolved in Nebraska as the place of seizure. One element is whether the claimant has sufficient ties to the community to provide assurance that the property will be available at the time of trial. Another, already noted, is the hardship that may result from interference with a job or business. An argument that the claimant needs the seized automobile to get to work, for example, may depend on evaluating the character and quality of a local public transit system. Even the risk of destruction, damage, loss, concealment, or transfer may be affected by local factors.

It also was suggested that after the return petition is filed the government might choose to file the forfeiture action in a court selected to seek advantage on the petition. This suggestion was met by the renewed observation that there is little incentive to do that. The warrant court was selected as the best court for the yet-to-be-filed forfeiture proceeding.

These doubts were supplemented by asking whether it is proper to adopt court-rule provisions that authorize or direct transfer. Although courts have developed forum non conveniens remedies by relying on stay or dismissal, transfer devices have been adopted by statute. If the statute means what it seems to say, the statute allows the petition to be filed in the seizure district even if the warrant was issued in another district. Mandatory transfer defeats the statute.

For all of these doubts, the argument for permitting transfer as a matter of general transfer discretion is strong. The only need for a rule, however, arises from uncertainty whether "any civil action" in § 1404(a) includes a release petition. One approach might be to craft a rule that somehow defines a release petition as a civil action within § 1404(a). It would be unusual to seek to resolve a statutory ambiguity by rule provision, but it may be possible. The most modest approach would be to say that the petition may be transferred under 28 U.S C. § 1404(a), nothing more. A draft will be prepared on this model, with a footnote that asks whether venue should be addressed in Rule G at all

A much smaller question is raised by a draft provision that would state that a release petition must be assigned a miscellaneous docket number. Practices vary around the country. Some clerks assign a civil action number. Others assign a miscellaneous docket number. It seems likely that still more imaginative approaches are adopted by one court or another Apart from a natural aversion to disuniformity, the varying practices impose a burden on both the Department of Justice and on claimants. The software used to track forfeiture proceedings is not well designed to accommodate different docket designation practices. When a claimant seeks information about the status of a forfeiture proceeding, it may be difficult for the Department to respond quickly or efficiently.

Adoption of a single practice would help everyone. But doubt was expressed whether this sort of detail should be added to the already lengthy body of Civil Rules, or even to the shorter body of Rule G. The Department cannot control the practice directly because release petitions are filed by claimants, not the government — the United States Attorney arrives after a docket designation has been made. But this sort of question can be addressed by less formal means than adopting a court rule. Rule 79(a) reflects Administrative Office and Judicial Conference authority to direct the form of docket records. It was agreed that it would be better to rely on the Administrative Office structure to seek uniformity of practice in this area.

An important question is posed by this edit:

> **(iii)** ~~A motion for release of property pursuant to Section 983(f) is the exclusive means for seeking the return of property to the custody of the claimant pending trial.~~ Rule 41(eg) of the Federal Rules of Criminal Procedure does not apply to a civil forfeiture actions.

Both parts of the edit were challenged. Deletion of the provision that makes § 983(f) the sole means to seek return was suggested because § 983(f) applies only to actions governed by CAFRA. Some forfeiture statutes are carved out from CAFRA. The most common example involves traditional customs seizures under Title 19. Typically a customs seizure is effected at the port of entry. There are tens of thousands of these seizures every year. Very few of them ever become involved in district-court forfeiture proceedings. Other statutes also are exempted from CAFRA, such as the statute that may be used to reach money intended to finance terrorist activities. The deleted provision would mean that there is no means at all to seek return in a forfeiture proceeding that is not reached by § 983(f). The same consequence follows, however, from the second sentence Before § 983(f) was adopted, some courts allowed use of what then was Criminal Rule 41(e) to seek return of property that had been seized for forfeiture. The basic theory was that the courts should exercise "anomalous jurisdiction" through Rule 41(e) because the government otherwise could retain property indefinitely without affording any opportunity to seek return by initiating a judicial forfeiture proceeding Since § 983(f) is not available in CAFRA carve-out situations, denial of a Rule 41(g) remedy still would mean that there is no remedy at all

Further discussion suggested that this provision should be revised to say that § 983(f) is the only means to petition for release of property held for forfeiture under a statute that is covered by CAFRA procedures. There is a "constant flow" of Rule 41 motions by petitioners who fail to satisfy § 983(f) requirements. Making § 983(f) exclusive relies on the view that § 983(f) is intended to foreclose reliance on Rule 41(g) as an alternative remedy when the petitioner has failed to satisfy § 983(f) requirements. Rule 41(g) was invoked in its earlier embodiment as Rule 41(e) as an equitable remedy allowed in the absence of an adequate legal remedy. Section 983(f) now provides an adequate legal remedy. Criminal Rule 1(a)(5)(B) , moreover, states that a civil property forfeiture proceeding for violating a federal statute is not covered by the Criminal Rules. Its former embodiment in Criminal Rule 54(b)(5) did not oust application of former Rule 41(e), perhaps because an independent Rule 41(e) [now (g)] proceeding is not itself a civil property forfeiture proceeding. Nonetheless, there is an indication of purpose that bolsters the argument for making § 983(f) the exclusive means to release property seized under a CAFRA-covered statute To ensure that Rule 41(g) is not invoked, the second sentence should be retained in revised form. The revision

will say only that Criminal Rule 41(g) cannot be used to seek return of property held for forfeiture under a statute that falls within § 983(f). The language of the current draft will need further revision to avoid the inadequacy of saying that Rule 41(g) does not apply to a civil forfeiture action. We must say that it cannot be used to seek return of property held for forfeiture. This draft should be submitted to the Criminal Rules Committee for review

For property held by the government for forfeiture under a statute carved out from CAFRA, on the other hand, it seems unwise to attempt to overrule the pre-CAFRA cases recognizing an "anomalous jurisdiction" remedy under Criminal Rule 41 Rule G will not address those cases. But it may be desirable to add a Committee Note statement that Rule G does not imply any position on the availability of Rule 41(g).

Rule G(8)(e): Excessive Fines. CAFRA § 983(g), reflecting Supreme Court decisions, provides a petition to determine whether "the forfeiture was constitutionally excessive" because grossly disproportional to the gravity of the offense giving rise to forfeiture. Apart from referring to a petition, and perhaps assuming that there was a forfeiture (*the* forfeiture *was* constitutionally excessive), the statute does not provide any procedural guides. The case law says that a petition before trial is premature. The proportionality question is for the court, not the jury, so it cannot be raised during a jury trial. Proportionality, moreover, requires inquiry into any number of things that do not affect the forfeitability determination. The gravity of the offense is noted in the statute. Motive — if someone fails to report money on leaving the country, is it part of a drug transaction, financing for terrorist activities, or mere absent-mindedness? How have others been harmed by the offense? How much advanced planning as there? The catalogue begins to resemble the Sentencing Guidelines. Because so many of these factors do not bear on forfeitability, it is important to ensure that both parties, government and claimant, have opportunity to engage in civil discovery into information bearing on proportionality.

Although the issue often is properly decided after trial, it also may be suitable for pretrial disposition by summary judgment, again so long as there has been an opportunity for civil discovery on the proportionality issues

The cases have developed reasonable procedural guidelines that are incorporated in the draft. Setting them out in the rule will support consistent practice, and consistency in the better approaches. Claimants, for example, persist in attempting to address proportionality at the pleading stage. Courts have uniformly rejected such efforts. A halt should be called by adopting a rule that limits the practice to summary judgment or decision by the judge after trial.

As a first small question, it was agreed that it is proper to address mitigation only when sought by a claimant. An interested person who did not have notice of the proceeding and thus failed to become a claimant can seek protection directly on that ground. If the failure of notice supports relief, it will support reopening on all issues that the new person wishes to pursue.

As another small issue, it was agreed that the requirement that the claimant plead the "defense" be expressed by reference to Civil Rule 8, not to the affirmative defense provisions of 8(c). Rule 8(b) also requires that defenses be pleaded. Perhaps no cross-reference is needed, but it seems helpful here. Although the statute refers to a "petition" to determine proportionality, the word was

chosen without any conscious thought to the distinctions between pleading, motions, petitions, or yet other possible devices. Raising the issue by pleading seems the appropriate means of giving notice. That will invoke all of the pleading rules, including the Rule 15 amendment procedures. That should avoid interference with the statute's implication that the issue can be raised by petition for the first time after trial

It was asked what does it mean to say that the parties must "have had the opportunity to conduct civil discovery on the defense." How do you know when the opportunity has been carried far enough? Does this relate to the Rule 56(f) summary-judgment provisions that require justification by a party opposing summary judgment for lack of adequate opportunity to gather information? The central perception is that many proportionality issues are separate from the issues relevant to forfeitability. It may be sensible to have discovery on the proportionality issues before forfeitability is tried, leading to summary-judgment motions on proportionality. In that setting Rule 56(f) may make sense. If the proportionality issues are subject to discovery after trial, on the other hand, or if the question is not framed by a summary-judgment motion, Rule 56(f) is not an obvious point of departure.

It was agreed that these questions will be considered further at the December 9 Subcommittee meeting.

Rule G(8)(f): Summary Judgment on Innocent-Owner Defense. This part of the draft requires further work. The problems are shaped by the decision that Rule G will not attempt to revise the standing-to-claim doctrine developed in the cases. They arise when the government seeks summary judgment both on forfeitability and on an innocent-owner defense. The court may deny summary judgment of forfeitability, but grant summary judgment rejecting the innocent-owner defense. The government hopes to craft a procedure that will protect it against the need to carry the trial burden of establishing forfeitability after the claimant has lost on the innocent-owner defense.

It was objected that the whole point of the standing debate was that a person who is not an "owner" may nonetheless have standing to make a claim. The cases clearly recognize claim standing on the basis of possessory or record-title interests that do not qualify for "ownership" as defined by § 983(d)(6) for the innocent-owner defense. A summary-judgment determination that the claimant is not an "owner" does not, without more, establish that the claimant lacks standing. Rule G(8)(c), moreover, establishes a procedure to strike a claim and answer for lack of standing. The court can strike on the basis of findings of fact that would not be possible on summary judgment That is sufficient protection for the government's interests. It was further pointed out that the government cannot avoid the burden of proving forfeitability when a claimant does not raise an innocent-owner defense, so there is no occasion for a summary judgment that the claimant is not an owner. There is no reason to penalize the claimant who has standing for losing summary judgment on the ownership issue.

The response was that the standing threshold is too low. There ought to be some procedure, beyond the motion to strike, that protects the government against the burden of proving forfeitability when the claimant has lost on the ownership issue. The government's problem in proving forfeitability ordinarily is not that the property is not forfeitable, but that the evidence that proves forfeitability will jeopardize continuing investigations or investigator-informants.

It was agreed that a revised draft will be prepared to attempt to capture these issues.

Notes: Rule G Subcommittee Meeting 9 December 2003

The Forfeiture Subcommittee met on December 9, 2003, at the Administrative Office of the United States Courts in Washington, D.C. Judge McKnight chaired the meeting. Members Heim, Kyle, and Jeffries attended. Judge Rosenthal was present. Cooper attended as Advisory Committee Reporter. Administrative Office representatives included Deyling, Gensler, and Rabiej. Cassella and Hoffman presented Department of Justice positions.

Judge McKnight opened the meeting with thanks to all for attending, and special appreciation for the continuing work of the Department of Justice. The object of the meeting was stated to be production of a good working draft, making the decisions to move toward the detailed final drafting.

Cassella noted that Hoffman and Courtney Lind helped prepare the Department of Justice 45-page comments on the November 12 "Style draft."

Subdivision (1)

Discussion began with subdivision (1). The Style Draft speaks of an action "for violating" a federal statute. It was recommended that this be changed back to "for violation of." Addressing it as "for violating" makes it appear that the forfeiture proceeding is a form of punishment. It is not punishment. Although it is an action in rem, not against a person, the aura of punishment may hang on.

It was further suggested that the rule could be made active: "This rule governs." The means of incorporating the other Supplemental Rules and the Civil Rules was changed from "to the extent consistent with" to "To the extent that this rule does not address."

The result of these changes was a new subdivision (1):

> **(1) Application.** This rule governs a forfeiture action in rem arising from a violation of a federal statute. To the extent that this rule does not address an issue, Supplemental Rules C and E and the Federal Rules of Civil Procedure also apply.

Subdivision (2)

A variety of phrases have been used to refer to the property the government seeks to forfeit. Some of them are relatively long, such as "the property that is the subject of the action " Others are short — "the defendant property," or simply "the property." Discussion suggested that perhaps the first reference in each subdivision should be to "the defendant property," while later references in that subdivision could be simply to "the property."

The Style draft omitted any reference to subject-matter jurisdiction on the theory that Rule 8(a)(1) requires a statement of subject-matter jurisdiction. But it was concluded that it is useful to include an explicit reminder in Rule G. This change was adopted.

Further discussion addressed the way to plead the statutory basis for forfeiture and the facts that support forfeiture. Particularized pleading has long been accepted in this area. The government and NACDL seem to have reached agreement that a proper formulation can be drawn from U.S v. Mondragon, 4th Cir.2002, 313 F.3d 862.

These discussions led to revision of paragraphs (b), (c), and (d) to read as follows, along with unchanged paragraph (a):

> **(2) Complaint.** The complaint must:
>
> > **(a)** be verified;
> >
> > **(b)** state the grounds for subject-matter jurisdiction, in rem jurisdiction over the defendant property, and venue;
> >
> > **(c)** describe the property with reasonable particularity, and if the property is tangible state its location when any seizure occurred and when the action is filed; and
> >
> > **(d)** identify the statute under which the forfeiture action is brought, and state sufficiently detailed facts to support a reasonable belief that the government will be able to meet its burden of proof at trial.

Subdivision (3)

Paragraph (a) was rephrased in line with the convention for describing the property: "If the defendant is real property, the government must proceed under 18 U.S.C. § 985."

Paragraph (b)'s heading was changed from "Not Real Property" to "Other Property." It will begin "If the defendant is not real property:"

The purpose of paragraph (b) is to make it clear that an arrest warrant is not needed when the property is subject to a restraining order. It is not clear whether a warrant is needed to establish in rem jurisdiction over personal property; a warrant is not needed as to real property.

It was suggested that the subparagraphs could begin with a direction that the clerk issue a warrant to arrest property already in government possession. The next subparagraph would require the court to find probable cause if the property is not in government possession. And the final subparagraph would address property that is subject to a restraining order. The Style draft carries forward elaborate terms that look to the need for a warrant to preserve the court's jurisdiction if the restraining order may expire. It was concluded that these terms need not be included in the rule; the government remains free to seek a warrant when it anticipates that a restraining order will expire.

Paragraph (c) on execution of process was revised to better separate property in the United States from property not in the United States.

One suggested revision would require delivery of the warrant to "the central authority" in the foreign country where the property is located. It was asked whether this phrase properly describes the body to which the request should be addressed, and whether there is a better way to identify a body with authority in the foreign country. A number of questions arise. It may not be possible to identify an appropriate authority in another country. Depending on the country, the United States

may know that the warrant will not be executed; that execution is not likely to happen; or that it will not be possible to prove whether execution happened. Even if it is represented that service was made, the United States may later learn that it did not happen.

An aggressive approach would be to say that a warrant is executed by delivering it to an appropriate authority in a foreign country. In rem jurisdiction is established by statute if the crime was committed in the forfeiture district without regard to the property's location at the time of the offense or at the time of the forfeiture action. That does not mean that a forfeiture judgment can be enforced against property in another country. But even an unenforceable judgment has practical value. It can be used to show the world that some countries do not enforce judgments. Many countries do not recognize in rem judgments. A set of unenforced judgments can advance arguments to change the domestic laws of other countries.

It was agreed to speak of "executing" a warrant rather than "enforcing" it.

Subdivision (c) was approved, subject to the uncertainty about execution by transmitting to a foreign authority, as follows:

With this discussion, subdivision (3) became:

(3) Judicial Authorization and Process.

(a) Real Property. If the defendant is real property the government must proceed under 18 U.S.C. § 985.

(b) Other Property; Arrest Warrant. If the defendant is not real property:

(i) the clerk must promptly issue a warrant to arrest the property if it is in the government's possession;

(ii) the court — on finding probable cause — must issue a warrant to arrest the property if it is not in the government's possession and is not subject to a judicial restraining order; and

(iii) no warrant is necessary if the property is subject to a judicial restraining order.

(c) Execution of Process.

(i) The warrant and any supplemental process must be delivered to a person or organization authorized to execute it, who may be: (A) a marshal; (B) someone under contract with the United States; (C) someone specially appointed by the court for that purpose; or (D) any United States officer or employee

(ii) If execution of a warrant on property not in the United States is required, [service may be effected by transmitting the warrant]{the warrant may be transmitted} to an appropriate authority for serving process where the property is located

(iii) The person or organization authorized under (c)(1) must execute the warrant and any supplemental process upon property in the United States as soon as practicable unless:

(A) the property is in the government's possession; or

(B) the court orders a different time when the complaint is under seal, the action is stayed before the warrant and supplemental process are executed, or the court finds other good cause.

(iv) The warrant and any supplemental process may be executed within the district or, when authorized by statute, outside the district.

Subdivision (4)

The first question addressed the triggering event for publishing notice. It was agreed that time should be measured from filing the complaint, and publication should be within a reasonable time.

It also was agreed that the publication requirement should be enforced by stating that — subject to stated exceptions — a forfeiture judgment may not be entered unless notice has been published.

It was further agreed that the subparagraph on notice content should become (ii), making the subparagraph on frequency of publication (iii).

Selecting the means of publication touches on due process concerns. The style draft, taking a phrase from Mullane v. Central Hanover Bank, suggested publication by a method "that is at least as likely as the alternative [designated] methods to effect actual notice." The difficulty with this test is that it will generate frequent litigation over the choice. It will be argued that the wrong New York newspaper was selected, and so on. One alternative would be to confide the choice to the government by requiring publication by a method that the government reasonably believes is most likely to notify potential claimants. But that may give too much freedom to the government. But focus only on "most likely to notify potential claimants" will create the same problem of collateral litigation over notice. It was noted that the cases say that reasonable belief is the standard. But it was suggested that the better alternative may be to require a means and method reasonably calculated to notify potential claimants. This suggestion was accepted, with the observation that as a practical matter the government wants notice to be as effective as can be in order to avoid later due-process objections.

Other changes were made

Subdivision (4)(b) requires individual notice. The basic requirement in subparagraph (i) identifies the persons that the government should notify. It was agreed that they could be labeled "potential claimants," and that the time for determining who must get individual notice should be geared to the time for filing a claim.

Subparagraph (ii) was revised slightly.

Subparagraph (iii) describes the means of sending notice. The law is clear that it is enough to send notice. There is no need to ensure receipt There is no need to require a return receipt The list of methods in item (A) is properly described by "including"; means reasonably calculated to reach the potential claimant are not limited to first-class mail, commercial carrier, or electronic mail. The means of notice to an incarcerated person should be kept simple — it is better not to attempt to incorporate due process requirements by limiting the rule to persons incarcerated in facilities that have procedures that ensure personal receipt. The Committee Note should say that the rule does not attempt to define the due process constraints. Concern about internal prison distribution practices led to an even division on the question whether this item should require certified mail, return receipt requested. That option will be presented to the Advisory Committee for decision. Notice to a person who was arrested in connection with an offense giving rise to forfeiture but who is not incarcerated also was simplified, looking to the address the person last gave to the agency that arrested or released the person. Notice to a person from whom property was seized and who is not incarcerated may be to the last address that person gave the agency that seized the property. Both of these last two provisions are properly described as "may": if a person is incarcerated, notice to that person must be sent as described (unless notice can be sent to counsel under (4)(b)(III)(B)). But if the person is not incarcerated, notice to a better address is desirable when the government knows a better address than the one last given to the arresting or releasing agency.

Earlier drafts have described sanctions for failure to give individual notice. Rule 11, and matters of professional responsibility, need not be addressed in Rule G. It was decided that it will suffice to draft indirectly by providing that a potential claimant who had actual notice may not oppose forfeiture or seek relief because of failure to give G(4)(b) individual notice.

With these changes, subdivision (4) will look like this:

(4) Notice.

(a) Notice by Publication.

(i) When Publication is Required. No judgment of forfeiture may be entered unless the government has published notice of the action within a reasonable time after filing the complaint, or at a time the court orders. But notice need not be published if:

(A) the defendant property is worth less than $1,000 and direct notice is send under [subdivision] 4(b); or

(B) the court finds that the cost of publication exceeds the property's value and that other means of notice would satisfy due process.

(ii) Content of [the] Notice. Unless the court orders otherwise, the notice must:

(A) describe the property with reasonable particularity;

(B) state the times under subdivision (5) to file a claim and to answer; and

(C) name the government attorney to be served with the claim and answer.

(iii) Frequency of Publication. Published notice must appear:

(A) once a week for three consecutive weeks, or

(B) only once if, before the action was filed, notice of nonjudicial forfeiture of the same property was published on an authorized internet government forfeiture site for a period of not less than 30 days, or in a newspaper of general circulation for three consecutive weeks in a district where publication is authorized under (a)(iv).

(iv) Means and Method of Publication. The government should select from the following options a means and method of publication reasonably calculated to notify potential claimants of the action:

(A) if the property is in the United States, notice must be published in a newspaper generally circulated in a district where the action is filed, where the property was seized, or where property that was not seized is located;

(B) if the property is not in the United States, notice must be published in a newspaper generally circulated in a district where the action is filed, in a newspaper generally circulated in the country where the property is located, or in legal notices published and generally circulated in the country where the property is located; or

(C) in lieu of (A) and (B), the government may post notice on a designated internet government forfeiture site for not less [fewer?] than 30 days.

(b) Notice to Known Potential Claimants.

(i) Direct Notice Required. The government must send notice of the action and a copy of the complaint to any person who, on the facts known to the government at any time before the time for filing a claim under subdivision (5)(1)(ii)(B) expires, reasonably appears to be a potential claimant.

(ii) Content of the Notice. The notice must state.

(A) the date when the notice is sent;

(B) a deadline for filing a claim, at least 35 days after the notice is sent;

(C) that an answer must be filed no later than 20 days after filing the claim; and

(D) the name of the government attorney to be served with the claim and answer.

(iii) Sending Notice.

(A) The notice must be sent by means reasonably calculated to reach the potential claimant, including first-class mail, commercial carrier, or electronic mail.

(B) Notice may be sent to the potential claimant or to counsel representing the potential claimant with respect to the seizure of the property or in a related investigation, administrative forfeiture proceeding, or criminal case.

(C) Notice to a potential claimant who is incarcerated must be sent to the place of incarceration [by certified mail, return receipt requested].

(D) Notice to a person arrested in connection with an offense giving rise to the forfeiture who is not incarcerated when notice is sent may be sent to the address that person last gave to the agency that arrested or released the person.

(E) Notice to a person from whom property was seized who is not incarcerated when notice is sent may be sent to the last address that person gave to the agency that seized the property.

(iv) When Notice is Sent. The notice is sent on the date when it is placed in the mail, delivered to a commercial carrier, or sent by electronic mail.

(v) Failure to Send Notice. A potential claimant who had actual notice of a forfeiture action may not oppose forfeiture or seek relief from forfeiture for the government's failure to give the notice this subdivision requires

Subdivision (5)

Subdivision (5) addresses responsive pleading. Subparagraph (a)(i) states the elements to be stated in a claim. Although it seems redundant, the direction to file a claim should say "in the court where the action is pending." Without these words, claimants will argue that it suffices to file an administrative claim. It was suggested that the direction to sign the claim under penalty of perjury should be supplemented by a provision similar to present C(6)(a)(ii). C(6)(a)(ii) requires an agent, bailee, or attorney to state the authority to file a statement of interest in or right against the property on behalf of another. But (5)(a) envisions a claim made by an entity that can act only through an agent. This is not a claim on behalf of another. It was agreed that the rule need not speak to a claim filed by an agent The Committee Note will observe that only an authorized person can make a claim for an entity.

Subparagraph (a)(ii) sets the time for filing a claim. It was asked whether this provision should be made complete by including a time for filing a claim when notice was not published and direct notice was not sent to the claimant. The only situation in which that can happen is covered by (4)(a)(i)(B) — the court finds that the cost of publication exceeds the property's value and that other means of notice would satisfy due process, and the government did not send direct notice because it did not know of the claimant or of an address for the claimant. That will be a rare circumstance. But it is better not to leave a gap on the face of the rule. So provision will be made for this in (a)(ii)(C).

Subparagraph (a)(iii) addresses a claim filed by a person asserting an interest as a bailee. This subparagraph requires the claimant to identify the bailor. It was argued that claim standing cannot rest on possession alone. The question arises frequently. The rule should give an answer for the claimant who says "I had it. It is not mine. I claim it." It was noted that (5)(a)(i)(B) requires the claimant to state the claimant's interest in the property. But there is case law requiring identification of the bailor. It was decided to keep this.

Subparagraph (b) requires that an answer be served and filed within 20 days after filing the claim. It was agreed that both service and filing should be accomplished within these 20 days The draft provides that a claimant waives an objection to in rem jurisdiction or to venue that is not stated in the answer The Department of Justice wants this draft to be read to exclude a pre-answer motion to dismiss for lack of in rem jurisdiction or for improper venue. It also wants to exclude these objections after the answer is filed. But it was asked whether in rem jurisdiction objections involve a matter of subject-matter jurisdiction that can be raised at any time. It was asserted that waiver is possible. And raising the objection on the eve of trial is too late. It should be required early-on. But uncertainty was expressed on this score. It may be that there is no Article III case or controversy if there is nothing that a judgment can be directed to One approach would be to retain the rule language but observe in the Committee Note that waiver of in rem jurisdiction may be possible in some circumstances. An alternative would be to limit the rule to a statement that the answer must state any objection to in rem jurisdiction without referring to waiver. It was pointed out that even if the rule does state that an objection is waived if not stated in the answer, Rule 15 allows amendment of the answer. The result is that amendment is possible as a matter of course only for a brief period. After that amendment is available only if the court is persuaded that it should be allowed. That was accepted as sufficient basis to adopt a rule stating that an in rem jurisdiction objection is waived. But further research should be done to support a well-informed Committee Note statement about the possibility of waiver.

With this discussion, it was agreed that draft Rule G(5) would be:

(5) Responsive Pleadings.

(a) Filing a Claim.

(i) A person who asserts an interest in the defendant property may contest the forfeiture by filing a claim in the court where the action is pending. The claim must:

(A) identify the specific property claimed;

(B) identify the claimant and state the claimant's interest in the property;

(C) be signed under penalty of perjury by the person making the claim; and

(D) be served on the government attorney designated under subdivision (4)(a)(ii)(C) or (b)(ii)(D).

(ii) Unless the court for good cause sets a different time, the claim must be filed:

(A) by the time stated in a direct notice sent under subdivision (4)(b);

(B) if notice was published but direct notice was not sent to the claimant or claimant's counsel, no later than 30 days after final publication of notice under subdivision (4)(a), or

(C) if direct notice was not sent and notice was not published.

(1) if the property was in government possession when the complaint was filed, no later than 60 days after the complaint was filed, not counting any time when the complaint was under seal [or when the action was stayed?]; or

(2) if the property was not in government possession when the complaint was filed, no later than 60 days after the government complied with 18 U.S.C. § 985(c) as to real property, or after process was executed on the property under subdivision (3).

(iii) A claim filed by a person asserting an interest as a bailee must identify the bailor.

(b) Answer. A claimant must serve and file an answer to the complaint within 20 days after filing the claim. A claimant waives an objection to in rem jurisdiction or to venue that is not stated in the answer.

Subdivision (6)

Subdivision (6) provides for special interrogatories, limited to the claimant's identity and relationship to the property, that can be served before the Rule 26(d) discovery moratorium is over. It has been broken out from subdivision (5). It will be broken into three sentences, designed to ensure that the interrogatories may be served up to 20 days after a claimant files a motion to dismiss. It was noted that NACDL was opposed to an earlier provision for interrogatories that did not limit the subjects of inquiry, protesting that extensive interrogatories might discourage some claimants from proceeding further. The limited interrogatories now described in (6) will have less potential to discourage claimants, but the objection still may be advanced. It was asked whether the

interrogatories would count against Rule 33's presumptive limit of 25 interrogatories Rather than leave this question to practitioner guessing, or even to a Committee Note, it was concluded that "under Rule 33" should be added to the rule to provide a clear answer.

The time for serving answers was expanded to include objections within the same limit

It was asked whether there is any need to include paragraph (c), which stated that the court may not decide a motion to dismiss until 20 days after G(6) interrogatories are answered. This provision does more than tell the court to do something that it would do anyway. It ties to the government motion to strike the claim for lack of standing. What happens now is that a claimant moves to dismiss and the government moves to strike the claim. The government wants the motion to strike to take precedence. The government does not want to have to defend venue, respond to a limitations objection, or the like, until standing is first resolved. Even if standing is easily denied, a court might turn first to the venue objection or whatever. But it was observed that the court does not know when the claimant has answered the interrogatories. The trigger is the government response to the motion to dismiss. The rule should give the government 20 days after the claimant has answered the interrogatories to respond to a subdivision 8(b) motion to dismiss.

With this discussion, draft Rule G(6) took this form:

(6) Special Interrogatories.

> **(a) Time and Scope.** The government may serve special interrogatories under Rule 33 limited to the claimant's identity and relationship to the defendant property. The government may serve the interrogatories without leave of court at any time after the claim is filed and before discovery is closed But if the claimant serves a motion to dismiss the action, the government must serve the interrogatories within 20 days after the motion is served.
>
> **(b) Answers, Objections.** Answers or objections to these interrogatories must be served within 20 days after the interrogatories are served.
>
> **(c) Response Deferred.** The government need not respond to a claimant's motion to dismiss the action under subdivision 8(b) until 20 days after the claimant has answered these interrogatories.

Disclosure

It was agreed that initial disclosures do not make sense in civil forfeiture proceedings. They should be added to the list of exemptions in Rule 26(a)(1)(E) as item (ii), redesignating the items that presently begin with (ii):

Rule 26. General Provisions Governing Discovery; Duty of Disclosure.

> **(a) Required Disclosures; Methods to Discover Additional Matter.**

(1) Initial Disclosures. * * *

(E) The following categories of proceedings are exempt from initial disclosures under Rule 26(a)(1): * * *

(ii) A forfeiture action in rem arising from a violation of a federal statute; * * *

Subdivision (7)

Subdivision 7(a) authorizes the court to enter orders to preserve forfeiture property. It was agreed that the authority should extend beyond property named as defendant to include property subject to pre-complaint restraint. The Committee Note should explain that pre-complaint restraint includes restraining orders, notices of lis pendens, posting, and any other device intended to preserve property for anticipated forfeiture proceedings.

Subdivision 7(b) covers interlocutory sale or delivery of forfeiture property. Some style changes were made in the current drafts. The Committee Note will explain that although it is based in large part on present Rule E(9), no inferences should be drawn from differences in expression. New Rule G(7)(b) is drafted under current Style conventions that express the same meaning more clearly.

Subdivision 7(c) addresses disposition of forfeited property. The central question was whether there is any need for this provision, which says only that the property or its proceeds must be disposed of as provided by law. This provision draws from present Rule E(9)(a),(b), and (c). The problems that arise tend to involve innocent lien holders. A mortgagee, for example, may claim the debt secured by the property. Often these questions are resolved without difficulty, but there may be a dispute. The genuineness of the mortgage may be contested, as when the mortgagee is a family member. The Committee Note can provide a useful explanation, including the observation that an uncontested mortgage can be paid after an interlocutory sale. A related question asked whether the Committee Note should observe that a final forfeiture judgment may be entered under Civil Rule 54(b) as to some items of property while proceedings continue as to other items. This question was not answered.

With this discussion, draft Rule G(7) reads

(7) Preservation and Disposition of Property; Sales.

(a) Preservation of Property. When the government does not have actual possession of the defendant property, or of property subject to pre-complaint restraint, the court, on motion or on its own, may enter any order necessary to preserve the property and to prevent its removal or encumbrance.

(b) Interlocutory Sale or Delivery.

(i) Order to Sell. On motion by a party or a person having custody of the property, the court may order all or part of the property sold if.

(A) the property is perishable, or liable to deterioration, [decay,] diminution in value, or injury by being detained in custody pending the action;

(B) the expense of keeping the property is excessive or disproportionate to its fair market value;

(C) the property is subject to a mortgage or to taxes on which the owner is in default; or

(D) the court finds other good cause.

(ii) By Whom Sale Made. A sale must be made by an agency of the United States that has custody of the property or the agency's contractor, or by any person the court designates.

(iii) Sale Proceeds. Sale proceeds are a substitute res subject to forfeiture in place of the property that was sold. The proceeds must be held in an interest-bearing account maintained by the Attorney General pending decision of the forfeiture action.

(iv) Sale Procedures. The sale is governed by Chapter 127 of title 28, United States Code (28 U.S.C. §§ 2001 et seq.), unless all parties, with the court's approval, agree to the sale, aspects of the sale, or different procedures.

(v) Delivery. The court, on a claimant's motion, may order that the property be delivered to the claimant pending the conclusion of the proceeding if the claimant shows circumstances that would permit sale under (i) and gives security under these rules.

(c) Disposition of Forfeited Property. Upon entry of a forfeiture judgment, the property or proceeds from selling the property must be disposed of as provided by law.

Subdivision (8)

Subdivision 8(a) addresses a motion to suppress use of property as evidence. The Style Draft was approved with editorial changes

Subdivision 8(b)(i) as drafted provides that a party "with standing to contest the forfeiture action" may move to dismiss the complaint at any time after filing a claim and answer. This provision was described as expressing the heart of the government's interest. It wants the court to give priority to a government motion to strike the claim, addressing standing before turning to a motion to dismiss for failure to state a claim, for lack of jurisdiction or venue, and so on. That means there must be an answer to the complaint and answers to special interrogatories put under

subdivision (6). It should be remembered that the complaint must show reasonable ground to believe that the government will succeed at trial under the formulation adopted in G(2)(b).

Discussion suggested that the first step is to require the claimant to file both claim and answer. There is no need to say "with standing to contest the forfeiture action." The next thing to address is the priority of decision: a motion to strike for lack of claim standing should be decided before a 12(b)(6) motion. Priority could be addressed in subdivision 8(c).

Further discussion reopened the question whether a claimant should be able to seek dismissal before filing an answer. The Third Circuit has taken this view under the present rules, see U.S. v. $8,221,877.16, 3d Cir.2003, 330 F.3d 441. Claimants surely will want this approach to continue in Rule G. It will be argued that it may be easier to conclude that the court lacks jurisdiction or that a claim has not been stated than to resolve a difficult question of standing. The government, moreover, may fairly be asked to select a court that has jurisdiction and to plead a claim that would support forfeiture. And in any event, if a claimant has standing to contest forfeiture, why should an answer be required? The government interest could be addressed by limiting a motion to dismiss to a claimant that establishes standing. This could be coupled with a provision in subdivision (8)(c) that requires decision of a government motion to strike a claim before deciding the claimant's motion to dismiss. One variation would be to give priority to a government motion to strike based only on the face of the pleadings.

It was noted that earlier drafts had addressed the conclusive effect of summary-judgment rulings made in the context of an innocent-owner defense. The difficulty of formulating a useful provision has led to abandonment of the effort.

The meeting concluded without resolving the questions posed by the relationships between claim standing, motions to dismiss, and motions to strike a claim. The provisions of subdivision (8)(b)(i) and (c) sketched below indicate only the direction of the discussion. The remainder of subdivision (8) is the draft that will go forward to the next steps.

(8) Motions.

(a) Motion to Suppress Use of the Property as Evidence. If the defendant property was seized, a party with standing to contest the lawfulness of the seizure may move to suppress use of the property as evidence. Suppression does not affect forfeiture of the property based on independently derived evidence.

(b) Motion to Dismiss the Complaint [Action].

(i) A claimant who establishes standing to contest forfeiture may[, at any time after filing the claim,] move to dismiss the complaint [action] under Rule 12(b).

(ii) A complaint may not be dismissed on the ground that the government did not have adequate evidence at the time the complaint was filed to establish the forfeitability of the property.

(c) Motion to Strike a Claim or Answer. At any time before trial, the government may move to strike a claim or answer:

(i) for failure to comply with subdivisions (5) or (6); or

(ii) because the claimant lacks standing to contest the forfeiture. The government's motion must be decided before addressing any motion by the claimant to dismiss the complaint [action]. The claimant has the burden of establishing standing. Standing is to be determined by the court, which may consider the allegations in the complaint, claim, and answer; responses to interrogatories served under subdivision (6); and the evidence introduced at any hearing.[50]

(d) Motion to Release Property.

(i) If the United States or a contractor of a United States agency holds property for judicial or nonjudicial forfeiture, a person who has filed a claim to the property may petition for release of the property under 18 U.S.C. § 983(f).

(ii) If a petition for release is filed before a judicial forfeiture action has been filed against the property, the petition may be filed either in the district where the property was seized or in the district where a warrant for the seizure of the property was issued.[51] If a judicial forfeiture action against the property is subsequently filed in another district — or if the government shows that the action will be filed in another district — the petition may be transferred to that district under 28 U.S C. § 1404.[52]

(iii) In an action subject to 18 U.S.C. § 983(f), a petition under § 983(f) is the sole means to seek return of property to the claimant's custody pending trial, and Federal Rule of Criminal Procedure 41(g) does not apply.[53]

(iv) No petition for release may be made under this subdivision in an action exempted from the Civil Asset Reform Act of 2000 by 18 U.S.C. § 983(i).

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[50]The material on establishing standing might be separated out as (c)(iii) Then (b)(i) would begin· "A claimant who establishes standing to contest forfeiture under subdivision (c)(iii) may * * * " (c)(ii) would end after the second sentence (c)(iii) would begin "The claimant has the burden * * *," etc as in present (c)(ii)

[51]Could this be "where a warrant to seize the property issued?"

[52]The Committee Note will say that this provision is designed as a reminder that a civil forfeiture action is a civil action that can be transferred under § 1404 Application of § 1404 to in rem actions is described in 15 Federal Practice & Procedure § 3843

[53]This subparagraph was provided in response to conference call discussions and was not independently reviewed If it stays in this form, the Committee Note should say that Rule G(8)(d) does not address "anomalous jurisdiction" Rule 41(g) motions in proceedings that are not subject to § 983(f)

(e) Excessive Fines. A claimant may seek to mitigate a forfeiture under the Eighth Amendment Excessive Fines Clause by motion for summary judgment or by motion made after entry of a forfeiture judgment if:

(i) the claimant has pleaded the defense under Rule 8, and

(ii) the parties have had the opportunity to conduct civil discovery on the defense.

Subdivision (9)

Subdivision (9) was not discussed. The Style draft will go forward as the current draft:

(9) Trial.

Trial is to the court unless any party requests a trial by jury under Rule 38.

Supplemental Rules

The Subcommittee was reminded that adoption of Rule G will require amendment of earlier Supplemental Rules to strip out the forfeiture provisions that are consolidated in G.

March 12, 2004

Participants in the March 12, 2004 conference call included Cassella, Cooper, Heim, Kyle, Marcus, McKnight, and Rosenthal. Cassella and Hoffman represented the Department of Justice. David B. Smith and Richard J. Troberman presented the views of the National Association of Criminal Defense Lawyers. McCabe and Rabiej represented the Administrative Office, along with others who listened in.

Judge McKnight stated that the initial part of the call discussion would be devoted to presentation by the NACDL representatives of the questions they wish to address to the "January 2004" Rule G draft. Each question would be discussed in turn by Subcommittee members and the Department of Justice Representatives. Following this discussion, the call would be restricted to the deliberations of Subcommittee members and advisers.

(2)(d)

The language of subdivision (2)(d) was accepted on all sides. It was urged that the Committee Note should state that this language carries forward the meaning that has been given by courts to Rule E(2)(a) in forfeiture actions.

(3)(c)(iii)(B)

It was agreed that (3)(c)(iii) properly expresses the time to execute an arrest warrant as "as soon as practicable " But a challenge was addressed to the exception that allows the court to order a different time when the complaint is under seal or the action is stayed. This provision creates backdoor authority for sealing or staying, without providing any standards. It amplifies the risk that judges will "rubber stamp" ex parte applications to seal the complaint or stay proceedings. If the rule is to speak of sealing and stays, it should provide specific standards that will forestall routine motions. The time limits adopted in CAFRA are key parts of the reforms, and they should not be defeated by a filing that in form meets a deadline but then functionally defeats the deadline by remaining secret.

In response, it was said that this provision is not intended to provide new authority for sealing or staying The authority exists now, and is exercised. Judges do not "rubber stamp" the applications. They exercise the responsibility of judging. They do ask why a seal or stay is needed. The government indeed has a form brief demonstrating the authority and reasons for granting such relief. Subdivision (3) does not extend or endorse the decisions. Stays and sealing are not sought to undermine CAFRA reforms. All of the statutory time lines are observed. Remember that (3)(c)(iii)(A) provides that the warrant need not be executed if the property is already in the government's possession. And if the property has not been seized, a seal or a stay does not undermine CAFRA. It makes no sense to seal the complaint and then require that process be served as soon as practicable.

But, it was argued, the purpose of limitations periods is to have trial while the facts are fresh. Suspending execution of the warrant after it issues defeats that purpose. There is no time limit now on the duration of the seal or stay, and the draft rule does not provide one.

Creation of guidelines for a seal or stay was further resisted on the ground that the guidelines — whether cast in terms of "good cause" or more pointed criteria — would become the occasion for ex-post arguments that the seal or stay was improper. A valid forfeiture might be defeated because the government relied on a seal or stay it properly persuaded the court to order, only to have the court change its mind. It was responded that most state statutes have short time deadlines, and provide for dismissal if the government does not meet them. If the government obtains a seal or stay without good cause, it should not be excused its failure to meet the statutory time deadlines. There is in fact one federal case in which the district court dismissed a civil forfeiture action filed under seal on the ground that sealing does not satisfy time limit requirements. (The government view is that this case is wrong. It makes no sense to authorize filing under seal and then dismiss the action because the warrant was not executed "forthwith.")

It was agreed that if (3)(c)(iii)(B) remains, the Committee Note should state that the rule does not address the grounds for sealing.

(4)(a)(iii)(B), (iv)(C)

It was agreed that the provisions allowing web site publication as an alternative to newspaper publication are workable, so long as Rule 4(b) direct notice is provided.

(4)(b)

It was urged that Rule 4(b) should provide for direct notice by formal service of process under Civil Rule 4, not merely for "sending" notice. The present Supplemental Rules refer to service, but do not actually require service on potential claimants. But the Supplemental Rules reflect ancient practices that responded to different circumstances. The practices adopted then for seizure for customs duties of a ship whose owners were abroad should not carry forward forever. The government commonly knows the identity of potential claimants in a civil forfeiture proceeding — there is a claim in the nonjudicial proceeding that triggers the civil action. If the subject is real property, land records can be consulted. CAFRA is designed to level the playing field, to make it easier to participate.

The response was that the current rules do not provide for any form of individual notice. Publication is the only notice. But due process requires more than mere publication, and the government in fact undertakes to provide individual notice to identifiable potential claimants. Rule 4(b) is designed to codify and regularize the practice, so that it will be uniform in all districts. It satisfies the Mullane requirement that reasonable steps be taken to provide actual notice. The formality of Rule 4 service is not required by due process. Rule 4(b) also addresses specific variations, such as the problem of notice to incarcerated persons as governed by the Dusenbery decision.

The responding protest was that the government is asking for the lowest possible due process standard. The rule should provide more. At a minimum, certified mail with a return receipt should be required. The Dusenbery decision divided 5 to 4 on the question whether a return receipt should be required; that is close to a due process requirement. But formal service is better, and should be required. The goal is actual notice, and sending notice by other means will fail to provide actual notice too often to be acceptable.

The provision for e-mail notice also falls short. Many claimants do not have access to e-mail. Even if they do, it is often at home through a computer that is shared with family members. Delivery of an e-mail notice to the computer provides inadequate assurance that it will be read by the claimant before it is corrupted or deleted by someone who does not appreciate its importance.

In turn it was repeated that due process does not require actual notice. It requires reasonable efforts to convey actual notice. The rules should not create traps that defeat proper forfeitures. E-mail, for example, will be used for notice only if there is an established pattern of e-mail communication — that is most likely to be communication with an attorney who will recognize the importance of the notice. Courts use e-mail Congress, after anthrax scares, often does not accept physical mail.

But it was protested that these notices commonly are not communications between professionals. Even if notice is addressed to an attorney for the potential claimant, such notice is troubling. It imposes an obligation on the attorney to notify the claimant, at risk of malpractice, even though the attorney does not — and will not — represent the claimant in the civil forfeiture proceeding. And claimants ordinarily do not sort their e-mail messages on a daily basis The need

is not for a rule that will set needless traps for the government, but for a rule that will enhance the prospect of actual notice to potential claimants.

Addressing a question presented by a footnote option, it was urged that the provision in (4)(b)(iii)(C) for notice to an incarcerated person should require a return receipt. An incarcerated person has lost control over the means that may be used to effect or receive notice. The cost is negligible. But it was replied that cost is not the issue. The problem is that the return receipt ordinarily is signed by a prison official, not by the inmate. The receipt shows only that the letter reached the prison. The rule should not attempt to address the tangled questions that arise from potentially inadequate prison systems for delivering "legal" mail, or for delivering all mail. It would be a mistake to require only one form of service. In some instances notice is delivered directly to a potential claimant during a hearing, it is even possible to accomplish personal delivery in the prison. Some other means may be developed in the future. (C), moreover, is in the rule for a specific reason — it makes it clear that notice may not be sent to some other address for the incarcerated person, such as the home address before incarceration.

Further discussion of noticed to an incarcerated person was inconclusive. The NACDL representatives recognized that a return-receipt requirement may not provide much protection since there are many opportunities for mail to go astray after it reaches the prison and a prison official signs the return receipt.

Turning back to (4)(b)(iii)(A), it was urged that even if formal Rule 4 service of process is not required, "first class mail" should be deleted. Return receipts should be required as a minimum. Even if there have been prior exchanges by ordinary mail, the first notice that a forfeiture action has been filed should be sent by formal means. Mail with a return receipt, or a commercial carrier, would do. It might be better still to delete all illustrations from (b)(iii)(A), so that it would say only that the notice must be sent by means reasonably calculated to reach the potential claimant.

(5)(a)

(5)(a)(i)(C) provides that a claim must be signed under penalty of perjury by the person making the claim. It was urged that provision should be made for an attorney to sign on behalf of the client-claimant. But it was responded that existing law requires that a claim be signed under penalty of perjury. The attorney cannot do that. A corporation, for example, can sign only through an agent. Present Rule C(6)(a) requires that a statement of interest be verified. Accepting that, the suggestion was changed. There are emergency situations that prevent an attorney from getting the claimant's signature within the time to claim. The claimant may live abroad, or may be in a prison that makes it difficult to get the signature. There should be a provision for signature by the attorney in these circumstances. The response was that (b)(a)(ii) authorizes the court to extend the claim time. It was agreed that an extension of time is the solution. The Committee Note should identify the problem and this solution.

(5)(b)

The first suggestion was that the relationship between Rule 12 motion practice and the time to answer should be the same in forfeiture actions as in other civil actions. A claimant should be allowed to move to dismiss for failure to state a claim or lack of jurisdiction before filing an answer.

The claim will provide whatever information bearing on claim standing that the pleadings will provide. The answer will add nothing of use on this score. The Third Circuit has accepted this view, and nothing in CAFRA was intended to change it. The government's standing objections can be raised in response to the motion to dismiss. Argument of the motion to dismiss will provide any further information needed to address standing, particularly in light of the subdivision (6) interrogatories.

The Department's original concern was to be sure that the government can challenge standing before being required to address a motion to dismiss. That concern is now addressed by subdivisions (6) and (8). But CAFRA says that the claimant must file an answer 20 days after filing the claim. § 983(a)(4)(B). It does not say anything about suspending the 20-day period while a motion to dismiss is pending. Rule G should track the statute — the question is one of fidelity to the statute, not any remaining need to frame and resolve the standing question before a motion to dismiss. Rule 5(b) could be redrafted so that it simply incorporates § 983(a)(4)(B) by reference. An answer, moreover, may in fact flesh out the basis of the attack on the complaint. And it is not difficult to frame an answer..

It was asked whether ordinary civil practice is recognized by CAFRA itself. CAFRA dictates that civil forfeiture actions are governed by the supplemental rules. The supplemental rules are just that — supplemental rules. They invoke all of the Civil Rules, and the Third Circuit concluded that nothing in Rule 12 is inconsistent with the supplemental rules in this respect. The Third Circuit considered Rule C, which requires an answer 20 days after filing the complaint, and concluded that Rule C is not inconsistent with the motion practices established by Rule 12. So a claimant may believe that it cannot frame an answer to a confused complaint, and need to move for a more definite statement under Rule 12(e). Rule 12(e) motions are relatively common, although claimants and the government are likely to disagree on how frequently they are really needed. Existing practice, as determined by the Third Circuit, should be preserved.

(6)

It was urged that the time periods provided by (6) for special interrogatories are too long, adding too much delay to the process. The government does not need 20 days to serve these interrogatories after a motion to dismiss is served. It does not need another 20 days to respond to the motion to dismiss after answers to the interrogatories are served. If the claimant uses all of the 20 days provided to answer, the total time becomes 60 days. It may be still longer if the claimant objects to the interrogatories and the objections must be resolved. The time question is not trivial. Every day that passes injures the property owner The property may be a going business, or fresh food subject to rapid deterioration. The government should be able to get out the interrogatories within 5 days after a motion to dismiss is served.

In response, it was noted that in most districts there is only one civil forfeiture expert. That person may be in trial, ill, or on leave when the motion to dismiss is served. 20 days is reasonable. Claimants can accelerate the process by serving answers to the interrogatories in less than 20 days, but that is not likely to happen. To the contrary, the government often has to move to compel answers. Remember that the response to a motion to dismiss the action may be a cross-motion to dismiss the claim for lack of standing. The government needs the 20 days after interrogatory

answers are served. And as to the perishable property, sales are arranged. If sale is not arranged by agreement, subdivision (7)(b) provides for sale by order.

It was protested that often prompt sales are not arranged. It is better to have short time periods, with allowance for extensions to meet such possible problems as illness, absence, or the like. And the government does not need 20 days to prepare a cross-motion to strike a claim any more than it needs 20 days to respond to a motion to dismiss.

(7)(b)

Concern was expressed over the (7)(b)(i)(A) provision authorizing sale of property subject to a defaulted mortgage or back taxes To be sure, a claimant should not be able to live in his home rent-free because the government seeks to forfeit the home. But suppose the property is an automobile. Unless the property is returned, the claimant cannot use it and the government gets the benefit of continuing payments made by the claimant pending forfeiture if the automobile is forfeited.

On the other hand, the mortgagee or taxing authority is injured if no payments are made while the forfeiture action is pending and the property is then forfeited. Sale is the remedy. The claimant then can seek return of the sale proceeds.

But it was protested that the sale will destroy the equity. There will be no reason left to fight the forfeiture. The fact that the government then loses the opportunity to forfeit anything is no consolation to the claimant.

(8)(d)

(8)(d)(iii) states that 18 U.S.C. § 983(f) is the sole means to seek return of property to the claimant's custody pending trial in an action to which § 983(f) applies. (§ 983(f) does not apply to the forfeiture actions exempted from CAFRA by § 983(i).) (8)(d)(iii) further states that Criminal Rule 41(g) does not apply. NACDL accepts the proposition that § 983(f) is the sole means for hardship-based return after a civil action is filed. But that does not address claims for relief on the ground that the government unlawfully seized the property. There are many cases ruling that due process requires a prompt post-deprivation hearing to determine whether the seizure was lawful. A leading case is Commissioner v. Shapiro, 424 U.S. 614, 629-634 (1976). It is particularly important to have a judicial remedy during the period between seizure and filing the civil forfeiture action. The Supreme Court would hold that due process requires a prompt hearing on the validity of the seizure. CAFRA allows the government to delay filing for at least 180 days, and includes many opportunities to extend the period. Great hardship can be imposed if § 983(f) is the only remedy available during the pre-filing period. The Department of Justice, moreover, proposed during the legislative process that § 983(f) be made the exclusive remedy for returning property before a forfeiture judgment; the proposal was rejected Section 983(f) would not have all of the exclusions that it now includes if it had been intended to be exclusive. Currency, monetary instruments, or electronic funds are eligible for hardship return only if they are "the assets of a legitimate business which has been seized" Seizure of money in other circumstances can be ruinous; it cannot be that there is no remedy. Although the Criminal Rules have long excluded civil asset forfeiture proceedings from application of the Criminal Rules, courts relied on former Criminal Rule 41(e), now Rule 41(g), to

order return of assets held for forfeiture. No post-CAFRA case says that Rule 41(g) does not apply. Congress refused to read Rule 41(g) out of the scene. Rule 41(g) is used sparingly. Courts look to all the circumstances, not only the merits of the case but the equities.

The response was that Rule 41(g) is an equitable remedy. CAFRA provides substitute remedies. The forfeiture can be challenged on the merits. A motion can be made to suppress the property as evidence. Hardship return is provided by § 983(f). If the § 983(f) remedy is inadequate, relief should be sought in Congress; the House passed the provision that NACDL wanted, but Congress did not. Nothing in CAFRA justifies any change. The government must file a civil action within 90 days after a claim is made in a nonjudicial forfeiture proceeding, and Criminal Rule 41(g) disappears once the civil action is filed. The source of NACDL's concern lies in the statute allowing the government 90 days to file. But the 90-day period is important. The government makes 20,000 seizures a year. The filing date cannot be advanced simply because the claimant wants a probable-cause hearing. In a criminal prosecution, the defendant files a motion to suppress. Rule G(8)(a) provides a motion to suppress And Criminal Rule 1(a)(5)(B) makes it plain that Rule 41(g) does not apply to a civil forfeiture action. A claimant who is anxious to seek return can file a claim in the nonjudicial forfeiture proceeding at any time, and if relief is not provided in 15 days can go to court for relief without waiting for the government to file a civil action.

It was protested that the agencies that seize property will not accept a claim filed immediately after seizure. The answer was that "there is an agency problem, but agencies understand that they must accept the claim if a § 983(f) petition is filed with the agency." At the same time, a § 983(f) petition is not available with respect to cash.

The discussion returned to probable cause for seizure. The government seizes all of the claimant's bank accounts. There is no § 983(f) remedy for cash. It cannot be that the claimant has to wait until the government gets around to filing a civil action, perhaps 180 days later or, with extensions, later still. Due process requires an earlier hearing. Remember that Congress refused the Department's proposal that § 983(f) be made the exclusive remedy for return of property. Section 983(f) would not have all these exclusions if it were meant to be the exclusive remedy. "A person could be ruined." Criminal Rule 1(a)(5)(B) and its predecessor have been around a long time and have not defeated equitable remedies. "All the cases support us. Nothing has changed since CAFRA."

It was protested that there are cases holding that Criminal Rule 41(g) no longer applies. The pre-CAFRA cases used Rule 41(g) to force prompt filing of the forfeiture complaint. That is no longer necessary, since CAFRA sets the 90-day filing deadline. In rejoinder, it was noted that other cases say there is no adequate remedy before the action is filed; before filing, Rule 41(g) and equity provide remedies Hardship — the claimant cannot eat — is important, but should not be confused with due process. Due process requires that a claimant have a hearing on the probable-cause issue.

It was agreed that hardship is not the same as due-process hearing requirements. Due process, however, is satisfied by providing a remedy for return, § 983(f), and by providing a motion to suppress evidence use of unlawfully seized property. The 90-day period to file after a claim is made in a nonjudicial forfeiture proceeding was resisted in Congress, but it was enacted. It should not be defeated by a prefiling motion to suppress. 28 U.S.C. § 2465(b)(1), for that matter, provides

interest if the claimant defeats forfeiture, and § 2680(c) extends the Tort Claims Act to give a remedy for improper seizure.

Yet it was argued that interest at a later time does not help the claimant eat, hire a lawyer, or post bond. Rule 41(g) provided a remedy before, and it should continue to be available. This does not expand anything. "Ask the members of Congress who were responsible for this." NACDL did not even oppose enactment of the 90-day filing period because no one even suggested that Rule 41(g) would not be available. This is an important remedy. It is important for businessmen as well as individual claimants.

The open discussion portion of the call concluded at this point. The NACDL and Department of Justice representatives were thanked for their help, both during this call and throughout the process of developing Rule G to its present point.

Subcommittee members then began deliberations.

It was pointed out that the pleading standard of (2)(d) had been accepted. All that remains is a Note explaining that the standard reflects case law interpreting the current Rule E provisions requiring particularized pleading.

As to (3)(c)(iii), the Note will say that the rule does not imply anything about the circumstances in which sealing or a stay is available. With that, the draft rule should remain unchanged

The suggestion that (4)(b) should require that notice be served under Civil Rule 4 procedures was rejected.

It was agreed that (4)(b)(iii)(A) should be changed by deleting references to any specific examples of sending notice: "(A) The notice must be sent by means reasonably calculated to reach the potential claimant~~, including first class mail, commercial carrier, or electronic mail~~." It was recognized that in this form the rule is "terse." Examples in the Note might help, perhaps expressed in an agnostic tone. Suggestions made by the Department of Justice in its March 8 letter responding to the NACDL comments, pp. 11-12, may provide some inspiration. What is reasonably calculated to reach the potential claimant does depend on the circumstances. Perhaps the Note could refer to certified mail with a return receipt or "equally efficacious" means.

(4)(b)(iii)(C) addresses the particular problem of notice to an incarcerated claimant. If (A) requires means reasonably calculated to reach the claimant, why should there be any need to elaborate in (C)? Certified mail may not be the best means — the receipt is signed by the jailer, or perhaps not signed at all, that most prisons have systems to distribute "legal mail" to inmates does not ensure delivery even if the receipt is signed. It was agreed to delete the suggestion that would limit service on a prisoner to certified mail with return receipt. The Note may address these issues briefly.

The Note to (5)(a)(i)(C) should observe that unavailability of a potential claimant to sign a timely claim may be a ground for an order extending the time to file the claim.

It was agreed that (5)(b) should not require that a claimant file an answer before being allowed to move to dismiss. It will be amended: "A claimant must serve and file an answer to the complaint or a motion under Rule 12 within 20 days after filing the claim. A claimant waives an objection to in rem jurisdiction or to venue that is not stated by motion or in the answer." The Note may refer to the Third Circuit decision that accepted this procedure for pre-CAFRA cases.

The time periods incorporated in subdivision (6) were found acceptable. They will not be changed.

The (7)(b)(i)(C) provisions for sale of property because of defaulted mortgage or tax payments were found troubling. It is difficult to provide an adequate sense of the problems by relying on the Committee Note alone The greatest concern is with sale of the claimant's residence. Perhaps Note commentary is the least unsatisfactory response. The Note could point out the possibilities of abuse in either direction, and urge a sensitive approach to a motion to sell.

All participating subcommittee members agreed to strike the provision of (8)(d)(iii) that would expressly reject resort to Criminal Rule 41(g). The rule should not take sides in this dispute. The due-process argument should be fought out in the courts. The time has not come either to develop an explicit procedure for relief during the period before the government files a civil forfeiture action or to exclude any remedy. The rule should make § 983(f) exclusive only as to "hardship" return, and only for cases to which § 983(f) applies.

CORRESPONDENCE
FROM
THE DEPARTMENT OF JUSTICE

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WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief

Rules Committee Support Office

December 2, 2002

MEMORANDUM TO RICHARD TROBERMAN, DAVID SMITH, AND E.E. EDWARDS

SUBJECT: *Department of Justice's Reply to NACDL's Comments on Proposed Rule G*

For your information, I am attaching a copy of the Department of Justice's reply to NACDL's comments on the proposed forfeiture Rule G.

John K. Rabiej

Attachment

Supplemental Rule G

Revised November 26, 2002

Rule G. Forfeiture Actions In Rem: Special Provisions

(1) **Application.** This Rule G applies to a forfeiture action *in rem* for violation of a federal statute. Rules A through F also apply unless inconsistent with Rule G.

(2) **Complaint.**

(a) The complaint must be verified and must describe with reasonable particularity the property that is the subject of the action.

(b) The complaint must state —

(i) the location of the property;

(ii) the basis for the court's exercise of subject matter jurisdiction over the action or *in rem* jurisdiction over the property;

(iii) the basis for venue;

(iv) the statute under which the action is brought, and the nature of the relationship between the property and the underlying criminal offense that gives rise to forfeiture under the statute; and

(v) the circumstances from which the action arises with such particularity that a claimant will be able to commence an investigation of the facts and to frame a responsive pleading.

(c) Interrogatories may be served with the complaint without leave of court.

(3) **Judicial Authorization and Process.**

(a) Arrest Warrant or Restraining Order.

(i) The clerk must promptly issue a warrant to arrest property other than real property described in a forfeiture complaint.

(ii) If a court has jurisdiction over property under an order that restrains the property, issuance of an arrest warrant under Rule G(3)(a)(i) is unnecessary unless, on motion of the United States, the court finds that execution of a warrant is necessary to preserve the court's jurisdiction in the event the restraining order expires or

is dissolved.

(iii) If the property is real property, the United States must proceed under 18 U.S.C. § 985.

(iv) If the property to be arrested is neither already in the possession of the Government nor subject to a judicial order that restrains the property, the warrant may be issued only after a neutral and detached magistrate has determined that there is probable cause for the arrest.

(b) Execution of Process.

(i) The warrant and any supplemental process must be delivered to a person or organization authorized to enforce it, who may be: (A) a marshal; (B) someone under contract with the United States;(C) someone specially appointed by the court for that purpose; (D) any officer or employee of the United States; or (E) in the case of property located in a foreign country, a person authorized to serve process in such country.

(ii) A person authorized under Rule G(3)(b)(i) must execute the warrant or supplemental process as soon as practicable, unless the court directs a different time when

(A) the complaint is under seal,

(B) the property is located abroad, or

(C) the action is stayed prior to execution of the warrant.

(iii) Process in rem may be executed within the district or outside the district when authorized by statute.

(4) **Notice.**

(a) Publication.

(i) Following execution of an arrest warrant under Rule G(3)(b) or, in the case of real property, following compliance with 18 U.S.C. § 985(c), the Attorney General must publish notice of the forfeiture action. Unless the court orders otherwise, the notice must

(A) specify the times under Rule G(5) to file a claim to the property and to answer the complaint,

(B) name the attorney for the United States to be served with a claim and answer, and

(C) appear once a week for three successive weeks in a newspaper of general circulation in a district where (1) the action is filed, (2) the property was seized, or (3) the property is located.

(ii) The Rule G(4)(a)(i)(C) notice need be published only once if, before the action was filed, notice of non-judicial forfeiture of the same property was published in a newspaper of general circulation for three successive weeks in a district where publication is authorized under Rule G(4)(a)(i)(C).

(iii) No publication is required under Rule G(4)(a)(i) if the value of the property is less than $1000 and direct notice of the forfeiture action is sent under Rule G(4)(b).

(iv) If the property subject to forfeiture is located in a foreign country, or a person on whom notice must be served under Rule G(4)(b) is believed to be located in a foreign country, publication may be made in any of the following:

(A) a newspaper of general circulation in the district where the action is filed;

(B) a newspaper published outside the foreign country where the property is located but generally circulated in that foreign country; or

(C) a newspaper, legal gazette, or listing of legal notices published and generally circulated in the foreign country where the property is located.

(v) In lieu of publication in a newspaper, notice that satisfies Rule G(4)(a)(i)(A) and (B) may, in the Attorney General's discretion, be posted on the Internet for a period of not less than 30 days in a manner reasonably calculated to provide notice to persons who may have an ownership interest in the property.

(b) Direct Notice.

(i) In addition to the requirements of Rule G(4)(a), the Attorney General must serve notice of the forfeiture action, including a copy of the complaint, on any person who, appearing to have an interest

in the property, is a potential claimant.

(ii) The notice required under Rule G(4)(b)(i) may be served on the potential claimant or the potential claimant's counsel representing the potential claimant with respect to the seizure of the subject property, or representing the potential claimant in a related investigation, administrative forfeiture proceeding, or criminal case, in any manner reasonably calculated to ensure that the notice is received, including first class mail, private carrier, or electronic mail. Notice pursuant to this Rule G(4)(b) is served on the date when the notice is sent.

(iii) Notice to a potential claimant who is incarcerated must be sent to the facility where the potential claimant is incarcerated.

(iv) Notice to a potential claimant who was arrested in connection with the offense giving rise to the forfeiture but who is not incarcerated may be sent to the address given by the potential claimant at the time of his arrest or release from custody, unless the potential claimant has provided a different address to the agency to which he provided the address at the time of his arrest or release from custody.

(v) The notice must state the date on which the notice is sent, and must either (A) state that a claim must be filed not more than 30 days after such date, or (B) set forth a specific date not less than 30 days after the date on which the notice is sent by which a claim must be filed.

(vi) The notice must also name the attorney for the United States to be served with a claim and answer and must state that an answer to the complaint must be filed under Rule G(5)(b) not later than 20 days after filing the claim.

(vii) In cases to which the exemption from the Civil Asset Forfeiture Reform Act of 2000 applies (18 U.S.C. § 983(i)), the time periods set forth in the notice pursuant to Rule G(4)(b)(v) and (vi) must correspond to the time periods in the applicable statute.

(5) **Responsive Pleading; Interrogatories.**

(a) Claim.

(i) A person who asserts an ownership interest in the property that

is the subject of the action may contest the action by filing a claim in the court where the action is pending. The claim must —

(A) identify the specific property being claimed;

(B) state the claimant's ownership interest in such property, in terms of 18 U.S.C. § 983(d)(6);

(C) be signed by the person making the claim under penalty of perjury; and

(D) be served on the attorney for the government who is designated under Rule G(4)(a)(i)(B) or (b)(vi).

(ii) Unless the court for good cause sets a different time, the claim must be filed

(A) by the time stated in a direct notice sent under Rule G(4)(b), or

(B) if direct notice was not sent under Rule G(4)(b) to the person filing the claim,

(1) no later than 30 days after the date of final publication of notice under Rule G(4)(a), or

(2) no later than 60 days after the complaint was filed, if notice was not published under Rule G(4)(a)(iii).

(iii) A claim filed by a corporation must be verified by an officer of the corporation who is duly authorized to file a claim on behalf of the corporation.

(iv) In cases to which the exemption from the Civil Asset Forfeiture Reform Act of 2000 applies (18 U.S.C. § 983(i)), the time for filing a claim under Rule G(5)(a)(ii)(B) must correspond to the time periods in the applicable statute.

(b) Answer.

A person filing a claim must serve and file an answer to the complaint within 20 days after filing the claim. Any objections to the court's exercise of *in rem* jurisdiction over the property, or to the venue for forfeiture action, must be stated in the answer or will be waived.

(c) Interrogatories.

Answers to interrogatories served under Rule G(2)(c) must be served with the answer to the complaint.

(6) **Preservation and Disposition of Property; Sales.**

(a) Preservation of Property. When the owner or another person remains in possession of property that has been named as the defendant *in rem* in a civil forfeiture action, or has been attached or arrested under the provisions of this Rule or any statute that permits execution of process without taking actual possession, the court, on motion or on its own, may enter any order necessary to preserve the property and to prevent its removal, destruction or encumbrance.

(b) Interlocutory Sales; Delivery.

(i) On motion by a party, or by the marshal or other person having custody of the property, the court may order all or part of the property sold, if:

(A) the property is perishable, or liable to deterioration, decay, diminution in value, or injury by being detained in custody pending the action;

(B) the expense of keeping the property is excessive or disproportionate to its fair market value;

(C) the property is subject to a mortgage or to taxes on which the owner is in default, or

(D) other good cause is found by the court.

(ii) In the circumstances described in Rule G(6)(b)(i), the court, on motion by a person filing a claim, may order that the property, rather than being sold, be delivered to the movant pending the conclusion of the proceeding upon giving security under these rules.

(c) Sales; Proceeds.

(i) All sales of property under Rule G(6)(b) must be made by the agency of the United States having custody of the property or that agency's contractor, or by any other person assigned by the court.

(ii) The court must designate the proceeds of a sale under Rule G(6)(b) as a substitute *res* subject to forfeiture in place of the property that was sold. The proceeds must be held in an interest-bearing account pending the outcome of the forfeiture action.

(iii) The sale of property under Rule G(6)(b) shall be governed by Chapter 127 of title 28, United States Code (28 U.S.C. §§ 2001 *et seq.*), except where the interlocutory sale or aspects of such sale of the property are agreed upon by all parties and approved by the court.

(d) Entry of Order of Forfeiture. Upon completion of the forfeiture proceeding by entry of an order of forfeiture, the property or proceeds of the sale of the property under this Rule must be disposed of as provided by law.

(7) Motions.

(a) Motion to Suppress Use as Evidence. If the property subject to forfeiture was seized, a party with standing to contest the lawfulness of the seizure may move to suppress use of the property as evidence at the forfeiture trial. Suppression does not affect forfeiture of the property based on independently derived evidence.

(b) Motion to Strike Claim. The United States may move at any time before trial to strike a claim and answer for failure to comply with the filing requirements, or for failure to establish an ownership interest in the property subject to forfeiture.

(c) Motion for Release of Property. If the property is in the possession of the United States (including a contractor of an agency of the United States), a party with standing to seek the release of the property under 18 U.S.C. § 983(f) may move for release of the property by the court. A motion for the release of property pursuant to Section 983(f) is the exclusive means for seeking the return of the property to the custody of the claimant pending trial. Rule 41(e) of the Federal Rules of Criminal Procedure does not apply to civil forfeiture actions once a verified complaint has been filed.

(d) Dismissal. (i) A party with an ownership interest in the property may, at any time after filing a claim and answer, move to dismiss the complaint under Rule 12(b).

(ii) A complaint may not be dismissed on the ground that the United States did not have adequate evidence at the time the complaint was filed to establish the forfeitability of the property.

(e) Excessive Fines. A claimant may seek mitigation of a forfeiture under the Excessive Fines Clause of the Eighth Amendment by motion for summary judgment under Rule 56, or by motion made after entry of a judgment of forfeiture, if

(i) the claimant has pleaded the Excessive Fines defense under Rule 8; and

(ii) the parties have had the opportunity to conduct civil discovery on the factors relevant to the Eighth Amendment issue.

(f) Rules G(7) (c) and (d) do not apply to cases to which the exemption from the Civil Asset Forfeiture Reform Act of 2000 applies (18 U.S.C. § 983(i)).

(8) Trial.

The trial is to the court, unless any party requests a trial by jury under Rule 38.

Explanation of Rule G, Supplemental Rules

Introduction

Civil forfeiture cases typically begin with the seizure of property by a State or Federal law enforcement officer.[1] Except in cases involving real property,[2] and non-cash property having a value of more than $500,000,[3] the Government has the option of forfeiting the property administratively pursuant to the Customs laws.[4] If the Government commences an administrative forfeiture proceeding,[5] and no one contests the administrative forfeiture by filing a timely claim,[6] the property is forfeited to the Government upon the entry of a declaration of forfeiture by the seizing agency,[7] and without any action having to be taken by any court.[8]

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[1] *See* 18 U.S.C. § 981(b) (authorizing seizure for forfeiture for most federal crimes); 21 U.S.C. § 881(b) (same for drug cases). Except in extraordinary circumstances, the Government does not seize real property prior to commencing a judicial forfeiture action. *See* 18 U.S.C. § 985.

[2] *See* 18 U.S.C. § 985.

[3] *See* 19 U.S.C. § 1607.

[4] *See* 19 U.S.C. § 1602 *et seq.* as incorporated for most non-drug civil forfeiture cases by 18 U.S.C. § 981(d), and for drug forfeiture cases by 21 U.S.C. § 881(d).

[5] Administrative forfeiture proceedings are governed by 18 U.S.C. § 983(a)(1), enacted by the Civil Asset Forfeiture Reform Act of 2000 (CAFRA), and by 19 U.S.C. § 1602 *et seq.* To the extent that these two provisions conflict, the title18 procedures control. For a discussion of the application of CAFRA to administrative forfeitures, *see* Cassella, "The Civil Asset Forfeiture Reform Act of 2000," 27 Journal of Legislation 97, Notre Dame Law School (2001).

[6] The procedure for filing a claim is set forth in 18 U.S.C. § 983(a)(2).

[7] *See* 19 U.S.C. § 1609.

[8] For a summary of administrative forfeiture procedure, *see United States v. Gonzalez-Gonzalez*, 257 F.3d 31 (1st Cir. 2001); *United States v. McDaniel*, 97 F. Supp.2d 679 (D.S.C. 2000); *United States v. $57,960.00 in U.S. Currency*, 58 F. Supp. 2d 660 (D.S.C. 1999); *United States v. Derenak*, 27 F. Supp. 2d 1300 (M.D. Fla. 1998); *Concepcion v. United States*, 938 F. Supp. 134 (E.D.N.Y. 1996); *United States v. $50,200 In U.S. Currency*, 76 F. Supp. 2d 1247 (D. Wyo. 1999).

On the other hand, if someone does contest the administrative forfeiture, or if the Government is required by statute to proceed directly to court to forfeit the property judicially, or if the Government simply elects to bypass the administrative forfeiture procedure, the Government must commence a civil forfeiture action by filing a complaint in a Federal district court.[9]

The filing of a civil forfeiture complaint, and the subsequent litigation of the merits of the action, are governed by a combination of statutory requirements and the provisions of the Supplemental Rules for Certain Admiralty and Maritime Claims (the "Supplemental Rules"). In particular, 28 U.S.C. § 2461(b) provides that in cases where the forfeiture of property is prescribed as a penalty for a violation of Federal law, and the seizure of the property takes place on land, "the forfeiture may be enforced by a proceeding by libel which shall conform as near as may be to proceedings in admiralty." Moreover, 18 U.S.C. § 981(b)(2)(A) provides that property may be seized for the purposes of civil judicial forfeiture pursuant to an arrest warrant *in rem* issued in accordance with the Supplemental Rules, and 18 U.S.C. § 983(a)(3) provides that when a claim is filed contesting an administrative forfeiture proceeding, the Government "shall file a complaint for forfeiture in the manner set forth in the Supplemental Rules . . .."

Finally, Section 983(a)(4) provides that a person claiming an interest in the property named in the complaint must file a claim and answer in the manner set forth in the Supplemental Rules, except to the extent that the Supplemental Rules conflict with the time limits described in the statute. Other provisions of Section 983 govern various aspects of pre-trial, trial, and post-trial procedure in civil forfeiture cases, including the pre-trial release of the property,[10] the issuance of pre-trial restraining orders,[11] burden of proof at trial,[12] and the adjudication of post-trial petitions to reduce the amount of forfeiture to avoid a violation of the Excessive Fines Clause of the Eighth Amendment.[13] 18 U.S.C. § 985 contains additional procedures governing civil judicial forfeitures of real property.

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[9] The procedure for filing a complaint in response to the filing of a claim in an administrative forfeiture proceeding is set forth in 18 U.S.C. § 983(a)(3).

[10] *See* 18 U.S.C. § 983(f).

[11] *See* 18 U.S.C. § 983(j).

[12] *See* 18 U.S.C. § 983(c).

[13] *See* 18 U.S.C. § 983(g).

In addition to the Supplemental Rules and the statutory provisions governing civil forfeiture cases, there is a well-developed body of case law filling in the gaps in forfeiture procedure, and applying additional requirements articulated by the Supreme Court regarding the application of the warrant requirement of the Fourth Amendment, the Due Process Clause of the Fifth Amendment, the right to a trial by jury guaranteed by the Seventh Amendment, the Excessive Fines Clause of the Eighth Amendment, and other constitutional matters.

Purpose of Rule G

The purposes of Rule G are several. First, the consolidation of all procedural rules governing civil forfeiture practice in one place recognizes that civil forfeiture practice is now a routine part of federal law enforcement litigation, involving thousands of filings every year. Just as the Federal Rules of *Criminal* Procedure pertaining to asset forfeiture have been consolidated into a single rule,[14] so should the procedures pertaining to civil forfeiture be consolidated. The current situation, in which the rules applicable to civil forfeitures are interspersed with rules applicable only in traditional admiralty cases, and are spread over all of the Supplemental Rules, is confusing to courts and practitioners alike, and impedes the administration of justice.

Second, the current rules fail to address situations that arise out of the application of the forfeiture laws to situations not contemplated by traditional admiralty procedures, such as forfeiture actions directed against assets located in foreign countries, or the forfeiture of real property. The current rules also do not address the constitutional requirements that the courts have applied to civil forfeiture procedure, such as the requirement that direct notice of the forfeiture action be sent to each person appearing to have an interest in the property subject to forfeiture,[15] and they do not provide any guidance regarding motions practice – a gap that has been filled in different ways in different courts.

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[14] *See* Rule 32.2, Federal Rules of Criminal Procedure, effective December 1, 2000.

[15] *See Dusenbery v. United States,* 534 U.S. 161 (2002) (mailing notice to the prison where claimant was incarcerated, and where there were procedures in place for delivering mail to prisoners during "mail call," satisfied due process under *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); more rigorous procedures such as having prisoner sign a logbook, which would guarantee proof of actual receipt of notice, are not required).

The current rules also should be updated to take advantage of advances in technology, such as the possibility of providing notice of a forfeiture action via the Internet instead of relying on traditional newspaper publication.

Finally, separating the rules governing civil forfeitures from those governing traditional admiralty cases will avoid the confusion, inefficiency, and unintended consequences that flow when language intended to be applied in one type of case is applied in the other type of case. In particular, such separation will avoid the disruption in traditional admiralty procedure that results when a long-established procedure or well-defined term is modified by a court applying that procedure or term in a non-admiralty context.

The provisions of Rule G are intended to be consistent with, and complementary to, the statutory procedures enacted by the Civil Asset Forfeiture Reform Act of 2000 (CAFRA). The following is a section-by-section analysis of the provisions of Rule G.

Section (1). Application

The intent of the amendment to the Supplemental Rules is to place all of the procedures that are unique to civil judicial forfeiture proceedings in one place: *i.e.,* in Rule G. Thus, in addition to setting forth civil forfeiture procedures in Rule G itself, the amendments include a set of conforming amendments that strike the provisions that were designed to apply only to civil forfeiture cases from Rules A through F. However, to avoid unnecessary redundancy, provisions that apply equally to traditional admiralty cases and to civil forfeiture cases have not been replicated in Rule G. To the contrary, if a matter is not addressed by Rule G, it is intended that a provision addressing that matter that is found in Rules A through F shall apply. Rule G(1) expresses this principle of application.

Moreover, Rule A provides that the general Rules of Civil Procedure apply to cases governed by the Supplemental Rules "except to the extent that they are inconsistent" with those rules. In accordance with Rule G(1), that provision will apply equally in civil forfeiture cases governed by Rule G. Thus, just as is the case under the current structure, matters not addressed either by Rule G or by any other provision of the Supplemental Rules will be governed by the general Rules of Civil Procedure.

It should be clear, however, that Rule G applies exclusively to forfeiture cases, and that the use of terms such as "claim" and "claimant" in Rule G relates to the specialized meaning given those terms in the applicable forfeiture

statutes, such as 18 U.S.C. § 983, and does not have any impact on the very different meaning assigned those terms in traditional admiralty cases governed by Rules A through F.

In their comments regarding an earlier draft of Rule G, the National Association of Criminal Defense Lawyers (NACDL) pointed out that while Rule G was designed to conform with the statutory procedures enacted by the CAFRA, codified at 18 U.S.C. § 983, not all civil judicial forfeiture proceedings are governed by CAFRA. In particular, traditional customs cases, tax cases and forfeitures involving the Trading With the Enemy Act and the International Emergency Economic Powers Act are exempted from CAFRA by 18 U.S.C. § 983(i).

Judicial forfeiture cases involving the exempted statutes are relatively rare, comprising only a small fraction of all civil forfeiture filings in a given year. Nevertheless, throughout Rule G, clauses have been inserted making clear when a given provision only applies to cases governed by CAFRA. For example, Rule G(7)(d) provides a procedural counterpart to 18 U.S.C. § 983(a)(3)(D), which deals with motions to dismiss a civil forfeiture complaint. But because Section 983(a)(3)(D) does not apply to cases exempted from CAFRA by Section 983(i), Rule G(7)(d) would not apply to such cases either. This is made clear by Rule G(7)(f).

Section (2). Complaint

Rule G(2) is derived for the most part from current Rule C(2), which requires that a complaint be verified, describe the property with "reasonable particularity," and state the place where the seizure took place, the basis for the court's exercise of jurisdiction, and "all allegations required by the statute under which the action is brought."

All of the requirements of Rule C(2) are retained, with certain clarifying language changes. For example, subsection (b) makes clear that the complaint must state both the basis for court's exercise of *in rem* jurisdiction over the property and the basis for venue.[16] In addition, the requirement that the

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[16] *See* Rule G(2)(b)(ii) and (iii). Generally, the same facts will support both the exercise of *in rem* jurisdiction over the property and venue for the filing of the forfeiture action. *See* 28 U.S.C. § 1355(b) and (d), providing that the court in the district where

complaint set forth "all allegations required by the statute under which the action is brought" is clarified to require that the complaint 1) identify the statute under which the action is brought, and 2) describe the nature of the relationship between the property and the underlying criminal offense that gives rise to the forfeiture of property under that statute. Both requirements would be satisfied by citing a particular forfeiture statute and tracking the language describing the property subject to forfeiture.

For example, in a drug case, the complaint might state that the forfeiture action was filed pursuant to 21 U.S.C. § 881(a)(4), and that, in the terms of that statute, the property was subject to forfeiture because it was a conveyance that was used or intended to be used to transport or to facilitate the transportation, sale, receipt, possession or concealment of a controlled substance.

The last provision in Rule G(2), subsection (b)(v), is derived from current Rule E(2)(a), which requires that the complaint state the facts and circumstances of the case with particularity. No substantive change to the particularity requirement is intended. To the contrary, the intent is solely to place the current particularity requirement in the same section of the Rule where the other pleading requirements pertaining to the complaint appear. Thus, the case law interpreting current Rule E(2)(a) would apply to Rule G(2)(b)(v).[17]

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the offense giving rise to the forfeiture took place is the proper venue for the forfeiture action and may issue process to obtain jurisdiction over the property. *See also United States v. All Funds in Account Nos. 747.034/278 (Banco Espanol de Credito)*, 295 F.3d 23 (D.C. Cir. 2002) (§ 1355(b) is not merely a venue statute; it gives the court *in rem* jurisdiction over property located in another district; "it would make little sense for Congress to provide venue in a district court if there were no means for that court to exercise jurisdiction"); *United States v. $633,021.67 in U.S. Currency*, 842 F. Supp. 528 (N.D. Ga. 1993) (section 1355(b) is both a venue statute and an *in rem* jurisdictional statute; district has both jurisdiction and venue over property seized in other districts if some of the offenses giving rise to forfeiture occurred in district); *United States v. 18900 S.W. 50th Street*, 915 F. Supp. 1199 (N.D. Fla. 1994) (same).

[17] Rule E(2) requires more specificity than simple notice pleading, and is meant to ensure that claimant is apprized of the circumstances that support a forfeiture. *United States v. Funds in Amount of $122,500*, 2000 WL 984411 (N.D. Ill. 2000). But the complaint need not plead all of the facts sufficient to meet the Government's burden of proof at trial. *United States v. Daccarett*, 6 F.3d 37, 47 (2d Cir. 1993) (complaint need not satisfy burden of proof pre-trial); *United States v. Two Parcels in Russell County*, 92 F.3d 1123 (11th Cir. 1996) (same); *United States v. $94,010 U.S. Currency*, 1998 WL 567837 (W.D.N.Y. 1998) (particularity requirement ensures that the

NACDL objects that the Government is actually seeking a substantive change in what the "particularly requirement" requires. But that is not the case. In fact, the Government originally proposed that the language in Rule E(2) be transferred to Rule G(2)(b) verbatim. The omission of the phrase "without moving for a more definite statement" from Rule E – the alteration in language that NACDL cites as evidence of a substantive change (Troberman Letter at 4) – was the suggestion of the Advisory Committee's Reporter, who thought the phrase was unnecessary.

Government does not "seize and hold," for a substantial period, property to which it has no legitimate claim; but particularity requirement does not require demonstration that Government can meet its burden of proof pretrial); *United States v. One Parcel ... 2556 Yale Avenue*, 20 F. Supp. 2d 1212 (W.D. Tenn. 1998) (same); *United States v. $57,443.00 in U.S. Currency*, 42 F. Supp. 2d 1293 (S.D. Fla. 1999) (same), quoting *Pole No. 3172*, 852 F.2d 636, 628 (1st Cir. 1988); *United States v. One 1997 E35 Ford Van*, 50 F. Supp. 2d 789 (N.D. Ill. 1999) (the heightened pleading requirements in Rule E(2)(a) are intended "to avoid the due process problems associated with the [G]overnment holding property to which it has no legitimate claim"; complaint alleging that funds were intended to finance Middle East terrorism was sufficiently particular). *See also* 18 U.S.C. § 983(a)(3)(D) ("No complaint may be dismissed on the ground that the Government did not have adequate evidence at the time the complaint was filed to establish the forfeitability of the property.").

Thus, a complaint that gives a detailed description of the property and the circumstances of seizure is sufficiently particular. *See United States v. Daccarett, supra* (complaint described property with reasonable particularity where it named intermediate bank through which wire transfer occurred and the intended beneficiary); *United States v. $15,270,885.69 Formerly on Deposit in Account No. 8900261137,* 2000 WL 1234593 (S.D.N.Y. 2000) (money laundering complaint was sufficiently particular because it apprized the claimant of the means by which the money laundering scheme was carried out, the accounts involved, some of the bank officials who furthered the scheme, and the dates, places and amounts of a number of the transactions); *United States v. One 1993 Ford Thunderbird*, 1999 WL 436583 (N.D. Ill. 1999) (complaint that provided date and location of seizure, identity of vehicle, and its relationship to alleged offenses was sufficiently particular); *United States v. Funds in Amount of $122,500, supra* (complaint that contains specific information about the date and location of the seizure, the amount of money seized, and claimant's actions on date of seizure, is sufficiently particular); *United States v. Funds in the Amount of $29,266*, 96 F. Supp.2d 806, 809 (N.D. Ill. 2000) (same).

NACDL also contends that the cases cited in the margin do not accurately recite the case law interpreting the particularity requirement under current law. Troberman Letter at 3-4. The Government contends, to the contrary, that it has accurately represented the case law. While courts have indeed used a variety of ways of describing the contours of the particularity requirement, the cases most certainly do not say, as NACDL represents, that a forfeiture complaint may not be filed "unless it is supported by substantial evidence."
But this is beside the point. Whatever the cases say, nothing in Rule G changes or is intended to change in any substantive way what the Government is required to do to comply with the particularity requirement.

Rule G(2)(c) also preserves the existing provision in Rule C(6), authorizing the Government to serve interrogatories along with the complaint without leave of the court. The service of interrogatories along with the complaint in forfeiture cases has been part of civil forfeiture practice since its inception, **yet NACDL suggests that this practice should be abandoned.**

The service of interrogatories along with the complaint serves an important purpose. Because forfeiture proceedings are filed *in rem,* "there is a substantial danger of false claims in forfeiture proceedings."[18] Unlike a plaintiff in a normal civil lawsuit, who chooses the defendant against whom he will litigate, the Government has no control over who will file a challenge to a civil forfeiture complaint. For all the Government knows, the claimant may have no standing to contest the forfeiture, or no legal interest in the defendant property. In fact, in some cases, such as cases where the claim is filed by a foreign corporation, the Government does not even know if the claimant is a legal entity, or if it is controlled by the person whose criminal acts gave rise to the forfeiture.[19]

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[18] *United States v. $557,933.89, More or Less, in United States Funds*, 1998 WL 817651 (E.D.N.Y. 1998) (citing the need to guard against false claims as one of the reasons why claimant had to specify his interest in the defendant property under Rule C(6)).

[19] This is an important point in applying the "fugitive disentitlement doctrine," 28 U.S.C. 2466 (neither any person who is a fugitive in a related criminal case, nor any corporation he controls, may file a claim contesting the civil forfeiture of property).

The interrogatories thus serve the essential purpose of providing the Government with a means of determining, at an early stage in the proceedings, who the claimant is, what interest he has in the property, and whether his claim is frivolous – purposes which the courts have recognized as a proper basis for strictly applying the pleading requirements in present Rule C(6).[20] Indeed, these are the same reasons cited *infra* in support of requiring the claimant to file his Answer, and to answer the interrogatories, before he can move to dismiss the complaint – i.e., the Government should not have to litigate an *in rem* case with a person who has no interest in the property or no legal basis for contesting the forfeiture.

In CAFRA, Congress recognized that the filing of frivolous claims in forfeiture cases was a serious problem and a legitimate concern for the Government. Thus, language discouraging the filing of such claims was made an important part of the reforms enacted in 2000. *See* 18 U.S.C. § 983(h). Retaining the interrogatory provision in the Rules is necessary for the same reasons.

Section (3). Judicial Authorization and Process

Rule G(3)(a) governs the issuance of an arrest warrant *in rem* by the Clerk of the Court upon the filing of a civil forfeiture complaint. The language is derived from current Rule C(3)(a) which requires the issuance of an arrest warrant and summons by the Clerk in all civil forfeiture cases. The new provision incorporates the following changes to the existing procedures.

First, under the new Rule the Clerk would issue only the warrant itself and would not be required to issue a "summons" as well. As the notice requirements set forth in Rule G(4) require service of the complaint on any potential claimant to the property, no purpose is served by having the Clerk issue a "summons" along with the arrest warrant *in rem*.

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[20] *See United States v. $230,963.88 in U.S. Currency*, 2000 WL 1745130 (D.N.H. 2000) (the time limits and other pleading requirements in Rule C(6) exist to force claimants in civil forfeiture cases to come forward as soon as possible after forfeiture proceedings have begun, and to prevent them from filing false claims), quoting *United States v. One Urban Lot*, 885 F.2d 994, 1001 (1st Cir.1989).

Second, the new Rule exempts cases involving real property from its provisions. This brings the Supplemental Rules into accord with 18 U.S.C. § 985 which prescribes the procedures for commencing a forfeiture action against real property, and specifically dispenses with the requirement of an arrest warrant *in rem* in such cases.[21]

Third, Rule G(3)(a) dispenses with the arrest warrant as an unnecessary duplication and waste of judicial resources in cases where the property is subject to a pre-trial restraining order that has already been, or will be, served on the property.[22] However, Rule G(3)(a)(ii) provides that the court may issue an arrest warrant, on motion of the Government, if it becomes necessary for the court to do so to retain jurisdiction in the event the restraining order expires or is dissolved.

NACDL objects to the issuance of an arrest warrant *in rem* by the Clerk of the Court when it forms the basis for the actual seizure of property. In the vast majority of civil forfeiture cases, of course, personal property subject to forfeiture is already in the Government's possession by the time a complaint is filed and an arrest warrant *in rem* is issued. That is because most civil actions against personal property begin as administrative forfeitures in which the property was either seized as evidence, or was seized pursuant to arrest or pursuant to a warrant issued under 18 U.S.C. § 981(b).[23] In those cases, as NACDL seems to acknowledge, there is no problem in having the arrest warrant *in rem*

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[21] *See* 18 U.S.C. § 985(c)(3); *United States v. 630 Ardmore Drive*,178 F. Supp.2d 572 (M.D.N.C. 2001) (CAFRA overrules arrest warrant and summons requirement in real property cases).

[22] The old Rule did not address this issue because the authority to issue a pre-trial restraining order in a civil forfeiture case was not codified until 18 U.S.C. § 983(j) was enacted by CAFRA.

[23] 18 U.S.C. § 981(b)(2) provides for seizures pursuant to a seizure warrant, but authorizes seizures without a warrant in a number of circumstances in which there is probable cause to believe the property is subject to forfeiture, including seizure made pursuant to a lawful arrest or search, or where another exception to the Fourth Amendment warrant requirement would apply, such as where exigent circumstances exist. 18 U.S.C. § 981(b)(2)(A) also expressly provides for seizure without a warrant if a complaint for forfeiture has been filed in district court and the court has issued a warrant of arrest pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims.

issued as a ministerial act by the Clerk of the Court, as it does not result in the actual seizure of any property. Under these circumstances the warrant of arrest serves simply to bring the *res* within the jurisdiction of the court.[24]

In the rare case in which the arrest warrant actually results in the seizure of property, it is the practice of most U.S. Attorneys offices to have the arrest warrant issued by a district judge or a magistrate judge, based upon a finding of probable cause, as if it were a seizure warrant issued under the Fourth Amendment. The current draft of Rule G(3) codifies this practice, so that the Government will be required to apply to the court for an arrest warrant in rem when the property is not already in the Government's custody[25].

Subsection (b)(i) deals with the execution of the arrest warrant *in rem*, and is derived from current Rules C(3)(b) and E(4). Like Rule C(3)(b)(ii), the new Rule provides for execution of the warrant by a United States Marshal or one of three other categories of persons authorized to service process in forfeiture

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[24]"To acquire *in rem* jurisdiction, courts require actual or constructive control of the property." *United States v. All Right, Title and Interest in Five Parcels of Real Property and Appurtances Thereto Known as 64 Lovers Lane*, 830 F.Supp. 750, 755 (S.D.N.Y. 1993); *See also, United States v. Four Parcels of Real Property in Greene and Tuscaloosa Counties in the State of Alabama*, 941 F.2d 1428, 1435 (11th Cir. 1991) ("In rem jurisdiction derives entirely from the court's control over the defendant res.")

[25] NACDL misstates the underlying circumstances it says that "a warrant of arrest in rem issued pursuant to this provision by a clerk of the court without a prior determination of probable cause by a neutral and detached judicial officer may serve only to notify the defendant in rem of the filing of a civil complaint for forfeiture, in much the same way as an in personam defendant is served with a summons." Troberman Letter at 7 (emphasis added). This statement ignores the fact that under the forfeiture statutes, 18 U.S.C. § 981(b), and under the Fourth Amendment, there are constitutionally permissible exceptions to the warrant requirement when the government seizes property for forfeiture. Thus property already may be lawfully in the possession of the Government even in the absence of a prior determination of probable cause by a judicial officer. That is the basis for the court's holding in *United States. v. Turner*, 933 F.2d 240 (4th Cir. 1991), a case cited by counsel, in which the issuance of a warrant of arrest *in rem* by the Clerk was upheld as constitutional even though no finding of probable cause had been made by a judicial officer prior to the seizure. The seizure was upheld in the face of a 4th Amendment constitutional challenge, because it involved an automobile, and because the police officer who had previously seized the property had probable cause to believe the defendant Corvette contained contraband.

cases. In addition, the new Rule provides that in the case of property located abroad, the warrant may be executed by a person authorized to serve process in that country.

Subsection (b)(ii) requires that the warrant be executed "as soon as practicable," but creates three exceptions to that requirement. In cases where the complaint is filed under seal, the property is located abroad, or the case is stayed prior to the execution of the warrant, the court may direct that the service of the warrant be delayed for an appropriate period of time. Among other things, this provision recognizes that the "forthwith" service requirement of the existing provision in Rule E(4)(a) is inconsistent with the notion that a complaint may be filed under seal,[26] and may be inapplicable when the Government must rely on the cooperation of a foreign Government in serving the arrest warrant on property located abroad.

NACDL disputes the need for this provision, suggesting that there is no basis for filing a civil forfeiture complaint under seal. But filing a complaint under seal is accepted practice. It is rarely employed, but it is necessary in cases in which the government is required to comply with a time limit of some sort, but the case is part of an on-going undercover operation, grand jury investigation, or court-authorized electronic surveillance that would be jeopardized if the civil forfeiture complaint were publicly filed[27].

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[26] *See United States v. Funds Representing Proceeds of Drug Trafficking ($75,868.62)*, 52 F. Supp.2d 1160 (C.D. Cal. 1999) (Rule E(4)(a) requires arrest of the property "forthwith"once the complaint is filed; 94-day delay while complaint remained under seal failed to comply with this requirement).

[27] In a number of cases, courts have authorized the filing of civil forfeiture complaints under seal, to prevent disclosures prior to the seizure of property, so as to insure the availability of the property, or to avoid jeopardizing an ongoing criminal investigation. Cases filed under seal to avoid concealment of assets prior to seizure include *United States v. Leasehold Interest in Property Known as 900 East 40th Street, Apartment 102, Chicago, Illinois*, 740 F. Supp. 540, (N.D. Ill. 1990); *United States v. Michelle's Lounge*, 1992 WL 194652 (N.D. Ill. Aug. 6, 1992); *United States v. Real Property Commonly Known as 16899 S.W. Greenbrier, Lake Oswego, Clakamas County, Oregon*, 774 F.Supp. 1267 (D.Or. 1991): *United States v. One Parcel of Land ... Commonly Known as 4204 Cedarwood Matteson, Il*, 671 F. Supp. 544 (N.D. Ill. 1987).

While there is generally a presumption favoring access to judicial records, it is

For example, if the Government determines that funds in a certain bank account are traceable to a terrorism offense, it must file a civil forfeiture action against those funds within one year of the offense in order to take advantage of the "fungible property" provision in 18 U.S.C. § 984. (Electronic funds are considered fungible for only one year. After that time has passed, the Government is required to trace the funds in a bank account directly to the act giving rise to the forfeiture, something that is difficult to do in cases involving international terrorist financing and other matters.) But in that case, it may be inappropriate to file the civil complaint publicly because of the danger of jeopardizing the on-going terrorism investigation. It has been necessary to take this step several times since September 11, 2001.

Nothing in Rule G authorizes or expands in any way the Government's authority to request that a complaint be filed under seal. Again, although infrequently used, that authority already exists.[28] Rather, Rule G is drafted to address an inconsistency between the forthwith requirement in the current rules and the necessity of filing a complaint under seal that has been exploited in some cases by the defense. For example, in *United States v. Funds Representing Proceeds of Drug Trafficking ($75,868.62)*, 52 F.Supp.2d 1160 (C.D. Cal. 1999), a major drug trafficking case, it was necessary for the Government to file its complaint under seal in order to toll the one-year fungible property limitation in 18 U.S.C. § 984 while the lives of undercover agents, informants and witnesses were at risk in a still secret investigation. The court granted the Government's motion to seal the complaint, and the Government naturally did not serve the arrest warrant *in rem* while the complaint remained sealed. However, when arrests were made and the complaint was unsealed, the court ruled that the Government had failed to comply with the "forthwith" requirement in Rule E(4)(a), because a total of 94 days had elapsed between the filing of the complaint and the service of the warrant.

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left to the sound discretion of the district court to weigh the interests advanced by the parties and the public interest. *United States v. Amodeo*, 44 F.3d 141, 146 (2d Cir. 1995). The U.S. Court of Appeals for the Second Circuit in *Amodeo*, "recognized the law enforcement privilege as an interest worthy of protection." *Id.* at 147.

[28]The Government's form motion and order for placing a civil forfeiture complaint under seal is attached as Exhibit A.

Such a delay, the court said, indicated that the Government had not complied with the requirement to serve the warrant "forthwith."

In proposing Rule G(3)(b)(ii), the Government seeks only to codify a reasonable exception to the forthwith requirement to apply to cases where a court has granted the Government's request to file a complaint under seal. If a judge is persuaded that there are good reasons to file a case under seal, those reasons should not be frustrated by the operation of an inflexible administrative rule regarding the service of the warrant.

Subsection (b)(iii) is derived from current Rule E(3)(b) which permits service of process within the district where the action is filed, or outside the district when authorized by statute.[29]

Section (4). Notice.

(a) Publication.

Subsection (4)(a) sets forth the requirement that notice of the forfeiture action be given by publication following execution of the arrest warrant *in rem*, or in the case of real property, following the service of notice on the property owner pursuant to 18 U.S.C. § 985. It is derived from existing Rule C(4) with a number of significant changes.

First, unlike the existing rule which is unclear as to the number of times the notice must be published, subsection (a)(i) provides that the notice must be published once a week for three successive weeks. This conforms with the statutory requirement in administrative forfeiture cases,[30] and the customary practice of the Department of Justice in civil judicial cases. But subsection (a)(i) also provides that the court may prescribe a different publication schedule if it deems it appropriate to do so.

Subsection (a)(i) also clarifies that the publication may take place in any district where the action is filed or where the property was seized or is located. In addition, as is currently the case under Rule C(4), subsection (a)(i) requires

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[29] *See* 28 U.S.C. § 1355(d) (authorizing nationwide service of process in civil forfeiture cases).

[30] *See* 19 U.S.C. § 1607(a).

that the notice specify the time limits governing the filing of a claim to the property and an answer to the complaint.

Second, subsection (a)(ii) is a new provision allowing the Government to publish the notice only once in a civil judicial forfeiture case if the forfeiture action began as an administrative forfeiture and notice of the administrative forfeiture was published for three successive weeks. In short, if the Government has already published notice three times, has filed a civil judicial complaint, and is required to serve personal notice of that complaint on anyone who appears to have a legal interest in the property (see subsection (b), *infra*), there is little purpose in requiring the Government to bear the expense of publishing the same notice three more times for the benefit of persons unknown to the Government who did not choose to file a claim in the first instance.

Similarly, subsection (a)(iii) dispenses with the publication requirement to save judicial resources in cases where the property subject to forfeiture has a value of less than $1,000 and the Government has provided direct notice of the forfeiture to any person with a potential interest in the property. For example, if the Government seizes a gun from a criminal defendant, and commences a civil judicial forfeiture of the firearm under 18 U.S.C. § 924(d), the cost of publication of notice of the forfeiture action may greatly exceed the value of the weapon. Yet there is little purpose in such publication if the Government provides direct notice of the forfeiture to the person from whom the gun was seized.

Third, subsection (a)(iv) deals for the first time with the publication of notice in cases where the property or a person entitled to notice is located in a foreign country. It provides that the publication requirement may be satisfied in any of three ways: A) by publication in a newspaper in the district where the complaint is filed; B) by publication in a newspaper that circulates in the foreign country where the property is located (*e.g.*. in the *International Herald Tribune* or the international editions of a U.S. newspaper such as *USA Today*); or C) in a legal publication published and circulated in the foreign country.

Finally, recognizing the reality of 21st Century technology, subsection (a)(v) permits the Attorney General to satisfy the publication requirement by posting notice of the forfeiture action on the Internet for a period of not less than 30 days. Such posting would actually, in many instances, be more likely to provide notice to interested parties that would traditional newspaper publication.[31]

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[31] According to Nielsen/Netratings, by January 2001, 58 percent of U.S. households had Internet access. *Plunkett's E-Commerce and Internet Business Almanac* (2002),

NACDL opposes many of the provisions of the publication requirement for a variety of reasons. Troberman Letter at 7-9. At bottom, however, NACDL's difficulty derives from a failure to distinguish between two quite different concepts: (a) "service of process" in an *in rem* civil forfeiture case, which, as in traditional admiralty cases, means service upon the *res* for purposes of obtaining *in rem* jurisdiction; and (b) provision of notice to potential claimants. Rule G(4) is not, as NACDL suggests, a "drastic revision" of current Rule (C)(3)(b), which covers service of process upon the *res*. It is rather a reasonable revision, amplification, and clarification of the notice and response provisions that appear in current Rule C(4), and in the amended version of Rule C(6)(a)(i) that took effect on December 1, 2002.

In ordinary civil cases, the plaintiff knows its defendants in advance. At the outset of a civil forfeiture case, the Government often does not know who, if anyone, will claim an interest in the *res*. The plaintiff in an ordinary civil case names its defendants in the complaint, serves the complaint only upon those named defendants, litigates only with them, and obtains a judgment binding only as to them. By contrast, the United States, as plaintiff in an *in rem* civil forfeiture case, names only the *in rem* defendant in the complaint, serves process only upon that defendant, and ultimately obtains a judgment concerning the *in rem* defendant that is valid against all the world. To obtain such an *in rem* judgment, the Government publishes general notice of the forfeiture and also sends notice directly to those whom the Government has reason to believe will assert an interest in the *res*.

Service of the complaint in a civil forfeiture case is simply one of the ways of giving notice to potential claimants of the forfeiture proceeding. Thus the applicable statutes and the applicable section of Rule C provide that the time by which potential claimants must file claims is equally triggered either by service of the complaint or by the date of final publication of notice. 18 U.S.C. § 983(a)(4)(A); Rule C(6)(a)(i)(A) (2000); Rule C(6)(a)(i)(A) (2002).

The general publication of notice of civil forfeiture proceedings is done in addition to the sending of direct notice to known interested persons. As a practical matter, such general publication, particularly in its

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available at http://www.plunkettresearch.com/technology/ecommerce_almanac.htm.

traditional forms -- fine print legal notices and classified advertisements in the back sections of legal journals and newspapers -- is not highly likely to reach a general audience. Publication, particularly in these traditional forms, is only "constructive" notice, a legal fiction for the most part, done as a formality because the case law has viewed it over the years as somewhat better than nothing as a way of achieving notice to unknown persons, but not much better. The provisions contained in Rule G(4)(a) are designed to increase the likelihood that potential claimants will actually receive notice by publication, while seeking to minimize the expenditure of limited resources on publication that has no substantial chance of reaching that target audience.

With this background, we turn to each of NACDL's objections to the publication provisions in Rule G(4)(a).

Rule G(4)(a)(1)(C)

Current Rule C(4), as NACDL indicates, requires publication in, and only in, the district where the forfeiture case is filed. However, Rule C(4) was drafted and promulgated before Congress expanded venue for civil forfeiture cases to include not only the district in which the property is located, but also the district where the crime giving rise to the forfeiture took place. See 28 U.S.C. 1355(b) (enacted in 1992). Thus, under current law, if a crime occurs in Boston, the Government may file a forfeiture action against the proceeds of that crime in the District of Massachusetts, even though those proceeds have been invested in a real estate development in Miami.[32]

In such cases, under current Rule C(4), the Government must publish notice in the district where the case was filed, even if the property – and hence the persons most likely to be interested in contesting the forfeiture of the property – are all located in another district. In the above example, lienholders who have an interest in the real estate development

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[32] *United States v. $633,021.67 in U.S. Currency*, 842 F. Supp. 528 (N.D. Ga. 1993) (under section 1355(b) district court has both jurisdiction and venue over property seized in other districts if some of the offenses giving rise to forfeiture occurred in district); *United States v. 18900 S.W. 50th Street*, 915 F. Supp. 1199 (N.D. Fla. 1994) (same); *United States v. Contents of Account Number 2033301*, 831 F. Supp. 337 (S.D.N.Y. 1993) (district court in New York has venue and *in rem* jurisdiction over action against structured funds found in Florida where structuring offense occurred in New York).

in Miami are unlikely to see a notice published in a Boston newspaper, but would be much more likely to see the notice if it were published in a Florida newspaper.

The proposed rule gives additional flexibility as to the place of publication in order to increase the likelihood that interested persons unknown to the Government will actually see the notices. In deciding which of the proposed options to use, prosecutors will take into account the case law requiring that notice be given in a manner reasonably likely to achieve results.[33] NACDL's suggestion that the Government might choose to publish in the location of a remote storage facility to which an asset might have been taken, rather than publishing in a district where claimants are more likely to reside, fails to acknowledge the Government's strong interest in protecting forfeiture judgments from post-judgment attack. That interest is best served by publishing notice in the place most likely to reach potential claimants.[34] The proposed change simply gives the Government the option to do that in cases where the district of filing is not such a likely location.

NACDL's suggestions that the Government be required to publish in *both* districts, or that the Government be required to publish notice only in large, nationally circulated newspapers, are impractical and unjustified. Despite its relative inefficiency as a means of reaching unknown potential claimants, publication is extremely costly. In Boston, for example, current publication costs in local newspapers are running from about $1,000 to $2,000 per case. Nationally, the Treasury Office of Asset Forfeiture, which oversees forfeitures by the Customs Service, the Internal Revenue Service, the Bureau of Alcohol, Tobacco, and Firearms, and the Secret Service spent approximately $1.65 million to publish forfeiture notices in Fiscal 2002. The U.S. Marshals Service, which oversees the publication of forfeiture notices for itself, the Drug Enforcement Administration, and the

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[33] *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *United States v. Gonzalez-Gonzalez*, 257 F.3d 31 (1st Cir. 2001) ("the touchstone is reasonableness: the Government must afford notice sensibly calculated to inform the interested party of the contemplated forfeiture and to offer him a fair chance to present his claim of entitlement").

[34] Post-judgment attacks on civil forfeiture judgments, based on alleged due process violations concerning lack of notice, are among the most popular ways of challenging civil forfeiture actions. Hundreds of such actions are filed every year, and defending against them is an enormous drain on governmental and judicial resources.

Federal Bureau of Investigation, spent an average of more than $3.9 million per year on such notices during Fiscal 2000-2002.

Requiring the Government to publish notice in multiple districts, or to publish only in national newspapers, would drive these costs even higher, with little or no practical benefit. Where all of the persons likely to claim are in the district where the property was seized, for example, publishing both there and in the remote district where the action is pending would be a needless waste of money. Similarly, the added expense of publishing in *USA Today*, the *New York Times*, or some other nationally distributed newspaper could not be justified in a routine, locally based, civil forfeiture action, particularly when the Government is also required to send direct notice to potential claimants of whom the Government is aware.[35]

As the Supreme Court recognized in *Mullane*, organizations required to give notice may use means that are both "efficient and inexpensive." 339 U.S. at 319; *see Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 489-90 (notice "need not be inefficient or burdensome"). We should be looking for cost-effective ways of maximizing the number of people reached through publication, not burdening the Government with new costs for no good reason.

Property located abroad / Rule G(4)(a)(iv)(A)

Current Rule C(4)'s requirement of publication in the district where the complaint is filed, regardless where the property is located, is not consistent with the notion of providing efficient and fair notice in cases where the property, and the potential claimants, are located abroad.[36] Some change, therefore, must be made to the rule to allow the Government to publish notice in the foreign country itself if that is the best

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[35] *United States v. Rodgers*, 108 F.3d 1247 (10th Cir. 1997) (publication in *USA Today* satisfied publication requirement, but the Government also had an independent duty to provide direct notice).

[36] Section 1355(b)(2) allows complaints to be filed in the United States if that is where the crime occurred. In such cases, the Government has a choice of venue between the District of Columbia and the district where the crime occurred. See *United States v. All Funds in Account Nos. 747.034/278 (Banco Espanol de Credito)*, 295 F.3d 23 (D.C. Cir. 2002) (Section 1355(b)(2) gives the district court *in rem* jurisdiction over property located abroad).

way of reaching the potential claimants. In selecting among the proposed options in Rule G(4)(a)(iv)(A), the Government would be guided by the requirement that its selection be reasonably calculated to achieve notice under the applicable circumstances.

A blanket rule that notice *always* be published in the country where the property is located, however, is not reasonable. In some cases, notwithstanding the location of the property abroad, all of the interested parties are in the United States. For example, a New York drug dealer may hide all of his drug proceeds in a Caribbean bank account at a "brass plate" bank that has no physical presence in any Caribbean country. In such a case, publishing notice in an island newspaper would be a meaningless exercise. By the same token, a requirement that the Government always publish both in the U.S. and abroad would be needlessly, and unreasonably, expensive.

Moreover, some countries do not permit the United States to publish notice of forfeiture actions in their newspapers. Indeed, in some countries, any attempt at such publication would be considered a criminal offense.

Accordingly, the rule must have some flexibility so that prosecutors, mindful of the strictures of foreign law as well as the requirements of constitutional due process, can publish the notice in the manner most likely to reach the potential claimants.

Internet publication / Rule G(4)(a)(v)

Electronic filing has been authorized by Rule 5(e) of the Federal Rules of Civil Procedure since 1996 for districts where local rules permit such filing. The Bankruptcy Court, in the Eastern District of Virginia and elsewhere, is using electronic filing now, and federal district courts plan to begin using it soon for civil matters and, in selected experimental districts such as the District of Massachusetts, for both civil and criminal filings.

The 58 percent figure previously cited for Internet availability only covers its estimated availability in households. The figure does not include the free access to the Internet now available in many public libraries, and in most businesses and schools.

While access to the Internet is not yet universal, it cannot be contested at this point that Internet access is increasing and that it is already significantly greater than access to any particular newspaper, particularly when viewed nationally or internationally. Searching for a particular item on the Internet is already simpler than obtaining, and then manually searching through, all available newspapers to find a particular fine print legal notice.

If the use of the Internet for publication of forfeiture notices is authorized, the Government will be able to establish, and publicize to all those interested in forfeiture matters, a central forfeiture notice government website. That site would become the modern equivalent of the central forfeiture notice register publication that was under serious consideration by the Administrative Conference of the United States as long ago as 1994. The website would be much more easily locatable, searchable, and accessible to practitioners and the general public, than the bulky paper publication then contemplated. At best, the paper register would have been distributed to law libraries. The website will be conveniently and simultaneously available to everyone who has access to the Internet.

That some portions of the population presently lack access to the Internet is regrettable, but not dispositive of this issue. It may well be that those same portions of the population do not ordinarily buy the *New York Times* or *USA Today* on a daily basis. It is virtually certain that they do not regularly purchase *The National Lawyer's Weekly* or other such legal publications. Even those who do sometimes buy general interest or legal newspapers probably do not read carefully through all of the fine print legal notices appearing in them.

Authorizing forfeiture notice via the Internet would be a positive step, designed to make a real, practical, improvement in the publication of forfeiture proceedings to practitioners and the general public. Such notice, like traditional newspaper publication, would, of course, be <u>in addition to</u> direct notice to known interested persons. Like traditional newspaper publication, it would ultimately be measured by the courts against the same reasonable and practical due process standards that have been applied to other means of general "constructive" notice in the past.

(b) Direct Notice.

Other than the requirement regarding service of the arrest warrant *in rem*, the current rules pertaining to civil judicial forfeiture contain no requirement regarding the service of direct written notice of the forfeiture action on any interested party. In many cases, however, sending such direct notice may be essential to the guarantee of due process.[37]

Subsection (b)(i) requires that in addition to providing notice by publication, the Attorney General must serve notice of the forfeiture action, including a copy of the complaint, on any person who "appears to have an interest" in the property.[38] That would include, at a minimum, a person who filed a claim contesting the forfeiture in any administrative forfeiture proceeding that may have preceded the commencement of the judicial forfeiture action, and any other person who the Government has reason to believe has a legal interest in the property.[39] For convenience, a person appearing to have an interest in the

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[37] Most of the case law involves the parallel due process requirement in administrative forfeiture proceedings. *See, e.g., United States v. Rodgers*, 108 F.3d 1247 (10th Cir. 1997) (publication in *USA Today* satisfies publication requirement, but the Government has independent duty to provide direct notice); *United States v. Gonzalez-Gonzalez*, 257 F.3d 31 (1st Cir. 2001) ("the touchstone is reasonableness: the Government must afford notice sensibly calculated to inform the interested party of the contemplated forfeiture and to offer him a fair chance to present his claim of entitlement;" if Government knows whereabouts of fugitive it must send him notice, and may not rely on notice sent to "straw" owners, or notice published in newspaper); *United States v. Minor, 228* F.3d 352 (4th Cir. 2000) (publication and mailing notice to home address of incarcerated prisoner is an inadequate "gesture"); *United States v. Marolf*, 973 F. Supp.1139 (C.D. Cal. 1997) (failure to send notice to person appearing to have an interest in the property violates due process under the Supreme Court's decision in *Mullane v. Central Hanover Trust*).

[38] The requirement is identical to the one that applies to administrative forfeiture proceedings under 19 U.S.C. § 1607(a). That statute requires that notice be sent to "each party who appears to have an interest in the seized article."

[39] *See United States v. Colon*, 993 F. Supp. 42 (D.P.R. 1998) (sending notice to defendant alone was inadequate where the Government was on notice that another party's name appeared as the owner of record of the seized bank account); *but see Kadonsky v. United States*, 216 F.3d 499, 503 n.2 (5th Cir. 2000) ("mere possession of an article in and of itself is insufficient to render an individual one 'who appears to have an interest in the seized article' for purposes of § 1607(a)"); *Arango v. United States*, 1998 WL 417601 (N.D. Ill. 1998) (person who denies ownership of seized currency at the time it is seized cannot seek judicial review of administrative forfeiture on ground that he did not receive personal notice); *United States v. Phillips*, 185 F.3d 183 (4th Cir. 1999) (in criminal forfeiture cases, Government does not have to send notice to persons who lack standing to contest the forfeiture); *see also United*

property is referred to throughout the remainder of the Rule as a "potential claimant."

Subsection (b)(ii) addresses the manner in which direct notice may be served. The notice may be served on either the potential claimant or his counsel[40] in any manner "reasonably calculated to ensure that such notice is received," including first class mail, private carrier or electronic mail.

NACDL objects that this rule "would so radically change current civil procedure that it would make it almost unrecognizable." Troberman Letter at 9. But again, the issue here is notice, not "service of process."

NACDL is correct that the direct notice provisions in Rule G(4)(b) would be a change from current regulation, but not for the reasons that NACDL suggests. The primary change would be the codification of direct notice *at all.* While case law has required that direct notice be sent to known interested persons at least since *Mullane*, and while the Government, accordingly, has been sending direct notice to such persons for years, there is no provision in either the applicable statutes or the Supplemental Rules that requires *any* direct notice of a civil judicial forfeiture action other than the service of process upon the *res* itself. The Government can presently comply with all statutory requirements regarding third-party interests simply by publishing notice in a newspaper.

For the most part, Rule G(4)(b) is designed to codify and standardize practices already in use to varying degrees, with sometimes conflicting local variations, around the country. The primary reason for doing so is to provide a degree of uniformity, so that prosecutors and practitioners will know what to expect, and so that means of providing notice used in one district will not run afoul of a local requirement in some other district where persons receiving notice might reside.

States v. BCCI Holdings (Luxembourg) S.A. (Final Order of Forfeiture and Disbursement), 69 F. Supp. 2d 36 (D.D.C. 1999) (the Government should be encouraged to send notice as widely as possible; sending notice therefore does not estop the Government from moving to dismiss claim for lack of standing or for lack of subject matter jurisdiction).

[40] *See Bye v. United States*, 105 F.3d 856 (2d Cir. 1997) (notice to attorney representing defendant in the criminal case constitutes sufficient notice of administrative forfeiture); *McDonald v. DEA*, 1996 WL 157527 (S.D.N.Y. 1996) (service on defense counsel during discovery in criminal case was sufficient notice).

Rule G(4)(b) is intended to address this problem for the first time. It sets forth procedures designed to provide proper notice of civil forfeiture actions to interested parties by means reasonably calculated to achieve that goal efficiently, without unnecessary expenditure of Government resources. Moreover, the proposed rule relies upon means approved in the comparable context of notice of administrative forfeiture proceedings, *see* 18 U.S.C. § 983(a)(2)(B) (notice of administrative forfeiture may be in the form of a letter notifying the claimant that claims must be filed within 35 days from the date of the letter), and upon case law establishing the types of notice that are acceptable.[41]

The use of e-mail / Rule G(4)(b)(ii)

One of NACDL's objections is to the use of electronic mail to achieve direct notice. Troberman Letter at 10. Rule G(4)(b)(ii) permits notice to be sent by e-mail in circumstances where such notice is reasonable. To be sure, electronic mail has not yet replaced physical mail in business correspondence, but it certainly has made substantial inroads upon written correspondence both in business and in personal life. It has also been increasingly treated by private individuals, the business community, and government officials and attorneys as a generally reliable means of routine communication.

As one example, electronic mail is now the almost exclusive means of confirming wire transfers of billions of dollars every day between financial institutions all over the world. If e-mail can be relied upon for such a purpose, surely it should be possible, in at least some instances, to rely upon electronic mail to provide notice of a forfeiture action. Any rule written in the first decade of the twenty-first century that did not take into

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[41] *Brown v. United States,* 2002 WL 1339102 (S.D.N.Y. 2002) (notice mailed to residence where claimant's wife and children lived was adequate); *Crespo-Caraballo v. United States*, 200 F. Supp.2d 73 (D.P.R. 2002) (notice published in San Juan newspaper and mailed to claimant in English was valid even though claimant only spoke Spanish, zip code was incorrect on mailed notice, and dollar amount was slightly different from actual amount seized); *Owens v. United States*, 1997 WL 177863 (E.D.N.Y. 1997) (notice sent to defendant's address by certified mail is sufficient); *United States v. Randall*, 976 F. Supp. 1442 (M.D. Ala. 1997) (mailing certified notice to correct address is sufficient, even if claimant did not receive it); *Wilhite v. United States*, 2001 WL 124937 (N.D. Tex. 2001) (notice mailed to plaintiff at the address he provided for notice was adequate).

account this technological development would be blind to the realities of modern communications.

NACDL argues that no other rule or statute authorizes the use of electronic mail for the provision of notice. In fact, the electronic filing systems being used in bankruptcy courts, and prepared for use in federal district courts, permit parties to notify and serve other parties with pleadings by electronic mail, which may be generated at the time when the pleadings are filed, also electronically. In addition, Rule 5(b)(2)(D) of the Federal Rules of Civil Procedure specifically permits the service of papers other than the complaint in ordinary civil proceedings to be done by electronic means where the person served has consented in writing to such service. Rule 5(b)(3) provides, as an additional safeguard, that service by electronic means is not effective if the person making service learns that the attempted service did not reach the person to be served.

To be sure, electronic mail is not suitable for giving notice to all persons, including those without computers or without current e-mail addresses. If the Government chooses to rely upon e-mail notice as to certain persons in a particular case, it will do so subject to the requirement that notice be reasonably calculated to achieve actual notice to the intended recipient. In a situation suggested by NACDL, where the Government knows that it has seized the intended recipient's only computer, the use of e-mail would not be reasonable, and the Government would fall back on more traditional methods such as first class mail or Federal Express.

However, the fact that electronic mail is not suitable in some cases is no reason to bar its use in *all* cases. Where Government counsel knows that defense counsel, to whom notice is to be sent, regularly uses electronic mail, it would be reasonable for the Supplemental Rules to permit the Government to use that means of notifying counsel of a pending forfeiture.

NACDL makes the reasonable point that recipients are wary about e-mail attachments coming from strangers. Government attorneys relying upon e-mail notice would reasonably take such concerns into account, knowing that the efficacy of their notices could eventually be dispositive of their cases. If Government counsel were sending notice to a well-known colleague who was used to receiving attachments, counsel could send an

attached notice. If the notice was going to a stranger (although, of course, it would have to be a person for whom a reasonably reliable e-mail address was available to the government attorney in the first place), the notice could be placed in the body of the e-mail message instead.

However, such fine detail is not the proper concern of generally applicable rules. As always, details determining what passes due process muster, and what does not, will be developed on a case by case basis, over time. For now, it is sufficient that electronic mail is an available, much used, generally reliable means of communication. It is reasonable to permit the use of this means to give notice in appropriate cases.

Notice to potential claimant's counsel / Rule G(4)(b)(ii)

NACDL also objects to the provision authorizing notice to the potential claimant's counsel. Troberman Letter at 10. The Government has no objection to clarifying that this provision in Rule G(4)(b)(ii) is intended to authorize the sending of notice to counsel "representing the potential claimant with respect to the seizure of the subject property, or representing the potential claimant in a related investigation, administrative forfeiture proceeding, or criminal case." That change has been made to the Rule.

Recalling, once again, that the "the touchstone is reasonableness," notice to an attorney representing a potential claimant in any of these contexts is reasonably calculated to alert the claimant to the pendency of the forfeiture proceeding. A trained attorney, even one unfamiliar with forfeiture law, is generally more likely than the average person to recognize that a legal notice requires some type of responsive action. Attorneys are also likely to recognize that they would be placing themselves and their clients at risk if they received such a notice directed to one of their clients and failed, at a minimum, to tell the client about it. Courts have often recognized the efficacy of notice to criminal defense counsel, either by holding that such notice was sufficient in a given case, or by pointing out that if such notice had been given, that would have cured a notice deficiency.[42] The provision here is merely designed to

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[42] *See Bye v. United States*, 105 F.3d 856 (2d Cir. 1997) (notice to attorney representing defendant in the criminal case constitutes sufficient notice of administrative forfeiture); *McDonald v. DEA*, 1996 WL 157527 (S.D.N.Y. 1996) (service

codify what these courts have already made clear.

Notice deemed served on the date it is sent / Rule G(4)(b)(ii)

NACDL also objects to the provision in Rule G(4)(b)(ii) stating that "For purposes of this Rule G(4)(b), notice is served on the date that the notice is sent." Troberman Letter at 10-11. The date of service of notice is important because it, along with the date of final publication, triggers other requirements, such as the date by which the claimant must file a claim and answer, and the date on which a court may enter a default judgment for failure to do so.

The proposed provision that notice be deemed served on the date when it is sent is not a "radical departure." It is consistent with Rule 5(b)(2)(B) and (D) of the Federal Rules of Civil Procedure, which provides, respectively, that service by mail is complete on mailing, and that service by electronic means is complete upon transmission. It is also consistent with the model that Congress adopted in CAFRA for sending notice of administrative forfeiture. Section 983(a)(2)(B) provides that the Government can establish the date by which a claim contesting the forfeiture must be filed by including a deadline in the notice letter that is not less than 35 days from the date when the Government sent the notice. Clearly, this provision uses the date when the notice is *sent* as the triggering date, not the date when the notice is received.

Once it is understood that the purpose in both contexts is identical -- to give notice of forfeiture to a potential claimant -- there is no reason why using the date when notice is sent is adequate in administrative forfeiture proceedings, but not in judicial forfeiture proceedings, either of which can

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on defense counsel during discovery in criminal case was sufficient notice); *United States v. Cupples*, 112 F.3d 318 (8th Cir. 1997) (where there is a parallel administrative forfeiture and criminal prosecution, the Government must serve notice of the forfeiture on the defense attorney in the criminal case); *United States v. Cruz*, 1998 WL 326732 (S.D.N.Y. 1998) (notice sent to attorney in then-pending criminal case is adequate); *United States v. Franklin*, 897 F. Supp. 1301, 1303 (D. Ore. 1995) (attempts to send notice to defendant's home, attorney, and place of confinement were sufficient; failure to receive notice was not the Government's fault); *Allen v. United States*, 38 F. Supp. 2d 436 (D. Md. 1999) (same) (service on attorney sufficient, even though notice sent to defendant was sent to wrong jail); *United States v. Watts*, 1999 WL 493786 (E.D. Pa. July 13, 1999) (service on attorney was sufficient).

lead to a valid final forfeiture of the asset in question.

Subsection (b)(iii) provides that in the case of a potential claimant who is incarcerated, notice must be sent to the facility where the person is being held. The intent is for the rule to require the same level of notice as that approved by the Supreme Court in *Dusenbery v. United States.*[43] **NACDL'S objection to this is that, basically, they do not agree with the *Dusenbery* decision and would prefer that it were legislatively overruled.**

Rule G(4)(b)(iii), on the other hand, simply codifies the requirement of cases before and since *Dusenbery* holding that when the Government knows that a potential forfeiture claimant is incarcerated, it must send notice to the potential claimant at the current place of incarceration, and not only at a former home address.[44] These decisions place the burden on the Government to keep track of the prisoner's location. Notice sent to a prison where the prisoner was previously held, but not where he is being held at the time the notice is sent, is also inadequate.[45]

NACDL proposes that Rule G(4)(B)(iii) be amended to require proof that the notice sent to an incarcerated potential claimant was actually

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[43] 534 U.S. 161(2002), *supra* note 15.

[44] *United States v. Minor*, 228 F.3d 352 (4th Cir. 2000) (publication and mailing notice to home address of incarcerated prisoner is an inadequate "gesture"); *United States v. Giraldo*, 45 F.3d 509, 511 (1st Cir. 1995) (seizing agencies must take steps to locate the prisoner and send him notice in jail); *United States v. McGlory*, 202 F.3d 664 (3d Cir. 2000) (it violates due process for DEA to send notice to USMS, asking USMS to forward to prisoner; DEA must at least send notice to prison where defendant is confined); *but see Harris v. DEA*, 2001 WL 310974 (D. Md. 2001) (DEA not expected to know defendant is in state custody on unrelated state charge; therefore notice sent to home address was adequate even though defendant was incarcerated); *United States v. Donovan*, 2002 WL 730906 (7th Cir. April 18, 2002) (Table) (in light of DEA agent's statement to defendant that his property had been seized, and that he needed to take steps to recover it, failure to send notice to jail where defendant was held did not violate due process under *Dusenbery*).

[45] *Alli-Balogun v. United States,* 281 F.3d 362 (2nd Cir. 2002) (sending notice to prison two weeks after claimant was transferred to another prison violated claimant's due process rights under *Dusenbery*); *Small v. United States*, 136 F.3d 1334 (D.C. Cir. 1998) (notice sent to prisoner's place of incarceration is not adequate if notice is returned undelivered to seizing agency before administrative forfeiture is complete and agency could have taken steps to locate prisoner); *Lopez v. United States*, 201 F.3d 478 (D.C. Cir. 2000) (same as *Small*; also, parallel notice to prisoner's wife that *her* interest may be forfeited does not cure defective notice).

received. But that is exactly the requirement that the Supreme Court rejected in *Dusenbery*. The Court noted

> [N]one of our cases cited by either party has required actual notice in proceedings such as this. Instead, we have allowed the Government to defend the "reasonableness and hence the constitutional validity of any chosen method ... on the ground that it is in itself reasonably certain to inform those affected." *Mullane*, 339 U.S. at 315 ....

Dusenbery, 122 S. Ct. at 701. After reviewing the reasonable procedures for delivery of mail that were in place at the penitentiary where Dusenbery was housed at the time of notice, the Court held:

> Here, the use of the mail addressed to petitioner at the penitentiary was clearly acceptable for much the same reason we have approved mailed notice in the past. .... We think the FBI's use of the system described in detail above was "reasonably calculated, under all the circumstances, to apprize [petitioner] of the pendency of the action." *Mullane*, 339 U.S. at 314 .... Due process requires no more.

Dusenbery, 122 S. Ct. at 702.

The purpose underlying Rule G(4)(B)(iii) is to *codify Dusenbery* and related case law so that the rule adopted by the Supreme Court is accessible to practitioners. Rule G(4)(b) should not overturn the rule adopted by the Supreme Court in favor of the position that the NACDL advanced in the Court and lost. To be consistent with *Dusenbery*, Rule G(4)(b) should require the Government to send the notice addressed to the prisoner at the prison where the prisoner is presently incarcerated, but it should not require proof of actual receipt of the notice.

Of course, at trial, if the adequacy of the notice is contested, the Government will have to show not only that it complied with the Rule, but also that the prison had reasonable procedures in place to ensure proper delivery of the mail. It is not necessary or appropriate for the text of the Rule itself to attempt to spell out such procedures. At the due process hearing, the evidence will show that the prison either did or did not have the requisite procedures for mail delivery in place. The burden is on the Government to give, and ultimately to show that it gave, proper notice. Accordingly, there is no need for the Rule to impose additional burdens

beyond those already imposed by the requirements of due process.

Subsection (b)(iv) provides that, in most cases, if the person to be served with notice was arrested in connection with the offense giving arise to the forfeiture, but that person is no longer incarcerated, it will be sufficient for the Government to send direct notice of the forfeiture to the address that the potential claimant gave to the Government at the time of his arrest or release. This is consistent with the rule some courts have adopted,[46] and is intended to make clear that the Government is not required to check all available sources for alternative addresses for the potential claimant if that person gave the Government an apparently valid address when he was arrested or released.

This provision simply recognizes that it is generally reasonable for the Government to send a forfeiture notice to a non-incarcerated potential claimant at the address that the potential claimant provided to the Government at the time of arrest. Not coincidentally, the time of the potential claimant's arrest is, in many instances, identical, or very close, to the time when the subject assets are seized. The provision would not permit reliance upon the address given at time of arrest where the potential claimant has since provided the arresting agency with a different address.

NACDL objects to this provision (Troberman Letter at 12), but has provided no authority for its contrary argument that in comparable circumstances, a civil litigant would not generally be permitted to rely upon the address provided to the litigant by an opposing party.

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[46] *See, e.g. Wilhite v. United States*, 2001 WL 124937 (N.D. Tex. 2001) (notice mailed to plaintiff at the address he provided for notice was adequate; due process did not require the Government to track plaintiff down when plaintiff was not imprisoned and provided no forwarding address, nor is Government required to wait until plaintiff returns home from his travels before sending the notice); *Brown v. United States,* 2002 WL 1339102 (S.D.N.Y. 2002) (notice mailed to residence where claimant's wife and children lived was adequate under *Dusenbery,* even though claimant himself had been deported to Jamaica); *Albajon v. Gugliotta*, 72 F. Supp. 2d 1362 (S.D. Fla. 1999) (notice sent to various addresses on claimant's identifications and mailed after claimant was released from jail is sufficient to satisfy due process, even if claimant never received notice); *United States v. Schiavo*, 897 F. Supp. 644, 648-49 (D. Mass. 1995) (sending notice to fugitive's last known address is sufficient; not the Government's fault that notice was not effective).

Like the other provisions of Rule G(4), this provision would be construed under the reasonableness standards set by *Mullane* and upheld in *Dusenbery*. It would neither increase nor decrease the amount of diligence required of the Government by the courts. It would not protect the forfeiture from due process attack in any case where special circumstances make it unreasonable for the Government to continue to rely upon the address provided by the potential claimant at the time of arrest. However, this provision would have the significant benefit of encouraging potential claimants -- who, in such circumstances are generally well aware that their property has been seized and may be forfeited -- to protect their interests to the extent of furnishing a corrected address to the agency that seized the property. As courts have repeatedly held in the cases cited in the margin, it is generally not the Government's fault when notice duly sent to the very address provided by a property owner fails to reach the intended recipient because that recipient has moved, or has gone into hiding.

Civil forfeiture procedure should not be a game of "gotcha," in which potential claimants seek the return of their property on the ground that there was one more thing the Government might have done to find an alternative address to which to send notice. The test set forth by the Supreme Court in *Mullane* and reaffirmed in *Dusenbery* is whether the notice was reasonably calculated to apprize interested parties of the pendency of the action. Sending notice to the address that a person has personally given to law enforcement as the location where he can be reached surely satisfies that standard.

Finally, subsections (b)(v) and (vi) address the content of the notice and the timing of the filing of a claim and answer. Subsection (b)(v) provides that the notice must set forth the date on which the notice is sent, and must inform the recipient that he or she has 30 days from such date to file a claim in the judicial forfeiture proceeding. As provided in subsection (b)(ii), notice is deemed to be "served" on the date on which the notice sent. Thus, subsection (b)(v) conforms with the statutory requirement in 18 U.S.C. § 983(a)(4), which provides that a person contesting the judicial forfeiture action must file a claim pursuant to the Supplemental Rules "not later than 30 days after the date of service of the Government's complaint." Any other rule, such as one that counted the 30-day period from the date when the notice was received by the addressee, would be unworkable. In many cases, the Government and the court have no way of knowing when the notice is received, and thus have no way of knowing when a

default judgment may be entered against a party who has failed to file a claim.[47] Moreover, a rule counting the date for filing a claim from the date the notice is received would not take into account the fact that sending notice satisfies, in most cases, the requirements of due process even if the notice is not actually received.[48]

Subsection (b)(v) also gives the Government the option of setting forth a specific deadline for filing a claim that gives the potential claimant more time than the 30 days prescribed by statute. By availing itself of this option, the Government may extend a claimant the courtesy of having additional time to file a claim as the circumstances may warrant while at the same time making sure that the deadline for filing the claim is clearly set forth on the record.

NACDL objects to this Rule on the ground that the date of service should not be the date when notice is sent, but rather it should be the date when it is received. Troberman Letter at 13. The response to that

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[47] *See United States v. Commodity Account at Saul Stone & Co.*, 1999 WL 91910 (N.D. Ill. 1999) (once notice has been published and time for filing claims has expired, court may enter default judgment against all potential claimants who did not file claims), aff'd 219 F.3d 595 (7th Cir. 2000); *United States v. Real Property ... Lido Motel*, 135 F.3d 1312 (9th Cir. 1998) (claimant who received proper notice but failed to file claim in accordance with Rule C, lacked standing to challenge magistrate's authority to enter default judgment); *United States v. $230,963.88 in U.S. Currency*, 2000 WL 1745130 (D.N.H. 2000) (when party fails to respond to the complaint within the time specified by Rule C(6), the Government may move for default pursuant to Rule 55(a), F.R.Civ.P.; entry of default is prerequisite to a default judgment).

[48] *See Dusenbery, supra* note 15; *Krecioch v. United States*, 221 F.3d 976 (7TH Cir. 2000)(notice sent to defendant's current home address is adequate where DEA had no way of knowing when it sent the notice that defendant would turn himself in and be incarcerated before the notice arrived); *Albajon v. Gugliotta*, 72 F. Supp. 2d 1362 (S.D. Fla. 1999) (notice sent to various addresses on claimant's identifications, and mailed after claimant released from jail, is sufficient to satisfy due process, even if claimant never received notice); *United States v. Schiavo*, 897 F. Supp. 644, 648-49 (D. Mass. 1995) (sending notice to fugitive's last known address is sufficient; not the Government's fault that notice was not effective); *Owens v. United States*, 1997 WL 177863 (E.D.N.Y. 1997) (notice sent to defendant's address by certified mail is reasonable if the Government has no reason to believe it failed to reach defendant; the Government not responsible if someone forged defendant's name on return receipt card); *Gonzalez v. United States*, 1997 WL 278123 (S.D.N.Y. 1997) ("the [G]overnment is not required to ensure actual receipt of notice that is properly mailed").

objection appears *supra* with respect to Rule G(4)(b)(ii) and is not repeated here.

Rule G(4)(b)(v) would require that the notice set forth the date when the notice is sent, and either inform the recipient that claims must be filed within 30 days from that date, or set a deadline that is at least 30 days from the date when the notice was sent. Providing such a date in the notice itself is simply intended to benefit the potential claimant by clarifying a filing deadline that might otherwise be uncertain.

Again, this provision is consistent with the statutory provision adopted by Congress in CAFRA for the sending of notice of administrative forfeiture proceedings. *See* § 983(a)(2)(B). In such cases, the Government routinely sends the potential claimant a letter stating the date when the notice is being sent, and setting a deadline for filing a claim, which deadline is at least 35 days after the date of the notice. This bright line establishing when a claim must be filed greatly enhances the administration of justice, removes the uncertainty that would prevail if the court had to determine when, if ever, the potential claimant had received notice, and does not infringe in any meaningful way upon the claimant's opportunity to file a timely claim, or to challenge forfeitures that fail to conform to the requirements of due process.

Subsection (b)(vi) conforms with the statutory requirement in Section 983(a)(4)(B) giving the claimant 20 days after the filing of a claim to file an answer to the Government's complaint. **NACDL's objection (Troberman Letter at 14) is addressed *infra* with respect to Rule G(5).**

Section (5). Responsive Pleading; Interrogatories

Section (5) deals with the content and timing of a claim contesting a judicial forfeiture action. It is derived, for the most part, from current Rule C(6).

The first part of Section (5), however, which deals with the content of the claim, has no counterpart in the present Rule. In fact, both current Rule C(6) and the statute governing the filing of a claim in a judicial forfeiture case, 18 U.S.C. § 983(a)(4), are silent as to the information that the claim must contain. To fill this gap, subsection (5)(a)(i) sets forth requirements regarding the content of the claim that are derived from the statutory requirements for filing a claim in

an administrative forfeiture proceeding pursuant to 18 U.S.C. § 983(a)(2)(C),[49] and for filing a third party claim contesting a criminal forfeiture action pursuant to 21 U.S.C. § 853(n)(3).[50] Under subsection (a)(i), the claimant must identify the specific property being claimed, state the claimant's interest in the property, file the claim under oath, and serve a copy of the claim on the attorney for the Government.

Subsection (5)(a)(i) also makes clear that only a person who asserts an ownership interest in the property may file a claim. The definition of owner is tied to the statutory definition in 18 U.S.C. § 983(d)(6) which was enacted by CAFRA as part of the uniform innocent owner defense. The requirement makes clear that the Government does not have to litigate the forfeitability of the property with a person who does not have an ownership interest in it, even though he may have been in possession of the property when it was seized.

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[49] Section 983(a)(2)(C) provides that a claim contesting an administrative forfeiture proceeding must identify the specific property being claimed, state the claimant's interest in such property, and be made under oath and subject to penalty of perjury.

[50] Section 853(n)(3) requires that a third party contesting a criminal forfeiture order must file a petition under oath and must "set forth the nature and extent of the petitioner's right, title or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought." *See United States v. BCCI Holdings (Luxembourg) S.A. (Fifth Round Petition of Liquidation Comm'n for BCCI (Overseas) Macau)*, 980 F. Supp. 1 (D.D.C. 1997) (petition that is not signed under penalty of perjury and fails to identify asset in which claimant is asserting an interest and nature of that interest does not comply with section 1963(l)(3) (identical provision to section 853(n)(3)); *United States v. BCCI Holdings (Luxembourg) S.A. (Petition of Richard Eline)*, 916 F. Supp. 1286 (D.D.C. 1996) (claim that simply listed random legal phrases dismissed for failure to set forth nature and extent of legal interest in the forfeited property as required by section 1963(l)(3)); *United States v. BCCI Holdings (Luxembourg) S.A. (Fourth Round Petitions of General Creditors)*, 956 F. Supp. 1 (D.D.C. 1996) (petition stating only that "the property belongs to me" was insufficient); *Pegg v. United States*, No. 98-9617 (11th Cir. April 10, 2000) (unpub.) (Section 853(n) requires a third party to state the third party's interest in the property with particularity; a petition that merely tracks the language of section 853(n)(6) and does not provide the details section 853(n)(3) requires is insufficient and subject to dismissal on motion of the government); *United States v. Lindow*, 98-CR-244 (N.D.N.Y. Sept. 21, 2001) (bare assertion of legal title not sufficient for claim under § 853(n)(3); where claimant's husband stated during guilty plea that property belonged to him, claimant must explain basis for asserting an ownership interest).

This situation arises most frequently in cases involving the seizure of currency from a drug courier who has no ownership interest in the property yet files a claim contesting its forfeiture.

NACDL objects that the language in Rule G(5)(a)(i), limiting standing to file a claim to persons with an ownership interest in the property, is a departure from current case law. In this they are partially correct; in the absence of any statutory guidance, many courts do grant standing to claimants with no ownership interest in the defendant property. This is simply a situation where the rule needs to be changed.

Not long ago – indeed at the time CAFRA was being considered by Congress – courts in civil forfeiture cases used the terms "ownership" and "standing" almost interchangeably. This led to a great deal of confusion: a court would rule, as a threshold matter, that a claimant had "standing" to file a claim, but then, at the conclusion of the evidence regarding the claimant's ownership interest, would reverse itself and deny the claim for "lack of standing."

For example, in *United States v. $9,041,598.68 in U.S. Currency,*[51] the district court found, at the outset of the case, that a claimant who controlled a family bank account had standing to contest the forfeiture of the defendant funds. After a trial on the merits, however, the court reversed itself, finding that the claimant had not established the requisite ownership interest in the property and therefore did not have standing.[52] On appeal, the Fifth Circuit affirmed the district court, but noted that the court's initial determination of standing was correct, and should not have been reconsidered in light of what took place at trial. The district court's later determination that the claimant had no ownership interest in the defendant property, the panel said, went to the merits of the affirmative defense, not to the claimant's standing to litigate his claim.[53]

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[51] 976 F. Supp. 640, 648 (S.D. Tex. 1997).

[52] *Id.* (control over a "family" bank account may be sufficient to satisfy threshold standing requirements at the onset of trial, but the claimant still must prove his ownership interest by a preponderance of the evidence).

[53] 163 F.3d at 245 ("we consider Judge Atlas' post-verdict discussion of standing as no more than a recognition of the fact that the jury verdict defeated all possible claims of Massieu on the merits, and we find the trial court's earlier determinations that Massieu had standing to

Similarly, in *United States v. Hooper,*[54] the district court in a criminal forfeiture case held that the defendants' wives lacked standing to contest the forfeiture of certain property that they alleged to be part of their respective marital estates. On appeal, however, the Ninth Circuit held that there was "no dispute that Claimants had Article III standing to file their petitions and challenge the forfeitures on the asserted grounds." What the district court meant in concluding that the claimants lacked "standing," the panel said, was "simply another way of stating that Claimants had failed to establish on the merits a property interest entitling them to relief."[55] *See* Cassella, "The Uniform Innocent Owner Defense to Civil Asset Forfeiture," 89 *Kentucky Law Journal* 653, 672-77 (2001) (discussing the confusion between "standing" and "ownership" in recent case law).

Recognizing this confusion, courts have struggled to adopt a rule that distinguishes standing and ownership. The rule that has emerged in the past two or three years is this: standing and ownership are different concepts – one determines whether the claimant gets in the courthouse door; the other is an element of the affirmative innocent owner defense. Thus, it is now the law that a person with a merely "colorable interest" in the property has a sufficient interest to satisfy the Article III case-or-controversy requirement to litigate a civil forfeiture claim, but that same person may fail to establish his affirmative defense if he does not qualify as an "owner" of the property. *Id.*[56]

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be dispositive of that issue").

[54] 229 F.3d 818 (9th Cir. 2000).

[55] 229 F.3d at ___ n.4, citing *$9,041,598.68, supra. See also United States v. 5 S.351 Tuthill Road*, 2000 WL 1779182 (7th Cir. Dec. 5, 2000) (conflating standing with ownership, court holds that beneficiary of a land trust who would be injured if the property were forfeited, had standing, even though he failed to exercise dominion or control, and that therefore the only remaining issue was claimant's innocence), amended March 5, 2001, 233 F.3d 1017 (7th Cir. 2000).

[56] *See United States v. 5 S 351 Tuthill Road*, 233 F.3d 1017 (7th Cir. 2000), *as amended Mar. 21, 2001* (fact that beneficiary of a land trust, who would be injured if the property were forfeited, has standing even though he failed to exercise dominion or control does not resolve the issue of innocent ownership); *United States v. Premises Known as 7725 Unity Avenue*, 294 F.3d 954 (8th Cir. 2002) (lienholder has standing even if he acquired his lien after the property became subject to forfeiture, and he may not be able to prevail on the merits); *United States v. $100,348 U.S. Currency*, 157 F. Supp. 2d 1110 (C.D. Cal. 2001) (even though the person from whom currency is seized has standing to contest its forfeiture, if he is not the

The *de facto* adoption of this dichotomous approach has produced both good and bad results. On the one hand, courts recognize that Congress, in enacting CAFRA, has provided a statutory definition of "ownership" and made it clear that ownership is an element of the "innocent owner defense" codified at 18 U.S.C. § 983(d). Thus, persons who cannot establish the elements of ownership will not be able to establish an innocent owner defense even if they are found to have Article III standing.[57] Note: "ownership" as defined in Section 983(d)(6) is broadly defined to include lienholders, mortgagees, assignees, bailees (as long as they identify the bailor and have a "colorable legitimate interest" in the property) and persons with a secured interest.

On the other hand, courts have been inclined to interpret the case-or-controversy requirement freely, extending standing to persons with the most tenuous connection to the defendant property, believing that, in the end, if the claimant is not an "owner," his challenge to the forfeiture action will fail. For example, courts have extended standing to persons who actually *denied ownership* at the time the property was seized,[58] to one whose only possessory interest in a vehicle was that the keys momentarily passed through his hands,[59] to a non-owner resident who claimed that the

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owner of the property, his innocent owner defense must fail); *In re Seizure of $82,000 More or Less*, 2000 WL 1707495 (W.D. Mo. 2000) (titled owner and purchaser of vehicle both have colorable interest sufficient for standing, but must prove ownership as part of innocent owner defense on the merits); *Kadonsky v. United States*, 246 F.3d 681, 2001 WL 113825 (10th Cir. 2001) (Table) (for standing, claimant need not prove merits of underlying claim; allegation of ownership and some supporting evidence, such as possession, is sufficient; but claimant may yet fail to establish ownership on the merits); *United States v. $347,542.00 in U.S. Currency*, 2001 WL 335828 (S.D. Fla. 2001) (standing is a threshold issue; claimant still must establish ownership on the merits; Government's motion to dismiss denied where claimant has standing and his claim of ownership cannot be negated on the pleadings).

[57] See previous footnote.

[58] *United States v. $39,400 in U.S. Currency*, No. 01cv16255-IEG(LSP) (S.D. Cal. Aug. 12, 2002) (claimant who denied ownership at time currency was seized, but who later filed claim asserting ownership, has standing).

[59] *Mantilla v. United States,* 302 F.3d 182 (3rd Cir.2002) (claimant's temporary possession of the seized currency, however fleeting – he held the keys to the vehicle for a moment before passing them on – sufficient for court to "assume" claimant had a possessory interest).

forfeiture of the defendant real property would leave him homeless,[60] and to a person who claimed to have found the forfeitable currency blowing along the road.[61]

This latter trend, coupled with another change in civil forfeiture procedure under CAFRA, has produced unforeseen and deleterious consequences for the administration of justice. For it is not true, as some had surmised, that extending standing freely to all comers is a harmless gesture, certain to be cabined within the boundaries of the innocent owner defense. To the contrary, because under CAFRA the Government now has to establish the forfeitability of the defendant property by a preponderance of the admissible evidence *before* the claimant is required to put on his affirmative defense, there are a multitude of cases where the court never reaches the ownership issue at all.

This was not a problem as recently as three years ago when the Government could require the claimant to establish his ownership interest in the property simply by establishing probable cause to believe that the defendant property was subject to forfeiture.[62] But now the Government must establish the forfeitability of the property by a preponderance of the evidence before the issue of ownership is even joined. This means that the Government must litigate the merits of the case with anyone who has standing, and a claimant who has standing may prevail in the forfeiture action and recover the property if the Government fails to establish forfeitability, *even if the claimant is not the owner. United States v. $557,933.89, More or Less, in U.S. Funds*, 287 F.3d 66 (2nd Cir. 2002) (ownership only comes into play if the Government establishes forfeitability and the court reaches the innocent owner defense).

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[60] *United States v. 8402 W. 132nd Street*, 2000 WL 294094 (N.D. Ill. 2000) (non-owner resident who would be left homeless if property is forfeited has standing to contest forfeiture of father's real property).

[61] *United States v. $347,542.00 in U.S. Currency*, 2001 WL 335828 (S.D. Fla. 2001) (finder of lost currency has "facially colorable interest" sufficient for Article III standing).

[62] Before August 23, 2000, civil forfeiture proceedings were governed by 19 U.S.C. § 1615, under which the Government was required only to establish probable cause to believe that the defendant property was subject to forfeiture. Moreover, hearsay was admissible to establish probable cause. This was changed by CAFRA. *See* 18 U.S.C. § 983(c).

This cannot be right. It means, for example, that a person who finds money blowing along the road, or a drug courier carrying cash for a third party, can force the Government to establish the forfeitability of seized currency simply by asserting "I am the owner" in his claim, even though he has no interest in the money beyond simple possession.[63] The same would be true for a nominee whose only connection to the vehicle, boat or parcel of land subject to forfeiture is that someone put his name on the title.[64] It is understandable that owners involved in illegal activity would like this rule: it gives them an opportunity to contest forfeiture actions through couriers and straw men without ever having to identify themselves as the real parties in interest. But this is not good public policy.

The Government simply should not have to litigate the forfeitability of money with persons who deny ownership when it is seized or simply find it blowing down the road. In *United States v. $347,543.00 in U.S. Currency*, 2001 WL 335828 (S.D. Fla. 2001), an automobile driven by one Diuela Chavannes was headed west on a local road, when the car hit a bump causing the rear-hatch door to fly open and a box of Tide detergent to fall on the road. Giving new meaning to the term money laundering, the box spilled a quantity of soap powder as well as approximately $50,000 in cash on the pavement. An alert citizen, Robert Chandler, the driver in the vehicle behind Ms. Chavannes, jumped out of his car and started picking up currency, whereupon Ms. Chavannes alighted from her car and began striking Chandler and demanding the money back. Chandler called the police who arrived promptly and found another 8 boxes of Tide in Chavannes' car. Inside each box were bundles of currency, wrapped in fabric softener sheets (to avoid detection by a drug dog), and fastened together with rubber bands. All together, more than $347,000 in suspected drug proceeds were recovered.

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[63] *United States v. $557,933.89, More or Less, in U.S. Funds*, 287 F.3d 66, 71 n.1 (2nd Cir. 2002) (reaffirming that naked possession alone is insufficient for standing, but if courier files a verified claim asserting ownership, he has standing and can recover the property without having to establish his ownership interest if the Government cannot establish forfeitability by a preponderance of the evidence).

[64] *See United States v. Ida*, 14 F. Supp. 2d 454 (S.D.N.Y. 1998) (third-party challenge to criminal forfeiture: titled owner of real property had standing, but he was a mere straw and therefore could not prevail on the merits).

The Government filed a civil forfeiture complaint against the currency and quickly settled a claim filed by Chavannes' boyfriend, who claimed that some of the money came from a legitimate source. However, Chandler, the man who began picking up the money from the road, also filed a claim asserting that the money belonged to him. Following a hearing, the district court ruled that Chandler had standing to contest the forfeiture as a finder-in-possession, and referred the matter to a Magistrate Judge for an evidentiary hearing. At that hearing, the Government – now litigating only with Chandler – was required to establish by a preponderance of the admissible evidence that the money constituted drug proceeds before the court would reach the issue whether Chandler was an "owner" of the property under State law. Ultimately, the Government avoided the hearing by giving Chandler $10,000 to drop his claim.

To avoid such travesties, the rules regarding standing should be made coextensive with the broad definition of ownership that Congress enacted as part of CAFRA. If that were done, only a person who has a legitimate interest in the property – i.e., a person who at least could satisfy the ownership element of the innocent owner defense – could force the Government to go through the steps necessary to link the defendant property to the underlying offense. NACDL's position, that standing should be coextensive with the minimal requirements of Article III, has no constitutional basis and nothing to recommend it as a matter of good public policy.

Subsection (5)(a)(ii) is derived from current Rule C(6)(a), which sets forth the deadlines for filing a claim and answer in a civil judicial forfeiture proceeding. The new Rule, however, makes a number of substantive changes that are necessary to conform with the statutory requirements regarding the filing of the claim and answer that were enacted in 2000 as part of CAFRA.

In particular, before it was amended effective December 1, 2002, Rule C(6)(a) provided that a "statement of interest or right" must be filed "within 20 days after the earlier of (1) receiving actual notice of execution of process, or (2) completed publication of notice," but Section 983(a)(3), as noted previously, provides that a "claim" must be filed "not later than 30 days after the date of service of the Government's complaint or, as applicable, not later than 30 days after the date of final publication of notice of the filing of the complaint." To eliminate these conflicts, Rule G(5)(a)(ii) uses the statutory term "claim" instead

of "statement of interest or right," and provides that the claim must be filed not later than the deadline set forth in the direct notice sent to the claimant pursuant to Rule G(4)(b), *supra*, or 30 days after the final publication of notice, whichever is earlier. As mentioned earlier, these deadlines do not apply to cases to which the deadlines in Section 983(a) do not apply.

Subsection (a)(iii) addresses claims that are filed by corporations. It provides that such claims must be "verified by an officer of the corporation who is duly authorized to file a claim on behalf of the corporation." This is a necessary requirement in light of the provision in subsection (a)(i)(C) that the claim be filed under oath, subject to penalty of perjury. A claim filed by an attorney with no personal knowledge of the facts supporting the claim cannot comply with this requirement. Thus, the claim must be verified by an officer of the corporation.

Subsection (b) preserves the current rule and statutory requirement that an answer to the complaint be filed within 20 days after the filing of the claim. The new Rule conforms with the statutes enacted by CAFRA by using the statutory term "claim" in lieu of "statement of interest or right."

Subsection (b) also makes clear that the claimant must state any objections to the court's exercise of *in rem* jurisdiction over the property, or to the venue for the forfeiture action, in the answer. The concepts of *in rem* jurisdiction and venue have been merged by 28 U.S.C. § 1355(b),[65] at least with respect to property located in the United States.[66]

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[65] *See* note 16, *supra.*

[66] With respect to property located abroad, the courts sometimes require a showing that the district court has "constructive control" over the property by virtue of the cooperation of a foreign court or Government, and sometimes do not. *See United States v. All Funds in Account Nos. 747.034/278 (Banco Espanol de Credito)*, 295 F.3d 23 (D.C. Cir. 2002) (Section 1355(b)(2) gives the district court *in rem* jurisdiction over property located abroad; the foreign's country's compliance and cooperation "determines only the effectiveness of the forfeiture orders of the district courts, not their jurisdiction to issue those orders"); *United States v. Contents of Account #03001288 (Tasneem Jalal)*, 167 F. Supp. 2d 707 (D.N.J. 2001) (court has subject matter jurisdiction and venue for forfeiture of property abroad pursuant to 28 U.S.C. § 1355(a) and (b), and it obtained *in rem* jurisdiction over the property when UAE officials informed the United States that they had restrained the funds at their request, and that a United States forfeiture order would be enforced); *United States v. All Funds on Deposit*, 856 F. Supp. 759 (E.D.N.Y. 1994) (section 1355(b)(2) gives district court in

Finally, Subsection (c) preserves the provision in current Rule C(6)(c) that answers to interrogatories must be served along with the answer to the complaint. Subsection (c) is identical in all respects to the current Rule, and the case law regarding that Rule will therefore apply.[67]

In their comments on this provision, NACDL takes exception to the Government's characterization of the current law, and to the provision in Rule G(7)(d) requiring the claimant to file the answer before filing any dispositive motion. The difference of opinion between the Government and the NACDL on this issue is clearly stated. Defense lawyers want to be able to move to dismiss a forfeiture complaint pursuant to Rule 12(b) on technical grounds – such as the expiration of the statute of limitations – before having to establish that the claimant has a bona fide interest in the property. The Government – focusing on the fact that civil forfeitures are *in rem* actions in which the plaintiff has no control over who the claimant may be – believes that it should not have to litigate challenges to the complaint until it knows who the claimant is and that he has a right to challenge the forfeiture at all. Thus the defense lawyers take the view that Rule 12(a)(4) – permitting the filing of an answer to be deferred until after the court rules on dispositive motions – trumps current Rule C(6) and should trump Rule G(5)(b), while the Government believes that current law, and the better view, is that the answer must be filed before the court considers any dispositive motions.

There are many good and sound reasons that the provision in Rule 12(a)(4) deferring the filing of an answer until after the court rules on a dispositive motion, should not apply to in rem forfeiture cases, and the two

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New York venue and subject matter jurisdiction over property in United Kingdom; court also has *in rem* jurisdiction because seizure by U.K. authorities at request of U.S. gives court constructive possession or control); *aff'd, United States v. All Funds in Any Accounts Maintained in the Names of Meza*, 63 F.3d 148 (2d Cir. 1995).

[67] *See United States v. $8,221,877.16 in U.S. Currency*, 148 F. Supp.2d 427 (D. N.J. 2001) (filing of a motion to dismiss the forfeiture complaint does not toll the period for filing an answer under the Rule C(6); claimant must file answer and respond to interrogatories before filing motion to dismiss); *United States v. $38,870.00 in U.S. Currency,* No. 7:99-CV-47-(HL) (M.D. Ga. Sept. 24, 1999) (same; failure to file answer results in entry of default judgment).

courts that have addressed this issue have agreed with the Government.[68] In short, both courts agreed that Supplemental Rule C(6), which requires that the claimant answer the complaint and any interrogatories that were served with it within 20 days, overrides the provision in Rule 12(a)(4) that permits the defendant in an ordinary civil proceeding to file a dispositive motion in lieu of an answer.

To put it bluntly, current Rule C(6) is designed to "smoke out" claimants who have no real interest in the defendant *in rem* before the court invests judicial resources in litigating the claim. If there were no mechanism for testing the bona fides of a claimant in an *in rem* proceeding, the Government could be forced to litigate its case in the guise of defending a motion to dismiss the complaint against a claimant who declines to reveal his interest in the defendant property. For example, in *United States v. $8,221,877.16 in U.S. Currency*, 148 F. Supp. 2d 427 (D.N.J. 2001), the Government – believing that the money in question represented laundered drug proceeds – seized the contents of several bank accounts in the United States that were held in the names of several foreign corporations. A money exchanger based in Brazil filed a claim, but instead of filing an answer or responding to interrogatories, attempted to attack the complaint on a variety of grounds under Rule 12. For example, he argued that some of the seized funds were not covered by the seizure warrant, that the Government could not rely on the fungible property provision in 18 U.S.C. § 984 because it commenced its forfeiture action more than one year after the alleged criminal offenses, and that the Government could not establish probable cause to believe that the seized funds were traceable to any drug trafficking activity. But the Government responded that the court should not permit a claimant to raise such issues until the claimant, through his answers to the complaint and the interrogatories, provided sufficient reason to believe that he had an interest in the defendant funds.

The district court agreed with the Government and ordered the claimant to file an answer and respond to the Government's discovery requests. When he refused to do so, the court struck his claim and entered a default judgment for the Government. This case is now on

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[68] *See* note 67, *supra.*

appeal to the Third Circuit.[69]

It is entirely understandable that a claimant would like to have a complaint dismissed on technical grounds before having to identify himself and his connection to the defendant property – particularly, as was the case in *$8,221,877.16,* if the claimant is concerned that connecting himself to the property will make him the focus of a criminal investigation. But the Government has an overriding interest in knowing who it is that is challenging the forfeiture, and whether that person has a true interest in the property. In short, courts should not be entertaining challenges to forfeiture actions filed by anonymous South American money managers unwilling to tell the court who they are.

Moreover, if a non-owner claimant who has articulated no defense to the forfeiture were to prevail on technical grounds in a pre-trial motion to dismiss, there would be a distinct possibility that the property would be returned to a person who had no legal interest in the property – resulting in the unjust enrichment of a person who happened to have the foresight to file a claim and move to dismiss a forfeiture action on grounds cognizable under Rule 12(b). The rules of civil procedure should not countenance such a result.

Accordingly, the case law under which Supplemental Rule C(6), per Rule A, overrides Rule 12(a)(4), is sound legally and as a matter of public policy and its effectiveness should be preserved in Rule G.

Section (6). Preservation and Disposition of Property; Sales.

Subsection (6)(a) is derived from current Rule E(10) and permits the court to "enter any order necessary to preserve the property and to prevent its removal, destruction or encumbrance." Such an order would include a pre-trial restraining order under 18 U.S.C. § 983(j), or the interlocutory sale of the property under Rule G(6)(b). **In light of NACDL's objections to Rule G(6), it may be useful to review the existing rules and statutes governing interlocutory sales.**

The majority of interlocutory sales in civil forfeiture cases are ones in

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[69] No. 02-1264 (3rd Cir. 2002).

which the parties stipulate to the sale. In the minority of cases, a party, either the government, the claimant, or another holder of an interest in the property, will object to a proposed interlocutory sale. When the parties do not agree to the sale of the property or to the sale terms, a court order authorizing the interlocutory must be obtained by motion served on all interested parties.[70] The court may order that such a sale take place over a party's objection,[71] but in that case, the court must articulate the reasons justifying the sale.[72]

Rule G(6) does not break any new ground. In addition to Rule E(9)(b), statutory authority for interlocutory sales is already found in the Customs statute, 19 U.S.C. § 1612(a),[73] which is similar to the current Rule E(9)(b), and also authorizes interlocutory sales when property becomes subject to diminution in value. The statute provides as follows:

> Whenever it appears to the Customs Service that any vessel, vehicle, aircraft, merchandise, or baggage seized under the customs laws is liable to perish or to waste *or to be greatly reduced in value* by keeping, or that the expense of keeping the same is disproportionate to the value thereof, and such [property] . . . has not been delivered under bond . . . [and is not subject to administrative forfeiture], . . . the Customs Service shall forthwith transmit its report of the seizure to the United States Attorney who shall petition the court to order an immediate sale of such vessel, vehicle, aircraft, merchandise, or baggage and if the ends of justice

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[70] See *United States v. Steel Tank Barge H 1651*, 272 F.Supp 658, 662-63 (E.D.La. 1976) (vacating Interlocutory Sale Order because barge's owner had not received actual notice of the proposed sale).

[71] *See United States v. Pelullo*, 178 F.3d 196, 198-99 (3rd Cir. 1999) (interlocutory sale approved over criminal defendant's objections where equity was being depleted by accruing taxes and interest on mortgagee's foreclosure judgment);

[72] *See United States v. 8 Princess Court*, 970 F.2d 1156, 1160 (2nd Cir. 1992) (noting absence of findings by district court to justify sale and remanding case for further proceedings).

[73] Section 1612(a) is incorporated with other pertinent customs statutes by 21 U.S.C. § 881(d), 18 U.S.C. §981(d), and 18 U.S.C. § 2254(d) to the extent that it is "applicable and not inconsistent" with those civil forfeiture provisions. *See United States v. One Parcel of Property Located at 414 Kings Highway*, 128 F.3d 125 (2nd Cir. 1997) (19 U.S.C. § 1612 applies to forfeitures under 21 U.S.C. § 881).

> require it the court shall order such immediate sale, the proceeds thereof to be deposited with the court to await the final determination of the condemnation proceedings. Whether such sale be made by the Customs Service or by order of the court, the proceeds thereof shall be held subject to claims of parties in interest to the same extent as the vessel, vehicle, aircraft, merchandise, or baggage so sold would have been subject to such claim.

19 U.S.C. § 1612(a). (Emphasis added.)

Moreover, when the court orders an interlocutory sale over the objections of any interested party, such a sale must comply with the provisions of 28 U.S.C. §§ 2001, 2002, and/or 2004. These statutes provide procedural safeguards to ensure that court ordered sales are made on terms that best preserve the parties' interests, and apply to civil as well as criminal forfeitures.[74] Court-ordered interlocutory sales of personal property must proceed in the same manner as sales of real property, "unless the court orders otherwise." 28 U.S.C. § 2004. In all contested cases the Court is free to fashion an order to accommodate the interests of the government and the claimant, such as a release of the asset to the claimant on sufficient bond.[75]

The case law does not explicitly address whether a court is bound by 28 U.S.C. §§ 2001, 2002, 2004 when all interested parties agree to an interlocutory sale and to the terms of the sale. Section 2004 does expressly allow courts to alter the procedure for sales of personal property, but sections 2001 and 2002 do not contain such language. However, these provisions were aimed at protecting the rights of parties in situations where the court orders an interlocutory sale over a party's objection. The government believes that all interested parties may stipulate to the form of an interlocutory sale and have that sale approved by the court. Once proper notice of the intended interlocutory

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[74] *See United States v. Macia*, 1257 F. Supp.2d 1369, 1371 (S.D. Fla. 2001) (applying section 2001 to interlocutory sale in criminal forfeiture); *1984 Kawasaki Ninja Motorcycle*, 790 F. Supp. 697, 701 (W.D. Tex. 1992) (noting that property subject to 21 U.S.C. § 881 forfeiture may be sold pursuant 28 U.S.C. §§ 2001-2004 ("to the extent . . . not inconsistent with the relevant portions of the Drug Control Act").

[75] The Internal Revenue Code at 26 U.S.C. § 7324, provides for a return to owner under bond any property seized by the Internal Revenue Service that is "liable to perish or become greatly reduced in price or value by keeping, or when it cannot be kept without great expense - . . . ."

sale has been given to all interested parties and all interested parties agree on the terms of the sale, the considerations that might justify costly protective measures such obtaining three appraisals prior to a private sale pursuant to 28 U.S.C. § 2001(b) are no longer at issue because the parties have consented to the sale in terms acceptable to them. Accordingly, courts routinely approve stipulated interlocutory sales without reference to 28 U.S.C. §§ 2001 et seq.[76]

Rules G(6)(b) through (d) are derived from current Rule E(9) dealing with the interlocutory sale and ultimate disposition of the property subject to forfeiture. Subsection (b) sets forth the circumstances in which the court may order the interlocutory sale notwithstanding the objections of a party. In addition to those set forth in current Rule E(9), these circumstances include situations in which there is a diminution in value of the property, the authority for which is found in 19 U.S.C. § 1612(a), and where the owner of property subject to forfeiture has defaulted on mortgage or tax obligations.

Contrary to NACDL's contention, Rule G(6) does not create "broad new authority for the government to force" interlocutory sales in civil forfeiture cases. Courts have approved interlocutory sales in all of the circumstances described in proposed Rules G(6) (b) through (d).[77]

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[76] *See United States v. Real Property Located at 22 Santa Barbara Drive*, 264 F.3d 860, 866-67 (9th Cir. 2001); *United States v. BCCI Holdings (Luxembourg), S.A.*, 69 F. Supp.2d 36, 44-45 (D.D.C. 1999); *United States v. 4118 West 178th Street*, 1995 WL 758436 (N.D. Ill. Dec. 21, 1995).

[77] *See e.g. United States v. Real Property Located 22 Santa Barbara Drive*, 264 F.3d 860, 866-67 (9th Cir. 2001) (stipulated sale paid off mortgage); *United States v. Pelullo*, 178 F.3d 196, 198-99 (3rd Cir. 1999) (interlocutory sale approved over criminal defendants' objections where equity was being depleted accruing taxes and interest on mortgagee's foreclosure judgment); *United States v. One Parcel of Real Property Described as Lot 41, Berryhill Farm Estates*, 128 F.3d 1386, 1389-90 (10th Cir. 1997)(district court granted government's unopposed motion for interlocutory sale and confirmed sale despite claimant's subsequent motion to block it because property was subject to deterioration and decay); *United States v. $82,585.53, More or Less in Proceeds from the Interlocutory Sale of 218 Cattle*, 2000 WL 828080 (S.D. Ala. May 31, 2000) (livestock sold); *Aguilar v. United States*, 1999 WL 1067841 *5 (D. Conn. Nov. 8, 1999) (explaining that interlocutory sale opposed by claimant was warranted because properties were abandoned and subject to "vandalism, deterioration and depreciation" and mortgage payments were several months in arrears); *United States v. One 1979 Peterbilt*, 1994 WL 99540 *2 (E.D. La. Mar. 18, 1994) (granting unopposed motion for interlocutory sale because of depreciating value of vehicle); *cf. United States v. Real*

Moreover, the interlocutory sale of the property may protect the interests of the mortgagee or taxing authority which otherwise is unable to foreclose on the property pending the outcome of the forfeiture action.[78]

Whereas NACDL characterizes the interlocutory sale of property when mortgages or taxes are in default as a "substantial broadening of the government's power to force interlocutory sales," in fact it is the court and not the government that decides whether any particular contested interlocutory sale is appropriate, and then only after a noticed motion where the claimant and any other secured and interested parties have the opportunity to be heard. And, as noted earlier, courts have routinely approved interlocutory sales of real property when the claimant defaults on the mortgage. The fact that the property is subject to forfeiture is not an excuse for failing to keep the mortgage current. Any time a claimant falls behind on mortgage payments, a secured lender can, using appropriate state law procedures, foreclose on the property. Such private foreclosures, however, are disfavored because the lender generally sells the property for the amount of the lien, leaving nothing for the government or the victims.[79] Because of this, the government can generally enjoin private foreclosures, or remove the foreclosures from state to federal

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Property Known As 2916 Forest Glen Court, 162 F. Supp.2d 909, 917 (S.D. Ohio 2001) (court denied claimant's motion for interlocutory sale of seized, and nearly expired, pharmaceuticals because, *inter alia*, claimant failed to show likelihood of success on the merits and it was not in public interest to require the government to incur significant expense for tests to determine whether expiration date could be extended).

[78] *See United States v. One Parcel ... Lot 41, Berryhill Farm*, 128 F.3d 1386 (10th Cir. 1997) (interlocutory sale of residence, while civil case was stayed pending criminal trial, avoided waste and expense and allowed the Government to satisfy mortgage that defendant had stopped paying); *In re Newport Savings and Loan Association,* 928 F.2d 472, 479-80 (1st Cir. 1991) (foreclosure restrained where mortgagee bank had failed to file claim in civil forfeiture case, and had failed to protect government's forfeitable equity interest in the property by posting bond equal to difference between property's fair market value and amount of bank's mortgage interest).

[79] 18 U.S.C. § 981(e)(6) provides for the restoration of forfeited property to victims of the offenses giving rise to the forfeiture.

courts.[80] Given that the failure to pay a mortgage subjects the claimant to foreclosure anyway, what Rule G(6) does is to establish an orderly procedure to protect the interest of the lienholder, the government, and the victims, while preserving the claimant's right to contest the forfeiture of an amount equal to the value of his equity in the property.

Finally, Rule G(6)(c) makes clear that the proceeds of the sale must be designated as a substitute *res* to be forfeited to the United States in place of the property that has been sold, if the Government prevails in the forfeiture action. The proceeds must be held in an interest-bearing account until that time. All defenses that would otherwise apply to the forfeiture of the property that has been sold will apply to the forfeiture of the substitute *res*.

Subsection (c) also makes clear that the sale must be conducted by the marshal or other government agency or person appointed by the court pursuant to the procedures set forth in 28 U.S.C. § 2001 *et seq.* However, if the sale or aspects of the sale that would otherwise be determined according to the statute – such as the number of appraisals required or the location of the sale – are agreed to by all parties, it is not necessary for the sale to be conducted in accordance with all of the statutory requirements. This is intended to eliminate the unnecessary expense that would otherwise be incurred, for example, in connection with obtaining appraisals and publishing notice of the sale.

Section (7). Pre-trial Motions.

Subsection (7) addresses a number of issues that are not covered explicitly by the existing Supplemental Rules, but which arise repeatedly in civil judicial forfeiture cases. These include the application of the exclusionary rule to *in rem* forfeiture proceedings; the procedure for releasing seized property in "hardship" cases under 18 U.S.C. § 983(f); the applicability of Rule 41(e) of the Federal Rules of Criminal Procedure; and the procedures governing the application of the Excessive Fines Clause of the Eighth Amendment.

These issues are unique to forfeiture cases, but in the absence of any guidance provided by the Supplemental Rules, courts have been forced to fill in the gaps in the current procedures by borrowing concepts from both the civil and

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[80] *See Bank One, N.A. v. Everly*, 2002 WL 31056716 (N.D. Ill. 2002) (in this criminal case, instead of enjoining a state mortgage foreclosure action, the government removed the state action to federal court and moved to dismiss it as barred by 21 U.S.C. § 853(k)).

criminal rules of procedure, even though the situations in which those Rules apply are not analogous to the civil forfeiture context. The purpose of subsection (7) is to create a body of procedural rules that apply to the unique circumstances of civil forfeiture, and to consolidate in one place the rules regarding the most common pre-trial motions that have emerged thus far from the case law.

Subsection (a) adopts the case law holding that the Fourth Amendment exclusionary rule applies to civil forfeiture cases. Thus, if property is illegally seized, the court may order the suppression of that property and its fruits as evidence in the forfeiture case.[81] Subsection (a) also makes clear, however, as virtually all courts that have addressed the issue have held, that whatever evidentiary consequences the suppression of the seized property may have, such suppression does not bar the Government from proceeding with the forfeiture action based on other evidence.[82] Adoption of this Rule will eliminate a great deal of confusion among practitioners concerning this issue.

NACDL states that they are unaware of any "confusion among

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[81] *See United States v. Premises and Real Property ... 500 Delaware Street*, 113 F.3d 310 (2d Cir. 1997) (exclusionary rule applies to civil forfeiture cases) (citing *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965)); *United States v. $57,443.00 in U.S. Currency*, 42 F. Supp. 2d 1293 (S.D. Fla. 1999) (same); *United States v. One 1993 Ford Pickup*, 148 F. Supp.2d 1258, 1258 n.1 (M.D. Ala. 2001) (same); *United States v. Real Property Known as 22249 Dolorosa Street*, 167 F.3d 509 (9th Cir. 1999) (all evidence, including officer's testimony, derived from illegal search of house suppressed; suppressed evidence cannot be used to establish basis for forfeiture).

[82] *See United States v. $404,905.00 in U.S. Currency*, 182 F.3d 643 (8th Cir. 1999) (exclusionary rule applies to "quasi-criminal" civil forfeiture cases; but even if the seizure is unlawful, the Government may prove its forfeiture case with other, untainted evidence); *United States v. One 1974 Learjet*, 191 F.3d 668 (6th Cir. 1999) (district court erred in dismissing forfeiture complaint; illegal seizure of property might result in return of property pending trial or in suppression of evidence, but lack of probable cause at the time of seizure has no bearing on the right of the Government to establish forfeitability of the property at trial); *United States v. $9,041,598.68*, 163 F.3d 238 (5th Cir. 1998) (lack of probable cause for seizure may result in suppression of seized property as evidence but has no other consequence); *United States v. Daccarett*, 6 F.3d 37, 46 (2d Cir. 1993) ("even when the initial seizure is found to be illegal, the seized property may still be forfeited," although evidence may be suppressed); *United States v. U.S. Currency in the Amount of $146,800*, 1997 WL 269583 (E.D.N.Y. 1997) (seizure without probable cause has "evidentiary consequences" but does not bar forfeiture of the property).

practitioners" regarding the application of the exclusionary rule, but that confusion is evidenced by the number of cases in which claimants continue to move to dismiss civil forfeiture complaints on the ground that the property was illegally seized. If such motions weren't being made, there wouldn't be so many reported cases rejecting them.[83] As those cases uniformly hold, illegal seizure may be the basis for suppression of evidence, but nothing more. Making this clear in the rule will avoid needless litigation.

NACDL also says that the exclusionary rule should apply in instances other than at trial. Troberman Letter at 23. They do not say, however, when, other than "at trial," illegally seized evidence might be suppressed. The Government is not aware of what the other "purposes" of the exclusionary rule might be in the forfeiture context.

In any case, the application of the exclusionary rule in the civil forfeiture context works the same as it does in the criminal contest. Only a person with an expectation of privacy has standing to move to suppress the evidence. *Rakas v. Illinois,* 439 U.S. 128, 133-34 (1978). Just as in a criminal case, where the defendant has no standing to object to the allegedly illegal search of his girlfriend's purse, *Rawlings v. Kentucky,* 448 U.S. 98, 104-06 (1980), so in a civil forfeiture case, the claimant may not have standing to object to the admission of evidence illegally seized from a non-claimant third party. Thus, for example, a lienholder challenging the civil forfeiture of a vehicle would not have standing to object to the search or seizure of that vehicle without a warrant.

Subsection (b) provides a mechanism for the Government to move to strike the claim and answer for various reasons including failure to satisfy the filing requirements, and failure to establish the ownership interest necessary to establish standing under Rule G(5)(a). **In response to NACDL's concern that the phrase "at any time" was too broad, the current version makes clear that the Government may file such a motion to strike "at any time before trial."**

The explanation of Rule G(5), *supra*, addresses NACDL's opposition to raising the standard for standing to challenge a civil forfeiture action above the minimum required by the case-or-controversy clause of the

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[83] *See* note 82, *supra.*

Constitution. That explanation is not repeated here. In short, raising the standard to comport with the statutory definition of ownership in 18 U.S.C. § 983(d)(6) ensures that the Government does not have to litigate the forfeitability of the property with a person who has no ownership interest in it.

Subsection (c) provides a procedural counterpart to 18 U.S.C. § 983(f) which was enacted by CAFRA to provide a mechanism for the release of seized property pending trial to avoid a hardship. **In response to NACDL's valid concern that the proposed Rule was more limited than Section 983(f) in terms of both the time for making the motion and the identity of the person entitled to make it, those provisions have been dropped from the Rule.**

NACDL also pointed out that the Rule, as previously drafted, did make it explicit that a motion for the release of property to avoid a hardship is the exclusive ground for seeking the pre-trial return of the property to the claimant's custody, or that Rule 41(e) of the Criminal Rules does not apply to civil forfeiture matters once a verified complaint is filed. That omission has been rectified.

The latter provision of Subsection (c) is necessary to address confusion caused by the pre-CAFRA case law. Before Section 983(f) was enacted in 2000, some courts treated motions for the pre-trial release of property in civil forfeiture cases as motions filed pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure. In doing so, the courts evidently thought it necessary to exercise "anomalous jurisdiction" in order to avoid the hardship caused by the Government's delay in instituting formal forfeiture proceedings.[84] But in adopting

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[84] *See In the Matter of the Seizure of One White Jeep Cherokee*, 991 F. Supp. 1077 (S.D. Iowa 1998) (court exercises anomalous jurisdiction because seizure has effectively shut down claimant's business, and delay in instituting civil forfeiture action leaves claimant no remedy at law; but court holds that four-month delay since time of seizure does not violate due process, given the Government's need to avoid jeopardizing ongoing criminal investigation); *In Re McCorkle*, 972 F. Supp. 1423 (M.D. Fla. 1997) (seizure of property without filing civil or criminal forfeiture action allows court to exercise anomalous jurisdiction to avoid manifest injustice that would result if the Government seized property without probable cause; motion denied upon finding that probable cause was established); *In re: FBI Seizure of Cash and Other Property From Edwin W. Edwards*, 970 F. Supp. 557 (E.D. La. 1997) (where the claimant files a Rule 41(e) motion between the time of the seizure and the Government's filing of a forfeiture complaint, the motion will be stayed for 60 days to give the Government an opportunity

the standards set forth in Rule 41(e), the courts confused the legality of the seizure, which is the issue in Rule 41(e) motions, with the hardship suffered by the claimant as result of the pre-trial seizure of his property.

The legality of the seizure is the proper subject of a motion to suppress filed pursuant to subsection (a), but it has no bearing on the claimant's hardship motion under subsection (b). Property may be released to the claimant pending trial if the requirements of Section 983(f) are met whether or not the seizure was illegal; conversely, the illegality of a seizure is not a ground for the release of the property under Section 983(f). Nor may a claimant use Rule 41(e) to gain the release of his property in a civil forfeiture case: that equitable remedy is not available when the claimant has an adequate remedy at law, namely contesting the forfeiture action at trial.[85]

NACDL evidently disagrees with this long-standing rule. "Contrary to the view of many courts," they say, Rule 41(e) motions should be permitted even though formal forfeiture proceedings have been commenced. Troberman Letter at 24. But the "many courts" — indeed the vastly overwhelming majority of courts — that decline to exercise jurisdiction over Rule 41(e) motions in this context are correct. Once

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to file); *United States v. U.S. Currency in the Amount of $146,800*, 1997 WL 269583 (E.D.N.Y. 1997) (the Government generally not required to establish probable cause pre-trial, but where there is undue delay in filing the complaint, a finding of lack of probable cause may result in return of the property to the claimant pending trial).

[85] *See Rodriguez v. United States Department of Justice*, 2001 WL 180127 (2nd Cir. 2001) (Table) (once a forfeiture proceeding is commenced, the claimant has no opportunity or occasion to contest the illegal seizure of his property (other than by filing a motion to suppress evidence); claimant's remedy is to contest the forfeiture action itself on the merits); *United States v. One 1974 Learjet*, 191 F.3d 668 (6th Cir. 1999) (once the Government serves notice of a forfeiture action on the claimant, the claimant's only remedy is to contest the forfeiture on the merits; he may not file a Rule 41(e) motion); *United States v. One 1987 Jeep Wrangler*, 972 F.2d 472 (2d Cir. 1992); *United States v. U.S. Currency in the Amount of $146,800*, 1997 WL 269583 (E.D.N.Y. 1997) (Rule 41(e) motion not appropriate vehicle for challenging legality of seizure where claimant has adequate remedy at law; *i.e.*, contesting the forfeiture in the civil forfeiture case); *In Re Motion for Return of $61,412.00 in U.S. Currency*, No. 00-CV-6654 (ARR) (E.D.N.Y. Dec. 21, 2000) (unpub.) (once Government files civil forfeiture complaint, court lacks jurisdiction to consider Rule 41(e) motion based on Fourth Amendment violation, unless Claimant would suffer irreparable harm and lacks an adequate remedy at law).

forfeiture proceedings are commenced, the claimant has an adequate remedy at law and hence cannot seek equitable relief under Criminal Rule 41(e) or by asking the court to assert "anomalous jurisdiction." Now that there is a formal procedure for dealing with the hardship cases, as well as a set of strict deadlines for commencing forfeiture actions once property has been seized,[86] there is no reason for a court to exercise "anomalous jurisdiction" to grant equitable relief when forfeiture litigation in a federal court has already commenced.

Given the overwhelming case law stating that challenges to the forfeitability of the property cannot be raised pre-trial, it might seem to be unnecessary to codify that law in Rule G. But NACDL's comments make it abundantly clear that some claimants will continue to seek opportunities to challenge the rule no matter how many courts adopt it until the Rules of Procedure close the door on such endeavors.

Subsection (d) deals with motions to dismiss the complaint. The Rule simply makes clear that such motions are filed pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, and is not intended to modify any of the well-established case law applying the traditional grounds for relief under Rule 12(b) to civil forfeiture cases.[87] The new Rule is needed, however, to provide a procedural counterpart to a new statute, 18 U.S.C. § 983(a)(3)(D), which was enacted by CAFRA to overturn legislatively a number of cases permitting a civil

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[86] *See In Re Motion for Return of $61,412.00 in U.S. Currency*, No. 00-CV-6654 (ARR) (E.D.N.Y. Dec. 21, 2000) (unpublished) (any due process concern that might result from forcing claimant to litigate her Fourth Amendment claim in the forfeiture proceeding, instead of pursuant to a Rule 41(e) motion, is mitigated by the Government's prompt filing of its complaint).

[87] *See, e.g., United States v. Funds in Amount of $122,500*, 2000 WL 984411 (N.D. Ill. 2000) (complaint should not be dismissed unless it appears plaintiff cannot prove any facts in support of his claim that would entitle him to relief; to withstand a motion to dismiss, complaint need only allege facts sufficient to set forth the essential elements of the cause of action); *United States v. One Parcel ... 2556 Yale Avenue*, 20 F. Supp. 2d 1212 (W.D. Tenn. 1998) (when motion to dismiss is filed, court presumes all facts alleged to be true, and will deny motion unless it appears beyond doubt that the Government can prove no set of facts in support of its claim that would entitle it to relief); *United States v. Approximately $25,829,681.80 in Funds*, 1999 WL 1080370 (S.D.N.Y. 1999) (same); *United States v. One 1993 Ford Thunderbird*, 1999 WL 436583 (N.D. Ill. 1999) (motion to dismiss is intended to test sufficiency of complaint, not its merits; complaint need only set out essential elements of the cause of action).

forfeiture complaint to be dismissed pre-trial based on lack of evidence.[88]

Lack of evidence, of course, is not a basis for a motion to dismiss under Rule 12.[89] Section 983(a)(3)(D) affirms this rule by providing explicitly that "No complaint may be dismissed on the ground that the Government did not have adequate evidence at the time the complaint was filed to establish the forfeitability of the property." Subsection (d) incorporates this statute into the rule governing motions to dismiss.

NACDL's first objection is that it should not be necessary for the claimant to wait to file a dispositive motion until he has filed both a claim and an answer. The explanation of why a motion to dismiss may not be filed until the claimant has filed both a claim *and answer* appears in response to NACDL's criticism of Rule G(5) and is not repeated here. In short, contrary to NACDL's assertion, civil in rem forfeiture cases *are* different from ordinary civil litigation, which is why a different rule must apply.

Next, NACDL opposes Rule G(7)(d)(ii) on the ground that 18 U.S.C. § 983(a)(3)(D) is self-enforcing – thus making the rule unnecessary. But NACDL's statement makes it obvious just how necessary the rule is.

Section 983(a)(3)(D) was part of a carefully crafted congressional compromise whereby the Government accepted the enactment of a series of strict deadlines for filing civil forfeiture actions – *see* §§ 983(a)(1) & (3) –

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[88] *See United States v. $191,910.00 in U.S. Currency*, 16 F.3d 1051 (9th Cir. 1994) (construing 19 U.S.C. § 1615 to require that the Government have probable cause at the time it files its complaint or suffer dismissal); *United States v. $405,089.23 in U.S. Currency*, 122 F.3d 1285 (9th Cir. 1997) (the Government could not rely on drug dealer's conviction or evidence adduced at criminal trial to establish probable cause where forfeiture complaint was filed at the time of indictment); *United States v. Real Property Located at 22 Santa Barbara Drive*, 121 F.3d 719, 1997 WL 420580 (9th Cir. July 16, 1997) (unpublished) (Table) (same); *United States v. Real Property Known as 22249 Dolorosa Street*, 167 F.3d 509 (9th Cir. 1999) (applying *$405,089.23*; because evidence in the Government's possession at the time the complaint was filed was suppressed, and because evidence acquired independently after the complaint was filed was inadmissible to show probable cause; the Government was unable to forfeit residence drug dealer purchased with drug proceeds); *United States v. 255 Broadway, Hanover*, 9 F.3d 1000, 1003-06 (1st Cir. 1993) (probable cause determination in the First Circuit is made as of the time of the filing of the complaint); *see also United States v. One Lot of U.S. Currency ($36,634)*, 103 F.3d 1048, 1053-54 (1st Cir. 1997).

[89] *See* note 87, *supra.*

but in return obtained a clear statement that a civil forfeiture complaint could not be dismissed for lack of evidence. This was necessary because a minority of courts – principally the Ninth Circuit – had interpreted 19 U.S.C. § 1615 (the statute that governed civil forfeiture procedure before CAFRA) to mean that the Government had to have probable cause *at the time it filed its complaint.*[90] In contrast, the majority of courts had followed the usual rule that a complaint may not be dismissed unless the plaintiff could prove no set of facts that would entitled it to relief. *See* Cassella, "The Civil Asset Forfeiture Reform Act of 2000," 27 J. Legis. 97, 148-49 (2001) (discussing the legislative history).

In the Government's view, if the Government was going to be required to do more than simply meet the particularity requirement in Rule E(2) – that is, if it was going to be required to establish that it had a given quantum of evidence in hand at the time it filed its complaint – then it needed ample time to conduct its investigation before the complaint was filed. On the other hand, if the complaint had to be filed in just 90 days, then it should be clear that the complaint need only satisfy the particularity requirement, and that Government could continue to gather evidence after the complaint was filed. Congress agreed and included Section 983(a)(3)(D) in CAFRA. *Id.* at 149 & n.264.

Note: this has nothing to do with the standard for *seizing property* or for granting a motion to suppress evidence if the property is unlawfully seized. The issue here concerns only the standard for filing a complaint, which in itself does not affect the seizure of any property. *Id.* Indeed, complaints against real property are routinely filed without any prior or concurrent seizure; and complaints are often filed against personal property that has not been seized if the property is abroad, or if there is an ongoing investigation that requires that the complaint be filed under seal.

Despite the clear language in Section 983(a)(3)(D), some defense lawyers have continued to argue – in post-CAFRA cases – that the statute does not mean what it plainly says, and that the pre-CAFRA probable cause requirement still applies in the Ninth Circuit and elsewhere. Courts have uniformly rejected this argument, but NACDL persists in taking the unreconstructed view. Indeed, NACDL asserts that "many cases, both before *and after* CAFRA, hold that the Government must have probable

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[90] *See* note 88, *supra.*

cause at the time it files its complaint." Troberman Letter at 25. In support of that assertion, however, NACDL cites only one post-CAFRA case – a case that was decided in 2002 but involved *pre-CAFRA* facts and hence applied *pre-CAFRA* law.[91]

In an ideal world, the plain language of Section 983(a)(3)(D) would make it unnecessary to include a procedural counterpart in Rule G(7)(d). But as long as there is a dispute over the plain language that Congress has enacted, there will be a need to make the rules of procedure crystal clear.[92]

Finally, NACDL proposes that Rule G(7) be amended to include a new provision authorizing the filing of a motion for summary judgment after the filing of a complaint. Troberman Letter at 27. There does not appear to be any merit in this proposal. As Rule 56 itself provides, a motion for summary judgment should not be considered until the evidence is gathered and discovery is complete. *See* Rule 56(d). Moreover, the NACDL proposal is inconsistent with another provision of CAFRA – 18 U.S.C. § 983(c)(2), which provides as follows: "the Government may use evidence gathered after the filing of a complaint for forfeiture to establish, by a preponderance of the evidence, that property is subject to forfeiture."[93]

Subsection (e) fills in the gaps in the statute setting forth the procedure for resolving a motion to mitigate a civil forfeiture judgment to avoid a violation of the Excessive Fines Clause of the Eighth Amendment. The statute, 18 U.S.C. § 983(g), incorporates the constitutional standard of excessiveness articulated by the Supreme Court in *United States v. Bajakajian,* 524 U.S. 321 (1998): *i.e.,* a

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[91] *United States v. $734,578.82 in U.S. Currency*, 286 F.3d 641, 655 (3rd Cir. 2002) (applying § 1615 and other aspects of pre-CAFRA law to civil forfeiture complaint filed in January, 1999).

[92] At page 26 of the Troberman Letter, NACDL cites a statement from the legislative history in support of its contention that the probable cause standard survives the enactment of CAFRA. That statement, which was inserted into the Congressional Record at NACDL's request after the CAFRA compromise had been agreed to, and after the bill had passed the Senate, cannot contradict the plain language of the statute itself.

[93] NACDL also argues that Rule G(7)(d)(ii) should not apply to post-CAFRA cases to which CAFRA does not apply on account of the "carve-out" provision in 18 U.S.C. § 983(i). We address this in our response to NACDL's criticism of Rule G(1).

forfeiture is excessive if it is grossly disproportional to the gravity of the offense giving rise to the forfeiture. Moreover, the statute provides that the claimant has the burden of establishing that the forfeiture is grossly disproportional by a preponderance of the evidence at a hearing conducted by the court without a jury. But the statute is silent as to the point in a civil forfeiture proceeding when the Eighth Amendment challenge may be made.

Consistent with the case law on this issue, subsection (e) provides that a motion to mitigate a forfeiture to avoid an Eighth Amendment violation may be made "after the entry of a judgment of forfeiture, or as part of a motion for summary judgment in accordance with Rule 56," if the parties have had the opportunity to conduct civil discovery on the Eighth Amendment issue.[94] Moreover, the Rule provides that an Eighth Amendment objection is waived if not set forth as an affirmative defense in the answer pursuant to Rule 8.

NACDL contends that Congress expressly rejected the Government's proposal to include language similar to Rule G(7)(e) in CAFRA, and that adoption of Rule G(7)(e) would therefore undo a deliberate congressional choice. Troberman Letter at 27. That is not so.

During the CAFRA negotiations, the Government did ask for a clear rule stating that arguments relating to the proportionality of a civil forfeiture judgment could only be raised once discovery was complete and the forfeitability of the property was determined. NACDL argued for the opposite: a rule permitting Eighth Amendment arguments to be raised pre-trial. Congress, as it is sometimes inclined to do when contentious issues

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[94] *See United States v. Funds in the Amount of $170,926.00*, 985 F. Supp. 810 (N.D. Ill. 1997) (motion to dismiss civil complaint on Eighth Amendment grounds denied; court should not address excessive fines challenge until the Government has established forfeitability at trial); *United States v. $633,021.67 in U.S. Currency*, 842 F. Supp. 528 (N.D. Ga. 1993) (pretrial determination of excessiveness of yet-to-occur forfeiture would be premature); *United States v. One Parcel of Real Estate Located at 13143 S.W. 15th Lane)*, 872 F. Supp. 968 (S.D. Fla. 1994) (excessive fines issues is not ripe for review until after judgment of forfeiture has been entered); *United States v. Contents of Account 4000393242*, No. C-1-01-729 (S.D. Ohio March 13, 2002) (§ 983(g)(1) says court must conduct 8th Amendment review to determine if forfeiture "was" excessive; use of past tense means that determination is made only after there has been a finding of forfeiture; court cannot make disproportionality determination based only on a seizure and before any forfeiture occurs); *United States v. 2304 E. Highland Drive, Tucson, Arizona*, No. 98-CV-444-TUC-ACM (D. Ariz. Nov. 16, 2000) (court defers excessive fines issue until after it enters summary judgment for the Government on the merits, and then directs parties to submit briefing).

are involved, punted – leaving the issue totally unresolved so that the warring parties could fight over the issue in the courts. *See* 18 U.S.C. § 983(g) (providing that the gross disproportionality of the forfeiture may be raised in civil forfeiture cases, but remaining silent as to when such issues could be raised). Thus, the only deliberate congressional choice was the decision to leave the issue for another day.

That day has arrived. In a series of cases listed in the margin, courts have agreed with the Government that it makes no sense to ask the court to consider whether a forfeiture judgment would be disproportional to the gravity of the offense until all of the facts regarding the offense have been established. An Eighth Amendment argument raised before the court determines if the property is subject to forfeiture – i.e., before the court determines the nature, duration and seriousness of the offense, and any other factors that might go into the disproportionality equation – would be clearly premature. Indeed, in response to such a motion, the court would rightfully ask "disproportional to what?" A steady stream of cases, including those decided since Rule G(8) was first submitted to the Advisory Committee, say just that.[95]

Given that more than 2 years have passed since CAFRA was enacted, during which time the issue left open by Congress in Section 983(g) has been litigated numerous times, the time has come to end the uncertainty and debate and codify the rule embodied in Rule G(7)(e).

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[95] *See United States v. Six Negotiable Checks*, 207 F. Supp. 2d 677 (E.D. Mich. 2002) (claimant's motion for summary judgment on 8th Amendment issue denied; it is premature to resolve 8th Amendment issues when factors bearing on the gravity of the offense will be illuminated at trial); *United States v. Contents of Account 4000393242*, No. C-1-01-729 (S.D. Ohio March 13, 2002) (§ 983(g)(1) says court must conduct 8th Amendment review to determine if forfeiture "was" excessive; use of past tense means that determination is made only after there has been a finding of forfeiture; court can't make disproportionality determination based only on a seizure and before any forfeiture occurs); *United States v. One 1997 Ford Expedition*, 135 F. Supp 2d 1142 (D.N.M. 2001) (Government's motion for summary judgment on Eighth Amendment issue premature; requires factual inquiry); *United States v. $100,348 U.S. Currency*, 157 F. Supp. 2d 1110 (C.D. Cal. 2001) (if claimant raises Eighth Amendment claim in a motion for summary judgment, the court may re-open discovery to allow the Government to collect additional evidence relating to the connection between the property and other criminal acts, and the harm caused by the offense).

Finally, Subsection (f) provides that Rules G(7)(c) and (d) do not apply to cases exempted from 18 U.S.C. § 983 by Section 983(i).

Section (8)

The right to trial by jury in a civil forfeiture case is guaranteed by the Seventh Amendment. Rule G(8) codifies this principle while making it clear that the right to a jury is waived unless specifically requested under Rule 38. *See United States v. U.S. Currency in the Amount of $97,253.00*, 1999 WL 84122 (E.D.N.Y. Feb. 11, 1999).

NACDL questions the need for this provision. Troberman Letter at 28. It is true that Rule 38 applies to civil forfeiture cases, and that the right to a jury trial is waived if a request is not timely made pursuant to Rule 38(b). *See United States v. U.S. Currency in the Sum of $97,253*, 1999 WL 84122 (E.D.N.Y. 1999). However, for whatever reasons, practitioners continue to be confused regarding the manner in which the right to a jury trial may be exercised in an *in rem* proceeding. Thus, it seems helpful, and certainly harmless, to include an explicit reference to the applicable procedure in the rules dealing directly with civil forfeiture proceedings.

Accordingly, this section is proposed to clarify the need for any party in a civil forfeiture action to request a jury trial in a timely manner, and is consistent with Fed. R. Crim. P. 32.2, the new rule governing criminal forfeiture procedure. Rule 32.2(b)(4) codifies each party's right to a jury determination on the issue of forfeiture where a jury has returned a verdict of guilty, but requires a party to make a timely request "that the jury be retained to hear additional evidence regarding the forfeitability of the property." *See United States v. Davis*, 177 F. Supp. 2d 470 (E.D. Va. 2001).

Form No.:CIV2005
Document: Motion and Order to Seal Complaint
Comments: This form may be used to ask the district court to allow the Government to file its civil forfeiture complaint under seal. This may be necessary to toll an applicable statute of limitations while a case remains under active covert criminal investigation.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	UNDER SEAL
CONTENTS OF BANK ACCOUNT	)	
	)	
Defendant.	)	
	)	

EX PARTE APPLICATION TO FILE COMPLAINT FOR FORFEITURE IN REM
UNDER SEAL UNTIL FURTHER ORDER OF COURT

The United States of America hereby applies to this Court for an Order permitting the filing of the Complaint For Forfeiture In Rem in this case, and the declarations and exhibits attached thereto (hereinafter collectively referred to as the "Complaint for Forfeiture"), in camera under seal until further Order of Court. In addition, the government asks that this application likewise be filed under seal.

INTRODUCTION

The Complaint for Forfeiture will be filed in a civil forfeiture action that arises out of an ongoing criminal investigation entitled Operation X. Operation X is an undercover operation. Premature exposure of the details of the investigation, as set forth in the Complaint for Forfeiture, could jeopardize the success of the operation and expose undercover agents and others to considerable risk to their personal safety. The government is filing the present Complaint for Forfeiture to preserve a statute of limitations and to expedite the seizure of the defendant funds once the ongoing undercover investigation is terminated and the individual subjects are arrested. However, it is of great importance that the Complaint for Forfeiture remain under seal until that time.

LEGAL AUTHORITY

Federal Courts are empowered to seal documents in appropriate circumstances. Cf. Fed. R. of Crim. P. 6(e)(4) (sealing of indictments). The Supreme Court has noted that "[e]very Court has supervisory power over its own records and files, and access has been denied where Court files might have become a vehicle for improper purposes." Nixon v. Warner Communications, Inc., 435 U.S. 589, 598 (1978). Moreover, federal district Courts have the inherent power to seal affidavits filed with search warrants in appropriate circumstances. Washington Post v. Robinson, 935 F.2d 282, 289 n. 10 (D.C. Cir. 1991); Offices of Lakeside Non-Ferrous Metals, Inc. v. United States, 679 F.2d 778 (9th Cir. 1982); United States v. Agosto, 600 F.2d 1256 (9th Cir.

1979). This inherent power may appropriately be exercised when disclosure of the affidavit would disclose facts which would interfere with an ongoing criminal investigation. Shea v. Gabriel, 520 F.2d 879 (1st Cir. 1979). Rule 5 of the Federal Rules of Civil Procedure grants federal Courts supervisory power over the filing of pleadings.

DISCUSSION

As mentioned above, the premature disclosure of the Complaint for Forfeiture in this case would directly harm the government's ongoing investigation and expose undercover agents to considerable risk to their personal safety. This case involves [*e.g.* the laundering of narcotics proceeds through bank accounts in the United States and abroad, in violation of 18 U.S.C. Sections 1956 and 1957]. The declarations in support of the forfeiture complaint in this case describe the ongoing investigation, which involves a confidential informant and undercover government agents [doing interesting things in a covert manner]. The government intends to conclude the investigation and arrest the targets within approximately ____ days. Disclosure of the existence of this continuing investigation and the declaration in support of the civil forfeiture complaint before the investigation is concluded will alert the subjects of the investigation to the extent and direction of the investigation and will prevent law enforcement agents from arresting the targets, most of whom are not currently in the United States.

In addition, the disclosure of the existence of this ongoing investigation may cause the subjects of the investigation to threaten or kill law enforcement agents and witnesses who would provide testimony and evidence against them. Finally, premature disclosure of the contents of the Complaint would give the holders of the bank accounts subject to forfeiture an opportunity to remove the subject funds before the United States has an opportunity to request the assistance of the foreign governments where the accounts are located in seizing or restraining the subject funds.

CONCLUSION

For all of these reasons, the government respectfully requests that the Complaint for Forfeiture, and this Application, be filed under seal and held by the Court *in camera*, pending further Order of this Court.

Respectfully submitted,

Attorneys for Plaintiff
UNITED STATES OF AMERICA

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

CONTENTS OF BANK ACCOUNT

Defendant.

UNDER SEAL

ORDER SEALING

The United States of America has applied to this Court for an Order permitting it to file the Complaint for Forfeiture and the underlying declarations and exhibits in the above-captioned case, together with this its Ex Parte Application, in camera under seal. Upon consideration of the application and the entire record herein,

IT IS HEREBY ORDERED that the Complaint For Forfeiture and underlying declarations and exhibits in the above-entitled proceedings, together with the application of the United States, shall be filed with this Court in camera under seal and shall not be disclosed to any person unless otherwise Ordered by this Court.

DATED:

UNITED STATES DISTRICT JUDGE

EXHIBIT A

U.S. Department of Justice

Criminal Division

Washington, D C 20530

June 20, 2003

John K. Rabiej
Chief, Rules Committee Support Office
Administrative Office of the Courts
Washington, DC 20544

Dear John:

This letter constitutes the response of the Department of Justice to the letter from Richard Troberman of June 2, 2003, relating to the Third Circuit's decision in *United States v. $8,221,877 16 in U.S Currency*, 330 F.3d 141 (3rd Cir. 2003) .

As the members of the Rule G Subcommittee will recall, I advised the subcommittee during our last Rule G conference call that the district court decision in this case was under review by the Third Circuit and that the oral argument had not gone well from the Government's perspective. Also, within a day or two after the panel rendered its decision on May 28, 2003, I sent a summary of the decision to Ed Cooper.

NACDL takes the position that the Third Circuit's decision undermines the policy arguments advanced by the Department of Justice in favor of a clear provision in Rule G providing that the claimant must answer the complaint before filing a motion to dismiss pursuant to Rule 12(b). We take the opposite view. The Third Circuit decision highlights the ambiguity in the relationship between the Supplemental Rules and the Federal Rules of Civil Procedure, and reinforces the belief that that relationship should be clarified in Rule G.

Moreover, in our view, the Third Circuit did not reject the policy arguments advanced by the Government – i.e. that in civil forfeiture cases there is a compelling need to allow the Government to determine the bona fides of the claimant before the claimant is permitted to file dispositive motions on the pleadings. To the contrary, it merely held that given its understanding of the relationship between the Supplemental Rules and the Federal Rules of Civil Procedure, the Government's policy concerns were insufficient to override the fact that Rule 12(a)(4) trumps Supplemental Rule C(6). *See id.* at 157 ("Policy arguments cannot alter or undermine this clear statutory directive.")

Thus, in our view, the policy arguments in favor of a mechanism for learning the true identity and interests of the claimant before considering the claimant's dispositive motions are as compelling as they were before. What is more compelling now in light of the Third Circuit's decision is the need for a clearer expression of the relationship of the Supplemental Rules to the general Rules, and an explicit provision in Rule G that addresses the Government's concerns.

I note that after our last conference call, we deleted the reference to interrogatories in Rule G(2)(c) and replaced it with a new provision in Rule G(5)(c) that limits the Government's interrogatories to issues regarding the identity of the claimant and the relationship of the claimant to the property. The new provision would still require the claimant to respond to the interrogatories on this limited issue before filing a motion to dismiss pursuant to Rule 12(b). We also amended Rule G(1) to express more clearly the principle that Rule G will govern forfeiture proceedings, and that the general rules will apply only when Rule G is silent. The new language is reflected in the May 22, 2003 draft.

Sincerely,

STEFAN D. CASSELLA
Deputy Chief
Asset Forfeiture and Money Laundering Section

U.S. Department of Justice

Criminal Division

Washington, D C 20530

March 8, 2004

John K. Rabiej
Chief
Rules Committee Support Office
Administrative Office of the Courts
Washington, DC 20544

Re: Department of Justice's Response to NACDL Comments on Proposed Supplemental Rule G

Dear John:

Thank you for forwarding Mr. Troberman's letter commenting on the January 2004 draft of Supplemental Rule G on behalf of the National Association of Criminal Defense Lawyers (NACDL). We found that most of NACDL's comments simply reiterated points that NACDL had made in response to earlier drafts, and that the Subcommittee had declined to accept. Nevertheless, on behalf of the Department of Justice, I am pleased to provide our responses on each point raised in the most recent letter.

G(2)(d):[1]

NACDL is concerned that the present language of G(2)(d) might be read as reducing the "particularity" requirement of current Rule E(2)(a).

The present language should be retained. The Subcommittee will recall that the current draft was intended to replace the undefined term "particularity" in Rule E(2)(a) with the language employed by the cases construing the current

[1] The 1/9/04 draft of G(2)(d) provides:

(2) Complaint. The complaint must:

...

(d) identify the statute under which the forfeiture action is brought, and state sufficiently detailed facts to support a reasonable belief that the government will be able to meet its burden of proof at trial.

Rule. As we have said before, the courts in those cases have held that the Government satisfies the particularity requirement if it sets forth the facts in sufficient detail to support a reasonable belief that the Government will be able to meet its burden of proof at trial, and that no complaint that satisfies this requirement should be dismissed for failure to adequately plead the basis for the forfeiture. Adding "with particularity" to the draft of Rule G(2)(d) would therefore be both circular and redundant, in that it would reintroduce into the text of the rule the very term being defined.

Because the current draft uses language that is consistent with 18 U.S.C. § 983(a)(3)(D), which was enacted by CAFRA to limit the circumstances in which a motion to dismiss a forfeiture complaint may be granted,[2] and with *United States v. Mondragon*, 313 F.3d 862 (4th Cir. 2002), which the Department of Justice and NACDL agree is the leading case defining the standard for filing a post-CAFRA complaint,[3] it should be retained without change.

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[2] 18 U.S.C. § 983(a)(3)(D) provides:

> No complaint may be dismissed on the ground that the Government did not have adequate evidence at the time the complaint was filed to establish the forfeitability of the property.

See United States v. 630 Ardmore Drive, 178 F. Supp. 2d 572 (M.D.N.C. 2001) (section 983(a)(3)(D) relaxes the pleading requirements necessary to withstand a motion to dismiss for failure to comply with the particularity requirement in Rule E(2)).

[3] *See* Professor Cooper's Notes on the Rule G Subcommittee Meeting of 9 December 2003 at p. 2 (noting the apparent agreement of NACDL and DOJ on the *Mondragon* standard, which is reflected in the language of G(2)). *See also United States v. $49,000 in U.S. Currency*, 330 F.3d 371, 376 n.8 (5th Cir. 2003) (dicta) (following *Mondragon*; the standard for filing a civil forfeiture complaint is set forth in Rule E(2)(a), which requires the Government to "allege facts supporting a reasonable belief that it will be able to bear its burden at trial); *United States v. All Funds on Deposit at Dime Savings Bank*, 255 F. Supp.2d 56 (E.D.N.Y. 2003) (all the Government has to do at the pleading stage is to satisfy the particularity requirement in Rule E(2)(a) by alleging "sufficient facts to support a reasonable belief that the property is subject to forfeiture").

G(3)(c)(iii)[4]

NACDL "strongly" objects to G(3)(c)(iii)'s provision for execution of process on the res "as soon as practicable" instead of "forthwith," as required by current E(4). It also objects that the exceptions set forth in G(3)(c)(iii) would be used to provide "back door" authority for sealing forfeiture complaints. Both objections are without merit.

In his notes on the March 26, 2003, conference call, Professor Cooper relates that the Subcommittee discussed and rejected essentially the same NACDL criticism of this provision, which was then designated as G(3)(b)(ii).[5]

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[4] The 1/9/04 draft of G(3)(c)(iii) provides:

(iii) The person or organization authorized under (c)(i) must execute the warrant and any supplemental process upon property in the United States as soon as practicable unless:

(A) the property is in the government's possession or

(B) the court orders a different time when the complaint is under seal, the action is stayed before the warrant and supplemental process are executed, or the court finds other good cause.

[5] The Notes read as follows:

Rule G(3)(b)(ii) requires that the warrant be executed as soon as practicable, unless the court directs a different time in any of three circumstances. The first circumstance, (A), is that the complaint is under seal. NACDL assails this provision on the ground that there is no authority to seal the complaint, and on the further ground that there is an abuse when the government seeks to file under seal as a strategy to satisfy limitations periods while delaying further proceedings indefinitely. The same protest is made as to the third circumstance, (C), that allows delay in executing the warrant if the action is stayed prior to execution. (§ 983(a)(3)(A), with several complications, requires that within 90 days after a claim is filed in an administrative forfeiture proceeding the government file a civil-forfeiture action, or return the property.)

It is not clear how often the government seeks to delay execution of the warrant. Present Rule E(4)(a) directs that the marshal "forthwith execute the process." NACDL likes this requirement. (But note that Rule E(3)(c)

As Professor Cooper explained, Supp. Rule E(3)(c) presently makes plain that the government plaintiff in a forfeiture case may request, in appropriate circumstances, that "issuance and delivery of process in rem ... be held in abeyance" after filing a forfeiture complaint. The proposed change from current Rule E(3)(c) -- which requires the court to delay issuance and delivery of process upon such a request from the plaintiff -- to the proposed Rule G(3)(c)(iii)(B), under which such a delay would occur only if the court, in its discretion, so ordered, plainly benefits claimants rather than the government. E(3)(c) also makes plain that the government plaintiff in a forfeiture case may request, in appropriate circumstances, that "issuance and delivery of process in rem ... be held in abeyance" after filing a forfeiture complaint.

> provides that issuance and delivery of process in rem *shall* be held in abeyance if the plaintiff so requests.) The "forthwith execute" provision has caused problems for the government. There are three cases in the Central District of California — two of them now on review in the Ninth Circuit — that dismiss the complaint as a sanction for failure to serve "forthwith." That approach is inconsistent with sealing to protect sources of information, and is inconsistent with a stay issued to protect sources of information. It also is inconsistent with the problems that arise when the property is located abroad, where the government must rely on foreign officials for execution.
>
> NACDL's concerns seem to arise with respect to the CAFRA 90-day filing requirement and statutes of limitations. One "limitations" illustration arises from the statute providing that electronic funds are fungible for one year, but after that forfeiture of a present electronic fund is permitted only if it can be traced to the original forfeitable fund. It is important to file within that year. Another limitations problem arises in money-laundering; funds laundered long ago may be protected against forfeiture, even though involved in a continuing scheme.
>
> Satisfying these requirements without letting the claimants know is a legitimate concern. But delay is authorized by Rule G only if the court is persuaded to seal the complaint or stay execution.

Cooper Conference Call Notes at lines 573-614 (emphasis added).

For the reasons explained in Professor Cooper's notes, a rigid requirement that service of process upon the res be effected "forthwith" is inconsistent with this authority to delay such service upon the plaintiff's request. The "as soon as practicable" language of the current draft eliminates this inconsistency, and permits the court, to which any request for stay would be submitted, to strike the proper balance between two competing legitimate concerns: avoiding unnecessary delay and any resulting prejudice to claimants, and avoiding unnecessary interference with ongoing criminal investigations.

In addition, this change in the rules is necessary to take into account that, in modern practice, the defendant property in a civil forfeiture case may not be located within the district in which the action is brought, and that it may in fact be located outside of the United States entirely. *See* 28 U.S.C. § 1355(b)(2).

Moreover, the current draft recognizes that filing a complaint under seal is a recognized part of current forfeiture practice, and not an innovation for which the Government needs an "back door" authority. The protection for property owners is inherent in the fact that a complaint may be filed under seal only with the approval of the court.[6]

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[6] We explained this in an earlier submission to the Subcommittee:

> In a number of cases, courts have authorized the filing of civil forfeiture complaints under seal, to prevent disclosures prior to the seizure of property, so as to insure the availability of the property, or to avoid jeopardizing an ongoing criminal investigation. Cases filed under seal to avoid concealment of assets prior to seizure include *United States v. Leasehold Interest in Property Known as 900 East 40th Street, Apartment 102, Chicago, Illinois*, 740 F. Supp. 540, (N.D. Ill. 1990); *United States v. Michelle's Lounge*, 1992 WL 194652 (N.D. Ill. Aug. 6, 1992); *United States v. Real Property Commonly Known as 16899 S.W. Greenbrier, Lake Oswego, Clakamas County, Oregon*, 774 F.Supp. 1267 (D.Or. 1991): *United States v. One Parcel of Land ... Commonly Known as 4204 Cedarwood Matteson, Il*, 671 F. Supp. 544 (N.D. Ill. 1987).
>
> While there is generally a presumption favoring access to judicial records, it is left to the sound discretion of the district court to weigh the interests advanced by the parties and the public interest. *United States v. Amodeo*, 44 F.3d 141, 146 (2d Cir. 1995). The U.S. Court of Appeals for the Second Circuit in *Amodeo*, "recognized the law enforcement privilege as an interest worthy of protection." *Id.* at 147.

Finally, as reflected in Professor Cooper's notes, the current draft addresses the anomalies that have resulted in several cases where claimants have enjoyed a windfall when the Government failed, for whatever reason, to serve an arrest warrant in rem "forthwith" on property *that was already in Government custody.*

G(4)(a)(iii)(B)[7] / G(4)(a)(iv)(C)[8]

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[7] The 1/9/04 draft of G(4)(a)(iii) provides:

(iii) Frequency of Publication. Published notice must appear

(A) once a week for three consecutive weeks, or

(B) only once if, before the action was filed, notice of nonjudicial forfeiture of the same property was published on an authorized internet government forfeiture site for a period of not less than 30 days, or in a newspaper of general circulation for three consecutive weeks in a district where publication is authorized under subdivision (4)(a)(iv).

[8] The 1/9/04 draft of G(4)(a)(iv) provides:

(iv) Means and Method of Publication. The government should select from the following options a means and method of publication reasonably calculated to notify potential claimants of the action:

(A) if the property is in the United States, notice must be published in a newspaper generally circulated in a district where the action is filed, where the property was seized, or where property that was not seized is located;

(B) if the property is not in the United States, notice must be published in a newspaper generally circulated in a district where the action is filed, in a newspaper generally circulated in the country where the property is located, or in legal notices published and generally circulated in the country where the property is located; or

(C) in lieu of (A) and (B), the government may post notice on a designated internet government forfeiture site for not fewer than 30 days.

NACDL objects to G(4)(a)(iii)(B) and (a)(iv)(C) as if these subsections provided for Internet posting as the sole means of providing notice to potential claimants. Of course, that is not accurate.

G(4)(a) only addresses notice by publication. Such notice will occur, in virtually all cases, in addition to direct notice, which must be sent to all known potential claimants pursuant to G(4)(b).

Subsection G(4)(a)(iii)(B) only provides that where there has already been newspaper or Internet publication in an earlier administrative forfeiture proceeding, the government will be required to re-publish notice of the forfeiture in a newspaper only once, instead of the usual three times.

NACDL's primary criticism is directed at G(4)(a)(iv)(C), which permits the government, in lieu of newspaper publication, to "post notice on a designated internet government forfeiture site for not fewer than 30 days."

NACDL's persistent criticisms of the Internet as the sole means of *publication* (not the sole means of *notice*, as explained above) have not been supported by any evidence, or even by any reasoned argument, that traditional means of publication -- i.e., fine print legal notices in the back pages of a newspaper -- are more "reasonably calculated to notify potential claimants of the action," in the current draft's paraphrase of the *Mullane* due process standard, than publication on a government forfeiture Internet website.

Under the present draft Rule G, Internet publication will be acceptable only when it occurs upon a website that has been "designated" by the government in some public, official way, as the source of public information on pending forfeiture cases. Common sense, buttressed by the impressive report on the increasing pervasiveness of Internet access that the government previously submitted to the Subcommittee, strongly suggests that information posted on such a "designated" government forfeiture website will be easier for potential claimants to find, and much easier for them to search with respect to particular seized assets, than traditionally obscure newspaper legal notices. The "designated" website, which will be available worldwide to all who have access to the Internet via their own (and their attorneys') business and home computers, via publicly accessible computers in schools and public libraries, and via computers in increasingly common "Internet cafes" and other publicly available means of Internet access, will make forfeiture information accessible to a significantly broader audience than old-fashioned legal notices, currently required to be published in a single newspaper that may, or more likely, may not, happen to fall into the hands of a

particular potential claimant. Forfeiture notices published for at least 30 days on such a "designated" website thus will be more likely actually to come to the attention of previously unknown potential claimants -- who are the only persons who will not also be sent direct notice of forfeiture proceedings.

For all of these reasons, the draft's language on this issue should be retained.

G(4)(b)[9]

In its general objection to Section **G(4)(b)**, NACDL repeats its argument, previously considered and rejected by the Subcommittee, that Rule G should impose a new requirement that forfeiture complaints be served upon potential claimants pursuant to Fed. R. Civ. P. 4, in lieu of the traditional practice of serving process in *in rem* forfeiture cases only upon the *res* itself, and publishing and/or sending notice of the forfeiture proceeding to known potential claimants. NACDL offers no new arguments in support of this objection.

Professor Cooper addressed this issue briefly in his notes on the July 15, 2003, conference call:

> NACDL raises a broader question. It would prefer that instead of notice, potential claimants be served in the manner of Civil Rule 4. But the "defendant" in an in rem forfeiture action is the property; service is made by executing the arrest warrant or restraining order, or by the distinctive procedures established for real property. The Department of Justice believes that claimants are entitled to due process notice, but not formal service.

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[9] The 1/9/04 draft of G(4)(b) begins as follows:

(4) Notice.

....

(b) Notice to Known Potential Claimants.

(i) Direct Notice Required. The government must send notice of the action and a copy of the complaint to any person who, on the facts known to the government at any time before the time for filing a claim under (5)(a)(ii)(B) expires, reasonably appears to be a potential claimant.

> It was pointed out that CAFRA refers to filing a claim 30 days from "service" of the complaint. Yet this reference to service appears in conjunction with provisions that invoke the Admiralty Rules. ....

Conference Call notes at lines 790 ff.

When NACDL first raised this issue, DOJ responded by explaining that NACDL was failing to recognize the differences between *in rem* forfeiture cases and ordinary civil litigation. The well recognized differences between ordinary civil litigation and litigation *in rem* have traditionally, and logically, led to the adoption of different procedures and procedural rules for the two types of cases.

Moreover, NACDL's argument that the forfeiture complaint must be "served consistent with Rule 4" would overthrow established law to the contrary. *See United States v. Real Property, etc.*, 135 F.3d 1312, 1315 (9th Cir. 1995) (explaining that Supplemental Rule C(4) requires the government to "give notice of forfeiture proceedings by publication alone", and that notice by certified mail, even in the absence of actual notice, satisfies any due process requirements that exist beyond publication alone). Rule G(4)(B) is essentially a codification of the constitutional principles from that case, *Mullane*, and the Supreme Court's recent decision in *Dusenbery*.

NACDL fails to distinguish between two quite different concepts: (a) "service of process" in an *in rem* civil forfeiture case, which, as in traditional admiralty cases, means service upon the *res* for purposes of obtaining *in rem* jurisdiction; and (b) provision of notice to potential claimants. The proposed Rule G(4)(b) is not, as NACDL argued, a "drastic revision" of current Rule (C)(3)(b), which covers service of process upon the *res*. It is rather a reasonable revision, amplification, and clarification of the notice and response provisions that appear in current Rule C(4), in pre-amendment Rule C(6)(a)(i), and in the amended Rule C(6)(a)(i) that took effect on December 1, 2002.

In ordinary civil cases, the plaintiff knows its defendants in advance. At the outset of a civil forfeiture case, the Government often does not know who, if anyone, will claim an interest in the *res*.

The plaintiff in an ordinary civil case names its defendants in the complaint, serves the complaint only upon those named defendants, litigates only with them, and obtains a judgment binding only as to them. By contrast, the United States, as plaintiff in an *in rem* civil forfeiture case, names only the *in rem* defendant in the complaint, serves process only upon that defendant, and ultimately obtains a

judgment concerning the *in rem* defendant that is valid against all the world. To obtain such an *in rem* judgment, the Government publishes general notice of the forfeiture and also sends notice directly to those whom the Government has reason to believe will assert an interest in the *res*.

Service of the complaint in a civil forfeiture case is simply one of the ways of giving notice to potential claimants of the forfeiture proceeding. Thus the applicable statutes and the applicable section of Rule C provide that the time by which potential claimants must file claims is equally triggered either by service of the complaint or by the date of final publication of notice. 18 U.S.C. § 983(a)(4)(A); Supp. Rule C(6)(a)(i)(A) (2000); Supp. Rule C(6)(a)(i)(A) (2002).

Finally, we must not lose sight of the fact that existing Supplemental Rule C(4) provides only for notice by "publication alone." Thus, any rule that requires direct notice must be viewed as a procedural improvement.

For all of these reasons, the present draft of G(4)(b) properly provides for sending notice to potential claimants by various reasonable means, rather than imposing a new and different requirement of compliance with Fed. R. Civ. P. 4 in civil forfeiture cases.

G(4)(b)(iii)(A)[10]

NACDL objects to G(4)(b)(iii)(A)'s inclusion of electronic mail as one means that may be used to provide direct notice. Under the plain language of the subsection itself, however, email may only be used in cases where it is "reasonably calculated to reach the potential claimant."

DOJ has responded at length to this objection:

> One of NACDL's objections is to the use of electronic mail to achieve direct notice. Troberman Letter at 10. Rule G(4)(b)[(iii)(A)] permits notice

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[10] The 1/9/04 draft of G(4)(b)(iii)(A) provides:

(iii) Sending Notice.

(A) The notice must be sent by means reasonably calculated to reach the potential claimant, including first-class mail, commercial carrier, or electronic mail.

to be sent by e-mail in circumstances where such notice is reasonable. To be sure, electronic mail has not yet replaced physical mail in business correspondence, but it certainly has made substantial inroads upon written correspondence both in business and in personal life. It has also been increasingly treated by private individuals, the business community, and government officials and attorneys as a generally reliable means of routine communication.

As one example, electronic mail is now the almost exclusive means of confirming wire transfers of billions of dollars every day between financial institutions all over the world. If e-mail can be relied upon for such a purpose, surely it should be possible, in at least some instances, to rely upon electronic mail to provide notice of a forfeiture action. Any rule written in the first decade of the twenty-first century that did not take into account this technological development would be blind to the realities of modern communications.

NACDL argues that no other rule or statute authorizes the use of electronic mail for the provision of notice. In fact, the electronic filing systems being used in bankruptcy courts, and prepared for use in federal district courts, permit parties to notify and serve other parties with pleadings by electronic mail, which may be generated at the time when the pleadings are filed, also electronically. In addition, Rule 5(b)(2)(D) of the Federal Rules of Civil Procedure specifically permits the service of papers other than the complaint in ordinary civil proceedings to be done by electronic means where the person served has consented in writing to such service. Rule 5(b)(3) provides, as an additional safeguard, that service by electronic means is not effective if the person making service learns that the attempted service did not reach the person to be served.

To be sure, electronic mail is not suitable for giving notice to all persons, including those without computers or without current e-mail addresses. If the Government chooses to rely upon e-mail notice as to certain persons in a particular case, it will do so subject to the requirement that notice be reasonably calculated to achieve actual notice to the intended recipient. In a situation suggested by NACDL, where the Government knows that it has seized the intended recipient's only computer, the use of e-mail would not be reasonable, and the Government would fall back on more traditional methods such as first class mail or Federal Express.

However, the fact that electronic mail is not suitable in some cases is no reason to bar its use in *all* cases. Where Government counsel knows that defense counsel, to whom notice is to be sent, regularly uses electronic mail, it would be reasonable for the Supplemental Rules to permit the Government to use that means of notifying counsel of a pending forfeiture.

NACDL makes the reasonable point that recipients are wary about e-mail attachments coming from strangers. Government attorneys relying upon e-mail notice would reasonably take such concerns into account, knowing that the efficacy of their notices could eventually be dispositive of their cases. If Government counsel were sending notice to a well-known colleague who was used to receiving attachments, counsel could send an attached notice. If the notice was going to a stranger (although, of course, it would have to be a person for whom a reasonably reliable e-mail address was available to the government attorney in the first place), the notice could be placed in the body of the e-mail message instead.

However, such fine detail is not the proper concern of generally applicable rules. As always, details determining what passes due process muster, and what does not, will be developed on a case by case basis, over time. For now, it is sufficient that electronic mail is an available, much used, generally reliable means of communication. It is reasonable to permit the use of this means to give notice in appropriate cases.

Since DOJ first responded to this objection, electronic case management and filing systems have gone into effect at U.S. courts around the country. A March 2004 fact sheet available at http://pacer.psc.uscourts.gov/documents/press.pdf states that such systems -- under which registered attorneys and interested parties are routinely served by each other and provided with notices of court action solely by e-mail -- are in operation in 42 district courts, 71 bankruptcy courts, the Court of International Trade, and the Court of Federal Claims.

For all of these reasons, electronic mail is properly included as one means of providing notice under G(4)(b)(iii)(A).

G(4)(b)(iii)(C)[11]

[11] The 1/9/04 draft of G(4)(b)(iii)(C) provides:

NACDL urges the Subcommittee to adopt "the bracketed language" in "G(4)(b)(iii)(A)," apparently referring to the bracketed phrase in what is now G(4)(b)(iii)(C): "Notice to a potential claimant who is incarcerated must be sent to the place of incarceration [by certified mail, return receipt requested]."

This issue was discussed at the December 9, 2003, Subcommittee meeting, as Professor Cooper explained in his notes on the meeting:

> Subparagraph (iii) describes the means of sending notice. The law is clear that it is enough to send notice. There is no need to ensure receipt. There is no need to require a return receipt. The list of methods in item (A) is properly described by "including"; means reasonably calculated to reach the potential claimant are not limited to first-class mail, commercial carrier, or electronic mail. The means of notice to an incarcerated person should be kept simple — it is better not to attempt to incorporate due process requirements by limiting the rule to persons incarcerated in facilities that have procedures that ensure personal receipt. The Committee Note should say that the rule does not attempt to define the due process constraints. Concern about internal prison distribution practices led to an even division on the question whether this item should require certified mail, return receipt requested. That option will be presented to the Advisory Committee for decision.

The government agrees with Professor Cooper's analysis of this issue. Due process is satisfied under *Dusenbery v. United States*, 534 U.S. 161 (2002), if the government mails notice to an incarcerated potential claimant at the facility where the potential claimant is being held, and the facility has adequate procedures for delivery of mail to prisoners. *See also Chairez v. United States,* 355 F.3d 1099 (7th Cir. 2004) (*Dusenbery* does not require inquiry into how each jail handles the mail; proof of delivery to the jail is all that is required).

The Government often uses certified mail, return receipt requested, as a means of notifying incarcerated potential claimants because the return receipt may be useful later as evidence of mailing and delivery at the prison and as a means of identifying the prison official who signed for the mail. However, it is neither necessary nor appropriate for the Supplemental Rules to mandate one particular means of notifying this one particular class of potential claimants, to the exclusion of all other reasonable means that may be employed in a given case.

(C) Notice to a potential claimant who is incarcerated must be sent to the place of incarceration [by certified mail, return receipt requested].

For example, it is sometimes possible for the government to hand-deliver notice of a civil forfeiture proceeding to a detained potential claimant during a court appearance in connection with a related criminal case. If the bracketed language were included in G(4)(b)(iii)(C), even such direct personal service would be ineffective.

For all of these reasons, the bracketed language should be deleted from G(4)(b)(iii)(C).

G(5)(a)[12]

NACDL seeks to "clarify" that the current provision in Rule "C(6)(b)(iii)" which authorizes an attorney to file a claim on behalf of the attorney's client be retained, and suggests adding such a provision to "G(5)(a)(1)."

In his notes on the December 9, 2003, meeting of the Subcommittee, Professor Cooper explained why such a provision -- which actually appears currently in C(6)(a)(ii) -- was not included in G(5):

> Subdivision (5) addresses responsive pleading. .... It was suggested that the direction to sign the claim under penalty of perjury should be

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[12] The 1/9/04 draft G(5)(a) provides:

> **(5) Responsive Pleadings.**
>
> > **(a) Filing a Claim.**
> >
> > > **(i)** A person who asserts an interest in the defendant property may contest the forfeiture by filing a claim in the court where the action is pending. The claim must:
> > >
> > > > **(A)** identify the specific property claimed;
> > > >
> > > > **(B)** identify the claimant and state the claimant's interest in the property;
> > > >
> > > > **(C)** be signed under penalty of perjury by the person making the claim;
> > > >
> > > > **(D)** be served on the government attorney designated under subdivision (4)(a)(ii)(C) or (b)(ii)(D).

supplemented by a provision similar to present C(6)(a)(ii). C(6)(a)(ii) requires an agent, bailee, or attorney to state the authority to file a statement of interest in or right against the property on behalf of another. But (5)(a) envisions a claim made by an entity that can act only through an agent. This is not a claim on behalf of another. It was agreed that the rule need not speak to a claim filed by an agent. The Committee Note will observe that only an authorized person can make a claim for an entity.

Rule G(5)(a)(i)(C) requires that claims "be signed under penalty of perjury by the person making the claim." Where the "person" claiming is an entity, a duly authorized officer, attorney, or agent must, as a practical matter, sign the claim on the entity's behalf, as Professor Cooper explained. However, where the claimant is an individual, it is not appropriate for an attorney lacking personal knowledge to attest to the facts supporting the claim under the pains and penalties of perjury. In such cases, G(5)(a)(i)(C) properly requires the individual claimant to sign the claim.

G(5)(b)[13]

NACDL has two objections to G(5)(b). (1) It argues that the 20-day period for filing an answer after filing of a forfeiture claim should be tolled during the pendency of Rule 12(b) motions; and (2) it objects to the requirement that the claimant state any objections to in rem jurisdiction or to venue in the answer, or be deemed to have waived them. For the reasons explained below, both objections are without merit.

(1) The 20-Day Answer Requirement

NACDL argues that G(5)(b) should cross-refer to Fed. R. Civ. P. 12. NACDL particularly intends the cross-reference to include Rule 12(a)(4), which tolls the time for answering ordinary civil complaints during the pendency of certain motions made under Rule 12(b). NACDL proposes to accomplish this by inserting the underlined language in G(5)(b), as follows:

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[13] The 1/9/04 draft G(5)(b) provides:

(b) Answer. A claimant must serve and file an answer to the complaint within 20 days after filing the claim. A claimant waives an objection to in rem jurisdiction or to venue that is not stated in the answer.

(b) Answer. A claimant must serve and file an answer to the complaint, or a responsive pleading pursuant to Fed. R. Civ. P. 12, within 20 days after filing the claim. A claimant waives an objection to in rem jurisdiction or to venue that is not stated in the answer.

In support of its argument, NACDL argues that the Subcommittee and Professor Cooper have "confused" the claim, which, NACDL says, fully sets forth the bases for the claimant's asserted interest in the res, and the answer, which, according to NACDL, "generally adds no new information regarding the claimant's interest in the property." As evidence of this "confusion," NACDL quotes a small portion of the lengthy August 19, 2003, conference call notes by Professor Cooper on this issue, which arose at that time during discussion of what was then designated as G(7)(b)(i).[14]

In its discussions of G(2)(b) during the December 9, 2003, meeting, the Subcommittee indicated that it intended to enforce the 20-day answer requirement, as Professor Cooper noted:

> Subparagraph (b) requires that an answer be served and filed within 20 days after filing the claim. It was agreed that both service and filing should be accomplished within these 20 days.

Whether to require that a claimant answer the complaint before moving under Rule 12(b) was discussed again during a later portion of the December 9, 2003, Subcommittee meeting, in the context of G(8), dealing with motion practice. Professor Cooper's notes of the meeting reflect a lack of consensus on the issue, although, contrary to NACDL's argument, there was no confusion over the difference between "claim" and "answer."[15]

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[14] The July 18, 2003, draft of G(7)(b)(i) provided:

> **(b) Motion to Dismiss the Complaint.** (i) A party with standing to contest the forfeiture action may, at any time after filing a claim and answer, move to dismiss the complaint under Rule 12(b).

[15] In pertinent part, Professor Cooper's Notes say the following:

> Further discussion reopened the question whether a claimant should be able to seek dismissal before filing an answer. The Third Circuit has taken this view under the present rules, see U.S. v. $8,221,877.16, 3d Cir.2003, 330 F.3d 441. Claimants surely will want this approach to continue in Rule

The present draft of Rule G(5)(b) leaves to the courts to decide whether to follow or reject United States v. $8,221,877.16 in U.S. Currency, 330 F.3d 141, 149-57 (3d Cir. 2003) (Rule 12(a)(4) tolling applied in civil forfeiture case; Rule 12(a)(4)'s tolling of deadline to file answer upon timely filing of motion under Rule 12(b) was "not inconsistent" with Supp. Rule C(6)(a)(iii)'s requirement that answers in civil forfeiture cases be filed within 20 days after claim is filed); see also United States v. One Sentinel Arms Striker-12 Shotgun, Civil No. 03-886-MA (D. Ore. 1/22/2004) (citing U.S. v. $8,221,877.16 decision as authority for applying 12(a)(4) tolling, but holding tolling not applicable where 12(b) motion was not filed until after 20-day answer period had expired, and answer was filed more than 10 days after court had denied motion).

The Subcommittee should not leave this issue hanging. It should make clear that the 20-day answer deadline is not tolled upon filing of a motion under Rule 12(b) to avoid a conflict with plain language adopted by Congress in CAFRA.

Because U.S. v. $8,221,877.16 was a pre-CAFRA case, the Third Circuit focused exclusively upon determining whether, under Supp. Rule A, tolling during the pendency of a Rule 12(b) motion pursuant to Rule 12(a)(4) was "inconsistent" with Supp. Rule C(6)(a)(iii)'s requirement that answers to forfeiture complaints be filed within 20 days after forfeiture claims are filed. The Subcommittee's discussions have also focused on "consistency" and upon practical considerations peculiar to civil forfeiture that weigh for or against applying Rule 12(a)(4)'s tolling provision.

However, in CAFRA, Congress explicitly codified the requirement that, in civil forfeiture cases subject to CAFRA, "A person asserting an interest in seized

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G. It will be argued that it may be easier to conclude that the court lacks jurisdiction or that a claim has not been stated than to resolve a difficult question of standing. The government, moreover, may fairly be asked to select a court that has jurisdiction and to plead a claim that would support forfeiture. And in any event, if a claimant has standing to contest forfeiture, why should an answer be required? The government interest could be addressed by limiting a motion to dismiss to a claimant that establishes standing. This could be coupled with a provision in subdivision (8)(c) that requires decision of a government motion to strike a claim before deciding the claimant's motion to dismiss. One variation would be to give priority to a government motion to strike based only on the face of the pleadings.

property ... shall file an answer to the Government's complaint for forfeiture not later than 20 days after the date of the filing of the claim." 18 U.S.C. § 983(a)(4)(B) (emphasis added). In its notes on the 2002 amendments to Supp. Rule C, the Advisory Committee specifically noted this statutory requirement, and amended Rule C(6)(a)(iii) to adhere to the requirement and to notify claimants of it:

> Rule C(6)(a)(iii) is amended to give notice of the provision enacted by 18 U.S.C. § 983(a)(4)(B) that requires that the answer in a forfeiture proceeding be filed within 20 days. Without this notice, unwary litigants might rely on the provision of Rule 5(d) that allows for a reasonable time for filing after service.

Advisory Committee note on 2002 Amendments to Supp. Rule C (emphasis added).

It would be inappropriate for the Subcommittee to adopt the pre-CAFRA reasoning of the Third Circuit in U.S. v. $8,221,877.16 as urged by NACDL, contrary to the clear language of 18 U.S.C. § 983(a)(4)(B), by creating a Rule 12(b) motion tolling exception to the plain 20-day answer requirement codified by CAFRA.

Accordingly, the present language of draft G(5)(b) should be retained. To avoid any possible confusion or further litigation on this issue, the Subcommittee should add an advisory note explaining that the enactment of 18 U.S.C. § 983(a)(4)(B) in CAFRA prevails over U.S. v. $8,221,877.16, and that Rule 12(a)(4) tolling does not apply in civil forfeiture cases.

(2) Timely Venue/Jurisdiction Objection Requirement

NACDL continues to object to the requirement of G(5)(b) that objections to venue and in rem jurisdiction be waived if not stated in the answer. NACDL argues that a claimant may not have all of the facts necessary to object within the 20-day answer period.

This issue was discussed at some length at the December 9, 2003, Subcommittee meeting, as noted by Professor Cooper:

> .... The draft provides that a claimant waives an objection to in rem jurisdiction or to venue that is not stated in the answer. The Department of Justice wants this draft to be read to exclude a pre-answer motion to

dismiss for lack of in rem jurisdiction or for improper venue. It also wants to exclude these objections after the answer is filed. But it was asked whether in rem jurisdiction objections involve a matter of subject-matter jurisdiction that can be raised at any time. It was asserted that waiver is possible. And raising the objection on the eve of trial is too late. It should be required early-on. But uncertainty was expressed on this score. It may be that there is no Article III case or controversy if there is nothing that a judgment can be directed to. One approach would be to retain the rule language but observe in the Committee Note that waiver of in rem jurisdiction may be possible in some circumstances. An alternative would be to limit the rule to a statement that the answer must state any objection to in rem jurisdiction without referring to waiver. It was pointed out that even if the rule does state that an objection is waived if not stated in the answer, Rule 15 allows amendment of the answer. The result is that amendment is possible as a matter of course only for a brief period. After that amendment is available only if the court is persuaded that it should be allowed. That was accepted as sufficient basis to adopt a rule stating that an in rem jurisdiction objection is waived. But further research should be done to support a well-informed Committee Note statement about the possibility of waiver.

The Subcommittee struck a reasonable balance with the present draft of this provision, by including the object-or-waive requirement, but also noting that in appropriate cases, Rule 15 may permit an amendment of the answer to add these objections.

In response to the Subcommittee's question, the waivability of in rem jurisdiction is well established. Although litigants may generally raise issues of subject matter jurisdiction at any point in a pending civil proceeding, either in the district court, or even in the appellate courts, *Kontrick v. Ryan*, ___ U.S. ___, 124 S. Ct. 906, 915 (2004), in rem jurisdiction is "far more analogous" to personal jurisdiction than it is to subject matter jurisdiction. *Porshe Cars North American, Inc. v. Porshe.Net*, 302 F.3d 248, 256 (7th Cir. 2002) (citing *United States v. 51 Pieces of Real Property*, 17 F.3d 1306, 1309 (10th Cir. 1994); *United States v. Republic Marine, Inc.*, 829 F.2d 1399, 1401 n.1 (7th Cir. 1987), and other authorities describing in rem jurisdiction as a form of jurisdiction "over the parties"). Personal jurisdiction is waived absent timely objection. *Porshe Cars North American, Inc. v. Porshe.Net*, 302 F.3d at 256, Fed. R. Civ. P. 12(b)(2), 12(h)(1). Accordingly, "in admiralty and civil forfeiture cases, for years courts have held that objections to in rem jurisdiction may be waived." *Porshe Cars North American, Inc. v. Porshe.Net*, 302 F.3d at 256 (citing cases, including

United States v. Republic Marine, Inc., 829 F.2d at 1401-05 (barge waived in rem jurisdiction in admiralty case)).

In ordinary civil cases, objections to personal jurisdiction and venue are waived unless they are timely raised. Fed. R. Civ. P. 12(h)(1) (objections to personal venue waived if not made in timely motion under Rule 12(b) or included in responsive pleading or amendment thereof permitted by Rule 15(a) to be made as a matter of course). It is appropriate that a similar timeliness requirement apply to objections to in rem jurisdiction and venue in civil forfeiture cases. The present language should be retained.

G(6)[16]

NACDL objects to the amounts of time allotted to the government to serve special interrogatories (up to 20 days after service on the government of a motion to dismiss) and to respond to motions to dismiss (up to 20 days after claimant answers special interrogatories). NACDL argues that prosecutors have "canned" "simple form" standing interrogatories on their word processors that can be punched up and served within 5 days, and that 10 days is "more than ample" for prosecutors to respond to motions to dismiss. In support of these much shorter time periods than those set forth in the current draft, NACDL argues further that

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[16] The 1/9/04 draft of G(6) provides:

(6) Special Interrogatories.

(a) Time and Scope. The government may serve special interrogatories under Rule 33 limited to the claimant's identity and relationship to the defendant property, the claimant's relationship to any bailor identified by the claimant, and such bailor's relationship to the defendant property. The government may serve the interrogatories without leave of the court at any time after the claim is filed and before discovery is closed. But if the claimant serves a motion to dismiss the action, the government must serve the interrogatories within 20 days after the motion is served.

(b) Answers, Objections. Answers or objections to these interrogatories must be served within 20 days after the interrogatories are served.

(c) Response Deferred. The government need not respond to a claimant's motion to dismiss the action under subdivision (8)(b) until 20 days after the claimant has answered these interrogatories.

careful thought, and that the interrogatory answers will arrive too close to the motion response deadline for careful review and consideration.

The times periods now set forth in G(6) are fair and reasonable, and should be retained.

G(7)(b)(i)(C)[17]

NACDL objects to G(7)(b)(i)(C), which sets forth one circumstance, in a non-exclusive list of various circumstances, under which the court may rule that interlocutory sale of forfeitable property is appropriate. G(7)(b)(i)(C) would permit a court to order interlocutory sale of property where the owner is in default on a mortgage or real estate taxes.

As the government explained in an earlier submission to the Subcommittee:

> The provision [now appearing as G(7)(b)(i)(C)] was added because defaults on mortgages and real estate taxes are a major source of problems in the forfeiture of real property. Property owners who expect to lose their properties to forfeiture have little incentive to continue paying their real estate taxes and to continue paying off their mortgages. Thus, in effect, owners often abandon their properties to the mortgagees and taxing agencies. However, mortgagees and taxing agencies are usually barred from exercising their rights to foreclose upon real property while the property is the subject of forfeiture proceedings. *See, e.g., In re Newport Savings and Loan Association*, 928 F.2d 472, 479-80 (1st Cir. 1991) (mortgagee barred from proceeding against real property unless it posts a bond equal to the full value of the forfeitable equity).

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[17] The 1/9/04 draft of G(7)(b)(i)(C) provides:

(b) Interlocutory Sale or Delivery.

(i) **Order to Sell.** On motion by a party or a person having custody of the property, the court may order all or part of the property sold, if:

(C) the property is subject to a mortgage or to taxes on which the owner is in default ....

> In such cases, interlocutory sale is often warranted to preserve the status quo by preserving the equity in the property either for forfeiture or for return to the property owner, while also permitting the mortgagee and taxing agency to obtain the payments to which they are entitled.

NACDL argues that this provision would be unfair in a case where "virtually all of the assets of a claimant have been seized, thus making it impossible for the claimant to continue to pay mortgages and taxes when due," particularly "if the property is a residence."

Under CAFRA, which codified *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993), real property is rarely seized prior to forfeiture in civil forfeiture cases. See 18 U.S.C. §§ 981(b)(1), 985(d). In any event, if a claimant alleges that government seizures of forfeitable assets have made it "impossible" for the claimant to keep up with a real property mortgage or tax payments, the claimant would be free to present that argument to the court either in support of a motion for release of seized property because of hardship, 18 U.S.C. § 983(f), or in opposition to a motion by a creditor-claimant, or by the government, for an interlocutory sale. The court would then decide, in its discretion, whether, under the circumstances, an interlocutory sale should be ordered.

NACDL further argues that making mortgage or tax payments as to potentially forfeitable (usually real) property is "throwing good money after bad" and that the government should be required to reimburse the claimant for any such payments made after the commencement of the forfeiture proceeding in the event the government prevails and the property is forfeited. Stated differently, NACDL apparently believes that a drug dealer, for example, who is living in a residence that was purchased with drug money, or that was used to facilitate the drug offense, should be allowed to live in the residence tax free and without any mortgage obligations for months if not years as the forfeiture case remains pending in court, leaving the mortgagee with no means of collecting the principal and interest owed, and leaving the Government with the tax bill should it succeed in the forfeiture case. We see no merit in a rule that would endorse such an abuse of the legal process.

In any event, this argument, and the new remedy that NACDL now seeks, raise issues beyond the scope of the Supplemental Rules. The disposition of the proceeds of forfeited property is controlled by the applicable forfeiture statutes. *E.g.*, 18 U.S.C. § 981(e).

Property owners' obligations to pay loans secured by mortgages, and their obligations to pay taxes, exist independently and outside of the forfeiture laws. Taxing authorities and mortgage loan creditors also have rights to collect payments due to them, and to take action -- which may be limited or blocked during the pendency of forfeiture proceedings -- against property when debtors are in default. There is no right to pay one's personal obligations with forfeitable property, Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 626, 628 (1989); nor is it unfair to require claimants, particularly those who continue to have the use and occupancy of forfeitable real property during the pendency of forfeiture proceedings, to continue to meet their obligations to their mortgagees, taxing authorities, and other third parties with respect to that property.

G(8)(c)[18]

NACDL objects to G(8)(c) because it permits the government to move to strike a claim or answer at any time before trial, arguing that the provision is "asymmetrical" with the requirements elsewhere in Rule G that claimants timely object to in rem jurisdiction, venue, and alleged unconstitutional excessiveness.

That the government should be permitted to move to strike a claim or answer at any time before trial is appropriate. Contrary to NACDL's arguments, the listed bases for moving to strike are not mere technicalities, and may only become evident to the government as the result of discovery. A motion to strike

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[18] The 1/9/04 draft of G(8)(c) provides:

(c) Motion to Strike a Claim or Answer.

(i) At any time before trial, the government may move to strike a claim or answer:

(A) for failure to comply with subdivisions (5) or (6); or

(B) because the claimant lacks standing to contest the forfeiture.

(ii) The government's motion must be decided before any motion by the claimant to dismiss the action.

(iii) If, because material facts are in dispute, a motion pursuant to (i)(B) cannot be resolved on the pleadings, the court must conduct a hearing where the claimant has the burden of establishing standing based on a preponderance of the admissible evidence.

for failure to comply with the special interrogatory provision, G(6), is roughly comparable to a motion for dismissal as a discovery sanction under Fed. R. Civ. P. 37. Other forms of permitted motions to strike are comparable to civil motions under Fed. R. Civ. P. 12(b)(6), which may be filed at any time, even during a trial on the merits. Fed. R. Civ. P. 12(h)(2).

There is no unfair or unusual "asymmetry" in this provision. As explained above, the raise-or-waive requirement as to objections to venue and in rem jurisdiction are comparable to similar provisions requiring that personal jurisdiction and venue be timely raised or waived in ordinary civil cases. Fed. R. Civ. P. 12(h)(1). The G(8)(e) requirement that unconstitutional excessiveness be alleged in the answer is consistent with Rule 8(c), which requires that parties "set forth affirmatively [in their responsive pleading] ... any ... matter constituting an avoidance or affirmative defense." Fed. R. Civ. P. 8(c) (emphasis added).

G(8)(c) is reasonable and should be retained.

G(8)(d)(iii)[19]

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[19] The 1/9/04 draft of G(8)(d) provides:

(d) Petition for Release of Property Pending Trial.

(i) If the United States or a contractor of a United States agency holds property for judicial or nonjudicial forfeiture, a person who has filed a claim to the property may petition for release of the property under 18 U.S.C. § 983(f).

(ii) If a petition for release is filed before a judicial forfeiture action has been filed against the property, the petition may be filed either in the district where the property was seized, or in the district where a warrant for the seizure of the property issued. If a judicial forfeiture action against the property is subsequently filed in another district – or if the Government shows that the action will be filed in another district – the petition may be transferred to that district in accordance with the standards applicable to a change of venue for a civil action under 28 U.S.C. § 1404.

(iii) In an action to which 18 U.S.C. § 983(f) applies, a petition under § 983(f) is the sole means to seek return of property to the claimant's custody pending trial, and Federal Rule of Criminal Procedure 41(g) does not apply.

In G(8)(d), concerning petitions for release of property pending trial, NACDL objects to subsection (iii), which provides that "In an action to which 18 U.S.C. § 983(f) applies, a petition under § 983(f) is the sole means to seek return of property to the claimant's custody pending trial, and Federal Rule of Criminal Procedure 41(g) does not apply."

This provision was discussed at some length during a conference call on December 1, 2003, as noted by Professor Cooper:

> The first issues were raised by G(8)(d), as designated in the November 12 draft, dealing with a motion to release property. This paragraph reflects the remedy provided by CAFRA in 18 U.S.C. § 983(f). Section 983(f) establishes a right to "immediate release of seized property" pending a final forfeiture judgment based on hardship to the claimant. Release may be sought only by a claimant — there at least must have been a claim addressed to the agency that holds the property. Typical hardship grounds are reflected in § 983(f)(1)(C): continued government possession will prevent the functioning of a business, prevent an individual from working, or leave an individual homeless. Although § 983(f) creates the remedy, it does not describe appropriate procedures.
> ....
> ... Before § 983(f) was adopted, some courts allowed use of what then was Criminal Rule 41(e) to seek return of property that had been seized for forfeiture. The basic theory was that the courts should exercise "anomalous jurisdiction" through Rule 41(e) because the government otherwise could retain property indefinitely without affording any opportunity to seek return by initiating a judicial forfeiture proceeding. ....
>
> Further discussion suggested that this provision should be revised to say that § 983(f) is the only means to petition for release of property held for forfeiture under a statute that is covered by CAFRA procedures. There is a "constant flow" of Rule 41 motions by petitioners who fail to satisfy § 983(f) requirements. Making § 983(f) exclusive relies on the view that § 983(f) is intended to foreclose reliance on Rule 41(g) as an alternative remedy when the petitioner has failed to satisfy § 983(f) requirements. Rule 41(g) was invoked in its earlier embodiment as Rule 41(e) as an equitable remedy allowed in the absence of an adequate legal remedy.

> **(iv)** No petition for release may be made under this subdivision in an action exempted from the Civil Asset Reform Act of 2000 by 18 U.S.C. § 983(i).

> Section 983(f) now provides an adequate legal remedy. Criminal Rule 1(a)(5)(B), moreover, states that a civil property forfeiture proceeding for violating a federal statute is not covered by the Criminal Rules. Its former embodiment in Criminal Rule 54(b)(5) did not oust application of former Rule 41(e), perhaps because an independent Rule 41(e) [now (g)] proceeding is not itself a civil property forfeiture proceeding. Nonetheless, there is an indication of purpose that bolsters the argument for making § 983(f) the exclusive means to release property seized under a CAFRA-covered statute. To ensure that Rule 41(g) is not invoked, the second sentence should be retained in revised form. The revision will say only that Criminal Rule 41(g) cannot be used to seek return of property held for forfeiture under a statute that falls within § 983(f)....
>
> For property held by the government for forfeiture under a statute carved out from CAFRA, on the other hand, it seems unwise to attempt to overrule the pre-CAFRA cases recognizing an "anomalous jurisdiction" remedy under Criminal Rule 41. Rule G will not address those cases. But it may be desirable to add a Committee Note statement that Rule G does not imply any position on the availability of Rule 41(g).

G(8)(d)(iii) was not specifically discussed during the December 9, 2003, meeting of the Subcommittee. In his notes on that meeting, Professor Cooper included the following as to G(8)(d)(iii):

> This subparagraph was provided in response to conference call discussions and was not independently reviewed. If it stays in this form, the Committee Note should say that Rule G(8)(d) does not address "anomalous jurisdiction" Rule 41(g) motions in proceedings that are not subject to § 983(f)."

NACDL objects to G(8)(d)(iii) to the extent that it would preclude the filing of motions under Criminal Rule 41(g) to return unconstitutionally seized property during the time between seizure and commencement of civil forfeiture proceedings. After such proceedings have commenced, NACDL appears to agree that the return of property remedy available under 18 U.S.C. § 983(f) is exclusive, at least in civil forfeiture cases covered by CAFRA.

Whatever merit NACDL's objections might have had in the pre-CAFRA world, they have little merit now. In cases to which CAFRA applies, the forfeiture action must be commenced within 60 days of the seizure. Moreover, the hardship provision in Section 983(f) applies during that 60-day period. Thus if the

alleged "unconstitutional" seizure is causing the claimant a hardship, he has a remedy.

This leaves NACDL with an objection that arises 1) only in the first 60 days after a seizure, and 2) only in non-hardship cases. There seems to be no reason why a person not suffering any hardship cannot wait 60 days to raise a constitutional objection to the forfeiture action via the remedies available under CAFRA. What NACDL is seeking is an alternative remedy to apply when the provisions that Congress authorized in CAFRA are unappealing or unsatisfactory to the claimant. But as we have pointed out many times before, the courts remain unsympathetic to the notion that a new equitable remedy must be found to supplement what Congress has done in crafting a comprehensive body of due process protections for civil forfeiture cases.[20]

G(8)(e)[21]

NACDL reiterates its objection, also raised with respect to G(8)(c), to the requirement that claimants plead unconstitutional excessiveness in their answers

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[20] We have cited the voluminous case law on Rule 41(g) motions before. The most recent cases, citing to CAFRA's comprehensive scheme to protect the due process rights of claimants as the preferred remedy, include the following: *$8,050.00 in U.S. Currency v. United States,* ___ F. Supp. 2d ___, 2004 WL _____, No. 1:03 MC 99 (N.D. Ohio Feb. 25, 2004) (comprehensive provisions enacted by CAFRA in Section 983(a) give claimant an adequate remedy at law for contesting a civil forfeiture; thus, once the Government commences administrative forfeiture, the Rule 41(g) motion must be dismissed; claimant's argument that he filed his motion first is without merit); *United States v. Douleh*, No. 03-M-4033P (W.D.N.Y. July 3, 2003) (Magistrate's Report and Recommendation) (claimant cannot use Rule 41(g) to seek return of his property based on an illegal seizure; his remedy is to file a motion to suppress; Rule 1(a)(5)(B) makes clear that Rule 41(g) does not apply to civil forfeiture cases).

[21] The 1/9/04 draft G(8)(e) provides:

> **(e) Excessive Fines.** A claimant may seek to mitigate a forfeiture under the Eighth Amendment Excessive Fines Clause by motion for summary judgment or by motion made after entry of a forfeiture judgment if:
>
> (i) the claimant has pleaded the defense under Rule 8(c), and
>
> (ii) the parties have had the opportunity to conduct civil discovery on the defense.

to forfeiture complaints along with all other defenses to the complaint, as required by Fed. R. Civ. P. 8(c). As explained above, the requirement that unconstitutional excessiveness be alleged in the answer is consistent with Rule 8(c)'s broad and comprehensive requirement that parties "set forth affirmatively [in their responsive pleading] ... any ... matter constituting an avoidance or affirmative defense." Fed. R. Civ. P. 8(c) (emphasis added).

NACDL argues that specifically naming excessiveness in Rule G as one of the defenses that must be alleged in the answer constitutes "singling out this defense for special adverse treatment" and thereby creating a "trap" for unwary claimants.

Just the opposite is true. Specifically naming this defense in Rule G(8)(e) plainly alerts forfeiture claimants to its availability, and also reminds them of the need to plead it in their answers in appropriate cases. They would be required to do so in any event by the comprehensive pleading requirement of Civil Rule 8(c). G(8)(e) should be retained.

Conclusion

This concludes our response to NACDL's comments. We look forward to the conference call on March 12, 2004.

Respectfully Submitted,

LESTER JOSEPH
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March 11, 2004

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Re: Department of Justice's Response to NACDL
Comments on Proposed Supplemental Rule G

Dear John:

Thank you for forwarding Mr. Smith's letter regarding Rule G. We note that he focuses most of his attention on the provision in Rule G(8)(d)(iii) stating that Section 983(f) is the "sole means to seek return of property to the claimant's custody pending trial." As we noted late last year in responding to another set of comments, "Inclusion of this paragraph is of the utmost importance to law enforcement and is one of the highest priorities of the Department of Justice in proposing Rule G."

As we have discussed, members of the subcommittee might not have ready access to all of DOJ's prior comments on this provision. Hence, in anticipation of tomorrow's telephone conference, I have attempted to assemble them here.

Last December, we advised the Subcommittee as follows with respect to the need for the provision in Rule G(8)(d)(iii):

> As we have explained previously, prior to CAFRA, courts generally ruled that Rule 41(g) (previously Rule 41(e)) could not be used to seek the release of property once a forfeiture case was filed, because the claimant in such case had an adequate remedy at law, but some courts exercised "anomalous jurisdiction" over such motions in order to relieve a hardship in instances where there was a delay in instituting forfeiture proceedings. CAFRA rendered the exercise of anomalous jurisdiction unnecessary in two ways: by specifically providing for hardship petitions under Section 983(f), and

by setting strict time limits on the initiation of forfeiture proceedings. Thus, in our view, and in the view of the courts that have addressed this issue,[1] there is no longer any basis for exercising jurisdiction over a Rule 41(g) motion in a civil forfeiture case. The defense bar, however, continues to take the contrary view, filing Rule 41(g) motions in an attempt to evade the clear procedures that CAFRA has set forth. An unambiguous statement in Rule G(8) is needed to make certain, as Rule 1(b)(5) provides, that Rule 41(g) simply does not apply in forfeiture cases that are governed by CAFRA.

The reference in those comments to our previous explanation of this provision was to the response we gave more than a year ago to NACDL's earlier set of comments. At that time we said the following:

> NACDL also pointed out that the Rule, as previously drafted, did not make it explicit that a motion for the release of property to avoid a hardship is the exclusive ground for seeking the pre-trial return of the property to the claimant's custody, or that Rule 41(e) of the Criminal Rules does not apply to civil forfeiture matters once a verified complaint is filed. That omission has been rectified.
>
> The latter provision of Subsection [d] is necessary to address confusion caused by the pre-CAFRA case law. Before Section 983(f) was enacted in 2000, some courts treated motions for the pre-trial release of property in civil forfeiture cases as motions filed pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure. In doing so, the courts evidently thought it necessary to exercise "anomalous jurisdiction" in order to avoid the hardship caused by the Government's delay in instituting formal forfeiture proceedings.[2] But

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[1] *See United States v. Douleh*, No. 03-M-4033P (W.D.N.Y. July 3, 2003) (Magistrate's Report and Recommendation) (Section 983(f) is the exclusive remedy for seeking release of property prior to trial; claimant's remedy for an illegal seizure is filing a motion to suppress; Rule 41(g) motion dismissed).

[2] *See In the Matter of the Seizure of One White Jeep Cherokee*, 991 F. Supp. 1077 (S.D. Iowa 1998) (court exercises anomalous jurisdiction because seizure has effectively shut down claimant's business, and delay in instituting civil forfeiture action leaves claimant no remedy at law; but court holds that four-month delay since time of seizure does not violate due process, given the Government's need to avoid jeopardizing ongoing criminal investigation); *In Re McCorkle*, 972 F. Supp 1423 (M D.

in adopting the standards set forth in Rule 41(e), the courts confused the legality of the seizure, which is the issue in Rule 41(e) motions, with the hardship suffered by the claimant as result of the pre-trial seizure of his property.

The legality of the seizure is the proper subject of a motion to suppress . . . , but it has no bearing on the claimant's hardship motion under [Section 983(f)]. Property may be released to the claimant pending trial if the requirements of Section 983(f) are met whether or not the seizure was illegal; conversely, the illegality of a seizure is not a ground for the release of the property under Section 983(f). Nor may a claimant use Rule 41(e) to gain the release of his property in a civil forfeiture case: that equitable remedy is not available when the claimant has an adequate remedy at law, namely contesting the forfeiture action at trial.[3]

Fla. 1997) (seizure of property without filing civil or criminal forfeiture action allows court to exercise anomalous jurisdiction to avoid manifest injustice that would result if the Government seized property without probable cause; motion denied upon finding that probable cause was established); *In re: FBI Seizure of Cash and Other Property From Edwin W. Edwards*, 970 F. Supp. 557 (E.D. La. 1997) (where the claimant files a Rule 41(e) motion between the time of the seizure and the Government's filing of a forfeiture complaint, the motion will be stayed for 60 days to give the Government an opportunity to file); *United States v. U.S. Currency in the Amount of $146,800*, 1997 WL 269583 (E.D.N.Y. 1997) (the Government generally not required to establish probable cause pre-trial, but where there is undue delay in filing the complaint, a finding of lack of probable cause may result in return of the property to the claimant pending trial).

[3] *See Rodriguez v. United States Department of Justice*, 2001 WL 180127 (2nd Cir. 2001) (Table) (once a forfeiture proceeding is commenced, the claimant has no opportunity or occasion to contest the illegal seizure of his property (other than by filing a motion to suppress evidence); claimant's remedy is to contest the forfeiture action itself on the merits); *United States v. One 1974 Learjet*, 191 F.3d 668 (6th Cir. 1999) (once the Government serves notice of a forfeiture action on the claimant, the claimant's only remedy is to contest the forfeiture on the merits; he may not file a Rule 41(e) motion); *United States v. One 1987 Jeep Wrangler*, 972 F.2d 472 (2d Cir. 1992); *United States v. U.S. Currency in the Amount of $146,800*, 1997 WL 269583 (E.D.N.Y. 1997) (Rule 41(e) motion not appropriate vehicle for challenging legality of seizure where claimant has adequate remedy at law; *i.e.*, contesting the forfeiture in the civil forfeiture case); *In Re Motion for Return of $61,412.00 in U.S. Currency*, No. 00-CV-6654 (ARR) (E.D.N.Y. Dec. 21, 2000) (unpub.) (once Government files civil forfeiture complaint, court lacks jurisdiction to consider Rule 41(e) motion based on Fourth Amendment violation, unless Claimant would suffer irreparable harm and lacks an

NACDL evidently disagrees with this long-standing rule. "Contrary to the view of many courts," they say, Rule 41(e) motions should be permitted even though formal forfeiture proceedings have been commenced. Troberman Letter at 24. But the "many courts" — indeed the vastly overwhelming majority of courts — that decline to exercise jurisdiction over Rule 41(e) motions in this context are correct. Once forfeiture proceedings are commenced, the claimant has an adequate remedy at law and hence cannot seek equitable relief under Criminal Rule 41(e) or by asking the court to assert "anomalous jurisdiction." Now that there is a formal procedure for dealing with the hardship cases, as well as a set of strict deadlines for commencing forfeiture actions once property has been seized,[4] there is no reason for a court to exercise "anomalous jurisdiction" to grant equitable relief when forfeiture litigation in a federal court has already commenced.

Given the overwhelming case law stating that challenges to the forfeitability of the property cannot be raised pre-trial, it might seem to be unnecessary to codify that law in Rule G. But NACDL's comments make it abundantly clear that some claimants will continue to seek opportunities to challenge the rule no matter how many courts adopt it until the Rules of Procedure close the door on such endeavors.

Furthermore, last summer, in response to Judge Kyle's request for a summary of outstanding issues, we provided the following with respect to what is now Rule G(8)(d)(iii):

> NACDL also objected that nothing in Section 983(f) provides that a hardship petition is the "exclusive means for seeking the return of property to the custody of the claimant pending trial." Rule G(7)(e)(iii). NACDL takes the view that apart from any considerations regarding hardship that are addressed by Section 983(f), a claimant should have the right to seek the release of

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adequate remedy at law).

[4] *See In Re Motion for Return of $61,412 00 in U.S Currency*, No. 00-CV-6654 (ARR) (E.D N.Y. Dec. 21, 2000) (unpublished) (any due process concern that might result from forcing claimant to litigate her Fourth Amendment claim in the forfeiture proceeding, instead of pursuant to a Rule 41(e) motion, is mitigated by the Government's prompt filing of its complaint).

property under Rule 41(g) of the Criminal Rules.

> DOJ responds that Rule 41(g) does not apply to civil cases, *see* Rule 1(b)(5); that the case law clearly holds that Rule 41(g) is an equitable remedy that does not apply when the claimant has an adequate remedy at law – i.e., contesting the forfeiture by filing a claim and answer, *see, e.g., United States v. One 1987 Jeep Wrangler*, 972 F.2d 472 (2d Cir. 1992); and that the few courts that departed from that rule prior to CAFRA by exercising "anomalous jurisdiction" did so because of the absence of any hardship provision – an omission that CAFRA has now cured, *see United States v. Douleh*, No. 03-M-4033P (W.D.N.Y. July 3, 2003) (Magistrate's Report and Recommendation) (Section 983(f) is the exclusive remedy for seeking release of property prior to trial; claimant's remedy for an illegal seizure is filing a motion to suppress; Rule 41(g) motion dismissed).

All of this may be summarized succinctly as follows. Rule 41(g) provides an equitable remedy that is not available when the claimant has an adequate remedy at law. CAFRA has given claimants two such remedies: there are now strict time limits on when the Government must commence a civil forfeiture action, *see* 18 U.S.C. § 983(a)(1) and (3), and for claimants who would suffer a hardship while those time limits were pending, there is a "hardship" provision in Section 983(f).

NACDL evidently does not like the hardship provision. It is loaded with exceptions and balancing tests reflecting a hard-fought legislative compromise between what NACDL originally sought (and the House passed) and what was passed by the Senate and enacted into law.[5] But the fact that a litigant does not

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[5] Senator Leahy, a key participant in the legislative process that resulted in CAFRA, remarked on this compromise when CAFRA was passed in the Senate:

> Release of property for hardship. The substitute will allow a property owner to hold on to his property pending the final disposition of the case, if he can show that continued possession by the government will cause the owner substantial hardship, such as preventing him from working, and that this hardship outweighs the risk that the property will be destroyed or concealed if returned to the owner during the pendency of the case. Unlike H.R. 1658, the substitute adopts the primary safeguards that the Justice

agree with the contours of the legal remedy that Congress has enacted does not mean that the he or she does not have "an adequate remedy at law" for purposes of deciding if a court should exercise equitable jurisdiction.

In this instance, Congress has set forth the scope and limitations of the grounds for obtaining release of property pending trial in a civil forfeiture case. NACDL thinks that the grounds for relief should be broader, and it wants to be able to avail itself of Rule 41(g) to seek such broader relief during the time when, according to CAFRA, the Government is preparing its civil forfeiture case. In our view, Rule G should not be used to undermine CAFRA or to create grounds for relief that Congress – after much deliberation – chose not to provide.

The case law remains overwhelmingly one-sided in denying relief under Rule 41(g) once administrative forfeiture proceedings — not just judicial forfeiture proceedings – have commenced. Some of the leading pre-CAFRA cases are set forth in the margin.[6] NACDL complains that "DOJ hasn't cited a case holding that

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> Department wanted added to the provision - that property owners must have sufficient ties to the community to provide assurance that the property will not disappear, and that certain property, such as currency and property particularly outfitted for use in illegal activities, shall not be returned.

146 Cong. Rec. S1753-02, *S1761, 2000 WL 309749 (March 27, 2000) (Remarks of Senator Leahy upon Senate passage of CAFRA).

[6] *United States v. Clymore*, 245 F.3d 1195 (10th Cir 2001) (a Rule 41(e) motion is properly denied if the property is contraband subject to forfeiture); *United States v One 1974 Learjet*, 191 F 3d 668 (6th Cir. 1999) (once the Government serves notice of a forfeiture action on the claimant, the claimant's only remedy is to contest the forfeiture on the merits; he may not file a Rule 41(e) motion); *Ibarra v United States*, 120 F.3d 472 (4th Cir. 1997) (district courts are divested of jurisdiction over a civil forfeiture action once the Government initiates administrative forfeiture proceedings unless the claimant files a claim); *In re Seizure of $82,000 More or Less*, 2000 WL 1707495 (W.D. Mo. 2000) (same), *United States v One 1987 Jeep Wrangler*, 972 F.2d 472 (2d Cir 1992) (same); *United States v. U.S. Currency in the Amount of $146,800*, 1997 WL 269583 (E.D.N.Y. 1997) (Rule 41(e) motion not appropriate vehicle for challenging legality of seizure where claimant has adequate remedy at law—*i e.*, contesting the forfeiture in the civil forfeiture case), *Rodriguez v United States Department of Justice*, 2001 WL 180127 (2d Cir. 2001) (Table) (once a forfeiture proceeding is commenced, the claimant has no opportunity or occasion to contest the illegal seizure of his property—other than by filing a motion to suppress evidence—claimant's remedy is to contest the forfeiture action itself on the merits); *Albajon v. Gugliotta*, 72 F. Supp 2d 1362 (S D Fla 1999) (Rule 41(e) is not a substitute for filing a claim; court lacks jurisdiction to hear Rule 41(e) claim by person who received adequate notice and failed to file a claim).

such motions – or their equitable equivalents – will no longer lie because of the enactment of Section 983(f)." Smith Letter at 4. To the contrary, we have repeatedly cited such post-CAFRA case law, and so again here. *See $8,050.00 in U S. Currency v. United States,* ___ F. Supp. 2d ___, 2004 WL _____, No. 1:03 MC 99 (N.D. Ohio Feb. 25, 2004) (comprehensive provisions enacted by CAFRA in Section 983(a) give claimant an adequate remedy at law for contesting a civil forfeiture; thus, once the Government commences administrative forfeiture, the Rule 41(g) motion must be dismissed; claimant's argument that he filed his motion first is without merit); *Baranski v. Fifteen Unknown Agents of ATF*, 195 F. Supp. 2d 962 (W.D. Ky. 2002) (court has no jurisdiction to consider Rule 41(e) motion raising Fourth Amendment issues where pending civil forfeiture action gives claimants adequate remedy at law); *United States v. Douleh*, No. 03-M-4033P (W.D.N.Y. July 3, 2003) (Magistrate's Report and Recommendation) (claimant cannot use Rule 41(g) to seek return of his property based on an illegal seizure; his remedy is to file a motion to suppress; Rule 1(a)(5)(B) makes clear that Rule 41(g) does not apply to civil forfeiture cases).

Finally, NACDL relies on *Krimstock v. Kelly,* 306 F.3d 40 (2d Cir. 2002), in support of their argument that a claimant should be entitled to challenge the Government's retention of his property pending trial. Smith Letter at 5. *Krimstock,* in fact, illustrates exactly the problem the Government is seeking to avoid in drafting Rule G(8)(d)(iii), and exactly the reason why the objections offered by NACDL have no merit.

In *Krimstock,* the City of New York had used its municipal forfeiture authority to seize automobiles involved in drunk driving cases. In light of the minor nature of the infraction, the length of time required to litigate a case to its conclusion, and the hardship encountered by the person who was deprived of his automobile, the Second Circuit held that in all instances, the court was required to give the claimant a probable cause hearing regarding the legality of the seizure of his automobile.

We well understand the fire that must glow in the eyes of the defense bar as they contemplate extending *Krimstock* to the 20,000 annual seizures undertaken by federal seizing agencies in cases ranging from drug trafficking to immigration violations to obscenity to terrorism. Having to hold a probable cause hearing in each of those cases would bring the system to a crashing halt. But the court in *Krimstock* was careful to note why such a rule would not apply in federal cases. In federal cases, unlike New York cases, the court said, there was – thanks to CAFRA – already an adequate legislative scheme in place to ensure that a property owner was afforded due process and the opportunity to seek the

return of his property to avoid a hardship. In light of those procedures, resort to extraordinary equitable relief as provided in *Krimstock* is unnecessary. So far, the federal courts have agreed. *See United States v. All Funds on Deposit at Dime Savings Bank*, 255 F. Supp. 2d 56 (E.D.N.Y. 2003) (rejecting notion that *Krimstock* applies to federal forfeiture cases where there are built-in due process protections for property owners such as the innocent owner defense and hardship provision).

For all of these reasons, we continue to believe that Rule 41(g) motions have no place in the pre-trial proceedings in civil forfeiture cases.

Respectfully Submitted,

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by: _____

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August 26, 2002

Professor Edward H. Cooper
Reporter, Advisory Committee on Civil Rules
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, DC 20544

Re: Proposed New Admiralty Rule G.

Dear Professor Cooper:

On behalf of the over 10,000 members of our association (and the approximately 28,000 affiliate members from all fifty states), the National Association of Criminal Defense Lawyers ("NACDL" herein) is pleased to submit the following comments with respect to the proposed amendment to the Supplemental Rules for Certain Admiralty and Maritime Claims. We want to thank the Committee for giving us this opportunity to comment on the Supplemental Rule G draft at this early stage of the process. We also hope to continue participating in the Committee's future deliberations concerning this important proposed amendment.

We believe that our considerable familiarity with the drafting process of the Civil Asset Forfeiture Reform Act of 2000 ("CAFRA" herein) will shed important light on the validity of some of the proposals under discussion. (Because there were no committee reports on the final version of the bill, the legislative history of CAFRA is rather opaque.) NACDL member David B. Smith, in his capacity as a frequently cited expert on forfeiture law, played a critical role in drafting the legislation that became CAFRA.[1]

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[1] Mr. Smith is the author of the leading forfeiture treatise, PROSECUTION AND DEFENSE OF FORFEITURE CASES. Recognizing Mr. Smith's contributions to CAFRA, House Judiciary Chair Henry Hyde (R-IL) observed in his remarks to Congress following passage of the bill:

> "And I must thank David Smith, who has been there since the beginning. David helped me draft my first forfeiture reform bill, the Civil Asset Forfeiture Reform Act of 1993, and helped draft Senators LEAHY'S and HATCH'S reform bill and helped draft the Senate-passed bill we are considering today. This bill is truly his accomplishment."

146 CONG. REC. H2047 (daily ed. April 11, 2000).

Richard J. Troberman and E. E. Edwards III, as co-chairs of the National Association of Criminal Defense Lawyers Forfeiture Abuse Task Force, also worked directly with Chairman Hyde's staff and Senator's Leahy's staff in the drafting process, and testified before Congress.[2]

Proposed Rule G appears to be the latest round in a decade long struggle between the proponents and opponents of civil forfeiture reform--a struggle that we had hoped was ended by the enactment of CAFRA. While some parts of the proposed Rule G are useful and unobjectionable, the same cannot be said about many of the more significant provisions which are inconsistent with the language, the spirit, and the legislative intent of CAFRA, and represent substantive as well as procedural changes.

One of the main goals of CAFRA was to create a level playing field in civil forfeiture cases. Proposed Rule G, however, represents an attempt, outside of the legislative process, to amend the Supplemental Rules and CAFRA, and to overrule clear and well established case law, in ways that would stint many of CAFRA's due process protections and again tilt the playing field in favor of the government. Nowhere is this more obvious, or more egregious, than in the proposed Sections 4 and 5 of Rule G, which attempt to vastly expand the methods of service of process (Section 4) while at the same time severely limit who may contest a forfeiture (Section 5). See discussion, *infra*. Accordingly, we view the government's efforts here with deep suspicion and apprehension, as well as a misuse of the Rules Enabling Act process.

We believe that the Committee should question why the DOJ has submitted many of these proposals to the Committee instead of to Congress. Clearly, it would make more sense to include many of these provisions in 18 U.S.C. § 983, rather than in a new Supplemental Rule. We believe the answer is obvious: many of these proposals were previously rejected by Congress during the CAFRA debate, and many of the others would not be given serious consideration by the House or Senate Judiciary Committees.

Nevertheless, DOJ apparently now believes that it can persuade this Committee to do what Congress would not. But they can only accomplish that goal by distorting the meaning and intent of the relevant CAFRA provisions and existing caselaw. They are attempting to do precisely that, as we show below. We now turn to the specific

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[2] For their work on asset forfeiture reform and CAFRA, Mr. Troberman and Mr. Edwards were awarded NACDL's Marshall Stern Award for Legislative Achievement for 2000 and 1998, respectively.

provisions, which we address in the same order they appear in the draft. (Some of the provisions that are the most disturbing appear toward the end of the draft.)

Section (1). Application. Proposed Rule G(1) states that "This Rule G applies to a forfeiture action *in rem* for violation of a federal statute." The expressed intent of the proposed rule is "to place all of the procedures that are unique to civil judicial forfeiture proceedings in one place, *i.e.*, in Rule G." Explanation of Rule G ("Explanation") at 4. The problem with this approach is that the rules for civil forfeiture proceedings are not all the same. See, *e.g.*, 18 U.S.C. §983(i)(2), which excludes certain forfeiture proceedings from the definition of "civil forfeiture statute" in 18 U.S.C. §983, thus exempting them from the CAFRA reforms.[3]

Thus, while some of the provisions proposed in Rule G are intended to apply to *all* civil forfeiture actions, many others are not. Accordingly, we believe that this provision must identify with greater specificity those statutes to which Rule G will apply. Moreover, in light of 28 U.S.C. §2072(b), the amended Rule as written (being ostensibly procedural in nature) would apparently supplant, not supplement, much of the carefully crafted and recently enacted work of Congress in this area.

Section (2). Complaint.

Rule G(2)(b)(v). The Explanation states (p.5) that Rule G(2)(b)(v) is not intended to make a substantive change to the particularity requirement in current Rule E(2)(a). "Thus, the case law interpreting current Rule E(2)(a) would apply to Rule G(2)(b)(v)." Despite that assurance, we are concerned about the highly inaccurate presentation of the case law interpreting Rule E(2)(a) in footnote 18 of the Explanation. In particular, the statement that "a complaint that gives a detailed description of the property and the circumstances of seizure is sufficiently particular" is simply wrong. There is no support for that minimalist view of Rule E(2)(a) in the reported case law. The insertion of such misleading statements in the Committee's authoritative note is likely to be used by the government to persuade courts that the law is what the Committee's note says it is, not what the cases actually say. Thus, if case law is to be cited in the note, it is important to present that case law objectively.

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[3] The United States Customs Service, for example, has recently taken the novel position that forfeiture proceedings for violations of Title 21 United States Code, which would be subject to CAFRA if initiated pursuant to 21 U.S.C. §881, are exempt from CAFRA if Customs chooses to proceed instead under the Tariff Act of 1930, 19 U.S.C. §1595a. This attempted end-run around CAFRA demonstrates the difficulties inherent in trying to establish one set of rules for all judicial forfeiture proceedings.

Although the cases use various verbal formulations, the courts agree that the complaint must *at least* allege sufficient facts to support a reasonable belief that the government will be able to prove the property is subject to forfeiture. This is a fairly demanding requirement, as the cases show. *E.g., U.S. v. One Parcel of Real Property Known As 6 Patricia* Dr., 921 F.2d 370, 76 (1st Cir. 1990); *U.S. v. Daccarett*, 6 F.3d 37, 47 (2d Cir. 1993); *U.S. v. One 1974 Learjet 24D*, 191 F.3d 668, 674 (6th Cir. 1999); *U.S. v. $38,000.00 In U.S. Currency*, 816 F.2d 1538, 1548 (11th Cir. 1987); *U.S. v. 59,974.00 In U.S. Currency*, 959 F. Supp. 243, 248 (D.N.J. 1997). Thus, the particularity requirement provides an important protection for claimants by insuring that a forfeiture complaint will not be filed unless it is supported by substantial evidence.

We also note that although the Explanation states (p. 5) that "the intent is solely to place the current particularity requirement in the same section of the Rule where other pleading requirements pertaining to the complaint appear," proposed Rule G(2)(b)(v) has inexplicably deleted the language "without moving for a more definite statement" which currently appears in Rule E(2)(a). If the language of Rule G(2)(b)(v) differs from the language of Rule E(2)(a), it will inevitably invite the argument that a different meaning was intended. Accordingly, we see no basis for the removal of this clause, and request that it be reinserted into the proposed new provision.

Rule G(2)(c). Rule G(2)(c) allows interrogatories to be served with the complaint without leave of court. Although that language carries forward the provision currently found in Rule C(6)(c), it is an anomaly that can no longer be justified in a rule that is intended to "place all of the procedures that are *unique to civil judicial forfeitures* in one place."

The Advisory Committee's Note to the 2000 Amendment of Rule C(6) acknowledges that the procedure for serving interrogatories with the complaint departs from the general provisions of Fed.R.Civ.P. 26(d), but states that "the special needs of expedition that often arise *in admiralty* justify continuing the practice." However, in the same Note, the Committee rightly says that "[a]dmiralty and maritime in rem proceedings often present special needs for prompt action that do not commonly arise in forfeiture proceedings." Although the Committee established different procedures for forfeiture and admiralty proceedings where appropriate, it inexplicably failed to do so in this instance. This would be an appropriate opportunity to eliminate this oversight.

Allowing the government to serve a first set of interrogatories with the complaint also encourages abuse. Many prosecutors serve lengthy, intrusive and burdensome interrogatories with the complaint in the hope of discouraging the claimant from contesting the forfeiture. These interrogatories frequently ask the claimant to detail her

entire financial history. The Committee should be aware that a high percentage of claimants are either unrepresented by counsel or ineffectively represented. They do not understand that they have a right to object to interrogatories that are overly burdensome or seek irrelevant information. Faced with the prospect of having to quickly answerer a battery of intrusive, burdensome interrogatories, many claimants will decide that they do not have the time or the intestinal fortitude to fight the government.

Accordingly, we submit that proposed Rule G(2)(c), instead of authorizing the service of interrogatories with the complaint, should clearly provide that Rule C(6)(c) does *not* apply to forfeiture actions *in rem* for violation of a federal statute.

Section (3). Judicial Authorization and Process.

Rule G(3)(a). This proposed rule, which is derived from current Rule C(3)(a)(i), authorizes the clerk of the court, upon the filing of a complaint for forfeiture, to issue–without prior judicial approval–a warrant of arrest for the property that is subject to forfeiture. There is a serious question as to whether this provision passes constitutional scrutiny when it forms the basis for the *actual seizure* of the property. A clerk's ministerial action in issuing a warrant for the arrest of property cannot make lawful a seizure that is not based upon probable cause.

Addressing the issue of "whether a valid warrant of arrest may issue without a prior determination of probable cause by a neutral and detached magistrate," the Fourth Circuit has concluded

> We hold that *if the seizure of the property is otherwise proper under the fourth amendment*, no violation of the fourth amendment occurs when the district court clerk issues a warrant of arrest in rem pursuant to subsection 881(b).

United States v. Turner, (One 1963 Corvette), 933 F.2d 240, 245 (4th Cir. 1991) (emphasis supplied). In reaching this conclusion, the Court further observed:

> Other courts considering the constitutionality under the fourth amendment of the warrant procedure established by subsection 881(b) and Rule C(3) have found it unconstitutional. *United States v. Real Property Located at 25231 Mammoth Circle, El Toro, Cal.*, 659 F.Supp. 925 (C.D. Cal. 1987); *United States v. Life Ins. Co. of Va., Single*

> *Premium Whole Life Policy, Policy No. 002138373,* 647 F.Supp. 732, 742 (W.D.N.C. 1986); *rev'd on other grounds sub nom. United States v. B & M Used Cars,* 860 F.2d 121 (4th Cir. 1988); *United States v. One Hundred Twenty-Eight Thousand Thirty-Five ($128,035.00) in U.S. Currency,* 628 F.Supp. 668 (S.D. Ohio), *appeal dismissed,* 806 F.2d 262 (6th Cir. 1986); *In re Kingsley,* 614 F.Supp. 219 (D.Mass. 1985), *appeal dismissed,* 802 F.2d 571 (1st Cir. 1986).

Id., 933 F.2d at 245.

Thus, courts have upheld this procedure only when no actual seizure of the property has occurred based upon a warrant of arrest issued by a court clerk.

> In the present case, the Government did not "seize" the real property. Instead, the Marshal's posting of the arrest warrant served only as notice to the in rem defendants of the civil complaint filed against them. Appellant Cunan has not shown that he was denied access to the property in question, which would indicate an actual seizure of the property by the government. A seizure occurs when "there is some meaningful interference with an individual's possessory interests" in the property seized. We find no such "meaningful interference" here for the warrant executed in this case only gave notice to the defendant in rem--it did not effect a seizure. Posting an in rem defendant is an appropriate method of notifying such a defendant of the action against it in much the same way as an in personam defendant is served with a copy of a complaint. It is a fictional way of acquiring jurisdiction over the res in an in rem action.

United States v. TWP 17 R 4, Certain Real Property in Maine, 970 F.2d 984 (1st Cir. 1992) (citations omitted) (containing a discussion of the Commentary to the 1985 Amendment to Rule C(3)). See also, *United States v. Pappas,* 613 F.2d 324, 329-330 (1st Cir. 1980) (en banc); *Schrob v. Catterson,* 948 F.2d 1402, 1415 (3rd Cir. 1991).

Accordingly, we believe that it is appropriate to include language in this provision, or in the Advisory Committee's Notes, to make clear that a warrant of arrest in rem issued by a clerk of the court under this section does not authorize the *actual seizure* of property, and thus is not a substitute for a proper seizure under the fourth

amendment. Stated another way, a warrant of arrest in rem issued pursuant to this provision by a clerk of the court without a prior determination of probable cause by a neutral and detached judicial officer may serve only to notify the defendant in rem of the filing of a civil complaint for forfeiture, in much the same way as an in personam defendant is served with a summons.

Rule G(3)(b)(ii). The other problem we have with proposed Rule G(3) is the provision in Rule G(3)(b)(ii) that allows the government to delay execution of the warrant when the complaint is filed under seal or when the action is stayed prior to execution of the warrant. We are unaware of any authority that permits the government to file a civil forfeiture complaint under seal. Indeed, the Explanation acknowledges (p. 7) that the "forthwith" service requirement of Rule E(4)(a) "is inconsistent with the notion that a complaint may be filed under seal." Filing a complaint under seal and delaying execution of process, which provides notice to the owner, can easily be abused. It allows the government to meet statute of limitations requirements and the ninety day deadline for filing a complaint pursuant to 18 U.S.C. § 983(a)(3)(A) without notifying the owner or giving her an opportunity to contest the forfeiture. Thus, the purpose of the ninety day deadline and the statute of limitations is thwarted. Under the proposed rule, execution of process may be delayed indefinitely.

Permitting execution of the warrant to be delayed if the action is stayed prior to execution of the warrant raises the same concerns. The government would make an *ex parte* application for a stay when it filed the complaint. The owner would not know of the complaint or the stay order until the court saw fit to lift the stay. But the government could file a lis pendens notice, effectively freezing real property, or direct a bank or brokerage firm to freeze the owner's accounts based on the secret complaint.

The government should be required to explain to the Committee why it is necessary to have resort to such drastic measures. And if these measures are to be made available, there must be a showing by the government that the circumstances of the particular case justify them. The draft does not require the government to make any showing before sealing a complaint or when seeking a stay of the action. It would encourage prosecutors to routinely resort to these extraordinary procedures.

Section (4). Notice.

Although we have many objections to proposed Rule G(4), we are especially troubled by the "Direct Notice" provisions in Section G(4)(b). Proposed Rule G(4)(b) constitutes a drastic revision of current Rule C(3)(b), and improperly conflates the administrative notice requirements of 18 U.S.C. §983(a)(1)(A)(i) and 19 U.S.C.

§1607(a) with the current service of process requirements of Rule C(3)(b) and Fed.R.Civ.P. 4 and 4.1. As explained below, this Rule, if adopted, would provide expansive new methods for service of process which would be unique to civil forfeiture actions. There is no justification for such an expansive and unique set of rules.

Rule G(4)(a)(i)(C). This provision permits publication of notice in the district "where (1) the action is filed, (2) the property was seized, or (3) the property is located." Current Rule C(4) requires publication in the district where the action is filed. No explanation is given for this proposed change. The current requirement should not be altered to give the government a choice of where to publish notice.

The district where the action is filed is usually the district where publication is likely to be most effective in providing notice to interested persons. In the case of personal property, the district where the property is "located" may often be different than either the district of seizure or the district where the action is filed because the Customs Service and the Marshals Service have widely scattered facilities for storing airplanes, boats and vehicles, and persons with an interest in the property often do not know where the property has been taken. Thus, publication solely in the district to which the property has been moved *by the seizing agency* is not likely to reach persons with an interest in the property.

For these reasons, we suggest that in those cases where the property is seized (or in the case of real property, is located) in a district other than the district in which the action is filed, the government should be required to publish notice in *both* districts.

We also believe that it is desirable that publication be made in a newspaper of national circulation such as *USA Today*. Such a practice would be much more likely to reach all interested persons than publication in some obscure local newspaper or business journal. Some law enforcement agencies already follow this practice in administrative forfeiture cases. We would propose this as an alternative method of publication.

Rule G(4)(a)(iv)(A). This provision provides that if the property is located in a foreign country, or the person on whom notice must be served is believed to be located in a foreign country, publication may be made (1) in a newspaper in the district in the United States where the action is filed; (2) in a newspaper published outside the foreign country where the property is located but generally circulated in the foreign country; or (3) in a newspaper, legal gazette, or listing of legal notices published and circulated in the foreign country where the property is located. We believe that when the property is located in a foreign country, or the person to whom notice must be

served is believed to be located in a foreign country, notice published solely in the district in the United States where the action is filed is clearly insufficient both in practical and in constitutional terms. Thus, in those situations, the government should be required to also publish notice in a newspaper or legal gazette generally circulated in the foreign country where the person or property is located. Anyone truly desiring to provide notice to interested persons would certainly do so.

Rule G(4)(a)(v). This provision would permit publication of the Notice required by Rule G(4)(a)(i) to be made solely on the Internet. The government cites statistics purporting to show that 58% of U.S. households have access to the Internet. Even if true, that still leaves almost half the population without Internet access. Moreover, experience teaches that those are the households that are more likely to have their property seized. Even if one has Internet access, how would one know that the government posts forfeiture notices on a particular web site? More importantly, what if the property seized is the claimant's computer (a not at all uncommon occurrence)? While we agree that in keeping up with technological advances it would be a good idea for the government to post notice on the Internet, we believe that at least for the foreseeable future this posting should be *in addition* to publishing notice in a newspaper, not *in lieu* thereof, since it would cost the government virtually nothing to post a notice on the Internet. Indeed, it is much too soon to mandate the use of the Internet in this way, as the Judicial Conference has repeatedly determined in other contexts in recent years, such as in discussing electronic filing and service by e-mail.

(B) Direct Notice.

Rule G(4)(b)(ii). This proposed rule would so radically change current civil procedure that it would make it almost unrecognizable in the context of civil judicial forfeiture proceedings. The proposed rule would permit *service of process* in civil judicial forfeiture cases "in any manner reasonably calculated to ensure that the notice is received, including first class mail, private carrier, or electronic mail." The government provides no justification, or even explanation, for such a radical change.[4]

[4] The government's entire "explanation" for this radical and unprecedented change in existing law is as follows:

> Subsection (b)(ii) addresses the manner in which direct notice may be served. The notice may be served on either the potential claimant or his counsel in any manner "reasonably calculated to ensure that such notice is received," including first class mail, private carrier or electronic mail. (p. 10)

We know of no other civil proceeding in which such expansive methods of service of process are authorized as a matter of right. Nor do we see any need for such expansive methods in the context of civil forfeiture proceedings.

There are several disturbing departures from the current rules of civil procedure buried within this provision. For example, we are unaware of any rule in any other context that would allow service of process to be made by electronic mail. If this method is not deemed sufficiently reliable in any other case, why should it be deemed an appropriate method of service in a civil forfeiture proceeding in which the government is seeking to permanently deprive the claimant of his or her property? It is common knowledge that e-mail can be accidentally or intentionally deleted by anyone with access to the same e-mail address, for example the claimant's child. E-mail can be also be sent to the wrong person, and e-mail addresses often change based on who the claimant's internet service provider is at any given time. Moreover, not everyone with e-mail can download an attached document, and in this era of internet viruses many people who are computer savvy simply refuse to do so. In sum, adoption of this provision would turn the spirit of CAFRA--which was to make forfeiture proceedings more fair--on its head.

Proposed Rule G(4)(b)(ii) would also allow service of process to be made on "the potential claimant's counsel." We are unaware of any provision authorizing service of original process on a person's counsel as a matter of right in any other context. *Bye v. United States,* 105 F.3d 856 (2nd Cir. 1997), the case cited in footnote 28 at page 10 of the Explanation, is clearly inapposite. That case dealt with an administrative notice of forfeiture, not service of process after a civil forfeiture complaint was filed.

Moreover, the proposed rule does not specify upon which of the "potential claimant's" counsel process may be served. Would this apply to a potential claimant's divorce counsel, or any other counsel representing the potential claimant in a non-related matter? Even if the provision was more narrowly drafted to limit it to counsel representing the potential claimant in a related criminal matter, it would continue to pose practical problems. This is so because a significant majority of criminal defense lawyers, especially public defenders, are not experienced in civil forfeiture law, and rarely handle these proceedings. Thus, it is not unheard of for such counsel to simply place the notice in the client's file and either take no further action at all, or not take *timely* action.

Rule G(4)(b)(ii) includes another radical departure from current procedure by providing that "notice is served on the date that the notice is sent." In other words, Rule G(4)(b)(ii) provides that *service of process* is deemed complete on the date service of process is sent. Given the number of methods of service set forth in the

proposed rule, we have no idea what this means. Service has always been deemed complete on the date when it actually occurred. Thus, a return of service is filed with the court indicating when the person was served, not when the process server received the papers with instructions to serve them. Even in those rare instances when service is accomplished by some means other than personal service by agreement of the parties, the date of service is generally deemed to be when the notice is actually received. For example, where first class mail is used, certified mail with a return receipt typically indicates when the notice was actually received. We see no compelling need or justification for such a radical change in procedure.

Rule G(4)(b)(iii). This provision would require that "notice" (*i.e.*, service of process) to a potential claimant who is incarcerated be sent to the facility where the potential claimant is incarcerated. The purported rationale for this rule is the Supreme Court's decision this term in *Dusenbery v. United States,* 534 U.S. 161, 151 L.Ed.2d 597, 122 S.Ct. 694 (2002). But that is not what *Dusenbery* holds. *Dusenbery* involved an administrative notice of forfeiture, not service of process. Moreover, the FBI in that case also sent notices to the address of the residence where Dusenbery was arrested as well as to his mother's residence address.

The Supreme Court, in a 5-4 decision, held that the government had satisfied the *minimal* due process requirements of *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 94 L.Ed.2d 865, 70 S.Ct. 652 (1950), because the notice was "reasonably calculated under all of the circumstances" to apprise Dusenbery of the pendency of the forfeiture. The Court observed as follows:

> The government here carried its burden of showing the following procedures had been used to give notice. The FBI sent certified mail addressed to petitioner at the correctional facility where he was incarcerated. At that facility, prison mailroom staff traveled to the city post office every day to obtain all the mail for the institution, including inmate mail. App. 36. The staff signed for all certified mail before leaving the post office. Once the mail was transported back to the facility, certified mail was entered in a logbook maintained in the mailroom. Id. at 37. A member of the inmate's Unit Team then signed for the certified mail to acknowledge its receipt before removing it from the mailroom, and either a Unite Team member or another staff member distributed the mail to the inmate during the institution's "mail call." Id. at 37, 51.

Id., 534 U.S. at 700. The government was only able to meet the minimal due process requirement by demonstrating the above facts. Nevertheless, four members of the Court found that the government's notice efforts in that case were insufficient.

Proposed Rule G(4)(b)(iii) does little to ensure that an inmate will actually receive process, because it only requires that notice be "sent" to the institution. Unlike the Court in *Dusenbery*, it says nothing about what steps the institution must take to deliver the notice to the inmate. While there may be established procedures for delivering mail to inmates in federal facilities, there is no guarantee that such procedures exist in state, county, or municipal facilities.[5]

Accordingly, while we agree that notice must be sent to the facility where a potential claimant is incarcerated, we believe that the rule should also provide that notice is deemed complete in such circumstances only when there is evidence that the potential claimant actually received the notice, *e.g.*, a signed receipt.

Rule G(4)(b)(iv). This provision deals with service of process on persons who were arrested in connection with the offense giving rise to the forfeiture, but who are not currently incarcerated. The rule provides that in such situations the "notice... may be sent to the address given by the potential claimant at the time of his arrest or release from custody, unless the potential claimant has provided a different address to the agency to which he provided the address at the time of his arrest or release from custody." The Explanation (p. 11) states that this procedure "is consistent with the rule some courts have adopted." Id. However, the government's sole support for this assertion is an unpublished order from a district court which upheld that procedure for an administrative notice, not for service of process, under the specific facts of that case.

We do not believe that the government should be relieved of making *reasonable* efforts to provide actual notice of forfeiture proceedings to potential claimants. That is what the caselaw requires. See, *Mullane, supra*, 339 U.S. 306. Reasonableness must be decided based upon the facts of each case. The proposed rule does not meet this test. For example, if the potential claimant is the subject of some pending criminal

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[5] As the government informed the Supreme Court on brief in *Dusenbery*, Bureau of Prison employees currently "must not only record the receipt of the certified mail and its distribution, but the prisoner himself must sign a log book acknowledging delivery. BOP Program Statement 5800.10.409, 5800.10.409A (Nov. 3, 1995). If a prisoner refuses to sign, a prison officer must document that refusal. BOP Operations Memorandum 035-99 (5800), July 9, 1999. 534 U.S. at 706 (GINSBURG, J., dissenting).

proceeding, or is currently on probation in another matter of which the government is aware, it is not unreasonable to require the government to check with the clerk of the court, the probation department, or the prosecutor or defense counsel, in an effort to determine a valid address for the potential claimant. Similarly, it is not unreasonable to require the government to check with the state Department of Licensing for the potential claimant's most current driver's license address. Any other plaintiff in a civil action is required to take such measures. Why should the government, with its superior resources, be relieved of such an obligation?

Rule G(4)(b)(v). This provision requires that the notice served with the Complaint must state that a claim must be filed no later than 30 days after the date of the notice. For the reasons stated in our objections to Rule G(4)(b)(ii), we find this provision unacceptable as a clear misstatement of well established law, and nothing in CAFRA was intended to change the current law in this regard. Contrary to the Explanation at page 11, this provision does not conform the rule with the statutory requirement in 18 U.S.C. §983(a)(4)(A). Section §983(a)(4)(A) provides that a claim must be filed "not later than 30 days after the date of service of the Government's complaint . . . " As stated above, service of a complaint has traditionally been on the date on which it was received, not the date on which it was sent.

The Explanation (p. 11) further complains that any other rule would be "unworkable" because the government would have no way of knowing when the notice is received. We suggest that this is more a problem created by the government's hoped-for expanded methods of service (*e.g.*, service by first class mail or by e-mail), for it has never been a problem with the traditional means of service currently in use. Indeed, even in those cases where service is accomplished by agreement of the parties utilizing first class mail, there is no difficulty in pinpointing the date when notice is received because the government sends a certified letter, return receipt requested.[6]

Even if there is doubt in some cases as to the precise date when the notice is received, this is not a practical problem. The government typically does not move for a default the day after the period for filing a claim expires, because Rule C(6) gives the court discretion to excuse the late filing of a claim. That discretion has been liberally exercised in the interest of deciding cases on their merits. Since the government normally waits at least a couple of weeks before moving for a default, determining the precise date when notice was received is generally not necessary.

[6] See, *e.g.*, Fed.R.Civ.P. 4(d). Notably, the Civil Rules refer to this procedure as "waiver" of service, not "acceptance" of service.

The rule proposed by the DOJ, *if* service of process by mail is adopted by the Committee, would also unfairly penalize potential claimants who, through no fault of their own, receive notice after a long delay of the mail. Moreover, despite the fact that a notice might be dated on a certain date, there is no guarantee that it was actually mailed to the potential claimant on that date. Even when mail is timely delivered, the proposed rule would shave several days off the thirty day period for filing a claim under 18 U.S.C. §983(a)(4)(A). Treating the receipt of notice as the date service is hardly an "unworkable" rule, contrary to the protests of DOJ.

Rule G(4)(b)(vi). This rule would, *inter alia*, require that the notice served with the Complaint include a statement that "an answer to the complaint must be filed under Rule G(5)(b) not later than 20 days after filing the claim. We recognize that this conforms with the statutory requirement of 18 U.S.C. §983(a)(4)(B) and current Rule C(6)(a)(iii). However, we believe it important to clarify that a claimant in a judicial civil forfeiture proceeding may file a responsive pleading pursuant to Fed.R.Civ.P. 12(b) within 20 days, rather than an answer. We explain our concerns in more detail in our response to proposed Rule G(5)(b), *infra*.

Section (5). Responsive Pleadings; Interrogatories.

This section is the single most objectionable provision of proposed Rule G. It would, without any legislative deliberation, severely restrict the class of persons who could file a claim to contest a forfeiture, and clearly conflicts with well established caselaw and the letter, spirit, and intent of CAFRA. Frankly, we are shocked by the content of this provision, and by the Explanation which accompanies it at page 13. As demonstrated below, the DOJ knows full well that CAFRA does not in any way, shape, or form limit the right to file a claim to persons asserting an ownership interest.

Rule G(5)(a)(i) and (a)(v)(i)(B). Proposed Rule G(5)(a)(i) states that "[A] person who asserts an *ownership* interest in the property that is the subject of the action may contest the action by filing a claim in the court where the action is pending." This is directly contrary to well established caselaw and current Rule C(6)(a). Rule C(6)(a)(i) provides that "[I]n an in rem forfeiture action for violation of a federal statute:

> (i) a person who asserts *an interest in or right against the property* that is the subject of the action must file a verified statement identifying *the interest or right* . . . (emphasis supplied)

* * *

> (ii) an agent, bailee, or attorney must state the authority to file a statement of interest in or right against the property on behalf of another; . . .

The Advisory Committee's Note to the 2000 Amendment of Rule C(6) includes the following statement:

> In a forfeiture proceeding governed by paragraph (a), a statement must be filed by a person who asserts an interest in or right against the property involved. *This category includes every right against the property, such as a lien, whether or not it establishes ownership or a right to possession.* In determining who has an interest in or a right against property, courts may continue to rely on precedents that have developed the meaning of "claims" or "claimants" for the purpose of civil forfeiture proceedings. (emphasis supplied).

Well established caselaw holds that in order to establish Article III standing, "a claimant must have a colorable *ownership, possessory or security interest* in at least a portion of the defendant property." *United States v. $515,060.42 in United States Currency,* 152 F.3d 491, 497 (6th Cir. 1998) (emphasis supplied).

The Second Circuit states the rule as follows:

> To demonstrate standing under Article III, therefore, a litigant must allege a "distinct and palpable injury to himself that is a direct result of the "putatively illegal conduct of the [adverse party]," and "likely to be redressed by the requested relief." (citations omitted)

United States v. Cambio Exacto, 166 F.3d 522, 527 (2nd Cir. 1999) (money exchange businesses had standing to contest a forfeiture of funds seized from their bank accounts because they had a financial stake in the funds--they had a liability to their customers in an amount equal to the forfeited funds).

See also, *United States v. Contents of Accounts Nos. 303450504 and 144-07143,* 971 F.2d 974, 985 (3rd Cir. 1992) (any colorable ownership or possessory interest sufficient); *United States v. 5 S 351 Tuthill Road,* 233 F.3d 1017, 1021-1026 (7th Cir. 2001) (conferring standing on the beneficiary of a land trust); *United States v.*

$191,910.00 in U.S. Currency, 16 F.3d 1051, 1057 (9th Cir. 1994) (claimant need only have some type of property interest in the forfeited items); *United States v. $260,242.00 in United States Currency,* 919 F.2d 686, 687 (11th Cir. 1990) (constructive possession of money in trunk of car is constitutionally sufficient for standing in forfeiture actions); 1 David B. Smith, PROSECUTION AND DEFENSE OF FORFEITURE CASES, ¶9.04, 9-69 through 9-70.6(1) (June 2002 ed).

During the CAFRA drafting process, the location and meaning of the term "owner" in the innocent owner provision [18 U.S.C. §983(d)(6)] was the subject of considerable debate, despite the fact that *all* parties, including the DOJ, understood that a claimant may establish standing to contest a forfeiture by showing either an ownership or a possessory interest in some portion of the property.

As part of the CAFRA drafting process, House and Senate staffers working on the bill sought input from a number of sources, including both DOJ and NACDL. Memoranda were circulated requesting comments on specific provisions that were undergoing revision, including the innocent owner provision. In particular, Senator Leahy's staff invited comments from the DOJ regarding the following proposal:

> **Page 22, lines 16-17.** Strike "an ownership interest" and insert "an ownership or possessory interest."
>
> It is well established that a claimant may establish standing to contest a forfeiture by showing either an ownership or a possessory interest in some portion of the property. This is the formulation used in the Sessions/Schumer bill, both in the provision on notice ("Upon commencing administrative forfeiture proceedings, the seizing agency shall send notice of the proceedings . . . to each party known to the seizing agency at the time of the seizure to have an ownership or possessory interest, including a lienholder's interest in the seized property.") and in Section 3 (motion to set aside a declaration of forfeiture shall be granted if the moving party "had an ownership or possessory interest in the forfeited property"...) S.1931 as currently drafted is particularly confusing, because it refers to "possessory interest" in one context (on page 16, re hardship release of property), and "ownership interest" in another (on page 22, re definition of "owner"). (emphasis in original)

On March 16, 2000, the DOJ responded to this proposal as follows:

[This] proposal would strike "an ownership interest" and insert "an ownership or possessory interest" on page 22, lines 16-17. This proposal involves the definition of the word "owner" in proposed new section 983. A global search of this provision reveals that the terms "owner" or "ownership" appear only in the provision governing the "innocent owner" defense to civil forfeiture. (Page 10, line 25, through page 14, line 21). (The terms also appear in proposed new Section 985 (page 13, line 10, through page 36, line 16), although we see no indication that the definition of the term "owner" on pages 22-23 is intended to apply to this section.

We believe that what is needed in addition to the provision defining "owner" on pages 22-23 is a provision stating that a claimant shall be deemed to have standing to contest a civil forfeiture if he/she (1) establishes a possessory or ownership interest in the specific property sought to be forfeited, including a leasehold, lien, mortgage, recorded security interest, or valid assignment of an ownership interest, (2) but not if the claimant is:

> (i) a person with only a general unsecured interest in, or claim against, the property or estate of another;
>
> (ii) a bailee unless the bailor is identified and the bailee shows a colorable legitimate interest in the property seized; or
>
> (iii) a nominee who exercises no dominion or control over the property.

Such a provision would codify established law that a claimant may establish standing to contest a forfeiture by showing either an ownership or a possessory interest in some portion of the property and it would also codify the exceptions to the standing requirement under current law. This appears to be what the definition of "owner" on pages 22-23 was intended to do, but it makes no sense to attempt to accomplish this purpose by defining a term that appears only in connection with the innocent owner defense.

We submit that the most logical place to put such a provision would be at page 10 of the March 9 draft just before current subsection (c) dealing with the burden of proof. . .

> We believe that the definition of "owner" on page 18 should remain intact. As noted, this definition applies to the "innocent owner" defense. Some provision is needed that makes clear that no relief will be granted where a person with a superior interest in the property subject to forfeiture fails to satisfy the "innocent owner" defense with respect to the property, while a person holding only a mere possessory interest is able to satisfy the defense. (emphasis in original).

DOJ's "March 16 Response to 'Comments on the March 9th Bill'" at 6-7.

Given that DOJ acknowledged to the drafters of CAFRA that clearly established law provides that persons with an ownership *or* possessory interest have standing to contest a forfeiture, and that DOJ even urged the inclusion of a separate provision that would make that point even more clear, it is incomprehensible to us that DOJ would now urge this Committee to adopt a rule that provides that only a person with an ownership interest has standing to contest a forfeiture.

Rule G(5)(a)(ii)(A). We object to this provision based upon our objection to the notice provision in Rule G(4)(b)(ii) ("notice is served on the date notice is sent.").

Rule G(5)(b). We agree that current Rule C(6)(a)(iii) and 18 U.S.C. §983(a)(4)(B) provide for the filing of an "answer" to the complaint within 20 days after the date of the filing of the claim. However, we are troubled by DOJ's interpretation of this rule as set forth in the Explanation, at 15, fn. 36. Relying on a single published decision of a district court judge in New Jersey--a decision which is currently under appeal to the Third Circuit--and one unpublished district court decision, the Explanation implies that, pursuant to Rule C(6)(a)(iii), a claimant may not file a motion to dismiss pursuant to Fed.R.Civ.P. 12(b), *or any other motion,* before filing an answer (as well as answers to interrogatories if served with the complaint). (See proposed Rule G(7)(d)(i)). We strongly disagree. In effect, DOJ's interpretation of Supplemental Rule C(6)(a)(iii) and proposed Rule G(5)(b) would not merely supplement Rule 12 of the Federal Rules of Civil Procedure, but would entirely supersede it.

The purpose of Rule C(6) and proposed Rule G(5) is clear: in situations in which the government brings an *in rem* proceeding against potentially forfeitable property, some mechanism is necessary in order to determine who has standing to enter the controversy. Obviously, the property, which is the actual defendant in the action, cannot itself contest the action. Rule C(6)(a) and proposed Rule G(5)(a) establish a procedure for entering the controversy, *i.e.*, by filing a claim. Admittedly, this procedure differs from Fed.R.Civ.P. 12, because in the ordinary civil case, there is no

need to file a claim. The Rules, however, also provide the time limit within which an answer must be filed *after* the filing of a claim. See Supplemental Rule C(6)(a)(iii) and proposed Rule G(5)(b). Thus, while Rule C(6) and proposed Rule G(5) interpose what is clearly a *supplemental* requirement--the filing of a verified claim--the remainder of the rule merely clarifies the requirement that an answer to the verified complaint must be served and filed following the filing of the claim, and the deadline for doing so.

Rule A provides, in relevant part, that "the general Rules of Civil Procedure for the United States District Courts are also applicable to the foregoing proceedings except to the extent that they are inconsistent with these Supplemental Rules." We do not believe that current Rule C(6)(a)(iii) or proposed Rule G(5)(b) is inconsistent with Fed.R.Civ.P.12. Instead, Rule C(6) and proposed Rule G(5) merely *supplement* Rule 12's explicit language that "the service of a motion permitted under this rule alters these periods of time [to answer] as follows: if the court denies the motion . . . the responsive pleading shall be served within 10 days after notice of the court's action." Fed.R.Civ.P. 12(a)(4)(A). The purpose of this rule is obvious: a defendant in a civil action should not bear the burden of responding to the allegations of a complaint that is so deficient that further proceedings will be unnecessary.

Indeed, Supplemental Rule E(2) requires that the government's complaint "state the circumstances from which the claim arises with such particularity that the defendant or claimant will be able, without moving for a more definite statement, to commence an investigation of the facts." See Objections to proposed Section G(2)(b)(v), above. The requirements of Supplemental Rule E(2) and proposed Rule G(2)(b)(v) would be meaningless, and their purpose frustrated entirely, if a claimant were required to answer insufficiently pled allegations *before* moving for relief. See also, David B. Smith, PROSECUTION AND DEFENSE OF FORFEITURE CASES, ¶9.04[4] (June, 2001) ("[c]laimant will be excused from filing an answer on the merits pending disposition of defenses made by motion under Fed.R.Civ.P. 12.").

Thus, we submit that Rule C(6)(a) and proposed Rule G(5)(b) are not inconsistent with Fed.R.Civ.P. 12. We further submit that there is no justification for prohibiting the filing of a motion to dismiss prior to the filing of an answer pursuant to Rule 12(b) in judicial civil forfeiture proceedings. Indeed, the government has yet to explain why a different rule should apply to civil forfeiture proceedings. We submit that, in order to clarify once and for all that Fed.R.Civ.P. 12 applies in forfeiture proceedings, the first sentence of proposed Rule G(5)(b) should be redrafted as follows:

> (b) Answer. A person filing a claim must serve and file an answer to the complaint, or a responsive pleading pursuant to Fed.R.Civ.P. 12, within 20 days after filing the claim.

For the same reasons, we object to the proposed new requirement that objections to the exercise of the Court's *in rem* jurisdiction over the property, or to venue, must be raised in the answer or will be deemed waived. The basis for objections to jurisdiction or venue may not become apparent until discovery has commenced. Fed.R.Civ.P 12(b) expressly provides that these matters may be raised by motion. The Explanation offers no justification for requiring that these matters be raised in the answer or are deemed waived.

Rule G(5)(c). We object to this provision based upon our objections to Rule G(2)(c), above.

Section (6). Preservation and Disposition of Property; Sales.

As discussed in detail below, proposed Section (6) creates broad new authority for the government to force the interlocutory sale of property named as a defendant in an *in rem* civil forfeiture proceeding. While at first glance this section appears benign and seemingly reasonable, the authority it grants–specifically the authority in subsections (6)(b) and (6)(c)–leaves substantial room for abuse by the government. Unfortunately, history strongly suggests that abuses will occur under these provisions. *See, e.g., United States v. Michelle's Lounge,* 39 F.3d 684, 699 (7th Cir. 1994)(using civil forfeiture laws to seize all of a person's substantial assets and hold such assets over two years without adversary hearing before indictment reflects a statutory scheme which "does present a great opportunity for abuse by the prosecutorial of the government"); *United States v. Farmer,* 274 F.3d 800 (4th Cir. 2001)(same; almost two years between seizure of all of defendant's assets and his indictment).

Rule G(6)(a). Preservation of Property. This subsection deals with property which is a defendant *in rem* in a forfeiture case and the owner or another person remains in possession of the property. In such cases the court may "enter any order necessary to preserve the property and to prevent its removal, destruction or encumbrance." While we have no objection to courts having this power, we are concerned with the expansive interpretation DOJ has placed on this power. As the government notes, the authority for proposed Rule G(6)(a) is derived from current Rule E(10). However, there is no provision in Rule E(10) that would allow for a *sale* of property under proposed Rule G(6)(a). Indeed, a sale of the defendant property would be inconsistent with the title and purpose of the proposed subsection, *i.e., the preservation* of the property.

Rule G(6)(b). Interlocutory Sales; Delivery. This subsection authorizes the sale of any defendant item of property, at any time after a forfeiture complaint is filed, on motion of any party, including the government or even the marshal, if any of four circumstances are shown:

> (A) the property is perishable, or liable to deterioration, decay, diminution in value, or injury by being detained in custody pending the action;
>
> (B) the expense of storage is "excessive or disproportionate to its fair market value";
>
> (C) the property is subject to a mortgage or taxes on which the owner is in default; or
>
> (D) other good cause is found by the court.

Although this provision is apparently derived from current Rule E(9), it is an enormous expansion of the circumstances where the government can obtain a forced interlocutory sale. The phrase "diminution in value" does not appear in Rule E(9). Any car, truck, boat, or plane which is priced in the marketplace by the model year of the property (and thus depreciates with time) would fall within the scope of this provision. Forfeiture actions very often involve property of this type. This provision would substantially and unfairly increase the government's power to coerce settlements where the owner seeks the return of the actual seized property.

The provision in proposed Rule G(6)(b)(C) relating to property subject to a mortgage or taxes in default is also not found in Rule E(9). This too is a substantial broadening of the government's power to force interlocutory sales. We oppose this expansion of the government's power because it is all too easily subject to abuse, and because of its potential to exacerbate erroneous deprivations. For example, where the government has seized all of a person's assets, or frozen the person's bank accounts, it is unlikely that the person will be able to keep mortgage or tax payments current. If the seizure or freeze order was in error, the error will be compounded by a sale of the property. *See Michelle's Lounge, supra,* at 698-700, citing *Mathews v. Eldridge,* 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 528 (1976).

Consider also, *e.g.,* a forfeiture action against a family residence where the husband and wife owners are claimants. Since *United States. v. James Daniel Good Real Property,* 510 U.S. 43, 114 S.Ct. 492, 126 L.Ed.2d 490 (1993), the government has been required to use a non-possessory method such as filing a *lis pendens* when

commencing a forfeiture action against real property. In order to take actual possession, prior notice and an adversary hearing is required. Significantly, the family that resides in the home is permitted to remain in possession while the case is pending. Under proposed (6)(b), if the family got behind on mortgage payments, the government could force an interlocutory sale, and the claimants would be helpless to stop it. Even if the owners ultimately prevailed after several years of litigation, they would still have lost their home. Moreover, the cost of buying comparable housing years later would almost certainly exceed the cash realized by the forced sale. In such cases, simply the *threat* by the government to force a sale could be used to coerce the claimants into accepting a settlement on the government's terms without any opportunity to have their claims adjudicated.

Similarly with motor vehicles, boats, and planes, the owner may have an interest in recovering the specific property that was seized. For example, the owner may know that the property functions well and has been well maintained. Its value to the owner may exceed what it would bring in the marketplace, and the owner may believe that it will be realistically impossible to buy an item of comparable quality on the open market. Such an owner would be highly susceptible to coercion to accept the government's settlement offer where the government is threatening to force a sale of the property.

In some cases the owner may agree to liquidate a defendant property. Obviously, in such instances no coercion would be involved, and a sale by agreement could proceed. However, in order to avoid the risk of erroneous deprivation, the authority to prevent a forced sale should remain with the owner.

In sum, we believe that the phrase "diminution in value" should be deleted from (6)(b)(i)(A) and that (6)(b)(i)(C) should be deleted altogether. The provision in (6)(b)(ii) allowing an alternative to a forced sale, *i.e.*, delivering the defendant property to a party while the case is pending upon the party's giving security, should be kept in the rule.

Rule G(6)(c). Sales; Proceeds. If the changes proposed in (6)(b) above, are made, we would have no opposition to this subsection.

Rule G(6)(d). Entry of Order of Forfeiture. This subsection provides that, upon the entry of an order of forfeiture, the property "must be disposed of as provided by law." No mention is made of a stay pending appeal. In order to avoid confusion, language should be added qualifying the mandatory disposal by the phrase "unless a stay is granted."

Section (7). Pre-trial Motions.

Section (7) addresses a number of issues that are not covered by the existing rules. We see no need to address any of these issues in Rule G. However, if the Committee is inclined to adopt any of these proposals, we want to be sure that the rule makes clear that the motions described in this section are not intended to be all-inclusive. We also have specific objections to the treatment of these issues.

Rule G(7)(a). Subsection (a) is a misguided attempt to codify existing case law holding that the Fourth Amendment exclusionary applies to civil forfeiture cases. As drafted, this proposal improperly narrows the holding of the caselaw because it limits suppression to use of the property as evidence "at the forfeiture trial." The caselaw provides for suppression of the use of the property for *all purposes.* Moreover, we are not aware of any "confusion among practitioners" concerning the application of the exclusionary rule. Explanation at 17.

Rule G(7)(b). Subsection (b) provides that the government may "move at any time to strike a claim and answer for failure to comply with the filing requirements, or for failure to establish an ownership interest in the property subject to forfeiture." We have already explained in response to proposed Section 5 why it is not necessary to establish an ownership interest in the property in order to have standing. This subsection would allow the government to move at any time to disqualify a claimant for failure to comply with the technical filing requirements governing claims and answers. We see no reason to permit the government to argue at trial, or even after trial on the merits, that a claim was filed late. Just as a claimant may waive certain issues by not raising them at the appropriate time, so can the government.

Rule G(7)(c). Subsection (c) provides that a claimant "with an ownership interest in the property" may move "at any time after filing a claim and answer, for release of the property under 18 U.S.C. 983(f)." DOJ claims that this subsection is needed to provide "a procedural counterpart to 18 U.S.C. § 983(f)." Explanation at 17. In fact, 18 U.S.C. §983(f) provides its own procedural rules, and they are incompatible with DOJ's proposal.

First, §983(f)(1)(A) merely requires the claimant to have "a possessory interest in the property," not an ownership interest. Second, whereas subsection (c) only permits the filing of a motion for release of property after a claim and answer have been filed, §983(f)(3)(A) permits a "claimant" to file a petition for release of the property on hardship grounds even "if no complaint has been filed." CAFRA's hardship release provision was thus intended to be available immediately following the seizure of the

property. A claimant is not required to wait many months until the government files a complaint, nor is there any requirement that the claimant first file a claim and an answer.

The Explanation states that subsection (c) is "necessary to address confusion caused by the pre-CAFRA case law" governing motions under Rule 41(e) of the Federal Rules of Criminal Procedure.[7] Explanation at 17. However, we do not see any language in subsection (c) that addresses this alleged "confusion."

The Explanation at 19 further states that subsection (b) provides that the criteria set forth in Section 983(f) are the only grounds for the pre-trial release of the property, but there is no such language in the draft of Rule G(7)(b) that was provided to us. If the reference was intended to be to subsection (c), we object to that characterization because this subsection is at odds with the language of 18 U.S.C. §983(f), which does not preclude other motions for release of seized property based on the illegality of the seizure. DOJ sought to insert language in section 983(f) making it the exclusive means of obtaining release of property prior to trial. Congress rejected that effort to abolish Rule 41(e) motions. Moreover, we do not agree with the government's view of Rule 41(e). It still has an important role to play after the enactment of Section 983(f). Indeed, the government appears to concede that a Rule 41(e) motion will lie before an administrative forfeiture proceeding is commenced.

But even after a notice of seizure is sent to the owner, there are situations where the claimant cannot wait an additional ninety days or more (the time for filing a complaint may be extended for good cause) for a remedy, and thus the forfeiture suit itself does not provide an adequate remedy at law. A company's property may have been seized illegally and the property may severely diminish in value over time, *e.g.*, perishable goods. Contrary to the view expressed by many courts, there should be no hard and fast rule that a motion under Rule 41(e) will not lie once a notice of seizure

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[7] The Explanation (p. 18) erroneously complains that "In adopting the standards set forth in Rule 41(e), courts confused the legality of the seizure, which is the issue in Rule 41(e) motions, with the hardship suffered by the claimant as result of the pre-trial seizure of his property." In fact, Fed.R.Crim.P. 41(e) provides, in relevant part, that "A person aggrieved by an unlawful search and seizure *or by the deprivation of property*" may move the district court for return of the property. (emphasis supplied). The Advisory Committee's Note to the 1989 amendments to Rule 41(e) explains that "[a]s amended, Rule 41(e) provides that an aggrieved person may seek return of property that has been unlawfully seized, and a person whose property has been lawfully seized may seek return of property when aggrieved by the government's continued possession of it."

is served. *See* 1 David B. Smith, PROSECUTION AND DEFENSE OF FORFEITURE CASES, ¶10.05A, 10-93 (June 2002 ed.)("The court should carefully weigh the competing interests of the claimant and the government in determining whether to rule on a motion for return of seized property. The equities may vary enormously depending on the circumstances and courts should be flexible."); *Muhammed v. DEA*, 92 F.3d 648, 652 (8th Cir. 1996)(Rule 41(e) motion may still lie after initiation of administrative forfeiture proceedings, depending on the equities of the situation).

Rule G(7)(d)(i). Subsection (d)(i) provides that a claimant (again misdefined as a party "with an ownership interest in the property") "may, at any time after filing a claim *and answer*, move to dismiss the complaint under Rule 12(b)." We see the necessity for first filing a claim but not for first filing an answer. Fed.R.Civ.P. 12(b) gives the pleader the option to make seven specified defenses by motion before answering the complaint. Surely DOJ does not believe that a different rule should apply in civil forfeiture cases. If they do, they have provided no rational justification to support such a rule.

Rule G(7)(d)(ii). Subsection (d)(ii) provides that a complaint may not be dismissed on the ground that the United States did not have adequate evidence at the time the complaint was filed to establish the forfeitability of the property." DOJ states that this provision is necessary to provide a procedural counterpart to a new statute, 18 U.S.C. § 983(a)(3)(D), which it claims was enacted "to overturn legislatively a number of cases permitting a civil forfeiture complaint to be dismissed pre-trial based on lack of evidence." Explanation at 20. DOJ states that lack of evidence is not a basis for a motion to dismiss under Rule 12.

Subsection (d)(ii) is not necessary to implement 18 U.S.C. §983(a)(3)(D), which is self-enforcing. DOJ wants to insert this provision, with a completely misleading explanation of section 983(a)(3)(D), in order to give section 983(a)(3)(D) a meaning it clearly does not have, and which Congress specifically sought to avoid.

Many cases, both before and after the enactment of the CAFRA, hold that the government must have probable cause at the time it files the complaint.[8] Indeed, the

[8] In addition to the cases cited in the Explanation at 20 n.43, see *U.S. v. $734,578.82 In U.S. Currency*, 286 F.3d 641, 655 (3d Cir. 2002). As the Third Circuit observed, this rule "avoids the obvious questions of fundamental fairness that would arise from the government attempting to have a court order forfeiture without first having an adequate factual basis to support the request."

legislative history of CAFRA expressly states the requirement:

> And, while the government may use evidence obtained after the forfeiture complaint is filed to establish the forfeitability of the property by a preponderance of the evidence, the government must still have had enough evidence to establish probable cause at the time of filing (or seizure, if earlier). The bill is not intended to limit the right of either party to bring a motion for summary judgment after the filing of the complaint pursuant to Fed.R.Civ.P. 56(a) or 56(b).

146 CONG. REC. H2050 (daily ed. April 11, 2000).

The government may not acquire its probable cause later, by conducting civil discovery. This probable cause requirement follows naturally from the fact that the Fourth Amendment prevents the government from seizing property without probable cause. It is also embodied in a statute, 19 U.S. C. § 1615, that was originally enacted in 1790, to govern the burden of proof in customs forfeiture cases.

DOJ asked Congress to abolish this requirement when it enacted CAFRA, but Congress refused to do so. However, Congress did agree that because CAFRA raised the government's burden of proof from probable cause to preponderance of the evidence, the government should not be required to prove its case by a preponderance of the evidence at the time it files the complaint. That is the rule found in section 983(a)(3)(D). The same rule is found twice in CAFRA. The other place is section 983(c), which provides that the "government may use evidence gathered after the filing of a complaint for forfeiture to establish, *by a preponderance of the evidence*, that property is subject to forfeiture." Congress thought it was enough that the government have probable cause at the time it commenced the forfeiture action. Had Congress wished to enact the DOJ's proposal, it would have substituted the words "probable cause" for "adequate evidence. . . to establish the forfeitability of the property" in section 983(a)(3)(D).[9]

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[9] H.R. 1965, a pro-government version of the "Hyde bill" introduced in 1997, would have relieved the government of the need to demonstrate that it had probable cause at the time it filed its complaint. That was one of the more objectionable features of the bill that ultimately resulted in its failure to pass. See H. Rep. No. 105-358, 105th Cong., 1st Sess. 47, 89 (1997).

There is a further problem with the government's proposal. CAFRA exempts certain statutes, mainly the Customs forfeiture laws under Title 19, from its main provisions. Those "carve-out" statutes remain unreformed. 18 U.S.C. §983(i). The government's burden of proof in those proceedings remains probable cause, as provided in 19 U.S.C. §1615. For those statutes, the government must have adequate evidence at the time it files the complaint to establish the forfeitability of the property.

Accordingly, the fact that a Rule 12 motion to dismiss will not normally lie for lack of evidence does not matter. In the unique context of civil forfeiture law, most courts agree that the government must have probable cause at the time it files the complaint. If it does not, then it may suffer dismissal or summary judgment or judgment after a trial.

If the Committee is inclined to adopt proposed Rule G(7)(d)(i) and/or (ii), we urge the Committee to add a new subsection (e) as follows:

> (e) Summary Judgment. Any party may bring a motion for summary judgment after the filing of the complaint pursuant to Fed.R.Civ.P. 56(a) or 56(b).

This proposed new subsection (e) is consistent with existing caselaw, and the intent of CAFRA, as set forth in the legislative history quoted above. If the Rule addresses motions to dismiss pursuant to Fed.R.Civ.P. 12(b), we think it also appropriate, in order to avoid confusion, to address motions for summary judgment in the same rule.

Rule G(7)(e). Subsection (e) supposedly "fills in the gaps" in 18 U.S.C. §983(g), the proportionality provision of the CAFRA. DOJ notes that section 983(g) is silent as to the point in a civil forfeiture proceeding when an Eighth Amendment challenge may be made. The reason section 983(g) is silent on that point is easily explained. The DOJ asked Congress to include a provision exactly like subsection (e) but Congress rejected it. Congress saw no reason to force claimants to wait until the government had conducted discovery on the issue. It decided to leave that to the discretion of the court. There will be some cases where the forfeiture sought is so clearly excessive that civil discovery is not necessary to resolve the issue.

We also see no reason for a hard and fast rule that an excessiveness issue may not be raised unless the claimant has pleaded it as a defense under Rule 8. Case law under Fed.R.Civ.P. 8 should govern this "waiver" issue. There is no need for a special rule pertaining to this one defense. This is a transparent attempt to create another trap for the unwary--something CAFRA specifically sought to avoid.

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Section (8). Trial.

There is no need to provide that trial is to the court unless a party requests a trial by jury under Rule 38. Rule 38 already covers this subject. Rule 38(d) provides that the failure of a party to serve and file a demand as required by Rule 38(b) constitutes a waiver by the party of trial by jury.

This concludes our comments to proposed Rule G. As always, NACDL appreciates the opportunity to offer the Advisory Committee our comments on proposed rule changes that may affect the interests of our clients. We thank you again for the opportunity, and look forward to our continued participation in the rule-making process.

Very truly yours,

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June 2, 2003

John K. Rabiej
Chief, Rules Committee Support Office
Administrative Office of the United States Courts
Washington, DC 20544

Re: Proposed Rule G, Supplemental Rules for Certain Admiralty and Maritime Claims; Rule G(7)(d)(i).

Dear Mr. Rabiej:

Proposed Rule G(7)(d)(i) provides as follows:

> (i) Dismissal. A party with an ownership interest in the property may, at any time after filing a claim and answer, move to dismiss the complaint under Rule 12(b).

In our letters to the Committee of August 26, 2002, and April 2, 2003, NACDL objected to this provision on several grounds. First, we objected to the language "a party with an *ownership* interest" as being an incorrect statement of the law with respect to standing.

Second, we objected on the basis that this would be a substantial and unwarranted change from current law, which allows a motion to dismiss pursuant to Fed.R.Civ.P. 12(b) *before* filing an answer. Relying on a single published opinion from a district court in New Jersey, which was at the time on appeal, DOJ asserted that its interpretation of the law--that current Rule C(6) is inconsistent with, and thus "trumps" Fed.R.Civ.P. 12(a)(4)--was correct. See, *United States v. $8,221,877.16 in U.S. Currency,* 148 F.Supp.2d 427 (D.N.J. 2001). Explanation at 42-44.

On May 28, 2003, the Third Circuit Court of Appeals reversed the New Jersey district court decision upon which DOJ had relied. *United States v. $8,221,817.16 in United States Currency,* 2003 WL 21223874, ___ F.3d ___ (3rd Cir. 2003; No. 02-1264). Rejecting the same legal and policy arguments DOJ made to this Committee, the Third Circuit held, *inter alia*:

> Rule 12(a)(4) is simply not incompatible with Supplemental Rule C(6). Rather, the two fit comfortably together, the same way that Rules 12(a)(1) and 12(a)(4) do. Just as a

> civil defendant may respond to a complaint with a motion to dismiss, and must then file an answer within ten days after the court disposes of that motion, a forfeiture claimant may, after being served with a complaint and filing a verified claim, respond to a forfeiture complaint by filing a motion to dismiss; the claimant must then serve an answer within ten days after the court disposes of that motion. There is no "either/or" choice to be made. Asking whether C(6) *or* 12(a)(4) applies is like asking whether 12(a)(1) *or* 12(a)(4) applies. The simple answer is: both do.

2003 WL 21223874 at *10 (emphasis in original). The Court observed that its reasoning was "supported by another provision of the Supplemental Rules, case law arising out of a similar context, and policy considerations." Indeed, the Court specifically rejected the government's policy argument that "because the answer and responses to interrogatories are essential to 'smoking out' false claims, they are a requirement of Rule C(6) that cannot be overridden by the provision for motions in Rule 12." Id. at *12. That is the same argument DOJ made to this Committee. See, Explanation at 42-44. The Court correctly dismissed the government's contention.

> But we conclude that any concern as to waste of judicial resources is laid to rest not only by the requirement that the claimant file a verified claim to the funds, but also by the very tactic that the government decries, namely, the early motion to dismiss. It would be a waste of resources to require the claimant to answer extensive interrogatories before making the motion to dismiss.
>
> * * *
>
> We are not compelling the government to litigate the ultimate issue of forfeiture any sooner than we normally ask plaintiffs to prove their cases. We are merely requiring it to defend against a motion to dismiss the complaint that raises preliminary issues before it imposes on [claimant] a great deal of burdensome discovery, just as we require plaintiffs in normal civil cases to defend the adequacy of their complaints before the defendant must file an answer.

Id. at *13. A copy of the Third Circuit opinion is enclosed herewith.

Accordingly, in order to clarify, once and for all, that Fed.R.Civ.P. 12(a)(4) applies to civil forfeiture proceedings, proposed Rule G(7)(d)(1) should be stricken, and proposed Rule G(5)(b) be modified to read as follows:

> (b) Answer. A person filing a claim must serve and file an answer to the complaint, or a responsive pleading pursuant to Fed.R.Civ.P. 12, within 20 days after filing the claim.

The Third Circuit also appears to agree with our criticism of Rule C(6)(c) and, by implication, proposed Rule G(2)(c). See, NACDL Letter of August 26, 2002 at 4-5; Letter of April 2, 2003, at 3-5 (the provision that allows interrogatories to be served with the complaint without leave of court is an anomaly based on special needs in admiralty cases, and cannot be justified in a rule intended to apply strictly to forfeiture). In its limited response to our criticism of proposed Rule G(2)(c), DOJ attempted to justify this provision on the basis that it was necessary in order for the government to weed out false claims and to determine standing. Without deciding the validity of Rule C(6)(c), the Third Circuit rejected the government's justification, observing:

> The advisory committee notes explain that the procedure for serving interrogatories with the complaint is justified by "the special needs of expedition that often arise in admiralty." Supp. R. C. advisory committee's note. *Contrary to the government's urging, the procedures for interrogatories does not appear to have been provided to inform the government as to the claimant's statutory standing in forfeiture cases.* In fact, the notes later acknowledge that the needs of expedition "do not commonly arise in forfeiture proceedings." Id. The advisory committee made no other comment regarding the reason for allowing the government to serve interrogatories with the complaint, nor did it indicate that the special needs of expedition are so great that they completely override the procedural safeguards of Rule 12(b).

2003 WL 21223874 at *12 (emphasis supplied). Thus, we renew our exhortation that the Committee strike proposed Rule G(2)(c).

Finally, on a separate matter, we once again note our disagreement with DOJ's misleading discussion of the particularity requirement of current Rule E(2)(a). Explanation at 5-7. The United States Court of Appeals for the Fourth Circuit recently

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had occasion to review Rule E(2)'s particularity requirement, and agreed with the interpretation advanced by NACDL. *United States v. Mondragon,* 313 F.3d 862 (4th Cir. 2002). Indeed, the Court found that based upon the government's heightened burden of proof (preponderance of the evidence) in the wake of CAFRA, the former pleading requirement that "the complaint must allege sufficient facts to support a reasonable belief that the government can demonstrate *probable cause* for forfeiture at trial," is no longer sufficient. Id., 313 F.3d at 865. The Fourth Circuit instead adopted the requirement that "the complaint must at bottom allege facts sufficient to support a reasonable belief that the property is subject to forfeiture." Id., 313 F.3d at 865-66.

As always, we thank you for the opportunity to offer the Advisory Committee our comments on this rule proposal.

Very truly yours,

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April 2, 2003

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Re: Proposed Rule G, Supplemental Rules for Certain Admiralty and Maritime Claims

Dear Mr. Rabiej:

Thank you for providing us with a copy of the Department of Justice's reply to NACDL's comments on the proposed Rule G. We have now had an opportunity to study the DOJ reply, and would like to submit the following additional comments.

Purpose of Rule G.

We submit that the real reason DOJ proposes a new Rule G is not the need to consolidate all of the procedures governing civil forfeitures in one place--which Rule G obviously does not accomplish--but, rather, DOJ's desire to create a special set of procedural *and standing* rules unique to civil forfeiture that would once again tilt the playing field in forfeiture cases in favor of the government. Moreover, DOJ wants to accomplish this shift in the balance outside of the legislative process, where its efforts there have either already been rebuked, or would have no chance of passage. If DOJ was truly interested in "the consolidation of all procedural rules governing civil forfeiture practice in one place," the logical place to insert these new provisions would be in 18 U.S.C. § 983. Rather than consolidating all of the procedural rules in one place, DOJ's proposal requires the practitioner to jump back and forth between section 983 and the new Rule G.

The Supplemental Rules currently govern only the commencement of a civil forfeiture action--due to its in rem nature. After the filing of the claim and answer, the Federal Rules of Civil Procedure take over. There is absolutely no reason to change this established system by devising special rules--all favoring the government--to govern motions practice and standing in civil forfeiture cases. There is nothing unique about motions practice in a civil forfeiture case that requires the crafting of special rules to govern only civil forfeiture cases. To the extent that these proposed special rules conflict with the Rules of Civil Procedure, or with established case law, they would

create confusion where none presently exists. They would also allow the government to win cases based on technicalities such as whether the claimant has asserted all of his defenses and jurisdictional objections in the Answer.

DOJ states (p. 31) that "civil forfeiture procedure should not be a game of "gotcha." We heartily agree. Indeed, CAFRA eliminated a number of DOJ's favorite "gotchas." Unfortunately however, the DOJ proposal would create new "gotchas" and traps for the unwary claimant, who is frequently proceeding *pro se* because he is unable to afford counsel.

Moreover, standing is not even a procedural matter. Standing in civil forfeiture cases has been governed by case law based on generally applicable Article III principles. See discussion, *infra,* at pages 11-16. We believe that the courts have crafted an intelligent, sound body of law in this area. DOJ rejects the cases that do not support its position on standing. Unable to persuade the courts and Congress, DOJ hopes that this Committee will craft a new set of highly restrictive standing rules more to its liking. We trust that the Committee will see DOJ's proposal for what it is, and will summarily reject it.

Rule G(2). Complaint.

We remain troubled by the unnecessary and misleading discussion of the particularity requirement in the footnotes. The only point that the footnoted commentary needs to make is that no change is intended from current Rule E(2)(a). It is simply not the case that "a complaint that gives a detailed description of the property and the circumstances of seizure is sufficiently particular." For that manifestly incorrect proposition, DOJ cites three district court decisions, two of which are unpublished.[1] DOJ does not discuss or even cite the legions of published circuit court opinions to the contrary, some of which we cited in our prior letter. *United States v. Daccarett,* 6 F.3d 37, 47 (2d Cir. 1993), cited by DOJ, does not support the government's position. *Daccarett*, like the other cases cited in our letter of August 26, 2002, states that the complaint "must allege sufficient facts to support a reasonable belief that the government will be able to prove the property is subject to forfeiture"--a much more demanding requirement than the government's vague formulation. The only

[1] DOJ relies on unpublished decisions throughout its draft commentary The problem with relying upon unpublished decisions is that such decisions can be found to support almost any proposition, no matter how clearly wrong.

conceivable reason for DOJ's persistence in including such deliberately misleading commentary is DOJ's desire to cite the Committee's notes as authority in future litigation, thereby warping the law in its favor.

DOJ also dismisses our complaint that proposed Rule G(2)(b)(v) has deleted the language "without moving for a more definite statement" which currently appears in Rule E(2)(a) by shifting the blame to the Advisory Committee's Reporter (p. 7). We continue to believe that if the language of proposed Rule G(2)(b)(v) differs from the language of Rule E(2)(a), it will inevitably invite the argument that a different meaning was intended. We believe that once the Reporter is made aware of the basis of our concerns, the necessity of this language will become obvious. If DOJ truly intends that "nothing in Rule G changes or is intended to change in any substantive way what the government is required to do to comply with the particularity requirement," then it should have no objection to the inclusion of this language.

Rule G(2)(c). Interrogatories.

Even more troubling is DOJ's response (or lack thereof) to our criticism of Rule G(2)(c), which does not attempt to grapple with the points we made. The Advisory Committee's Note to the 2000 Amendment of Rule C(6) states that "the special needs of expedition that often arise in admiralty justify continuing the practice." However, the same Note goes on to say that "[a]dmiralty and maritime in rem proceedings often present special needs for prompt action that do not commonly arise in forfeiture proceedings." Thus, there is no logical reason to allow interrogatories to be served with the complaint in forfeiture proceedings. DOJ utterly fails to respond to this cogent point. Instead, it offers a totally different justification for allowing interrogatories to be served with the complaint: to prevent false claims from being filed in civil forfeiture proceedings (p. 8). The interrogatories, in DOJ's view (p. 9), "serve the essential purpose of providing the Government with a means of determining, at an early stage in the proceedings, who the claimant is, what interest he has in the property, and whether his claim is frivolous."

DOJ fails to explain what is unique about forfeiture cases that justifies the creation of this special advantage for the government. It is true, as DOJ contends, that it has no control over who will file a challenge to a civil forfeiture.[2] But DOJ has not

[2] The same is true of criminal forfeiture cases where, after the preliminary order of forfeiture is entered, any third party can challenge the forfeiture. Yet the Rules of Criminal Procedure do

shown that it will suffer greatly if a claimant without standing is flushed out in due course through normal discovery, rather than immediately. At best, the government has offered a weak reason to permit interrogatories to be served with the complaint directed *solely to the issue of standing*. DOJ offers no explanation for allowing it to immediately propound questions, without leave of court, directed to the merits of the property owner's case; the credibility of his witnesses; the documentary evidence in his possession; *etc.* We know from experience that often times the real purpose for filing interrogatories with the complaint is to discourage property owners from contesting the forfeiture. That is why the interrogatories are typically so overbroad, burdensome and vexatious. Faced with a battery of such interrogatories at the very outset of the litigation, many would-be claimants decide that getting back their property is just not worth the effort and expense.

DOJ's suggestion that there is a heightened danger of false claims in forfeiture cases is disingenuous. Because claimants are litigating against the federal government in a quasi-criminal context, rather than against a private party, they are far *less* likely to make false claims than in an ordinary civil case. No one wants to be charged with perjury or obstruction of justice, and no one in his right mind trifles with federal law enforcement authorities. The few cases cited by the government have no bearing on the issue here--whether interrogatories should be permitted to be served with the complaint.

DOJ states (p. 9) that Congress recognized in CAFRA that the filing of frivolous claims was a serious problem and a legitimate concern for the government; and that language discouraging the filing of such claims was made an important part of the reforms enacted in 2000, citing 18 U.S.C. § 983(h). We disagree.[3]

Despite DOJ's strong objections, CAFRA abolished the prior requirement that every claimant give a "cost bond" to defray the government's expenses in litigating the forfeiture action. The same DOJ lawyers who wrote proposed Rule G lobbied Congress

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not allow the government to serve interrogatories--or utilize other means of discovery--at any point in the proceeding *without the leave of the court.* Rule 32.2(c)(1)(B)("before conducting a hearing on the [third party] petition, the court *may permit* the parties to conduct discovery"). We have not heard any government complaints about problems in criminal forfeiture cases occasioned by this much more restricted right to take discovery.

[3] If DOJ's characterization of Congress' attitude is correct, then the safeguards against false claims in CAFRA should be sufficient by themselves.

for months trying to persuade lawmakers not to abolish the cost bond requirement. They vociferously argued that the cost bond was essential, asserting that without it the government would be deluged with frivolous and false claims. Congress was not persuaded by these dire predictions, which, naturally, have not come to pass. Merely as a sop to law enforcement, Congress enacted section 983(h)--a provision which we do not believe has ever been invoked since the passage of the CAFRA.

Rule G(3)(a). Arrest Warrant.

We are pleased that DOJ acknowledged our concerns regarding the seizure of property, and we are satisfied with the revised language of proposed Rule G(3)(a).

Rule G(3)(b)(ii). Sealed Complaints.

DOJ has not met our objection to the provision allowing the government to delay execution of the warrant when the complaint is filed under seal, or when the action is stayed prior to execution of the warrant. We noted that there is no authority permitting the government to file a complaint under seal. While conceding that such practice is at odds with the "forthwith" service requirement of Rule E(4)(a), DOJ nonetheless asserts (p. 12) that filing a complaint under seal "is accepted practice," albeit "rarely employed." Accepted by whom? Certainly not the courts. DOJ's "authority" for this practice is a DOJ form motion and order attached to the Explanation as Exhibit A. It apparently does not matter to DOJ that no one else accepts it.[4] The first time such "accepted" practice was challenged, it was struck down as inconsistent with Rule E(4)(a). *U.S. v. Funds Representing Proceeds of Drug Trafficking ($75,868.62)*, 52 F.Supp.2d 1160 (C.D. Cal. 1999).

We agree that there may be unusual circumstances, such as the terrorism case posited in the DOJ's Explanation (p. 13), where filing a complaint under seal or staying

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[4] The district court cases cited by DoJ (p. 12 n.27) are inapposite. In those cases the courts allowed the complaint and/or other documents to be filed under seal for a very brief period of time--until the property could be seized--to prevent the owner from disposing of or concealing it. DoJ has not found any case in which the court authorized sealing--even for a brief period of time--to avoid jeopardizing an ongoing criminal investigation. We would have no objection to a rule authorizing the court, in appropriate circumstances, to allow the complaint to be filed under seal for a brief period of time until the property is seized or restrained. But because the government can seize property pursuant to a sealed seizure warrant issued under Rule 41, there would rarely, if ever, be a need to file a complaint under seal for this purpose.

the action prior to execution of the warrant might be justified. DOJ states (p. 14) that "[i]f a judge is persuaded that there are good reasons to file a case under seal" it should be permitted to do so and to delay service of the warrant. But that is not the rule DOJ has proposed. The proposed rule does not require the government to make any particular showing to a judge before the complaint is filed under seal or the action is stayed. We know from experience that *ex parte* requests by the government to file documents under seal are routinely rubber-stamped by busy courts, whether or not there is any compelling reason to do so That loose practice is not acceptable where the sealing of a complaint may delay the property owner's right to be heard for years, thereby nullifying the strict time limits established by CAFRA, and causing the owner irreparable injury

In order to obtain an *ex parte* sealing order or stay, the government should be required to make a compelling showing--not a mere conclusory allegation--that such a drastic measure is truly necessary to avoid jeopardizing an ongoing criminal investigation. The rule should also require the court to make written findings that the strict standard for obtaining a sealing order or stay has been met. *See In re Ramu Corp.*, 903 F.2d 312, 320 (5th Cir. 1990) (because the grant of a stay of discovery can deprive claimants of property without a hearing for a long time, "the government should at least be required to make a specific showing of the harm it will suffer without a stay and why other methods of protecting its interests are insufficient."); *U.S. v. Real Estate at 1303 Whitehead St., Key West*, 729 F. Supp. 98, 100 (S.D. Fla. 1990) (government must make a compelling showing of good cause for a stay of discovery in the same form that a party must show justification for a preliminary injunction; "Such a showing will avoid the hazards of unjustified indefinite delay, ensure that claimants receive due process of law, and generally assure the court of the propriety of a stay."); *U.S. v. $151,388.00 U.S. Currency*, 751 F. Supp. 547 (E.D.N.C. 1990) (adopting four-part test set out in *1303 Whitehead St.*); *U.S. v. Certain Real Property Located at 5137/5139 Central Ave.*, 776 F. Supp. 1090 (W.D.N.C. 1991)(same); *U.S. v. four Parcels of Property in Louisville, Ky.*, 864 F. Supp. 652 (W.D. Ky. 1994)(same). These cases all involve stay of discovery applications by the government in an adversarial context, after the litigation has begun. The hazards for claimants' rights are much greater where the government is seeking to obtain a stay or sealing order *ex parte*, as with DOJ's proposed rule. The government should have to satisfy the *1303 Whitehead St.* standard before obtaining a stay or sealing order.

Finally, we object to the general watering down of the present requirement of Rule E(4) that warrant or supplemental process be executed "forthwith." In place of the "forthwith" language, the DOJ proposal would substitute "as soon as practicable." DOJ

cannot cite a single case where a court construed "forthwith" unreasonably, without regard to the practical constraints that the marshal faces. We are concerned that the less demanding "as soon as practicable" language will encourage the government to delay execution of the warrant without good cause.

Rule G(4). Notice.

Rule G(4)(a). Notice by Publication.

We stand by objections to the proposed publication provisions of Rule G(4)(a) as set forth in our letter of August 26, 2002. We note with some skepticism DOJ's claim that "[i]n deciding which of the proposed options to use, prosecutors will take into account the case law requiring that notice be given in a manner reasonably likely to achieve results." (p. 18) What DOJ seeks to enact is a rule that allows minimum due process as the standard against which its actions are measured. Thus, DOJ wants to set the bar at the very minimum that the Constitution will allow. We, on the other hand, believe that the bar should be set higher in order to ensure that property owners will not lose their property without ever having notice of the pending action.

We do, however, commend DOJ's suggestion that all forfeiture notices should be placed on a "central forfeiture notice government website." Rule G(4)(a)(v) (p. 21). We agree that this is a good idea for the reasons stated by DOJ, and note that it could be accomplished at minimal cost to the DOJ. But we continue to believe that internet notice should be in addition to, not in lieu of, traditional publication in a newspaper.

Rule G(4)(b). Direct Notice.

We strongly disagree with DOJ's explanation and analysis of proposed Rule G(4)(b). 18 U.S.C. §983(a)(4)(A) provides as follows:

> **(4)(A)** In any case in which the Government files in the appropriate United States district court a complaint for forfeiture of property, any person claiming an interest in the seized property may file a claim asserting such person's interest in the property in the manner set forth in the Supplemental Rules for Certain Admiralty and Maritime Claims, except that such claim may be filed not later than 30 days after the date of service of the Government's complaint or, as applicable, not later than 30 days after the date of

> final publication of notice of filing of the complaint. (emphasis supplied)

Thus, we believe that it is DOJ, not NACDL, who has failed to distinguish between the concepts of service of process and providing notice to potential claimants.

DOJ disingenuously argues (p. 16) that "[A]t the outset of a civil forfeiture case, the Government often does not know who, if anyone, will claim an interest in the res." That is simply not true. The vast majority of civil forfeiture proceedings involving personal property are initiated with an administrative notice of seizure and intended forfeiture. If no one responds to the notice, the property is forfeited administratively. If, on the other hand, a claim is filed pursuant to 18 U.S.C. §983(a)(2), then the Government, subject to the exceptions set forth in 18 U.S.C. §983(a)(3)(B) or (C), must file a complaint for forfeiture in the appropriate United States district court pursuant to 18 U.S.C. §983(a)(3). At that point, the government clearly knows who has asserted a claim to the property. In the experience of the undersigned, it has always been the government's practice to serve process on any person who has filed an administrative claim and requested that the matter be filed in district court.[5]

Unlike forfeitures involving personal property, all civil forfeitures of real property and interests in real property must be commenced as judicial forfeitures. 18 U.S.C. §985(c) provides as follows:

> **(c)(1)** The Government shall initiate a civil forfeiture action against real property by --
>
> **(A)** filing complaint for forfeiture;
>
> **(B)** posting a notice of the complaint on the property; and
>
> **(C)** serving notice on the property owner, along with a copy of the complaint.

[5] The government is not required to serve process on persons who did not file a claim pursuant to 18 U.S.C. §983(a)(2), so long as the government has complied with the notice requirements of 18 U.S.C. §983(a)(1).

> **(2)** If the property owner cannot be served with the notice under paragraph (1) because the owner --
>
> > **(A)** is a fugitive;
> >
> > **(B)** resides outside the United States and efforts at service pursuant to Rule 4 of the Federal Rules of Civil Procedure are unavailing; or
> >
> > **(C)** cannot be located despite the exercise of due diligence, constructive service may be made in accordance with the laws of the State in which the property is located.

Thus, 18 U.S.C. §985(c) clearly requires service of process consistent with Rule 4 of the Federal Rules of Civil Procedure. If the government could serve notice "in any manner reasonably calculated to ensure that notice is received, including first class mail, private carrier, or electronic mail" as proposed in Rule G(4)(b)(ii), the exceptions set forth in 18 U.S.C. §985(c)(2)(A), (B), and (C) would be superfluous.

Moreover, the government knows at the outset of proceedings involving real property the identities of potential claimants. That is one of the primary purposes for recording interests in real property. It is inconceivable that DOJ would seriously argue that it could forfeit a property owner's home without serving process on the owner of the property.

Finally, we note that the service of process contemplated by current Rule C(3) involves the delivery of a warrant of arrest for the seized property to a marshal or other person specified to receive such process by Rule C(3)(b)(ii). We agree with DOJ that current Rule C(3) does not make any specific provision for either service of process or notice on persons who file a claim or are otherwise known to the government to have an interest in the seized property. But that clearly does not mean that service of process on persons who have asserted an interest in the property is not required. Indeed, both 18 U.S.C. §983 and §985 expressly contemplate service of a copy of the complaint. Service of a copy of the complaint on the property owner or person with an interest in the property must be distinguished from service of a warrant of arrest delivered to a marshal or other person authorized to receive the warrant.

Accordingly, we propose that if proposed Rule G is to be adopted at all, Rule G(4)(b) should be modified as follows:

> **(b) Service of Process.**
>
> (i) In addition to the requirements of Rule G(4)(a) --
>
> (A) The Attorney General must serve notice of the forfeiture action, including a copy of the complaint, pursuant to Rule 4 of the Federal Rules of Civil Procedure on any person who has filed a claim pursuant to 18 U.S.C. §983(a)(2); or
>
> (ii) In those cases in which the forfeiture action is commenced directly in district court without an administrative notice of seizure and intended forfeiture, the Attorney General must serve notice of the forfeiture action, including a copy of the complaint, pursuant to Rule 4 of the Federal Rules of Civil Procedure on any person whom the government knows, or reasonably should know, has an interest in the seized property, including, in the case of real property, on any person who has a recorded interest in the property.

Rule G(4)(b)(ii).

In light of the amendment proposed above, proposed Rule G(4)(b)(ii) should be eliminated.

Rule G(4)(b)(iii).

For the reasons stated in our letter of August 26, 2002, we stand by our objections to proposed Rule G(4)(b)(iii). If an inmate has filed a claim pursuant to 18 U.S.C. §983(a)(2), or has a recorded interest in real property, then *service of process* on the inmate should be made in the same manner provided for service of process on an inmate in any other civil proceeding.

Rule G(4)(b)(iv) and (v).

In light of the our proposed modifications to Rule G(4)(B)(i), these provisions are no longer necessary.

Rule G(5)(a) -- Claim and Standing.

DoJ's drastic curtailment of traditional standing rules in forfeiture cases is an outrageous proposal that flies in the face of virtually *all* the case law and Congress' work in the CAFRA. In our prior letter we laid bare the deceptive nature of DOJ's proposal. Somewhat chagrined, DOJ acknowledges that it is attempting to change the law in its favor; and that it never dared ask Congress to do what it now asks this Committee to do. DOJ admits that it is dissatisfied with court decisions in this area and wants the Committee to overrule them. But it gives the Committee no good reasons for overstepping its authority to write rules of procedure. And it offers no persuasive arguments on the merits of its standing proposal. *See U.S. v. 5 S 351 Tuthill Road, Naperville, Ill.*, 233 F.3d 1017, 1023 (7th Cir. 2000)("we think it particularly imprudent to adopt without a specific reason a [restrictive standing] test that appears to increase the harshness of the forfeiture remedy. So we will hew to the traditional 'actual stake in the outcome' test in analyzing whether [claimant] has standing").

As an initial matter, we object to the statement on pages 33-34 of DOJ's Explanation that subsection (5)(a)(i) sets forth requirements that are derived, in part, from the statutory requirements for filing a third party claim contesting a criminal forfeiture pursuant to 21 U.S.C. § 853(n)(3). The language of section 853(n)(3) is wholly different from--and serves a different purpose than--the language of proposed subsection (5)(a)(i). The petition that a third party claimant must file to challenge a criminal forfeiture is similar in breadth and scope to a complaint in a civil case. As the cases cited by the government indicate, failure to provide all of the required information is grounds for dismissal.

The government has been using the strict requirements of section 853(n)(3) as a "gotcha" in criminal forfeiture cases. We are concerned that the misleading statement in the commentary that subsection (5)(a)(i) "sets forth requirements regarding the content of the claim that are derived from the statutory requirements...for filing a third party claim contesting a criminal forfeiture action pursuant to 21 U.S.C. §853(n)(3)" is designed to allow the government to argue in future litigation that subsection (5)(a)(i)'s requirements are be construed *in pari materia* with §853(n)(3). That would transform the claim from the short and simple statement required by the literal language of

subsection (5)(a)(i) into a lengthy document in which the claimant must set forth--on peril of dismissal--all facts supporting his claim and the relief sought. The sheer length of footnote 50 on p. 34 of the DOJ draft convinces us that this is DOJ's stratagem. Unfortunately, we have seen DOJ use misleading commentary for future litigation purposes many times. This Committee should pay as much attention to the carefully written--but frequently duplicitous--commentary proffered by DOJ as to the actual language of proposed Rule G. The devil is often lurking in the footnotes, not in the language of the proposed Rule.

Rule G(5)(a)(i)(B). Standing.

The law of standing in civil forfeiture cases has been created by the courts over many years, based on general Article III principles. It is a still evolving body of law. In recent years the courts have repeatedly rejected DOJ's unpersuasive arguments for a crabbed and narrow view of standing. *See generally,* 1 David B. Smith, *Prosecution and Defense of Forfeiture Cases*, ¶9.04 (Dec. 2002 ed.). Unable to persuade even the most conservative courts to adopt its unreasonably narrow view of standing, DOJ now seeks to persuade this Committee to do what the courts, in dozens of decisions, have rejected. Given the audacity of this proposal, it is not unreasonable to expect that DOJ would have provided a detailed explanation of how it believes the courts have consistently erred in their standing decisions. However, no such explanation was forthcoming.

DOJ does not offer any explanation whatsoever as to why it thinks that a possessory interest in property should not generally be sufficient to confer standing. Our prior letter shows that DOJ did not ask Congress to alter standing law in this unprecedented manner. To the contrary, DOJ asked the Congress that enacted CAFRA to clarify that a possessory interest is sufficient to confer standing. DOJ offers no explanation for this reversal of its position.

DOJ's discussion of its complaint with the current law of standing is confusing and misleading. DOJ states (p. 35) that NACDL is "*partially* correct; in the absence of any statutory guidance, *many* courts do grant standing to claimants with no ownership interest." This is simply not true. It is firmly established that persons who have a mere possessory interest or a secured lienholder's interest in property have standing. There are no conflicting cases. DOJ has not cited a single case holding to the contrary. DOJ contradicts its own statement that there is a conflict on this issue in the very next sentence of its Explanation, where it characterizes the current case law as a "rule [that] needs to be changed." If the case law is in conflict, there is no "rule" to change.

DOJ then states that the courts "used the terms 'ownership' and 'standing' almost interchangeably." This, too, is false, and DOJ cites no cases for this remarkable statement. According to DOJ, this has "led to a great deal of confusion." We are not aware of any confusion on the issue other than the confusion DOJ is attempting to foster, presumably to justify a change in the established rules of standing. As evidence of this "confusion," DOJ cites a case in which a district court first ruled that claimant had standing but then reached a contrary conclusion after the trial on the merits. The Fifth Circuit held that the claimant did have standing, which was rather obvious. *U.S. v. $9,041,598.68 in U.S. Currency*, 163 F.3d at 245. We fail to see what lesson DOJ purports to derive from this case. The fact that one district judge misunderstood the elementary difference between standing and the claimant's defense on the merits does not justify the wholesale revision of the law of standing in forfeiture cases.

DOJ next argues (p. 36) that the "courts have struggled to adopt a rule that distinguishes standing and ownership. The rule that has emerged in the past two or three years is this: standing and ownership are different concepts--one determines whether the claimant gets in the courthouse door; the other is an element of the affirmative innocent owner defense." This statement is highly misleading. Standing has, since the very beginning of American forfeiture law in the 18th century, always encompassed far more than outright ownership of the property, as the case law demonstrates. Thus, standing and ownership have always been distinct concepts.[6] There has never been a "struggle" to distinguish them.

When Congress enacted CAFRA in 2000, it included a definition of who is an "owner" for purposes of asserting the innocent owner defense--one of many affirmative defenses to forfeiture. 18 U.S.C. § 983(d)(6). The statutory innocent owner defense had been around since at least 1978 and there had never been much of a problem in deciding who had standing to litigate the innocent owner defense. Nonetheless, at DOJ's urging, Congress sought to codify this point. DOJ tried to get Congress to restrict standing for those asserting the innocent owner defense, but it did not succeed. Congress merely codified the existing case law on the point. Section 983(d)(6) specifically allows bailees--who have only a possessory interest in the property--to

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[6] In the criminal forfeiture context, by contrast, the standing requirement in 21 U.S C. § 853(n)(2) tends to merge with the availability of the statutory defense under 21 U.S C. § 853(n)(6)(A) for third parties who have a superior interest in the property--which the third party has the burden of establishing. *E.g., U S. v. Hooper*, 229 F.3d 818, 820 n. 4 (9th Cir. 2000); *U.S. v. Ribadeneira*, 105 F.3d 833, 835 (2d Cir. 1997); Stefan D. Cassella, *Third Party Rights in Criminal Forfeiture Cases*, Crim. L. Bull 499, 525 (Nov./Dec. 1996).

assert the innocent owner defense.[7] Following the evolving case law, it only requires the bailee to identify the bailor and to show a "colorable legitimate interest in the property seized." §983(d)(6)(B)(ii). This requirement is designed to thwart drug money couriers who attempt to conceal the owner of the money. Thus, DOJ's only legitimate concern in this area was taken care of in CAFRA.

DOJ is correct in stating (p. 36) that "it is now the law that a person with a merely 'colorable interest' in the property has a sufficient interest to satisfy the Article III case-or-controversy requirement...but that same person may fail to establish his affirmative ["innocent owner"] defense if he does not qualify as an 'owner' of the property [as broadly defined in §983(d)(6)]." DOJ does not explain what is wrong with this approach. It seems to us to be elementary common sense.

DOJ then complains (p. 37) that "the courts have been inclined to interpret the case-or-controversy requirement freely, extending standing to persons with the most tenuous connection to the property..." However, the cases DOJ cites as examples of what it considers to be an overly generous approach to standing were, in our opinion, all correctly decided. At a minimum, none of the decisions is unreasonable.[8]

DOJ further complains (p. 37 n.58) of an unpublished decision holding that a claimant who denied ownership of currency at the time it was seized, but who later filed a claim asserting ownership, has standing. However, it is not uncommon for a person in possession of a large quantity of currency to deny ownership (or even to deny any

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[7] Section 983(d)(6)(A) defines owner to also include a person who has a leasehold, lien, mortgage, recorded security interest, or valid assignment of an ownership interest. Thus, the definition of "owner" is not restricted to persons who have a true ownership interest in the property. That is because Congress never intended to exclude such persons from the protection of the so-called innocent owner defense.

[8] If anything, the courts may have erred in requiring claimants to establish Article III standing *in addition to* statutory standing under Rule C(6), since it is the government that is invoking the power of the court to effect the forfeiture. Ordinarily, it is "the party invoking federal jurisdiction [who] bears the burden of establishing standing." *Luhan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Accordingly, the Second Circuit has recently questioned whether it is even necessary for a claimant to establish Article III standing. *U.S. v. $557,933 89, More or Less, in U.S. Funds*, 287 F.3d 66, 79 n.9 (2d Cir. 2002). In light of the fact that the government is the party invoking federal jurisdiction, DOJ should be grateful to the courts for erecting Article III standing requirements for claimants.

knowledge of the currency) when first confronted by the police, because of the fear that claiming ownership might be incriminating. If such a person later claims to be the owner, under penalty of perjury, his initial disclaimer of ownership simply creates a factual question for decision by the trier of fact. It does not automatically bar the person from litigating the forfeiture case--the ridiculous rule the government apparently wants this Committee to impose on the courts. An analogous rule would bar a defendant who makes a confession to the police from thereafter contesting his guilt!

Next, DOJ criticizes a decision "assuming" that a claimant who held the keys to a truck from which Customs seized $900,000 had standing to contest its forfeiture. *Mantilla v. U.S.*, 302 F.3d 182, 185 (3rd Cir. 2002). There is nothing surprising about this decision. As the court of appeals stated, "Mantilla did possess the funds at the time of transfer." The court went on to hold that Mantilla did not have standing to contest the forfeiture of a separate sum of cash confiscated from a vehicle "that Mantilla did not own, possess, or occupy." *Ibid.* Thus, *Mantilla* is a well-analyzed decision.

DOJ then condemns (p. 38 n. 60) an unpublished district court decision holding that a non-owner resident who would be left homeless by the forfeiture of his father's house had standing to contest the forfeiture. Again, we agree with the district court. The claimant in that case certainly had a colorable interest in the property sufficient under Article III for standing. In any event, we are unaware of any other case raising this particular issue. It is certainly not a recurring problem for the government.

DOJ's final "horror story" is a case holding that a finder of lost currency has standing to contest the forfeiture of the currency (p. 38-40). However, the decision is clearly correct. Property interests are defined by state law. In most, if not all states, a finder of lost property is an owner. Most people who find large sums of currency do not turn the money over to the police. The few good citizens who do turn the money over are surprised at the government's greed and ingratitude. The government typically claims that the money is drug-related, even if it doesn't have a scintilla of evidence to back up its claim. DOJ thinks it a "travesty" (p. 40) that it should have to prove its dubious forfeiture claim against the finder of the currency! And this "travesty" supposedly justifies DOJ's sweeping proposal to severely restrict standing. We submit that the real travesty is DOJ's proposal and the amazingly arrogant attitude toward property rights that it reflects.[9]

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[9] DOJ's statement (p. 39) that under current law a mere nominee or straw owner would have standing is clearly false. The cases uniformly hold that a straw owner who merely has title

DOJ states (p. 40) that "NACDL's position," that standing should be coextensive with the requirements of Article III, "has nothing to recommend it." But DOJ admits that NACDL's position is also the position of the courts (and not just the federal courts). What DOJ fails to explain is why the courts all agree with NACDL's position and reject DoJ's position, if it has nothing to recommend it.

According to DOJ (p. 38), CAFRA's alteration of the government's burden of proof in a civil forfeiture case "has produced unforseen and deleterious consequences for the administration of justice." But DOJ agreed in the CAFRA drafting process that its burden of proof should be raised to a preponderance of the evidence. What exactly are the unforseen consequences? DOJ claims that it must now "establish the forfeitability of the property by a preponderance of the evidence before the issue of ownership is even joined." This is not true. The government can challenge the claimant's standing immediately after a claim is filed, either through a motion to strike the claim or a motion for summary judgment. The government does this routinely, aided by the claimant's answers to the interrogatories the government routinely files with the complaint pursuant to Rule C(6).[10] The government does not have to establish the forfeitability of the property before it litigates a standing issue. It is true that the government has to litigate the merits of its case with anyone who *has* standing, even if the claimant is not the owner. The same was true prior to the enactment of CAFRA. The government apparently thinks this is an intolerable imposition (p. 38-39). We fail to see DOJ's concern. Does the DOJ really believe it should *not* have to litigate the merits with a claimant who has standing?

Rule G(5)(b). Answer.

DOJ continues to assert (p. 42) that current Rule C(6)(a)(iii), unlike Fed.R.Civ.Pro. 12, requires a claimant to file an answer before filing a motion to

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but does not exercise dominion or control over the property has no standing. 1 David B. Smith, *Prosecution and Defense of Forfeiture Cases*, ¶9.04[2][c][i] (discussion of case law relating to straw owners).

[10] As DOJ admits (p. 43), it uses Rule C(6) to "'smoke out' claimants who have no real interest in the defendant *in rem* before the court invests judicial resources in litigating the claim." This is why we said earlier that such interrogatories, if permitted at all, should be limited to the issue of claimant's standing. The court also has inherent authority to inquire, *sua sponte*, into the claimant's standing *U.S. v. $600,000.00 in U.S. Currency*, 871 F. Supp. 1397, 1400 (D. Kan. 1994).

dismiss or any other responsive motion. DOJ then dismissively states "[T]he difference of opinion between the government and the NACDL on this issue is clearly stated." But DOJ didn't respond in any meaningful fashion to the points we raised in our August 26, 2002 letter. Moreover, DOJ's interpretation of the current rule is sheer sophistry.

DOJ complains that "it should not have to litigate challenges to the complaint until it knows who the claimant is and that he has a right to challenge the forfeiture at all." We agree, of course, that a claimant must file a claim before challenging a forfeiture. See, Rule C(6)(a)(1)(A); 18 U.S.C. §983(a)(2). See also, Proposed Rule G(5)(a). But that is wholly unrelated to the issue of whether a person who has filed a claim (thus identifying himself and his interest in the property) must then file an answer before filing a motion to dismiss or any other responsive pleading pursuant to Fed.R.Civ.P. 12. It is the claim--not the answer--that establishes a claimant's standing in a civil forfeiture case.

Despite DOJ's assertion that the current rule prohibits the filing of motions prior to an answer, courts routinely hear and decide motions to dismiss in forfeiture cases before an answer is filed. The Supplemental Rules for Certain Admiralty and Maritime Claims were adopted February 28, 1966, effective July 1, 1966. The first modern forfeiture statute, 21 U.S.C. §881, was enacted in 1970 as part of the Controlled Substances Act. In the more than three decades that the Rule and the statute have been on the books, only one reported decision--and that decision is currently on appeal--has agreed with DOJ's interpretation of the relationship between Rule C(6) and Fed.R.Civ.P. 12.

Moreover, DOJ's interpretation simply doesn't make any sense. As we stated in our prior letter, there must be a mechanism for challenging a complaint that fails to comply with the particularity requirements of Rule E(2). Rule E(2) requires that the government's complaint "state the circumstances from which the claim arises with such particularity that the defendant or claimant will be able, without moving for a more definite statement, to commence an investigation of the facts." The requirement of Supplemental Rule E(2) (as well as proposed Rule G(2)(b)(v)) would be meaningless, and its purpose frustrated entirely, if a claimant were required to answer insufficiently pled allegations *before* moving for relief. See also, David B. Smith, PROSECUTION AND DEFENSE OF FORFEITURE CASES, ¶9.04[4] (June, 2001) ("[c]laimant will be excused from filing an answer on the merits pending disposition of defenses made by motion under Fed.R.Civ.P. 12."). DOJ did not respond to this cogent point at all.

Rule G(7). Pre-trial Motions.

Rule G(7)(a). Motion to Suppress Use as Evidence.

In our letter of August 26, 2002, we pointed out that proposed Rule G(7)(a) represents a narrowing of the case law because it limits suppression to use of the evidence at trial. DOJ responded (p. 51) by stating that "NACDL also says that the exclusionary rule should apply in instances other than trial. They do not say, however, when, other than 'at trial,' illegally seized evidence might be suppressed." The answer is simple--illegally seized evidence must be suppressed not just at trial, but at any pretrial hearing, including, *e.g.*, a motion to dismiss or a motion to suppress.

Rule G(7)(b). Motion to Strike Claim.

We fail to see why the government should be permitted to challenge a claimant's standing "at any time before trial" (Section (7)(b)) while the claimant waives any jurisdictional challenge he fails to raise in his answer (Section (5)(b)). DOJ evidently believes that what is sauce for the goose is not sauce for the gander. The government's proposed rule is particularly outrageous since (1) claimants often represent themselves or have inexperienced attorneys who have never handled a forfeiture case, while the government is always represented by forfeiture specialists who know the law; and (2) standing includes not merely Article III standing but statutory standing. If the claimant files his claim or answer a day after the statutory deadline, or there is some other technical defect in the form of the claim (such as a failure to properly verify it), the government should have to move to strike in a timely manner or waive its technical objection. It is not fair to allow claimant to spend a lot of time and money litigating a meritorious forfeiture claim, only to throw him out of court on the eve of trial because he failed to dot his i's or cross his t's. DOJ wants every opportunity to win cases through "gotchas" ("failure to comply with the filing requirements") but wants to be protected from losing them because it chose to file its case in the wrong district. It would seem much more reasonable to allow a claimant to challenge the court's in rem jurisdiction at any time before trial. However, DOJ's proposal would forbid that.

Rule G(7)(c). Motion for Release of Property.

Section (7)(c) also remains objectionable even though DOJ has eliminated some of the obvious conflicts between the original proposed rule and §983(f). As we stated in our prior letter, §983(f)(1)(A) merely requires the claimant to have "a possessory interest in the property." That is the explicit language of the statute. DOJ's current phraseology ("a party with standing to seek the release of the property under 18 U.S.C.

§ 983(f)") is likely to be misleading in light of DOJ's proposal to eliminate standing for persons who have a possessory interest in the property. Attorneys and judges might be misled into believing that more than a possessory interest is required.[11]

But there is an even more basic problem with this proposal. Congress would not have provided that persons with a mere possessory interest could obtain the release of the property *pendente lite* if--as would be the case under the DOJ proposal--such persons do not have standing to contest the forfeiture. DOJ's proposal to restrict standing to persons with an ownership interest is plainly in conflict with CAFRA as well as all of the case law.

DOJ has *apparently* accepted our position that Rule 41(e) motions for return of seized property should be available until a verified complaint has been filed, thereby making legal relief possible in court. That is what the last sentence of the current draft of Section (7)(c) says.[12] But the sentence before it states, in contradictory fashion, that a "motion for the release of property pursuant to Section 983(f) is the exclusive means for seeking the return of the property to the custody of the claimant pending trial." That sentence should be eliminated since it conflicts with the following sentence. The only new thing in Section (7)(c) would be the last sentence. In that case, it should be rewritten as follows:

> "(c) Rule 41(e) Motions. Rule 41(e) of the Federal Rules of Civil Procedure may not be used to seek the return of property in civil forfeiture actions once a verified complaint has been filed. However, if a hearing on a Rule 41(e) motion has commenced prior to the filing of the verified complaint, the court shall have discretion to grant the requested relief, notwithstanding the filing of the complaint."

The final caveat would prevent the government from playing fast and loose with the courts. Without it, the government could simply file a forfeiture complaint after it became apparent it was going to lose the Rule 41(e) motion because it had no legal

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[11]To avoid confusion, the language should say, "a person with a possessory or ownership interest in the property."

[12]However, the draft's commentary leaves us in some doubt since much of it appears inconsistent with the new language of Section (7)(c).

basis for seeking forfeiture. The mere filing of the complaint would divest the court of jurisdiction over the Rule 41(e) motion.

Rule G(7)(d). Dismissal.

Rule G(7)(d)(i).

Please see our objections to Rule G(5)(b), above.

Rule G(7)(d)(ii).

Our concern for this proposal has more to do with DOJ's explanation than the proposed rule itself. Proposed Rule G(7)(d)(ii) is an accurate statement of the law. See 18 U.S.C. §983(a)(3)(D). However, because the subject matter of the proposed rule is already covered almost verbatim in the statute, there is no need for the rule, other than to give DOJ an opportunity to suggest that the statute doesn't mean what it says. What the government is claiming in the Explanation is that the rule really means that no complaint may be dismissed on the ground that the United States did not have *probable cause* at the time the complaint was filed. But that is clearly not what the statute provides, and is an interpretation Congress expressly sought to avoid.

Section 983(a)(3)(D) was enacted to reflect CAFRA's heightened burden of proof and new filing deadlines. Instead of mere probable cause, the government must now establish that the property is subject to forfeiture by a preponderance of the evidence. Accordingly, Congress agreed that the government should not be required to prove its case by a preponderance of the evidence at the time it files the complaint. But Congress certainly did not intend to authorize the government to initiate civil forfeiture proceedings without probable cause, as DOJ now asserts in its Explanation of Rule G(7)(d)(ii). Clearly, Congress knows how to draft a statute. Had Congress intended to enact DOJ's proposal, 18 U.S.C. §983(a)(3)(D) would have provided as follows:

> (ii) A complaint may not be dismissed on the ground that the United States did not have *probable cause* at the time the complaint was filed to establish the forfeitability of the property.

This they did not do. Indeed, as we pointed out in our prior letter, the drafters of CAFRA specifically sought to avoid this result in the legislative history that accompanied CAFRA:

> And, while the government may use evidence obtained after the forfeiture complaint is filed to establish the forfeitability of the property by a preponderance of the evidence, the government must still have had enough evidence to establish probable cause at the time of filing (or seizure, if earlier). The bill is not intended to limit the right of either party to bring a motion for summary judgment after the filing of the complaint pursuant to Fed.R.Civ.P. 56(a) or 56(b).

146 CONG. REC. H2050 (daily ed. April 11, 2000). This Committee should not be party to DOJ's transparent attempt to rewrite the statute.

Rule G(7)(e). Excessive Fines.

For all of the reasons stated in our prior letter, we continue to oppose this provision. Despite DOJ's urging, Congress rightfully chose not to enact this provision. DOJ has not provided sufficient reason for this Committee to second guess Congress in this regard.

This concludes our supplemental response to proposed Rule G. We appreciate the opportunity to offer the Advisory Committee our additional comments on this proposed rule, and we look forward to our continued participation in the rule-making process.

Very truly yours,

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February 16, 2004

John K. Rabiej
Chief
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Washington, DC 20544

Re: Proposed Rule G, Supplemental Rules for Certain Admiralty and Maritime Claims

Dear Mr. Rabiej:

On behalf of NACDL, I want to express our appreciation to the Committee for seeking our comments to the most recent draft of proposed new Admiralty Rule G. We also wish to compliment to Committee for the quality of its work to date, and its willingness to consider all sides in the debate over the content of the proposed new rule. We have now had an opportunity to review the Draft Supplemental Rule G, Revised January 2004, and offer the following additional comments.

Please note, however, that we have not received a draft of the Committee Notes that would accompany this draft. As we have previously stated, the devil is often in the details, and what is in--or not in--the Notes can sometimes be as important as the Rule itself. Accordingly, our comments that follow are based solely on the draft of the Rule.

Rule G(2). Complaint.

We believe that this draft represents a significant improvement over previous drafts. However, we remain concerned that the new rule might be read to reduce the particularity requirement of current Rule E(2)(a). One suggestion would be to substitute the words "with particularity" for the words "sufficiently detailed" in proposed Rule G(2)(d). Alternatively, and perhaps preferably, would be the insertion of a simple statement in the Commentary to the effect that no change in the level of particularity from present Rule E(2)(a) is intended.

G(3)(b)(iii). We strongly object to the language of G(3)(c)(iii), which replaces the "forthwith" language of Rule E(4) with "as soon as practicable," and provides "back door" authority, where none now exists, to file a complaint under seal and to stay the action before the warrant and supplemental process are executed.

The Committee should not create authority--especially where no authority currently exists--for such doubtful practices which directly undermine the time limits created by CAFRA. We have repeatedly explained that no authority currently exists for the government to file a forfeiture complaint under seal. We justifiably fear, based on long experience, that if the Committee adopts the rule in its present form, DOJ will soon be citing this provision to the courts as the authority for filing a complaint under seal. This objection also applies to the language in proposed Rule G(5)(C)(1).

If the Committee is of the view that the government must have such authority, then it should undertake the task of establishing standards and procedures for allowing a complaint to be filed under seal or for issuing an ex parte order staying the action before the warrant and supplemental process are executed. We have previously suggested what the standards should be in our Letter of April 2, 2003, at 5-7. At a minimum, the Committee should include a Committee note explaining that it takes no position on the circumstances in which the filing of a complaint under seal or staying the action before the warrant and supplemental process are executed might be authorized.

Rule G(4). Notice.

G(4)(a)(iii)(B) and G(4)(a)(iv)(C). We continue to oppose the posting of notice on the internet where such posting is the sole means of notification to potential claimants. There are just too many people who do not have access to, or chose not to access, the internet. We agree that the creation of a government internet forfeiture site is a good idea, which could be accomplished at minimal cost to the DOJ. But we continue to believe that internet notice should be in addition to, not in lieu of, traditional forms of publication.

G(4)(b). For all of the reasons set forth in our letters of August 26, 2002, and April 2, 2003, we stand by our objections to the proposed direct notice provisions of Rule G(4)(b). We continue to believe that a complaint for forfeiture must be served consistent with Fed.R.Civ.P. 4, especially where the subject of the forfeiture is real property. This remains one of our most significant concerns with the current draft.

G(4)(b)(A). For the reasons set forth in our letter of August 26, 2002 (pages 9-10), we continue to oppose direct notice by electronic mail where that is the sole means of notice. There are too many potential problems with email to trust this form of notice where it is the only notice a claimant may receive.

G(4)(b)(iii)(A). We urge the full Committee to adopt the bracketed language.

Rule G(5). Responsive Pleadings.

We want to clarify that the current provision in Rule C(6)(b)(iii), which authorizes an attorney to file a claim on behalf of his client, is retained. We suggest adding a similar provision to Rule G(5)(a)(1).

G(5)(b). For all of the reasons set forth in our letters of August 26, 2002, April 2, 2003, and June 6, 2003, we continue to object to the requirement that a claimant file an answer to the complaint within 20 days. We again submit that there is no legitimate reason to distinguish a civil forfeiture proceeding from any other civil litigation in this regard, and that Fed.R.Civ.P. 12(a)(4) should apply. Accordingly, proposed Rule G(5)(b) should be modified to read as follows:

> **(b) Answer.** A claimant must serve and file an answer to the complaint, or a responsive pleading pursuant to Fed.R.Civ.P. 12, within 20 days after filing the claim.

We believe that there continues to be confusion among the Subcommittee as to how a claimant asserts an interest in the property. That is done in the claim, not the answer. See Proposed Rule G(5)(a)(i)(A), (B) and (C). The answer generally adds no new information regarding the claimant's interest in the property.

The Rule G Conference Call Notes, at page 19, contains the following discussion of this issue:

> The claim and answer requirement was included to "level the playing field." The government should be able to cross-move to dismiss the claim for lack of standing when the claimant moves to dismiss the forfeiture proceeding. The government "should not risk losing the property to someone without standing." But the government cannot make the cross-motion unless it knows who the claimant is. *That requires an answer that shows the basis for making the claim* and responses to Rule G(5)(c) interrogatories that inquire into the identity of the claimant and the claimant's relationship to the property. The government should not be forced to litigate even Rule 12(b) questions with "just anyone

who learns of the forfeiture proceeding and seeks to take advantage." (emphasis supplied)

This discussion shows a fundamental misunderstanding of the procedure contemplated by the proposed rule. Only a person who files a claim identifying the person's interest in the property--under penalty of perjury--could engage in litigation with the government over the property. Proposed Rule G(5)(a)(1). The basis for the claim is set forth in the claim, not in the answer. Consequently, there is no reason to require that an answer be filed rather than a responsive pleading pursuant to Fed.R.Civ.P. 12(b). We also note that the government's concerns are adequately addressed in proposed Rule G(6)(c), dealing with Special Interrogatories, which we address below.

We also continue to object to the requirement that any objection to in rem jurisdiction or venue be stated in the answer or permanently waived. This objection is all the more important if the answer must be filed within 20 days, because a claimant may not have all of the facts necessary to state such an objection within 20 days of filing the claim.

Rule G(6). Special Interrogatories.

Our only remaining problem with this provision is the amount of time the government is given to serve interrogatories under G(6)(a) and to respond to a claimant's motion to dismiss under G(6)(c). The 20 days given to the government under each subparagraph is too much time and will build unnecessary delay into the resolution of motions to dismiss. Under the proposed rule, the government is given a total of 60 days to respond to a motion to dismiss, from the time a claimant serves the motion (20 days + 20 days + 20 days = 60 days). All the while, the government remains in possession of the property, which may cause irreparable injury to the claimant.

Five days should suffice for serving simple form interrogatories under (6)(a). Every forfeiture AUSA has such interrogatories on their word processor. It should not take 20 days to serve such "canned" interrogatories.

Ten days should be more than ample time for the government to file a response to a motion to dismiss under G(6)(c). The government can begin work on the response as soon as the motion is received. It would be imprudent to wait to begin a response until after the answers to the special interrogatories are received. Moreover, if the

government needs more time than usual, it can always request an extension of time from the court.

Rule G(7). Preservation and Disposition of Property.

We remain troubled by proposed Rule G(7)(b)(i)(C), which would allow a court to order seized property sold if "the property is subject to a mortgage or to taxes on which the owner is in default." First, we are concerned about situations in which virtually all of a claimant's assets are seized, thus making it impossible for the claimant to continue to pay mortgages and taxes when due. The government should not be able to render a claimant indigent, and then penalize the claimant for not paying bills as they become due by selling the property, especially if the property is a residence.

Second, requiring a claimant to continue to make mortgage and tax payments during the pendency of a forfeiture proceeding confronts the claimant with a Hobson's choice. If the claimant is required to continue to pay these obligations while the action is pending, the claimant may be forced to "throw good money after bad." There is no reason why the government should benefit from payments a claimant makes after the commencement of the action. At the very least, there needs to be a provision that would require the government to reimburse the claimant for any payments made after the commencement of the forfeiture proceeding in the event that the government prevails and the property is forfeited.

Rule G(8)(c). Motion to Strike Claim or Answer.

We continue to strongly oppose this provision because it allows the government to move to strike the claim or answer "at any time before trial" for a failure to comply with any of the technical provisions of subdivisions (5) or (6). See our Letter of August 26, 2002, at 18. We believe that such motions must be made within a reasonable time after the government discovers facts sufficient to support such a motion. Under current law, the government would not dare file a belated motion to strike a claim, because the case law holds that the government waives such a captious motion to strike by not filing it in a timely manner. The courts recognize that it would be manifestly unfair to strike a claim or answer on timeliness or other technical grounds after the government has caused the claimant to spend time and money litigating the case on the merits. *E.g., U.S. v. Yukon Delta Houseboat,* 774 F.2d 1432, 1435-37 (9th Cir. 1985)(where government did not object to failure to file verified claim, treated claimants as the owners and proceeded on that basis for over a year, court suggests it would be an abuse of discretion to refuse to extend time for filing verified claim); *U.S. v. One (1)*

1979 Mercedes 450SE, 651 F.Supp. 351 (S.D.Fla. 1987)(court was not willing to "visit the sins of the attorney upon his client" in view of fact that the parties had already expended time and money on the litigation and had entered into pretrial stipulation; moreover, government was not prejudiced by untimely revelation of claimant's exact identity).

We also object to the proposed rule because of the obvious asymmetry between it and other provisions which require a claimant to (1) object to in rem jurisdiction or to venue in the answer and (2) raise an excessiveness defense in the answer or else waive those important objections and defenses. This asymmetry is particularly unfair insofar as the government is *always* represented by forfeiture specialists in civil forfeiture cases while the claimant is frequently appearing *pro se* or through counsel who has little or no forfeiture litigation experience. Moreover the defenses a claimant would automatically waive by not raising them in the answer are *far more fundamental* than the technical objection that a claim or answer was filed late or was not properly verified; or failed to identify the specific property claimed; or the claimant's precise interest in the property; etc. Adoption of this one-sided provision would again tilt the playing field heavily in favor of the government.

Rule G(8)(d). Petition for Release of Property Pending Trial.

Another provision of the latest draft to which we have strong objection is Rule G(8)(d)(iii), which makes 18 U.S.C. § 983(f) "the sole means to seek return of property to the claimant's custody pending trial." This rule would flatly prohibit owners from seeking the return of their seized property under Federal Rule of Criminal Procedure 41(g) (formerly Rule 41(e)).

In response to our earlier comments, it appeared that DOJ had accepted our position that Rule 41(g) motions should lie as a remedy until a complaint for forfeiture is filed. Once a complaint is filed, relief from an illegal seizure is available in the forfeiture action itself. See our Letter of April 2, 2003, at 19. We are disappointed to find DOJ and the Subcommittee going back to an indefensible position.

Section 983(f)'s hardship release provision is not a substitute for the important Rule 41(g) remedy. In enacting §983(f), Congress provided a new, very circumscribed remedy for the hardships caused by lawful seizures. Due to the restrictive language of §983(f), many property owners have no remedy. Rule 41(g), by contrast, provides an immediate remedy for property owners "aggrieved by an unlawful search and seizure of property or by the deprivation of property..."

Rule 41(g) plays a vitally important role in civil forfeiture cases. There are scores of reported cases brought under former Rule 41(e) in which the movant sought relief from an unlawful seizure. Rule 41(g) is the only check on the government's ability to seize and hold property illegally until a forfeiture suit is filed in court. Because the property owner cannot force the government to file a forfeiture action quickly, his only remedy is to go into court on a Rule 41(g) motion or a motion for return of seized property that invokes the court's equitable authority.[1]

Some might question what is wrong with depriving the owner of the unlawfully seized property of any remedy until after the government gets around to filing forfeiture complaint? The answer is that the value of the property can be destroyed in the time between its seizure and the filing of the forfeiture suit months later. This is particularly true where the property is an ongoing business, or a perishable commodity such as fish, lobster tails, or pharmaceuticals. Not surprisingly, many Rule 41(g) cases involve such property, often of great value. Due to the technical nature of many offenses under the customs laws; the Food, Drug and Cosmetics Act; the laws regulating commercial fishing and the Lacey Act; the government frequently makes mistakes.[2]

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[1] The important role that Rule 41(g) motions play in civil forfeiture litigation is examined at length in 1 David B. Smith, *Prosecution and Defense of Forfeiture Cases*, ¶ 10.05A, 10-86 to 10-98 (Dec. 2003 ed.).

[2] For example, the Lacey Act, 16 U.S.C.3372(a)(2) prohibits persons form importing, exporting, transporting, selling, receiving or acquiring any fish or wildlife that was taken, possessed, transported, or sold in violation of any underlying *foreign* law. The Act imposes criminal and forfeiture penalties on anyone who knew or should have known that the fish or wildlife was unlawfully taken, possessed, transported or sold.

In *U.S. v. McNab*, 331 F.3d 1228 (11th Cir. 2003), *pet. for cert. filed,* Nos. 03-622 and 03-627, the owner of a fleet of lobster fishing boats was convicted of Lacey Act violations predicated on his harvesting of spiny lobsters in Honduran fishing waters with a tail length of less than 5 ½ inches. Honduran fishing regulations (not statutes) allegedly made this illegal. Before the defendants' convictions were final, the Honduran government took the position that three of the Honduran fishing regulations at issue were not valid. Nonetheless, the convictions were affirmed, along with horrendously inflated 97 month sentences for "laundering" the proceeds of the lobster sales. Of course, McNab's lobster boat and all his lobsters were seized at the outset of the case. See also *U.S. v. Proceeds from the Sale of Approximately 15,538 Panulirus Argus Lobster Tails*, 834 F. Supp. 385 (S.D.Fla. 1993)(lobsters taken in violation of Turks and Caicos Fisheries Protection Regulations); *U.S. v. 2,507 Live Canary Winged Parakeets*, 689 F. Supp. 1106, 1113 (S.D.Fla. 1988)(birds exported from Peru in violation of Peruvian Supreme Decree).

When the government unlawfully seizes such goods, or an entire ongoing business, due process plainly entitles the owner--on a proper showing--to a prompt hearing at which he can demonstrate the illegality of the seizure and obtain the early release of his property before it becomes worthless. Otherwise, the government could ruin any business on a whim, or by mistake, with no remedy.

Rule 41(g) merely provides a convenient procedural mechanism for protecting these due process (and Fourth Amendment) rights. If this Committee abolishes Rule 41(g) and limits relief to §983(f), the courts would nonetheless have to provide the hearings and the relief required by due process. In short, the effort to abolish Rule 41(g) would prove nugatory because the rule is grounded in the Constitution.[3] Nonetheless, any change in the rule would engender confusion and needless constitutional litigation.

Rule G(8)(e). Excessive Fines.

We object to G(8)(e)(i)'s requirement that the claimant must plead excessiveness as a defense under Rule 8(c), or waive the issue. This important constitutional limitation on the severity of forfeitures would be waived in a high percentage of cases by not being pleaded under Rule 8. There is no reason to single out this "defense" for special adverse treatment. There is no reason to add more "gotchas" to civil forfeiture procedure except to give the government more windfall judgments.

CAFRA eliminated some of the procedural traps for claimants. DOJ wants to replace them with others. It is particularly inappropriate to create such a trap where the forfeiture is so egregiously disproportionate to the seriousness of the offense that it is deemed unconstitutionally excessive. See our Letter of August 26, 2002, at 27.

Finally, we would again reiterate our objection to the disparate treatment of claimants and the government in Rule G with respect to arguably tardy efforts to raise issues. The claimant is penalized with waiver of important constitutional rights while the government is allowed to make captious, technical motions to strike claims and answers right up to the eve of trial.

[3] The Congress that enacted the CAFRA rebuffed DOJ's effort to insert language into section 983(f) making it the exclusive remedy for obtaining release of property prior to trial. See our Letter of August 26, 2002, at 24. The Committee should reject the same gambit now.

This concludes our comments to the January 2004 draft of Proposed Rule G. We appreciate the opportunity to offer the Advisory Committee our additional comments on this proposed rule, and we look forward to our continued participation in the rule-making process. In this regard, we would welcome the opportunity to have Mr. Smith appear at the next Advisory Committee meeting on April 15-16, 2004, in Washington, DC. As you know, Mr. Smith is the author of the leading treatise on forfeiture, and was instrumental in the drafting of CAFRA. His expertise in this area would surely be a welcome addition at the Advisory Committee meeting.

Very truly yours,

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March 10, 2004

Via email
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Re: NOTES FOR CONFERENCE CALL WITH RULES SUBCOMMITTEE ON FORFEITURE RE SUPPLEMENTAL RULE G PROPOSAL

Dear John:

I am transmitting this letter to you via email for distribution to the participants in the March 12, 2004 conference call. I think it will expedite the discussion. It provides a lot of detail that I could not get into in a telephone conference call. Essentially, this is my reply to the Department of Justice letter of March 8, 2004. I am dealing only with the issues that I originally wrote up for the Subcommittee. I hope that my NACDL colleague, Richard Troberman, has time to do the same for his issues. I apologize for the informal style of the letter. I originally intended to use these notes only myself. I did not have enough time to write a formal letter.

1. **G(3)(c)(iii)(execution of process exceptions to "as soon as practicable" rule)**

Our problem is not with the replacement of the current "forthwith" standard with "as soon as practicable." Rather, it's with the exceptions to that rule provided for in (iii)(B) when the complaint is under seal or the action is stayed before the warrant is executed. The problem is that the draft is creating "back door" authority for sealing a complaint and staying the action on an ex parte basis without providing the courts with any standards other than the vague "good cause." We are concerned that judges will rubber stamp prosecutors' ex parte requests for sealing or for stays without good cause. **At a minimum, the Committee note should explain what countervailing interests are at stake here.** And the rule should require that the judge make a written finding of good cause with an explanation of the evidence or circumstances relied upon. This may help to deter rubber stamping of prosecutors' requests. If it is later determined that there was no good cause, the complaint should be treated as filed when it is unsealed or when the warrant is executed. This procedure could completely undermine the important time limits established in the CAFRA, which did not provide for sealing or stays. That was one of the CAFRA's core reforms.

As for the DoJ's claim that this provision merely reflects current practice, it cites four district court cases, the most recent of which is 12 years old. 3 of the 4 cases are from the same district (N.D.Ill.). I doubt that any of them addresses the issue. They are probably just cases where the government filed under seal and got away with it unchallenged.

The issue is not one of access to judicial records, as DoJ's March 8 letter suggests (p.5). The issue is under what circumstances should the salutary and important time limits established by CAFRA be disregarded because other interests, articulated by the government ex parte, allegedly outweigh them.

2. **G(6)(how much time government should have to serve special interrogatories and to respond to motions to dismiss).**

DoJ doesn't deny that prosecutors have "canned" standing interrogatories on their word processors. It doesn't take 20 days to modify those canned interrogatories to suit each case. I would guess it takes about an hour. Likewise, there is no reason why the prosecutor needs another 20 days after he receives the interrogatory answers to respond to the motion to dismiss. The interrogatory answers–which go to standing--will not often shed light on the issues raised by the motion to dismiss, such as statute of limitations or non-retroactivity of the forfeiture statute.

Section 983(f) is no answer to our delay/irreparable harm argument. (Not to mention the courts' interest in moving cases on their dockets.) §983(f) is a very limited remedy which can be unavailable for all kinds of reasons having nothing to do with hardship. §983(f)(8) **excludes** all cash, monetary instruments and bank accounts, among other things, from hardship release. That's a huge exception. 983(f) requires that the hardship be "substantial" and that it **outweigh** the risk that the property will be destroyed, damaged, concealed or transferred if it is returned. And it requires **exhaustion of administrative remedies** (via a petition to the seizing agency) before you can go into court. So even if you get a remedy, it's delayed.

The government has used delay as a weapon in forfeiture cases, to extract settlements it can't win on the merits—especially if the temporary detention of the property causes great harm to the owner, e.g., by making it difficult or impossible to run a business.

3. **G(8)(c)(permitting government to move to strike a claim or answer at any time before trial).**

We stated that "such motions must be made within a reasonable time after the government discovers facts sufficient to support such a motion." We noted that the courts have refused to strike claims and answers when the government has failed to make a timely objection to them and then proceeded to litigate the case, thus causing the property owner to spend time and money.

The govt's response doesn't meet our arguments. The government says that the basis for moving to strike may not become evident until after discovery. We recognized that and only sought to modify the language of the rule so that the govt is required to make such a motion within a reasonable time after it discovers the factual basis for the motion.

We don't see a motion to strike as comparable to a Rule 12(b)(6) motion, which may be made at any time. The government can't cite a case where a court permitted govt to make a long-delayed motion to strike.

We would agree with the government that an objection to in rem jurisdiction is comparable to an objection to personal jurisdiction or venue and may be waived.

4. **G(8)(d)(iii)(Rule 41(g) does not apply).**

This continues to be our most important objection. G(8)(d)(iii) should be revised to say that "§983(f) is the sole means to seek return of property to the claimant's custody *after the filing of the complaint.*" The addition of the italicized language would satisfy us.

The DoJ's response is disingenuous in several respects. **DoJ doesn't deny that Congress rejected this very language in enacting §983(f). If it thought that §983(f) was going to replace Rule 41(g), §983(f) would've looked very different.** Remember, CAFRA was a reform bill! The idea was to expand the remedies for property owners, not narrow them. §983(f) is a valuable new remedy but it is narrow in scope and subject to many conditions. It was never intended to be the sole remedy for harm caused by wrongful seizures before a complaint for forfeiture is filed.

As noted above, §983(f)(8) **excludes** all cash, monetary instruments and bank accounts, among other things, from hardship release. That's a huge exception. §983(f) requires that the hardship be "substantial" and that it **outweigh** the risk that the property will be destroyed, damaged, concealed or transferred if it is returned. And it requires **exhaustion of administrative remedies** (via a petition to the seizing agency, which it must decide within 15 days) before you can go into court. So even if you get a remedy it's delayed. If your shrimp shipment is seized, you can't wait fifteen days to get into court.

DoJ quotes from Professor Cooper's notes of the conference call on Dec. 1, 2003. Unfortunately, those notes–which we didn't receive--have some serious errors. The notes indicate that **before** §983(f) was adopted, "some courts" allowed Rule 41(e) to be used to seek the return of property seized for forfeiture. This is wrong on two scores. First, *all* courts allowed such a remedy either under Rule 41(e) or under the court's inherent equitable authority ("anomalous jurisdiction") or the court's authority to supervise seizures under warrants issued by the court, or the activities of law enforcement officers in its territory. Some courts thought that Rule 41(e) was not applicable because of the language in former Rule 54(b)(5) and now found in Rule 1(a)(5)(B). But it made no difference–a

motion for return of seized property would still lie under one of the other theories.

Second, there has been no change in the law since the enactment of §983(f), contrary to the implication of Professor Cooper's note and the DoJ letter. Indeed, the note states that there is "a constant flow" of new Rule 41(g) motions. DoJ hasn't cited a case holding that such motions–or their equitable equivalents—will no longer lie because of the enactment of §983(f).

Finally, Professor Cooper's note states that 983(f) "now provides an adequate legal remedy." This is clearly wrong for the reasons I have already stated. I'm not aware of any exception in the Due Process Clause for all seized monetary instruments. Or for property owners who can show that their property was illegally seized but who cannot show "**substantial** hardship" or that their hardship is not outweighed by the risk that the property will be damaged, lost, transferred, etc. if returned to them. **Once it is shown that the seizure is illegal, i.e., that there is no probable cause for forfeiture, there is nothing to balance against the claimant's interest in having the property returned to him.** The case is over. This is why Rule 41(g) serves a fundamentally different purpose than the hardship release provision. It's not a question of weighing relative hardship; rather, it addresses the legality of the seizure in the first place.

DoJ's attempt to minimize the significance of our objection fails. According to DoJ, our objection arises 1) only in the first 60 days after a seizure, and 2) only in non-hardship cases. DoJ Letter at 28. DoJ can't see any reason why a person "not suffering any hardship cannot wait 60 days to raise a constitutional objection to the forfeiture action via the remedies available under CAFRA." **This is misleading.** It is plainly not the case that the property owner (without a substantial hardship claim coming within the parameters of §983(f)) can raise a constitutional objection to the seizure after waiting just 60 days from the date of seizure. The only thing that happens after 60 days is the seizing agency–let's say it's DEA—sends a notice of the seizure to the property owner. The owner then has 30 or 35 days to make an administrative claim with the DEA, saying he wishes to contest the forfeiture in court. Then the U.S. Attorney gets an additional 90 days to file a complaint for forfeiture—the first document filed in the court. It is only then, **after a total of 180 or 185 days**, that the claimant has a judicial remedy for a wrongful seizure, apart from Rule 41(g). And that is simply too long to wait in many, if not most, cases.

And **that's the minimum** time table for getting a complaint filed. CAFRA allows the government to delay sending the initial notice of seizure and delay filing the complaint for various reasons. *See* §981(a)(1)(B)(seizing agency may extend period for sending administrative notice letter by 30 days *without* court approval); §981(a)(1)(C)(court may extend time for sending administrative notice letter for 60 days, which period may be further extended for 60-day periods); §981(a)(1)(E)(3)(A)(court may extend 90 period for filing of complaint for forfeiture "for good cause shown"). This can add many months or even years to the process before the owner can get into court without the help of Rule

41(g) and its equitable equivalents.

Due process requires that there be an opportunity for a **prompt**, post-deprivation opportunity to challenge the seizure. FDIC v. Mallen, 486 U.S. 230,242 (1988)("there is a point at which an unjustified delay in completing a post-deprivation proceeding would become a constitutional violation"). Mallen involved a 90 day delay. The Court said it was not "so long that it will *always* violate due process."

In U.S. v. James Good Real Property,510 US 43, 114 S.Ct.492, 502 (1993), the Court held that due process requires an adversary hearing **before** seizure of real property "where the govt has a direct pecuniary interest in the outcome of the proceeding." Here, we are only arguing about the opportunity for a reasonably prompt **post-seizure** hearing. The DoJ wants to deprive the owner of any opportunity for a hearing for at least 180-185 days. This is a very serious matter. For example, in Krimstock v. Kelly, 306 F.3d 40 (2d Cir. 2002), the Second Circuit held that due process requires a truly prompt opportunity for a post-seizure hearing in all DWI vehicle seizure cases under a NYC ordinance, despite the fact that under that ordinance, the risk of erroneous seizures was minimal and the cars seized were not of great value. In the typical federal forfeiture case, the risk of error is much greater and the property may be of great value. A minimum delay of 180 days before one can be heard in a federal civil forfeiture case would violate due process. Rule 41(g) and its equitable equivalents provide the procedural mechanism to obtain a prompt post-seizure hearing. Without them, the courts would still have to enforce the Due Process Clause by granting the same types of hearings.

5. **G(8)(e)(excessiveness must be pleaded under Rule 8(c))**

We will not pursue our objection to this singling out of the excessiveness defense.

Respectfully submitted,

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March 11, 2004

Via email
John K Rabiej
Chief
Rules Committee Support Office
Administrative Office of the Courts
Washington, D.C. 20544

Dear John

I wish to reply briefly to Mr. Cassella's letter of March 11, which is a response to my letter of March 10. I would appreciate it if you can distribute this letter before the conference call

The DoJ letter is full of strange contradictions. For example, it asserts that there is "overwhelming case law stating that challenges to the forfeitability of the property cannot be raised pretrial" (DoJ Letter at 4), yet all the case law it cites in the letter says precisely the opposite—at least before the time that the administrative notice letter is sent.[1] The rule

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[1]Many courts have made the mistake of limiting the ambit of Rule 41(g) motions to the time period before the administrative notice letter is sent, apparently not realizing that the mere sending of that letter does not allow the property owner to get into court quickly to litigate the forfeiture. This Subcommittee should not make the same mistake. DoJ's letter at 3 cites a number of cases where the courts correctly held that a Rule 41(g) motion will lie until the time when the complaint is filed, which is the time when a property owner can *actually litigate* the legality of the forfeiture in the forfeiture case and therefore has *an adequate remedy at law*. That is precisely our position. We made clear in our letter of March 10 that we do not contend that a Rule

advocated by DoJ would of course bar a Rule 41(g) motion even during the period of time (at least 60 days) between the seizure and the sending of the administrative notice letter.

One wonders, if the case law is so overwhelming in its favor, why does DoJ need a new rule explicitly prohibiting Rule 41(g) motions? Why not move for Rule 11 sanctions when defense attorney file Rule 41(g) motions DoJ deems frivolous? The answer is that the case law does not support DoJ's position. Even DoJ's own case cites and parentheticals show that.

The DoJ's letter recognizes that a Rule 41(g) motion serves a basically different purpose than a hardship release petition under §983(f). DoJ Letter at 3 (the issue in Rule 41(e) motions is the legality of the seizure, regardless of whether there is hardship). Yet, paradoxically, DoJ maintains that the hardship provision of §983(f) somehow provides a fully adequate legal remedy to claimants whose property was seized illegally!

Contrary to DoJ, NACDL does not have a problem with the hardship provision. But it is simply not addressed to the question of the legality of the seizure, as DoJ admits And that is why it is so limited in scope. It makes sense to exclude all monetary instruments from the scope of the hardship provision precisely because it is appropriate to balance the claimant's hardship against the risk that the property, if released, will not be available for forfeiture. No such balancing takes place under Rule 41(g) because it is addressed to the wholly different issue of the legality of the seizure.

DoJ makes the Orwellian argument that "Rule G should not be used to undermine CAFRA or to create grounds for relief that Congress—after much deliberation—chose not to provide " DoJ Letter at 6 But it is the DoJ proposal that would undermine the CAFRA, not our position. Again, DoJ has not denied that it proposed *this very provision* to the Congress that enacted CAFRA and it was rejected out of hand. Obviously, Congress did not wish to make Rule 41(g) relief unavailable prior to the commencement of the forfeiture action in court—because it is unrelated to the question of hardship Had Congress wished to replace Rule 41(g) with §983(f), the latter provision would plainly be written very differently

We would again reiterate that DoJ has cited no authority to support its position that after the enactment of CAFRA, Rule 41(g) relief is no longer needed or no longer available in appropriate circumstances. We do not have a copy of the unpublished magistrate judge's report and recommendation in the *Douleh* case. But even if it lends any support to the DoJ position, which we doubt, it is hardly persuasive authority. The other two district court decisions cited by the DoJ at 7 merely reiterate pre-CAFRA law. They recognize,

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41(g) motion should be available after the filing of the complaint.

contrary to the DoJ's position, that a Rule 41(g) motion will lie before the commencement of the forfeiture action.

Finally, a word about the implications of the Second Circuit's decision in *Krimstock v. Kelly*, 306 F.3d 40 (2d Cir. 2002). Unlike DoJ, we do not read that opinion as excluding federal civil forfeitures from the potential ambit of a due process challenge based on the failure to afford claimant the opportunity for a post-seizure hearing at a meaningful time. By attempting to bar Rule 41(g) motions in all circumstances, DoJ is inviting what it most fears—a constitutional due process ruling that requires an opportunity for a prompt post-seizure hearing in every case.

I look forward to the conference call tomorrow.

Sincerely,

DAVID B. SMITH

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March 11, 2004

John K. Rabiej
Chief
Rules Committee Support Office
Administrative Office of the United States Courts
Washington, DC 20544

Re: Proposed Rule G, Supplemental Rules for Certain Admiralty and Maritime Claims

Dear Mr. Rabiej:

Thank you for providing me with a copy of the Department of Justice March 8, 2004, response to my letter of February 16, 2004. Although I have not had an opportunity to review DOJ's response in depth, I would like to offer the following comments in reply. My NACDL colleague, David B. Smith, has already provided you with a reply to the DOJ's response regarding issues about which he is more familiar.

Rule G(2). Complaint. From the beginning of the drafting process, DOJ has consistently stated its position that no change in the level of particularity from current Rule E(2)(a) is intended by the new rule. We would be satisfied with the inclusion of a statement to this effect in the Commentary of the new rule.

We note in passing, however, that DOJ is conflating two different concepts when it refers to 18 U.S.C. §983(a)(3)(D) as authority for its position with respect to the particularity requirement. 18 U.S.C. §983(a)(3)(D) addresses the entirely separate issue of the quantum of evidence the government must have under the Fourth Amendment and 19 U.S.C. § 1615 when it commences a forfeiture proceeding in court, not the content of the complaint. As we have repeatedly explained, the sole purpose of §983(a)(3)(D) was to make clear that the government does not have to show that it had evidence proving its case by a preponderance of the evidence at the time it commenced the action. It still has to be able to show that it had probable cause to believe the property was subject to forfeiture.

Rule G(4)(a)(iii)(B) and Rule G(4)(a)(iv)(C). We withdraw our objection to notice by publication on a DOJ website based on DOJ's representation that such publication of notice will not be the sole means of notice to potential claimants. However, we have seen nothing from DOJ as to when such a website will be set up, and what efforts will be made to publicize the existence of such a website.

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Rule G(4). Notice. DOJ complains that NACDL:

> "fails to distinguish between two quite different concepts: (a) 'service of process' in an *in rem* civil forfeiture case, **which as in traditional admiralty cases**, means service upon the *res* for purposes of obtaining *in rem* jurisdiction; and (b) provision of notice to potential claimants." (bold emphasis supplied).

It was our understanding that one of the primary purposes of creating a new Rule G was "to move out of the traditional admiralty rules all of the provisions that explicitly relate to forfeiture." Yet DOJ wants to keep antiquated concepts that no longer serve any beneficial purpose. For example, the concept of serving the property developed at a time when the offending property was typically a ship involved in smuggling goods into the United States in order to avoid paying duties at a time when the customs duties provided the bulk of the revenue for the fledgling country. More often than not, the ship owners were abroad, beyond the reach of the jurisdiction of the United States. Thus developed the concept of serving process on the vessel rather than the owner of the vessel. These concepts no longer apply in the modern world.

The whole purpose behind the Civil Asset Forfeiture Reform Act was to curb the abuses that were so rampant under the old rules. As one court observed after the enactment of CAFRA:

> Most significantly, as it title implies--Civil Asset Forfeiture *Reform* Act--the legislation is primarily remedial in nature. It is specifically designed to rectify an unfairness to the individual vis-a-vis the government. It corrects an aberration that existed previously by leveling the playing field between the government and persons whose property has been seized.

United States v. Real Property in Section 9, Township 29 North, 241 F.3d 796, 799 (6th Cir. 2001) (emphasis in original).

As stated above, it is clear from a review of the history of forfeiture laws that the early justification for the "personification" doctrine, and the harsh results it visited upon property owners, are no longer relevant in a modern society which places such a high value on the right to own property. As Justice Holmes so powerfully stated:

RICHARD J. TROBERMAN, P.S.
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> It is revolting to have no better reason for a rule than that it was laid down at the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.

Holmes, *The Path of Law*, 10 HARV. L. REV. 457, 469 (1897).

We believe that Rule G should be consistent with, and harmonize with, the spirit and intent of CAFRA. Thus, we believe, the government should be required to serve process on persons whom it knows have a potential claim to the property.

The government complains (p. 9) that "at the outset of a civil forfeiture case, the Government often does not know who, if anyone, will claim an interest in the *res*." But that is absurd. Most civil forfeitures begin as administrative forfeitures. Judicial proceedings are commenced only if someone files a claim. At that point, the government clearly knows the identities of persons who have filed claims. DOJ has offered no valid reason why those persons should not be served with process like any other litigant in a civil action.

Even more important, in forfeiture proceedings involving real property, the government knows who the title holders are. There is no reason why persons with a title interest in real property should not receive service of process, rather than an email informing them that their property is about to be forfeited.

Finally, the government acknowledges that the current rules contemplate service of process. However, the government also claims that this is merely an option, but not a requirement. We continue to think otherwise.

Rue G(4)(b)(A). Direct Notice by Electronic Mail. DOJ argues that "under the plain language of the subsection itself, however, email may only be used in cases where it is 'reasonably calculated to reach the potential claimant.'" However, we believe that the section as currently drafted implies that "first-class mail, commercial carrier, or electronic mail" are deemed by the rule to be "reasonably calculated to reach the potential claimant."

Moreover, DOJ's examples of contexts in which electronic mail is a regularly accepted practice are simply not germane in the context of civil forfeiture statutes. For example, financial institutions transfer large sums of money by email because that

RICHARD J. TROBERMAN, P.S.
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is an accepted practice that both parties expect and are prepared for. The same can be said of electronic filing by various courts. But no court allows the commencement of an action by electronic mail. And only lawyers who sign up for electronic filing participate in the system. Thus, those lawyers expect to receive notices by email.

The same cannot be said for the typical person who has property seized. Very few people would be sophisticated enough to expect to receive a notice of forfeiture by electronic mail. And unlike an office setting, where typically only adults have access to computers, in the home there is always the possibility that a child might open, delete, or otherwise corrupt an email notice, which could have potentially disastrous consequences for the property owner.

We are also concerned with DOJ's continued emphasis on providing notice of a forfeiture action on attorneys. We are naturally concerned about burdening attorneys with this additional responsibility, especially where they do not actually represent the person in the forfeiture proceeding. This provision creates a potential liability on the attorney if the attorney fails to timely pass on the notice to the client.

We question DOJ's intentions, given their vigorous objections to serving process or other traditional means of direct notice. Indeed, the government even objects to the requirement that service by mail be certified, return receipt requested. According to DOJ, regular first class postage is sufficient. The government's reluctance to insure actual notice to property owners is clearly out of step with the goals of forfeiture reform.

Rule G(4)(b)(iii)(A). For all of the reasons stated above, we find it difficult to understand how DOJ can continue to object to a requirement that they serve an incarcerated property owner with certified mail, return receipt requested. Why do they object so strongly? It can't be because of the extra cost of certified mail Throughout this rule making process, the government has fought for the minimum standard that the constitution requires. We think that, in line with the remedial nature of forfeiture reform legislation, the rules ought to require the government to conform to a higher standard.

Rule G(5)(a). Responsive Pleadings Signed by Attorney. Frankly, we do not understand DOJ's objection, nor do we agree with Professor Cooper's note in so far as it states that "(5)(a) envisions a claim made by an entity that can only act through an agent." We do not read current Rule C(6)(a)(ii) so narrowly. The case law has long recognized that an attorney may sign the claim on behalf of his or her client where the client is physically unable to sign the claim in time to meet the deadline for filing. For example, the client might be abroad and not able to get to the lawyer's office to sign the

RICHARD J. TROBERMAN, P.S.
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claim. We do not want the rule to prohibit a lawyer from signing the claim on behalf of the client in such circumstances, and see no legitimate reason for such a prohibition. Again, the Committee should not lose sight of the fact that the reforms are intended to make level the playing field to make it easier on a claimant, not more difficult.[1]

Rule G(5)(b). Answer. There is no legitimate reason to distinguish a civil forfeiture proceeding from any other civil litigation in this regard, and DOJ has provided none. Accordingly, Fed.R.Civ.P. 12(a)(4) should apply to these proceedings. The Third Circuit, in a very well reasoned opinion, reached the same conclusion. *United States v. $8,221,877.16 in U.S. Currency,* 330 F.3d 141 149-57 (3d Cir. 2003). No appellate court has reached a contrary holding.

Nevertheless, once again ignoring the remedial nature of CAFRA, DOJ argues that CAFRA somehow requires a different result. DOJ's position is, at best, disingenuous. Nothing in the legislative process of CAFRA suggests that such a result was contemplated or intended, and we challenge DOJ to produce any Committee notes that would support such an interpretation. CAFRA merely attempted to incorporate the time limit for filing an answer from Rule C as it then existed, which used the term "answer" rather than responsive pleading."[2] No substantive change was intended.

We are in complete agreement with Professor Cooper's analysis. In his notes on the December 9, 2003 conference, Professor Cooper asked: "If a claimant has standing, why should an answer be required? The government interest could be addressed by limiting a motion to dismiss to a claimant that establishes standing." As Professor Cooper suggests, this gives the government all it can reasonably ask for.

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[1] Prior to the 2000 amendments, Rule C(6) provided, in relevant part:

> If the claim is made on behalf of the person entitled to possession by an agent, bailee, or attorney, it shall state that the agent, bailee, or attorney is duly authorized to make the claim.

[2] At the time CAFRA was enacted, Rule C(6) provided, in relevant part, as follows:

> "The claimant of property that is the subject of an action in rem shall file a claim within 10 days after process has been executed, . . . and shall serve and file an answer within 20 days after the filing of the claim."

RICHARD J. TROBERMAN, P.S.
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Rule G(7). Preservation and Disposition of Property. DOJ complains that "a drug dealer" should not be able to live in a residence "tax free and without mortgage obligations." We agree. But what of the situation where the property is actually seized by the government, *e.g.*, a vehicle. As the government notes, the proceeding may drag on for years. Should the owner be required to continue making payments while the government has possession of the vehicle? If so, should the government get the benefit of all of the post-seizure payments if the government eventually prevails? In the spirit of fairness and forfeiture reform, we think not.

This concludes our comments to the March 8, 2004, DOJ letter.

Very truly yours,

RICHARD J. TROBERMAN

RJT:nm

ANALYSIS OF "STANDING" ISSUES

MEMORANDUM

To: Chief Judge David F. Levi
Chair, Advisory Committee on Civil Rules

From: Ned Diver

Date: August 15, 2003

Re: Standing Requirements in Civil Forfeiture Actions Under Proposed Rule G.

The Advisory Committee on Civil Rules is considering a proposal to create a new Supplemental Rule for civil forfeiture cases.[1] Among the changes Proposed Rule G would make is the creation of a new standing requirement for those wishing to challenge a forfeiture. The Department of Justice has requested this provision to prevent "straw owners" and others with minimal interests in the forfeited property from forcing the government to prove the forfeitability of the property. While the proposal should effectively address the government's legitimate concerns, there may be significant questions about whether the proposal goes beyond what is appropriately accomplished by rulemaking, by eliminating what may now be legitimate claims, and increasing claimants' burden of proof in establishing standing.

I. Overview

Civil forfeiture is adjudicated in an *in rem* proceeding brought by the government against property allegedly connected to criminal activity. Under current law, the government bears the initial burden of establishing the forfeitability of the property—that is, the property's appropriate relationship to criminal activity. If it succeeds, a claimant may defeat forfeiture by establishing an "innocent owner" defense. If the claimant is an owner who was unaware of the criminal connection, for example, she may be able to retrieve the property.

The innocent owners defense requires showing both innocence and ownership (where "ownership" is construed broadly). A claimant may establish standing to challenge a forfeiture, however, with an interest less than "ownership."

Consequently, a person who would not be able to establish innocent ownership may nonetheless be able to challenge the government's attempt to establish forfeitability. The government is concerned that claimants with tenuous connections to the property will be able to

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[1] Civil forfeitures are subject to the Supplemental Rules for Certain Admiralty and Maritime Claims to the Federal Rules of Civil Procedure. Proposed Supplemental Rule G would be a new rule consolidating requirements for civil forfeiture actions.

stand in for the owner and force the government to put on its forfeitability case. The government may find such a burden onerous for a number of reasons, including that it may have law-enforcement reasons for not wishing to put on such a case. The owner, by contrast, is able to avoid exposing himself through litigation by having a stand-in challenge the forfeiture.

The government's proposal would prevent this result by requiring a claimant to be an owner—for purposes of the innocent-owner defense—to establish standing to challenge a forfeiture. It would also allow the government to move to dismiss a claim for lack of ownership before it establishes forfeitability. A claimant with a minor interest in the property barely sufficient for Article III standing would consequently not be able to force the government to prove forfeitability.

The government contends the need for this legislation has arisen as a result of the Civil Asset Forfeiture Reform Act of 2000 ("CAFRA"). 18 U.S.C. § 983, 985; 28 U.S.C. § 2466-67. Before CAFRA, the government's initial burden on forfeitability was met by showing probable cause. The burden would then be on the claimant to establish the property was not forfeitable by a preponderance of the evidence. CAFRA changed this burden, requiring the government to show forfeitability by a preponderance of the evidence. Before CAFRA, a sham challenge would not likely be effective, since the government's burden was so low, and the claimant would have to present a case establishing a lack of forfeitability. But now, a sham claimant can require the government to put on evidence sufficient to show forfeitability, a burden it believes it should not have to meet for nominal claimants, especially because presenting such evidence might be thought to jeopardize ongoing investigations or prosecutions.

II. Civil Forfeiture

Because of the distinct nature of civil forfeiture actions, standing plays a special role in this area. To understand civil forfeiture, it is helpful to compare it to criminal forfeiture. Criminal forfeiture occurs in the context of a criminal trial. The prosecutor general includes a forfeiture count in the indictment or information. Criminal forfeiture can occur only if the government prevails on the underlying criminal counts. If, say, the government establishes (beyond a reasonable doubt) that a defendant is guilty of drug charges, associated property, such as drug money resulting from the sale of the drugs at issue, can be forfeited. *See generally*, 1 Steven L. Kessler, *Civil and Criminal Forfeiture: Federal and State Practice*, ch. 4 (Dec. 2002).

In criminal forfeitures, third-party standing is not an issue at trial. A criminal forfeiture is an *in personam* claim against the defendant only. After the forfeiture, claimants are generally given the opportunity to bring claims against the government in a separate action. If they can establish a sufficient interest in the property (such as one greater than the defendant's), they may be able to get the property from the government. *See* 21 U.S.C. § 853(n).

Civil forfeiture differs in two important ways. First, a civil forfeiture can proceed without a prior conviction. The property's relationship to the criminal activity must be shown, which obviously requires a showing of criminal activity. But that showing is made within the context of the civil forfeiture proceeding, and need be made only under the lower standard-of-proof requirement applicable in such proceedings. Until recently, this often only required establishment

of probable cause as a practical matter. The lower standard of proof required of the government in civil forfeitures has been one of the principle bases for criticisms directed against it. *See* H.R. Rep. No. 105-358(I), at 28 (1997). One concern is that a low standard of proof permits the government to effectively sanction people for criminal offenses without granting them the protections afforded criminal defendants.

The Supreme Court has struggled with the relationship between forfeiture and criminal prosecution, at times describing forfeitures as "quasi criminal" subject to certain constitutional protections applicable to criminal proceedings, but not others. Civil forfeitures are subject to the exclusionary rule under the Fifth Amendment, *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 700 (1965); *Boyd v. United States*, 116 U.S. 524, 533 (1885), but are not subject to the double jeopardy clause. *United States v. Ursery,* 518 U.S. 267, 303 (1996).

The second—and for present purposes, perhaps most important—difference is that a civil forfeiture action is a proceeding *in rem*. As such, the formal defendant is not the property owner or the alleged criminal, but the property itself. "It is the property which is proceeded against, and, by resort to a legal fiction, held guilty and condemned as though it were conscious instead of inanimate and insentient." *Various Items of Personal Property v. United States*, 282 U.S. 577, 581 (1931). The property is "guilty"—that is, forfeitable—if it is sufficiently involved with criminal activity.

The property cannot itself commit criminal acts, of course, so it must be related to a person's criminal activity. But the identity of that person is irrelevant to the "guilt" of the property. The criminal actor need not be the owner of—or anyone with a substantial interest in—the charged property. As long as the property was used in the commission of the crime, was a proceed of the criminal activity, or was otherwise related to the crime in an appropriate way, it is forfeitable as an initial matter regardless of whose property it is or was at the time of the crime's commission. Innocent owners may be able to block a forfeiture by way of an affirmative defense, but initial determination of forfeitability does not turn on the distribution of property rights in the "guilty" property.

Another consequence of the *in rem* nature of civil forfeiture proceedings is that, unlike criminal forfeiture, it resolves all claims in the property. "By virtue of its forfeiture judgment and the fact that the time for filing ancillary petitions has run or such proceedings have been concluded, the government succeeds as against the world to the defendant's property. In other words, the government has effectively quieted its title to the defendant's property and owns it outright." *United States v. Gilbert*, 244 F.3d 888, 891 (11th Cir. 2001). Accordingly, while the property is the formal defendant, one might say that everyone is the functional defendant, for all potential claims will be extinguished by a successful forfeiture action.

As a result, a person with an interest in a piece of property the government seeks to forfeit must successfully challenge the forfeiture in order to preserve that interest. In order to do so, such a claimant must establish standing to contest the forfeiture. Legitimate owners have standing without question But an issue arises with respect to those with lesser property interests. Of special significance are "straw owners"—title holders with no genuine interest in the

property—and those with nothing more than a possessory interest. How far standing to challenge a forfeiture should extend is addressed by the government's proposal.

III. CAFRA

The government's proposal to add a standing requirement to the Rules is a response, in part, to certain changes to civil forfeiture law made by the Civil Asset Forfeiture Reform Act of 2000. 18 U.S.C. § 983, 985; 28 U.S.C. § 2466-67. CAFRA was passed in response to a perception that there was a certain amount of abuse of civil forfeiture, and that the law as it then stood was unfair to property holders in a number of ways.

CAFRA made two changes that are significant here. First, it raised the standard of proof required of the government in proving forfeitability. 18 U.S.C. § 983(c). And second, it created a uniform innocent-owner defense. § 983(d).

Under the previous law, the government ordinarily had to show only that it had probable cause to seize the property. And the government could meet that burden with hearsay evidence. Stefan J. Cassella, *The Civil Asset Forfeiture Reform Act of 2000: Expanded Government Forfeiture Authority and Strict Deadlines Imposed on All Parties*, 27 J. Legis. 97, 108-09 (2001). Following such a showing, the burden shifted to the claimant to show, by a preponderance of the evidence, that the property was not forfeitable. *Id.* Because the government's burden was so easily met, this effectively placed the burden on the claimant in most cases. The claimant could also prevail under some—but not all—forfeiture statutes by establishing an affirmative defense of innocent ownership.

Under CAFRA, the government presents its case first and has the burden of establishing forfeitability by a preponderance of the evidence. § 983(c)(1). The claimant then may respond with evidence to defeat forfeitability, and may present affirmative defenses, including the innocent-owner defense, which is now available in all civil forfeiture actions. § 983(d)(1) ("An innocent owner's interest in property shall not be forfeited under any civil forfeiture statute."). Accordingly, after the government presents its case on forfeitability, the claimant can respond by establishing that she is an innocent owner by a preponderance of the evidence. § 983(d). Even if the property is adjudged "guilty," the claimant may defeat a civil forfeiture if she meets the burden of establishing that she is an innocent owner.

To meet this burden, a claimant must establish both innocence and ownership. Innocence is established in a number of ways, depending on the circumstances. For these purposes, it is sufficient to say that innocence is established if the owner did not know of the conduct giving rise to the conduct and took available steps to prevent such conduct and report it to law enforcement.[2]

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[2] Section 983(d) provides:

(2)(A) With respect to a property interest in existence at the time the illegal

conduct giving rise to forfeiture took place, the term "innocent owner" means an owner who—

(i) did not know of the conduct giving rise to forfeiture; or

(ii) upon learning of the conduct giving rise to the forfeiture, did all that reasonably could be expected under the circumstances to terminate such use of the property.

(B)(i) For the purposes of this paragraph, ways in which a person may show that such person did all that reasonably could be expected may include demonstrating that such person, to the extent permitted by law—

(I) gave timely notice to an appropriate law enforcement agency of information that led the person to know the conduct giving rise to a forfeiture would occur or has occurred; and

(II) in a timely fashion revoked or made a good faith attempt to revoke permission for those engaging in such conduct to use the property or took reasonable actions in consultation with a law enforcement agency to discourage or prevent the illegal use of the property.

(ii) A person is not required by this subparagraph to take steps that the person reasonably believes would be likely to subject any person (other than the person whose conduct gave rise to the forfeiture) to physical danger.

(3)(A) With respect to a property interest acquired after the conduct giving rise to the forfeiture has taken place, the term "innocent owner" means a person who, at the time that person acquired the interest in the property—

(i) was a bona fide purchaser or seller for value (including a purchaser or seller of goods or services for value); and

(ii) did not know and was reasonably without cause to believe that the property was subject to forfeiture.

(B) An otherwise valid claim under subparagraph (A) shall not be denied on the ground that the claimant gave nothing of value in exchange for the property if—

(i) the property is the primary residence of the claimant;

(ii) depriving the claimant of the property would deprive the claimant of the means to maintain reasonable shelter in the community for the claimant and all dependents residing with the claimant;

(iii) the property is not, and is not traceable to, the proceeds of any criminal offense; and

(iv) the claimant acquired his or her interest in the property through marriage, divorce, or legal separation, or the claimant was the spouse or legal dependent of a person whose death resulted in the transfer of the property to the claimant through inheritance or probate,

except that the court shall limit the value of any real property interest for which innocent ownership is recognized under this subparagraph to the value necessary to maintain reasonable shelter in the community for such claimant and all

"Ownership" is defined fairly broadly in the statute. An "owner" for purposes of the defense is "a person with an ownership interest in the specific property sought to be forfeited, including a leasehold, lien, mortgage, recorded security interest, or valid assignment of an ownership interest; and (B) does not include (i) a person with only a general unsecured interest in, or claim against, the property or estate of another; (ii) a bailee unless the bailor is identified and the bailee shows a colorable legitimate interest in the property seized; or (iii) a nominee who exercises no dominion or control over the property." § 983(d)(6). Nor does it include other lesser property interests, such as possessory interests other than the recognized bailment interests.

Thus, the government may obtain ownership of the property if (1) it shows forfeitability; and (2) the claimant fails to establish (a) that he has a sufficient interest in the proper to be an "owner," or (b) that was innocent according to the statute. As a result of this order of required showings, it is possible for a claimant to prevail without reaching the question of innocent ownership. Once a claimant has standing, she is able to put the government to its proof on forfeitability, regardless of whether she is ultimately either innocent or an owner. If the government fails to establish forfeitability, the claimant may prevail without having to establish innocent ownership.

IV. Standing in Civil Forfeiture Actions

Standing determinations, of course, involve statutory, constitutional, and prudential considerations. There are no generally applicable substantive statutory limits on standing to file a claim based on the kind of property interests a person claims to have in property of which the government seeks forfeiture. CAFRA states that "any person claiming an interest in the seized property may file a claim asserting such person's interest in the property." 18 U.S.C. § 983(a)(4)(A). The statute does not elaborate on what a "person claiming an interest" is, suggesting that it is not meant to impose any substantive restrictions on who may make a claim. The lack of substantive statutory limitations on standing means that statutory standing is met by fulfilling the procedural requirements for filing a claim in the forfeiture statutes and Supplemental Rule C(6). *United States v. Cambio Exacto, S.A.*, 166 F.3d 522, 527 (2d Cir. 1999); *United States v. $515,060.42*, 152 F.3d 491, 497 (6th Cir. 1998); *United States v. $2,857.00*, 754 F.2d 208, 213 (7th Cir. 1984); David B. Smith, *Prosecution and Defense of Forfeiture Cases*, ¶ 9.04[2][a], at 9-68 (Dec. 2002).

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dependents residing with the claimant.

For Article III standing,[3] the claimant must be able to show an injury that would be redressable by the return of the property. In most cases, injury is established by pleading some property interest in the seized item. For the most part, courts have held that nearly any interest in the property, including possessory and security interests are sufficient. "Such interests in property usually confer standing because they are 'reliable indicators of injury that occurs when property is seized.'" *Cambio Exacto*, 166 F.3d at 526 (2d Cir. 1999); *accord United States v. $81,000*, 189 F.3d 28, (1st Cir. 1999); *$515,060.42*, 152 F.3d at 497 (6th Cir. 1998) ("[A]n owner or possessor of property that has been seized necessarily suffers an injury that can be redressed at least in part by the return of the property."); *accord United States v. Contents of Accounts Nos. 3034504504 and 144-07143 at Merrill, Lynch, Pierce, Fenner and Smith, Inc.*, 971 F.2d 974, 985 (3d Cir. 1992); Smith, ¶ 9.04[a], at 9-70; Kessler, § 3:12 ,at 3-96 to 3-99.

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[3] Courts are nearly unanimous in requiring constitutional standing. Nonetheless, there is a genuine question whether the Constitution has anything to say about standing to challenge a forfeiture, as the Second Circuit has noted. *United States v. $557,933.89*, 287 F.3d 66, 79 n.9 (2d Cir. 2002). Article III standing doctrine is based on the requirement that courts only resolve "cases and controversies." But so long as the government has established its own standing, there is a constitutional case—between the government and the property. "Indeed, because 'the party invoking federal jurisdiction bears the burden of establishing' standing, it might very well be argued that, at least as far as Article III—as opposed to statutory—standing goes, the claimant bears no burden at all, as it is really the government which is invoking the power of the federal courts to effect the forfeiture." *Id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)).

A challenge to a civil forfeiture action is in the nature of an intervention. *See United States v. One-Sixth Share of James J. Bulger in All Present and Future Proceeds of Mass Millions Lottery Ticket No. M2462333*, 326 F.3d 36, 40 (1st Cir. 2003) ("[D]efenses against the forfeiture can be brought only be third parties, who must intervene."). The Supreme Court has expressly declined to decide whether intervenors under Federal Rule of Civil Procedure 26 must independently meet the requirements of Article III standing, *Diamond v. Charles*, 476 U.S. 54, 68 (1986), and the circuits have split on the issue. *Compare Ruiz v. Estelle*, 865 F.2d 1197 (11th Cir. 1989) (no Article III standing requirements) *and Chiles v. Thornburgh*, 161 F.3d 814 (5th Cir. 1998) (same) *with Mausolf v. Babbitt*, 85 F.3d 1295 (8th Cir. 1996) (holding that "the Constitution requires that prospective intervenors have Article III standing to litigate their claims in federal court"); *City of Cleveland v. Nuclear Regulatory Comm'n*, 17 F.3d 1515 (D.C. Cir. 1994). Article III is always a requirement for intervenors if the original parties do not remain in the suit. *Arizonans for Official English v. Ariz.*, 520 U.S. 43, 65 (1997); *Diamond*, 476 U.S. at 62.

Because the courts generally speak of Article III requirements, I will assume Article III does impose requirements on claimants. If this is not true, then the requirements imposed under the Article III rubric may simply be considered prudential limitations on standing.

Two important, and distinct, questions arise First, what interests in the property suffice for standing? And second, what kind of showing must be made that one actually has those interests, whatever they are determined to be?

A. Property Interests Sufficient For Standing.

The cases are not entirely uniform with respect to what interests will suffice, but in broad outline, nearly all cases agree that possession can be sufficient for standing. *See* U.S. Dep't of Justice, *Asset Forfeiture Law and Practice Manual*, at 4-32 to 4-33 (1998) ("To have standing, one must have an ownership or possessory interest in the *res*, although the courts offer a number of variations on this theme."). *See, e.g., One-Sixth Share*, 326 F.3d at 41 (1st Cir. 2003) ("At the initial stage of intervention, the requirements for a claimant to demonstrate constitutional standing are very forgiving. In general, any colorable claim on the defendant property suffices."); *Cambio-Exacto*, 166 F.3d at 527 (2d Cir. 1999) ("We have ... recognized that the possession of property may ... confer standing to challenge its forfeiture."); *$81,000*, 189 F.3d at 35 (1st Cir. 1999) ("Courts generally do not deny standing to a claimant who is either the colorable owner of the *res* or who has any colorable possessory interest in it."); *$515,060.42*, 152 F.3d at 497 (6th Cir. 1998) ("[A] claimant must have a colorable ownership, possessory or security interest in at least a portion of the defendant property."); *Contents of Accounts*, 971 F.2d at 985 (3d Cir. 1992) ("Courts generally do not deny standing to a claimant who is either the colorable owner of the *res* or who has any colorable possessory interest in it."); *United States v. Four Million, Two Hundred Fifty-Five Thousand*, 762 F.2d 895, 907 (11th Cir. 1985); *United States v. 1982 Sanger 24' Spectra Boat*, 738 F.2d 1043, 1046 (9th Cir. 1984) ("A lesser property interest such as possession creates standing."); *cf. United States v. $94,000.00*, 2 F.3d 778, 790 (7th Cir. 1992) ("[T]here is authority for the proposition that standing may be conferred in forfeiture cases on the basis of possessory interests alone.")

The Fifth Circuit has stated that an "ownership interest" is required. *E.g., United States v. One Parcel of Real Property*, 831 F.2d 566, 567-68 (5th Cir. 1987). It has clarified, however, that for purposes of determining standing, "the term owner should be broadly interpreted to included any person with a recognizable legal or equitable interest in the property." *United States v. $38,570*, 950 F.2d 1108, 1112 n.4 (5th Cir. 1992). The Eighth Circuit has also stated that claimants must show "ownership." But again, the term "owner" seems to be shorthand for a broad set of property interests. "To have standing, a claimant ... need only show a colorable interest in the property, redressable, at least in part, by the return of the property." *United States v. One Lincoln Navigator 1998*, 328 F.3d 1011 (8th Cir. 2003); *see also United States. v. One 1945 Douglas C-54 (DC-4) Aircraft*, 604 F.2d 27, 28 (8th Cir. 1979) ("Broadly speaking, ownership may be defined as having a possessory interest in the *res*, with its attendant characteristics of dominion and control."). The Eighth Circuit did hold, however, that possession of real property by the parents of the owner was not a sufficient interest to satisfy the ownership requirement. *United States v. One Parcel of Property*, 51 F.3d 117, 121 (8th Cir. 1995). As residents, they undoubtedly would be injured by the forfeiture in a way redressable by a successful challenge to the forfeiture, which would likely be enough in other courts. *See United States v. 8402 W. 132nd St.*, 103 F. Supp. 2d 1040, 1043 (N.D. Ill. 2000) (resident who would be made homeless had standing to contest forfeiture).

One consistently recognized limit is that unsecured creditors do not have standing to contest civil forfeitures. "[T]he federal courts have consistently held that unsecured creditors do not have standing to challenge the civil forfeiture of their debtors' property." *One-Sixth Share*, 326 F.3d at 44 (1st Cir. 2003) (quoting *United States v. $20,193.39,* 16 F.3d 344, 346 (9th Cir. 1994)).

Although all kinds of interests in the property are normally sufficient to establish standing to challenge a forfeiture, most courts have required that there be some substance to interest. Courts have been generally held that standing is not available to those with no more than a "naked claim of possession." *Cambio Exacto*, 166 F.3d at 527 (2d Cir. 1999); *$557,933.89*, 287 F.3d at 79 n.10 (2d Cir. 2002); *$515,060.42*, 152 F.3d at 498 (6th Cir. 1998); *United States v. $191,191.00*, 16 F.3d 1051, 1058 (9th Cir. 1994); *United States v. $321,470.00*, 874 F.2d 298, 303 (5th Cir. 1989). *But cf.*, *Mantilla v. United States*, 302 F.3d 182, 185 (3d Cir. 2002) (assuming, without deciding, that claimant who held the keys to seized car without explanation had standing). In most cases, the courts have not, however, required much. *See, e.g.*, *$191,191.00*, 16 F.3d at 1051 (9th Cir. 1994) ("Mere *unexplained possession* will not be sufficient. However, where a claimant asserts a *possessory interest* and provides some explanation of it (e.g., that he is holding the item for a friend), he will have standing."); *$557,933.89*, 287 F.3d at 79 n.10 (2d Cir. 2002) (where claimant's verified claim that he was owner sufficient to establish standing); *$321,470.00*, 874 F.2d at 304 (5th Cir. 1989) ("[T]he possessory interest [must] be a colorably lawful one."). Some courts have required that bailees name the bailor in order to establish that their possession is colorably lawful. *United States v. Currency, U.S. $42,500.00*, 283 F.3d 977, 983 (9th Cir. 2002); *$321,470*, 874 F.2d at 304 (5th Cir. 1989). But like most issues in this area, exactly how much more than "naked possession" is required is not entirely clear or consistent. *See, e.g., $515,050.42*, 152 F.3d at 498 (6th Cir. 1998) ("The assertion of simple physical possession of property as a basis for standing must be accompanied by factual allegations regarding how the claimant came to possess the property, the nature of the claimant's relationship to the property, and/or the story behind the claimant's control of the property."). At minimum, it appears the possession must be at least "colorably lawful."

In an attempt to prevent challenges by "straw owners," many courts have held that those with formal title to property, but who do not maintain "dominion and control" over the property may be denied standing. *See, e.g.*, *One-Sixth Share*, 326 F.3d at 44 (1st Cir. 2003); *$81,000*, 189 F.3d at 37 (1st Cir. 1999); *Cambio Exacto*, 166 F.3d at 527 (2d Cir. 1999); *Contents of Accounts*, 971 F.2d at 985-86 (3d Cir. 1992);*$38,570*, 950 F.2d at 1113 (5th Cir. 1992); *United States v. 526 Liscum Dr.*, 866 F.2d 213, 217 (6th Cir. 1989); *United States v. 900 Rio Vista Blvd.*, 803 F2d 625, 630 (11th Cir. 1986); *One 1945 Douglas C-54*, 604 F.2d at 28 (8th Cir. 1979). This limits the ability of criminals to protect their property by placing ownership of property in the name of a relative, for instance. In such cases, the titled person is not viewed as the "true owner." *$81,000*, 189 F.3d at 36.

The Second Circuit has tied the straw owner (and "naked possessor") analysis to constitutional injury. Where an "owner" is one in name only, then he will not actually be harmed by the forfeiture, it has said. Where that is the case, it is appropriate to deny standing. *Cambio*

Exacto, 166 F.3d at 527 (2d Cir. 1999) ("It is because of the lack of proven injury that we have, for example, denied standing to 'straw' owners who do indeed 'own' the property, but hold title to it for somebody else.").

Some courts have rejected such attempts to flush out straw owners. *See United States v. 5 S 351 Tuthill Rd.*, 233 F.3d 1017, 1023 (7th Cir. 2001) (possibility of monetary gain on sale of item establishes sufficient interest in forfeited property, despite lack of dominion and control); *United States v. Certain Real Property Located at 16510 Ashton*, 47 F.3d 1465, 1471 (6th Cir. 1995) ([W]hether or not [claimant] proves to be a straw man at the hearing, as the record title holder, he is entitled to notice and a hearing before being deprived of his interest in the property.") (Martin, J., writing for the court); *but see 16510 Ashton*, 47 F.3d at 1472 (Engel J., concurring) ("If [claimant's] only connection with the forfeited property were that of a naked title holder ... I might agree with the trial judge's determination that he lacked standing ...."). It is not always clear, however, whether the courts are focusing on the interests that suffice, or the showing that must be made. It appears that at least some of the time, courts accept that straw ownership is not sufficient for standing, but that legal title is itself sufficient evidence of genuine ownership for purposes of the standing inquiry. *See One Lincoln Navigator*, 328 F.3d at 1013 (8th Cir. 2003) ("[A]lthough there is evidence that [claimant] has only 'bare legal title,' we conclude that is sufficient to confer Article III standing to contest the forfeiture."); *$191,910.00*, 16 F.3d at 1058 (9th Cir. 1994) ("[A] simple claim of ownership will be sufficient to create standing to challenge a forfeiture."). In any event, most courts would probably reject the claim of a straw owner if that status could be sufficiently established at the time of the standing determination.

In sum, courts have generally held that a broad range of interests in the property at issue—including lawful possession—are sufficient to establish standing. Most courts, attempting to weed out straw owners, require that the interests at issue have a degree of substance to them, or be explained. The scope of the property interests required for standing does not appear to have changed significantly since the passage of CAFRA. It may be that recent cases are somewhat more consistent in permitting more possessory interests, and somewhat more likely to permit what may be cases of straw ownership, but there has not been a significant shift with respect to this issue over the last several decades.

B. Required Showing.

Somewhat less settled is the issue of what showing a claimant must make, and when it must be made. Courts have consistently labeled standing a "threshold" issue. *E.g.*, *$557,933.89*, 287 F.3d at 78 (2d Cir. 2002); *Cambio Exacto*, 166 F.3d at 526 (2d Cir. 1999); *United States v. $9,041,598.68*, 163 F.3d 238, 245 (5th Cir. 1999);*$38,570*, 950 F.2d at 1111 (5th Cir. 1992). A claimant must consequently establish standing in order to get her feet in the door, as it were. Courts have also been fairly consistent that only a "colorable" interest in the property need be shown. *See, e.g.*, *One-Sixth Share*, 326 F.3d at 41 (1st Cir. 2003); *One Lincoln Navigator 1998*, 328 F.3d at 1013 (8th Cir. 2003); *$557,933.89*, 287 F.3d at 79 (2d Cir 2002); *$81,000*, 189 F.3d at 35 (1st Cir. 1999) ("Courts generally do not deny standing to a claimant who is either the colorable owner of the *res* or who has any colorable possessory interest in it."); *$515,060.42*, 152

F.2d at 497-98 (6th Cir. 1998); *Contents of Accounts*, 971 F.2d at 985 (3d Cir. 1992); *$38,570*, 950 F.2d at 1112 (5th Cir. 1992) *$321,470.00*, 874 F.2d at 304 (5th Cir. 1989) ("colorably lawful interest").

Courts and commentators have commonly distinguished this threshold showing of a colorable interest from the merits of the claimants' claim. When standing is at issue, "a claimant need not prove the underlying merits of the claim." *One Lincoln Navigator*, 328 F.3d at 1013 (8th Cir. 2003); *accord*, *One-Sixth Share*, 326 F.3d at 41 (1st Cir. 2003); *$557,933.89*, 287 F.3d at 78 (2d Cir. 2002); *$81,000*, 189 F.3d at 35 (1st Cir. 1999); *$515,060.42*, 152 F.2d at 497 (6th Cir. 1998); *$38,570*, 950 F.2d at 1112 (5th Cir. 1992). The burden of proof is on the claimant, *e.g.*, *$38,570*, 950 F.2d at 112, but that burden is generally not especially great. *See, e.g.*, *One-Sixth Share*, 326 F.3d at 41 ("At the initial stage of intervention, the requirements for a claimant to demonstrate constitutional standing are very forgiving.").

Establishing the requisite property interest at trial requires a different—and ordinary more substantial—showing. But if a claimant fails to establish ownership at trial (when putting on an innocent owner defense, for instance), that will not undermine the previous finding of standing, which ordinarily will have required only a colorable interest in the property. *See $557,933.89*, 287 F.3d at 78 (2d Cir. 2002); *$9,041,598.68*, 163 F.3d at 245 (5th Cir. 1998) (disagreeing with district court finding of lack of standing based on jury verdict finding no ownership); *United States v. Hooper*, 229 F.3d 818, 820 n.4 (9th Cir. 2000) ("The district court's concluding statement that Claimants lacked 'standing' is simply another way of stating that Claimants had failed to establish on the merits a property interest entitling them to relief."). Stefan Cassella of the Asset Forfeiture and Money Laundering Section of the Department of Justice has endorsed the view that standing should be treated as a threshold issue, and should be kept distinct from the ultimate determination of ownership:

> [T]he better practice would be to refer to the threshold Article III "case-or-controversy" requirement as one that necessitates a showing by the claimant that he has standing to litigate his or her claim, and to refer to the ultimate question of ownership as part of the claimant's affirmative defense. That would make clear what has always been the rule: a person with a "colorable interest" in the defendant property is allowed in the courthouse door to litigate his claim, but once inside, the claimant is required to show that he satisfies all of the indicia of ownership as part of his affirmative defense. As the outcome in *$9,041,598.68* illustrates, there will be claimants who are able to establish standing to contest a forfeiture at the outset of the proceeding by showing that they have a colorable interest in the property (e.g., by showing that their name is on the title to the property, or that they have possession of it) yet they will be unable to establish the requisite ownership interest under § 983(d)(2)(A) at trial.

Stefan D. Cassella, *The Uniform Innocent Owner Defense to Civil Asset Forfeiture: The Civil Asset Forfeiture Reform Act of 2000 Creates a Uniform Innocent Owner Defense to Most Civil Forfeiture Cases Filed by the Federal Government*, 89 Ky. L.J. 653, 676-77 (2001).

At the pleading stage, it makes sense to permit the claimant to establish standing on a very limited showing. Thus, cases decided on the pleadings tend to speak only of a requirement that the claimant allege facts establishing standing—in most cases, facts that would establishing a facially colorable interest in the *res*. *E.g.*, *$191,910.00*, 16 F.3d at 1057 (9th Cir. 1994). But language in at least one case appears to create a requirement that the claimant present evidence along with the claim. *$38,570*, 950 F.2d at 113 (5th Cir. 1992) ("Ordinarily, ... a claimant is required to submit some additional evidence of ownership along with his claim in order to establish standing to contest the forfeiture."). *But see* Smith, ¶ 9.04, at 9-70.7 ("There is no justification or authority for requiring a claimant to submit proof of standing along with a claim."). Regardless of whether evidence is required to be submitted along with the claim, if the government challenges the claimant's standing, the claimant will generally be required to come forward with proof establishing a colorable interest in the property.

When the facts related to standing are in dispute, the burden on the claimant can vary from case to case. There seem to be two general tracks that litigation of the issue takes in standing challenges that go beyond the pleadings. Standing can be litigated as an issue in summary judgment motions, or the court can itself resolve the factual issues, often after an evidentiary hearing.[4]

On summary judgment, the burden on the claimant is presumably the familiar one: the claimant must establish that there is at least a genuine issue of material fact as to the requisite property interest. "[A]lthough at the motion to dismiss stage it is enough to allege the elements of standing, at the summary judgment stage the party with the burden of demonstrating standing must demonstrate that there is a genuine issue of material fact as to the standing elements ...." *United States v. $57,790.00*, 263 F. Supp. 2d 1239, 1242 (S.D. Cal. 2003); *see also $515,060.42*, 152 F.3d at 499 (6th Cir. 1998) ("Here, the real question is ... whether there was sufficient proof of property interests to establish standing and avoid summary judgment."). In some cases, courts have resolved the issue in the context of a summary judgment motion, but have not discussed the standard applied. *See, e.g.*, *United States v. $122,043.00*, 792 F.2d 1470 (9th Cir. 1986); *$321,470.00*, 874 F.2d 298 (5th Cir. 1989).

Because standing is a legal issue, however, courts may resolve standing issues on their own. *Cambio Exacto*, 166 F.3d at 526 (2d Cir. 1999); *Contents of Accounts*, 971 F.2d at 984 (3d Cir. 1992). "If a threshold issue of Article III standing raises material fact disputes, including credibility issues, the district court may conduct an evidentiary hearing and resolve them." *One Lincoln Navigator*, 328 F.3d at 1014 (8th Cir. 2003). Indeed, an evidentiary hearing may be required in certain cases, such as where credibility determinations must be made to resolve the issue. *United States v. 1998 BMW "I" Convertible*, 235 F.3d 397, 400 (8th Cir. 2000). As a general matter, the choice of which approach to take would appear to be a matter of discretion. *See* Smith, ¶ 9.04, at 9-70-9 ("Where the determination of a standing question requires the taking of evidence, it is within the court's discretion to leave the matter unresolved until trial.").

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[4] This tracks standard practice. *See infra*, at 26.

These approaches may not be as different as they appear, however. For, as discussed, courts consistently state that all that claimant need establish is a "colorable" interest in the property. Courts have not elaborated on what "colorable" means in this context. But it is clearly something less than establishing an ownership interest by a preponderance of the evidence. As noted, the prevailing view would seem to be that sufficient averments in the claim together with some supporting evidence will ordinarily be sufficient. This standard should at least be in the neighborhood of a requirement that claimant produce sufficient evidence to permit a jury to conclude that the claimed property interest is genuine. *See* Smith, ¶ 9.04, at 9-70.9 ("Any disputed issue of fact, such as who owns the property, can then be decided by a jury. All that needs to be shown at the preliminary stage is a 'facially colorable interest in the proceedings sufficient to satisfy the case-or-controversy requirement and prudential considerations defining and limiting the role of the court.'") (quoting *$557,933.89*, 287 F.3d at 78-89, and collecting cases). In any event, in both instances, the court resolves the standing question without fully resolving issues going to the merits of the case.

In some decisions, courts appear to have gone further, making ultimate determinations of the property interests of the claimant. In *Contents of Accounts*, for instance, the Third Circuit analyzed the district court's finding of straw ownership for clear error, 971 F.2d at 987, even though it had stated that standing is available to a claimant "who is either the colorable owner of the *res* or who has any colorable interest in it." *Id.* at 985. *See also $81,000*, 189 F.3d at 41-42 (1st Cir. 1999) ("After carefully reviewing the grand jury testimony, we disagree with the district court's conclusion and hold that [claimant] did indeed exercise sufficient dominion and control over the *res* to have standing in this civil forfeiture proceeding."). It may be that these courts were only determining that the claimant had a colorable claim, but the language of the opinions, together with the searching inquiry into the facts, suggests something more. *Cf. United States v. Morgan*, 224 F.3d 339 (4th Cir. 2000) (reviewing factual findings of ownership in criminal forfeiture).

Over the last few years, courts have become somewhat more insistent on distinguishing the standing issue—a threshold determination of a colorable interest—from the "merits" of the claim—including assessment of the actual interests the claimant has in the *res*. In *One Lincoln Navigator*, the court set aside a district court finding going to ownership. The court noted that "[i]f a threshold issue of Article III standing raises material fact disputes, including credibility issues, the district court may conduct an evidentiary hearing and resolve them." 328 F.3d at 1014 (8th Cir. 2003). But the district court's findings with respect to whether claimants had a real ownership interest or merely "bare legal title," was a merits issue that must be resolved by the jury. *Id.* A court could make such a finding before trial, the court held, only "in accordance with Rule 56 standards." *Id.* Because the district court had resolved genuine issues of material fact in reaching its conclusions, summary judgment had been erroneously granted. *Id.*

As noted, the Second and Fifth Circuits have both set aside district court determinations that the claimant lacked standing based on jury determinations. *$557,933.89*, 287 F.3d at 79 (2d Cir. 2002); *$9,041,598.68*, 163 F.3d at 245 (5th Cir. 1999). The Fifth Circuit noted that this required it to review what should be a threshold issue by assessing the merits of the case. "Allowing a district court to revisit the question of standing post-verdict necessarily invites this

Court to chase its tail—we ought to review standing as a threshold matter yet in order to do so we must review the merits." *$9,041,598.68*, 163 F.3d at 245. The Second Circuit followed this reasoning, emphasizing that as a result, district courts should limit the standing inquiry to the threshold determination of whether there is a colorable interest. *$557,933.89*, 287 F.3d at 79. *Cf. United States v. $242,484.00*, 2003 WL 21488882, at *13 n.6 (11th Cir. June 30, 2003) (opinion withdrawn without comment, July 23, 2003). *But see $57,790.00*, 263 F. Supp. 2d at 1245 (S.D. Cal. 2003) (holding that claimants "must prove their standing to contest the forfeiture at trial by a preponderance of the evidence.").

Although this area of the law remains somewhat muddy, there is a fairly well-defined prevailing view. Standing challenges are often made on the pleadings, at which stage it should be enough to properly allege the requisite interest in the property. When evidence is required for a standing determination, standing may be litigated at the summary judgment stage subject to the requirements of Rule 56. Alternatively, the court may make factual findings, but only so far as is necessary to determine that the claimant has a sufficient colorable interest in the *res*. And once this threshold determination of standing is made based on evidence, the issue is treated as resolved. The fact that a claimant is later found to have no genuine interest will not defeat standing, which is settled "at the threshold" on the limited determination of a mere colorable interest.

Because standing requires only a limited showing, a person who in fact lacks the requisite interests for standing may obtain standing if he can make a colorable showing of having those interests. As a result, nominees and straw men with enough evidence to establish a colorable interest, among others, may be able to obtain standing to challenge a forfeiture.

V. The Government's Concern.

Proposed Rule G seeks to address certain consequences that have resulted from the forfeiture standing doctrine in CAFRA-governed cases. CAFRA did not expressly change the rules of standing, and there has been no dramatic shift in the case law on standing. But the combination of these standing rules and CAFRA has resulted in a set of circumstances that permit illegitimate claimants to take advantage of the system in certain cases.

The fundamental concern is that a person with either minimal interests in the property, or no interests at all, will be able to obtain standing and force the government to prove forfeitability, thereby incurring all of the costs associated therewith. To be sure, such claimants could obtain standing before CAFRA. And just as now, a person with no genuine interest in the property may be able to prevail, but the threat such claimants represent has become significantly greater.

Before CAFRA, a claimant who barely met minimal standing requirements could force the government to meet its initial burden, but that burden was easily met. After that, the claimant would need either to prove that the property was not forfeitable by a preponderance of the evidence, or to establish an affirmative defense, such as innocent ownership, if available.

Now, by contrast, once the claimant meets the standing requirement, it is possible for her to prevail without making any further showing. If the government is successful in meeting its burden, then the claimant will prevail only if she can establish an innocent-ownership defense.

But because innocent ownership is an affirmative defense, those issues need be litigated only after the government has put on its case. Obtaining standing is sufficient to put the government to its proof—a showing much more substantial than was previously required. And standing, under the cases, is often very easily obtained. The result is that a person with no real chance of establishing innocent ownership, or who has no actual legal interest in the property at all, may still find it valuable to challenge a forfeiture, because if she can establish standing, that may be enough. She can put the government to its proof.

According to the government, this situation invites abuse. Those with no significant interest in the property can be used by wrongdoers to easily and cheaply challenge forfeitures. The real owners, meanwhile, are protected from exposing themselves through litigating the forfeiture. The government, by contrast, must expose what may be an ongoing investigation to make its case. And after it expends the resources necessary to put on its case, the government may fall short of establishing the forfeitability of the property, requiring it, in certain cases, to turn over the property to a person with no legitimate claim to the *res*.

The government has highlighted the following examples of cases in which it believes undeserving claimants have been granted standing. In one case, the court assumed, without deciding, that a claimant had standing who had held the keys to a car moments before it was seized. *Mantilla v. United States*, 302 F.3d 182 (3d Cir. 2002). In another, a resident of a seized property obtained standing because he would be rendered homeless by a forfeiture, even though he had no ownership rights in the property. *United States v. 8402 W. 132nd St.*, 103 F. Supp. 2d 1040 (N.D. Ill. 2000). Finally, standing was granted to a person who found money on the highway after it had fallen out of a car in front of him. *United States v. $347,542.00*, 2001 WL 335828 (S.D. Fla 2001). In all of these cases, the claimant could establish a minimal case-or-controversy showing, but would not be able to challenge the forfeiture under proposed Rule G.

VI. Proposed Rule G

Proposed Rule G would make a number of changes to requirements for standing to challenge civil forfeitures. The rule makes changes with respect to the kinds of interests sufficient to challenge a forfeiture and to the procedures for resolving standing disputes.

These provisions are found in sections five and seven of the proposed rule. Section 5(a) governs the filing of a claim. It provides: "A person who asserts an ownership interest in the property that is the subject of the action may contest the action ...." It also provides that the claimant must "state the claimant's ownership interest in the property, in terms of 18 U.S.C. § 983(d)(6)." Section 983(d)(6) defines the term "owner" for purposes of the innocent owner defense.[5]

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[5] Section 983(d)(6) provides, in full:

In this subsection, the term "owner"—(A) means a person with an ownership interest in the specific property sought to be forfeited, including a leasehold, lien, mortgage, recorded security interest, or valid assignment of an ownership interest; and (B) does not include (i) a

The connection between the statutory definition of "owner" for purposes of the innocent owner defense and standing is even more explicitly drawn in section seven, which governs motions practice. Section 7(d)[6] includes a definition of standing, as well as procedures for litigating the issue. It expressly provides, "A party has standing to contest a forfeiture action if the party has an ownership or possessory interest in the property as defined by 18 U.S.C. § 983(d)(6)."

The definition of ownership included in the statute tracks many of the elements that courts have focused on in resolving standing disputes. The statute defines ownership interests broadly—including mortgages and liens, among others—but stops short of unsecured credit interests and claims against the property. Straw owners are expressly omitted by the exclusion of "a nominee who exercises no dominion or control over the property." The definition also limits possessory interests, excluding "a bailee unless the bailor is identified and the bailee shows a colorable legitimate interest in the property seized."

Nevertheless, the definition is narrower than the limits of Article III standing. The family member who would be rendered homeless by the forfeiture of his home and the person finding money on the highway may be excluded by Rule G, for example. And by excluding "nominees," the adoption of the § 983 standard would work a change in those circuits that have held that issue to be a merits question that must be resolved at trial.

Section seven of Rule G also includes important provisions governing the procedure involved in resolving standing disputes. The rule specifies that the government may move at any time before trial for judgment in its favor if the court finds a lack of a sufficient ownership interest. Supp. Rule G(7)(d)(i). It also states that standing is an issue for the court, and that the claimant has the burden of establishing standing.

These procedures do not appear to be greatly different from current practice. The difference is made significant, however, by the fact that the definition of standing is made in terms of the ownership interests stated in § 983. Under this proposal, it appears to be no longer sufficient to establish a *colorable* interest in the property.[7] The claimant must actually establish the interest in the property. And the determination whether the claimant has met his or her burden is to be made by the judge, who is to weigh the evidence and reach an ultimate conclusion with

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person with only a general unsecured interest in, or claim against, the property or estate of another; (ii) a bailee unless the bailor is identified and the bailee shows a colorable legitimate interest in the property seized; or (iii) a nominee who exercises no dominion or control over the property.

[6] This subsection was part of the July 18th amendments to the government's proposal.

[7] The definition does include one reference to a colorable showing. A bailee, under the statute, is an owner only if she identifies the bailor and has "a colorably legitimate interest" in the *res*. § 983(d)(6)(B)(ii).

respect to ownership. Any disputed issue of fact material to the standing question, it appears, must be resolved by the court.

Proposed Rule G also includes a related provision on summary judgment motions If either party can prevail on the innocent ownership issue on summary judgment, the court must dismiss the case. This provision does not appear to have a direct effect on standing Only the ownership part of the innocent ownership defense is relevant to standing, and the court can resolve that issue on the facts without appeal to this section. This provision is consistent with the view that those who cannot establish innocent ownership should not be able to put the government to its proof on forfeitability, but does not appear to actually change anything with respect to standing disputes.

VII. Analysis of the Changes

The primary reason for Rule G's standing requirements appears to be to eliminate challenges by straw owners and nominees. The proposal would effectively achieve that aim. The definition of ownership expressly excludes "a nominee who exercises no dominion or control over the property." 21 U.S.C. § 983(d)(6). And the proposal permits that issue to be fully litigated before trial. Thus, any straw owners can be effectively flushed out without the government having to put on its forfeitability case, along with its associated costs and risks of revealing confidential information.

The prevention of genuine nominees from challenging forfeiture in the place of the real owners seems a worthy goal. In the typical case, the true owner will wish to avoid challenging the forfeiture, because in order to so, she would have to admit ownership and otherwise expose herself through the litigation. She will then designate a nominee in whose name she may place title, in order to permit a "clean" challenge to the forfeiture. Most importantly, the nominee in such a scenario has no genuine interest in the property that needs to be protected by the law. So there is no good reason to recognize the nominee's standing. And there are very good reasons for wanting the real owner to protect her own interests. Since the substantive interests really being protected are the owner's alone, the owner should be the one from whom the government can seek discovery.

Proposed Rule G achieves these ends both by limiting the interests that suffice for ownership and by providing for full resolution of the existence of those interests before trial. Though the effects are often intertwined, it is helpful to look at them independently. The first change—the ownership requirement—is directed at eliminating those with minimal interests in the property. The second—the procedural change—is directed at eliminating those who assert interests that are sufficient, but who cannot prove they really have those interests.

A. Ownership Requirement.

1. Is the Change Substantive?

By instituting an ownership requirement, proposed Rule G narrows the class of people entitled to challenge a forfeiture. Nominees and straw owners are expressly excluded from the definition of "owner" adopted by proposed Rule G, effectively excluding those with only

superficial rights to the *res*. But in tying standing to the definition of ownership in § 983, proposed Rule G goes further than that, excluding the claims of not only nominees, but also others with lesser property rights, including certain possessory rights. It thus appears, on its face, to abridge substantive rights: some of those with a legitimate cause of action under current law would lose the right to pursue their claims under proposed Rule G. And changes to the rules should not, of course, alter substantive rights.

The change to the standing requirement, however, is accomplished by moving a standard applicable elsewhere in the litigation to the standing inquiry. In at least some cases—those in which innocent ownership is claimed—it does not impose a new or increased requirement, it simply changes order of proof. Instead of litigating ownership as part of an innocent-owner affirmative defense, the proposal would move resolution of that question up before the government's presenting of evidence on forfeiture. Currently, litigation of cases involving innocent-owner defenses proceeds as follows: (1) the claimant attempts to establish standing; (2) the government attempts to establish forfeitability; and (3) the claimant attempts to establish (a) innocence and (b) ownership. In such cases, proposed Rule G would move half of the affirmative defense up to the standing stage: (1) the claimant attempts to establish standing by establishing (b) ownership; (2) the government attempts to establish forfeitability; and (3) the claimant attempts to establish (a) innocence.

The effect of the proposal, however, is not limited to simply rearranging the order of proof in all cases. For under current law, the claimant is not required to put on an innocent-owner defense to prevail. So the claimant is not required to prove ownership. The only time it is currently necessary is after the government successfully establishes forfeitability, which it might not do. Under proposed Rule G, however, every claimant would face the requirement of establishing ownership. The proposed rule would thus create a new requirement in certain cases.

This may not be a problem if it were true that only innocent owners were genuinely entitled to prevail in these cases.[8] Were this true, a claimant's possibility of prevailing without

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[8]The government appears to accept that only innocent owners are genuinely entitled to prevail in a civil forfeiture challenge. The assumption is embodied in recently-added section (7)(g) of proposed Rule G. The proposal contemplates that all grants of summary judgment on the innocent ownership issue will be dispositive, and will obviate any need to litigate forfeitability. With respect to claimants' motions, this is unremarkable. When a claimant prevails on such a motion, the court will have found that the claimant is an innocent owner as a matter of law. If so, then the claimant will win no matter what the government does. That innocent ownership defeats forfeitability is a fundamental feature of the innocent-owner defense.

By contrast, with respect to the government's summary judgment motions, the proposal is very significant. If a conclusion that the claimant is not an innocent owner is dispositive, that implies that the claimant will lose even if the government cannot show the property to be forfeitable. This essentially codifies the assumption that only innocent owners are entitled to prevail in a forfeiture challenge.

ever getting to the innocent-owner portion of the litigation would be simply fortuitous. When the government fails to establish forfeitability, it is established that it does not have a right to the property. But that does not mean that the claimant necessarily has a legitimate entitlement to it. Under the current system, because the government must go first, if neither part has a genuine right to the property, the default is in favor of the claimant. The change would simply mean that undeserving claimants could not prevail over the government, even when it could not establish its entitlement to the property. Accepting this view, the only people hurt by the new change would be those who now win by default, but who do not have a genuine entitlement to prevail in these cases.

Under current law, however, it is not true that one must be an innocent owner to have a genuine claim in this sense. By granting standing to those with an interest in the property less than ownership, it is implicit in the law that people other than innocent owners may rightly prevail in a civil forfeiture challenge. Under the present state of the law, those with lesser interests in the property, or who would otherwise be injured by the forfeiture, have a right to challenge a forfeiture in order to prevent the injury forfeiture would cause. The resident who would be made homeless by a forfeiture, for instance, cannot prevail on an innocent-owner defense, but may be entitled to challenge the government on forfeitability.

Under proposed Rule G, by contrast, those potential claimants would lose the right to contest the forfeiture. Because forfeiture finally resolves the government's outright ownership in the forfeited property, the inability to challenge the forfeiture means they would have no recourse at all. And these claims would be lost because of the *substance* of the claims. There are no procedural steps they could take to challenge the loss of the property through forfeiture, or to receive compensation for their loss.

Non-owners could, of course, rely on owners to bring these challenges. By eliminating the ability of non-owners to challenge a forfeiture, the rule would force the real owners to either challenge the forfeiture themselves or let the property go. For the reasons that make straw ownership troubling, this would be beneficial. And because the actual owner will generally have the greatest to lose, she will generally have plenty of incentive to step in, if there are no other challengers.

Nonetheless, the owner may not want to challenge the forfeiture for any number of reasons. A person with a lesser interest in the property cannot force the owners to file a claim. Such a person will simply lose the ability to protect his interest in the property, or prevent the injury he will suffer by the government's (potentially wrongful) forfeiture. The change defines away such a person's claim based on the rights it seeks to protect.

2. Congressional Intent.

Proposed Rule G appears to represent a substantive change from the current state of the law, as represented in the cases, but does it represent a change from what Congress intended? Did Congress intend to protect only innocent owners? Current law represents a fairly consistent

set of interpretations by a number of federal courts. Is there a compelling reason for thinking these interpretations are wrong?

It should be remembered that, historically, standing was regularly granted to those who could not establish an innocent owner defense, because in most cases, there was no innocent owner defense. The only way to challenge a forfeiture was to challenge the government on the forfeitability issue. Thus, standing necessarily developed independently of innocent ownership. There is thus no reason to presume any particular connection between the two.

a. Does the Current Rule Make Sense?

If the current system was irrational, we might be able to presume that Congress did not intend these results. But while the question whether the current system is a good thing or a bad thing is a legitimate one, it cannot be said to be irrational.

A civil forfeiture action is directed at resolving the government's right to the property, not the claimant's. When a forfeiture judgment is entered, "the government succeeds as against the world to the defendant's property. In other words, the government has effectively quieted its title to the defendant's property and owns it outright." *United States v. Gilbert*, 244 F.3d 888, 891 (11th Cir. 2001).

On the other hand, when the government cannot establish the forfeitability of the property, it has no rights in the property at all. So even a claimant with a minimal interest will have a greater claim to the property than the government. Thus, it is reasonable to think a party with an interest in the property—even a relatively minor one—should be able to protect that interest if the property is not forfeitable, and challenging the forfeiture is generally the only opportunity to do so.

Forfeiture with an innocent owner defense might be seen as establishing a particular ordering of property rights. When property is forfeitable, the government obtains rights in that property inferior to innocent owners, but superior to all others. If the property is not forfeitable, then any genuine interest in the property will be superior to the government's. Viewed this way, it makes sense to permit a person with a lesser interest in the property to challenge the government, because if the property is not, in fact, forfeitable, the claimant will be wrongfully harmed if the forfeiture is permitted to stand.

From this perspective, it is apparent that many of the cases the government has expressed concern about may not represent bad outcomes. In *Mantilla v. United States*, 302 F.3d 182 (3d Cir. 2002), the Third Circuit assumed claimant had standing where he briefly held the keys to the seized car before handing them over to a government agent. His interest in the property had obviously not been shown to be significant. Nevertheless, if the property turns out not to be forfeitable, there is no obvious reason that the government should not return the keys to him. Similarly, the claimant who would be rendered homeless by a forfeiture, as in *8402 W. 132nd St.*, 103 F. Supp. 2d 1040, would clearly suffer a very significant injury should the property be forfeited. A wrongful forfeiture would wrongfully deprive him of a place to live. And the person who found the money on the highway had a non-trivial interest in the money. Under state law, lost money reported to the appropriate officials becomes the owner's after ninety days if the

previous owner is not identified. *$347,542.00*, 2001 WL 335828, at *4. Thus, the finder has a substantial chance of keeping all the money he collected. If the property was not actually forfeitable, there is no apparent reason he should not be able to pursue this possibility. The government has labeled this case a "travesty," because it found it necessary to settle with the claimant rather than put its case on. But it is only a travesty if the money was rightfully the government's. If not, then the claimant's interest in the money was clearly greater than the government's. So while the case may have been a travesty, because the government did not put on its forfeitability case, it is not clear that the outcome of the case can be assumed to be regrettable.

These cases are troublesome only if we either assume that the claimant should not have prevailed whether or not the government established forfeitability, or if we assume that the property was, in fact, forfeitable. But is not obvious that either assumption can be made. One could reasonably think that those with lesser interests should have the chance to challenge the government on the issue of forfeitability even if they could not prevail on an innocent ownership defense. And only when the government prevails on the merits of its forfeitability case can the law accept that it has a right to the property—that is the burden Congress has placed on it.

b. Legislative History.

The government suggests a different reason for presuming that Congress intended to limit forfeiture challenges to owners within the meaning of § 983(d)(6). The government contends that courts generally used the terms "ownership" and "standing" interchangeably until recently, including the period during which Congress was considering CAFRA. Congress may consequently have though that standing and ownership were treated as essentially the same thing at that time, and would continue to be so treated. Consequently, even if Congress could have chosen the system adopted by the courts, it may have intended to permit only owners to bring challenges.

As discussed, however, most courts have long taken a broader view of the kinds of property rights sufficient to establish standing. *See, e.g., Four Million, Two Hundred Fifty-Five Thousand*, 762 F.2d at 907 (11th Cir. 1985) ("[A] claimant must demonstrate an ownership or possessory interest in the property seized."); *1982 Sanger 24' Spectra Boat*, 738 F.2d at 1046 (9th Cir. 1984) ("A lesser property interest such as possession creates standing."). And the appropriateness of the Article III redressable-injury inquiry was recognized by at least one court long before the passage of CAFRA, and by several others before CAFRA. *Contents of Accounts*, 971 F.2d at 985 (3d Cir. 1992) ("We see little analytic difference between [the injury-in-fact] approach and the owner-possessor approach in forfeiture cases. An owner or possessor of property that has been seized necessarily suffers an injury that can be redressed, at least in part, by return of the seized property."); *$81,000*, 189 F.3d 28 (1st Cir. 1999); *Cambio Exacto*, 166 F.3d at 526 (2d Cir. 1999);*$515,060.42*, 152 F.3d at 497 (6th Cir. 1998) ("[A]n owner or possessor of property that has been seized necessarily suffers an injury that can be redressed at least in part by the return of the property.").

On the other hand, it is true that in the years before CAFRA's passage, there was a certain amount of confusion about the relationship between ownership and standing, and a few courts

did equate standing with ownership. *See, e.g., United States v. One Parcel of Real Property*, 831 F.2d 566, 567-68 (5th Cir. 1987); *United States v. $9,041,598.68*, 976 F. Supp. 642 (S.D. Tex. 1997). Consequently, it is possible that Congress did understand the requirements to be more or less equivalent.

In support of this possibility is the fact that the individual parts of the definition of owner in § 983(d)(6) are strikingly similar to previous rulings on standing. The definition includes a broad range of interests, including secured creditors' interests, but excludes a unsecured creditors, nominees, and bailees who do not identify the bailor. § 983(d)(6). All of these limitations are found in cases addressing standing issues. And overall, though the definition of ownership is somewhat narrower than the range of property interests sufficient for standing under the cases, it is undoubtedly a plausible view of where the boundaries should be set as a matter of statutory standing.

c. Statutory Structure.

The statute itself does not provide much guidance. As noted, CAFRA states that "*any person claiming an interest* in the seized property may file a claim asserting such person's interest in the property in the manner set forth in the Supplemental Rules for Certain Admiralty and Maritime Claims." 18 U.S.C. § 983(a)(4)(A) (emphasis added). There are no express standing requirements. The term "standing" does, however, appear in a few locations.[9] There are also a few places where it or related concepts appeared in earlier bills, but did not make it into the final version.[10] The lessons to be drawn from these examples are not clear, but it does seem that Congress considered various issues related to standing, ownership, and possession over the

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[9]The statute provides for the appointment of counsel in certain cases, but only for "a person with standing to contest the forfeiture of property in a judicial civil forfeiture proceeding under a civil forfeiture statute." § 983(b)(1)(A), (b)(2)(A). CAFRA also permits the court to stay proceedings with respect to a claimant for whom participation in the civil forfeiture action may burden the right against self-incrimination in an ongoing criminal investigation. Such a claimant is entitled to relief only if "the claimant has standing to assert a claim in the civil forfeiture proceeding." 18 U.S.C. § 981(g)(2)(b).

[10]One place standing is not expressly required is in the provision for return of the property before trial to avoid a hardship. The enacted version requires the person to have a "possessory interest" in the property. § 983(f)(1)(A). One version of the bill required that "the claimant has standing to assert a claim in the civil forfeiture proceeding." S. 1701, 106th Cong. (Oct. 6, 1999). To reform civil asset forfeiture, and for other purposes. Another had required that "the claimant has a possessory interest in the property sufficient to establish standing to contest forfeiture and has filed a nonfrivolous claim on the merits of the forfeiture action." H.R. 1965, 105th Cong. (Oct. 20, 1998). Also, currently, a "person entitled to written notice" in an administrative forfeiture who does not receive may move to set aside the forfeiture. § 983(e)(1). A related provision in an earlier bill allowed a "person with an ownership or possessory interest in the seized article" to move to set aside. H.R. Rep. No. 105-358 (Oct. 30, 1997).

course of its deliberations. Consequently, there is no particular reason to think, from looking at the enacted bill and its predecessors, that it simply overlooked these considerations.[11]

In sum, the requirement that claimants be "owners" as defined in § 983(d)(6) appears, on its face, to be a substantive one. Nevertheless, if it is correct that only innocent owners are genuinely entitled to prevail in a forfeiture action, the change may be seen as procedural. Under this view it would simply change the order of proof, placing part of the claimant's case before the government's. Such a view is not, however, consistent with the case law, and it is not obvious that courts have interpreted CAFRA incorrectly. Regardless of its wisdom, the case law presents a coherent view of the law that does not appear to be inconsistent with the statute. And I have not found anything in the legislative history that is clearly to the contrary.

B. Procedural Changes.

Proposed Rule G also makes significant changes to the procedures for litigating standing disputes. Section seven provides a mechanism for the government to move to challenge the claimant's standing at any time before trial: "On the motion of the United States made at any time before trial, the court must enter a judgment for the Government if it finds, based on the allegations in the complaint, the responses to interrogatories served under Rule G(5)(c), or other evidence in the record following a hearing, that the claimant does not standing to contest the forfeiture." Proposed Supp. Rule G(7)(d)(1) (July 18, 2003).

The important change, however, is not the timing of the motions—the government can currently challenge the claimant's standing through a number of pretrial motions—but the standard to be employed. Currently, a claimant need not prove the merits of his case, he need only show a "colorable" interest in the *res*. Under proposed Rule G as I understand it, the existence of sufficient interests in the property would be fully litigated. The claimant would have to show, by a preponderance of the evidence, that he has the requisite interest in the property.

1. The Nature of the Change.

Proposed Rule G now expressly states that standing is to be resolved as a matter of law by the court, not the jury, and that the burden of proof is on the claimant. These appear consistent with current law. The burden of proof is now on the claimant to show a colorable interest, a

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[11] Richard Troberman, on behalf of the National Association of Criminal Defense Lawyers, claims DOJ, in a letter to Congress, emphasized the distinction between "ownership" for purposes of the innocent-owner defense and standing. DOJ apparently recommended that the statute include a provision identifying standing requirements that was largely the same as the current "ownership" definition, but permitted standing for those with a "possessory or ownership interest in the specified property." Letter of Richard J. Troberman, at 17 (August 26, 2002) (quoting DOJ's "March 16 Response to 'Comments of the March 9th Bill" at 6-7). This would suggest that Congress did consider these issues directly at least to an extent, and did so with the assistance and input of DOJ.

determination that can be made by the court. But under the new rule, the burden would seem to be different. The claimant has standing only if he *is* an owner under § 983(d)(6)—not if he can show only a *colorable* ownership interest. And the court must enter judgment for the government if it finds the claimant does not have standing—*i.e.*, is not an owner. The court thus appears to be called to make an ultimate determination whether the claimant is an owner, rather than simply whether he can show a colorable ownership (or other) interest in the property.[12]

Note that this change is logically independent of tying the standing inquiry to ownership. Even if the substantive standards are not changed, it would still be a substantial change to current law to require the court to fully resolve all disputes over the actual existence of whatever interests are deemed sufficient for standing. With respect to the substantive changes, the question is whether a person with an assumedly *genuine*, but *minimal* interest has standing. Here, the question is whether a person who has made only a *colorable* showing of a *sufficient* interest has standing, even though he may not actually have that interest.

The advantages of this change to the government are clear. Those with bogus claims would no longer be able to slip past the standing inquiry on a minimal showing. A verified claim of ownership without more would no longer buy an opportunity to challenge the forfeiture. Nor would bare legal title suffice in many cases. The government could thus avoid the costs associated with litigating forfeitability in many cases by challenging the claimant on standing. Only those with real interests in the property (or a real likelihood of injury from the forfeiture)—and thus presumably only those genuinely entitled to relief—would be able to force the government to put on its forfeitability case.

This part of the proposal changes the default outcome. Under the current system, after the minimal standing showing is made, the government can only prevail if it establishes forfeitability, even if the person does not actually have the interest in the property alleged. So if the government cannot show forfeitability (for whatever reason) and the claimant does not "really" have standing, the claimant will win by default. Under the proposed change, the government would prevail under those circumstances, because the issue of forfeitability would never get resolved against the government. The change is, therefore, not substantive in the same way as is the ownership requirement.

2. Threshold v. Merits.

Because of the particular role standing plays in forfeiture actions, there is more focus on its status as a threshold issue than in other cases. "[I]n a civil forfeiture action the *government* is the plaintiff, and it is the government's right to forfeiture that is the sole cause of action adjudicated." *$557,933.89*, 287 F.3d at 79 (2d Cir. 2002). "The function of standing in a forfeiture action is therefore truly threshold only—to insure that the government is put to its proof only where someone with a legitimate interest contests the forfeiture." *Id.* A determination

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[12] Again, the definition does include a requirement that a bailee show his possession to be "colorably legitimate." § 983(d)(6)(B)(ii). Other than that, the interests, under the proposal, would have to be fully established, it appears.

at trial after the government has put on its proof that the claimant lacked standing should not change the outcome. For once it is shown that the property is not forfeitable, the government has no interest in the property. The claimant's interest or lack thereof does not change that. And it is the government's interest, not the claimant's, that is formally at issue. So the claimant's standing must be settled before the issue of forfeitability is resolved. In that sense, it is necessarily a threshold issue.

But this is different from saying the claimant need only make a "threshold showing" in the sense that the claimant need only show enough to get past the courthouse door. Currently, all that need be assessed is whether the claimant "has shown the required 'facially colorable interest,' not whether he ultimately proves the existence of that interest." *$557,933.89*, 287 F.3d at 79 (2d Cir. 2002). But the logical precedence of the standing inquiry simply requires that it come before, not that it be made on only a minimal showing. There is no logical reason that standing cannot be litigated fully, so long as it is done before the government puts its case on.

The primary reason courts have resisted requiring a greater showing appears to be that it would require the claimant to establish the merits prematurely. *See supra*, at 11. The issue of one's interest in the property is a part of the innocent-owner defense—an issue that is properly resolved at trial. Indeed, because a claimant has a Seventh Amendment right to a jury in a civil forfeiture action, *C.J. Hendry Co. v. Moore*, 318 U.S. 133, 153 (1943); *United States v. One 1976 Mercedes Benz 280S*, 618 F.2d 453, 469 (7th Cir. 1980), the issue of ownership is often resolved by a jury. As is discussed in more detail below, the Eighth Circuit has thus held that resolving the issue of ownership (in a nominee case) interferes with the claimant's right to a jury. *One Lincoln Navigator*, 328 F.3d at 1014 (8th Cir. 2003).

In order to avoid interfering with the merits, a court should presumably refrain from resolving any genuine issue of fact that could be determinative at trial. The ultimate assessment of a claimant's interest in the property may or may not fall into this category, depending on whether the claimant asserts an innocent-owner defense. If so, then if the court dismisses the claim on standing by resolving a genuine dispute going to ownership, it will decide an issue that would be resolved by a jury, and could be determinative. If the claimant does not assert an innocent-owner defense, then ownership cannot be a determinative issue at trial. Thus, the court could make ultimate findings of fact with respect to property interests other than those that qualify under the innocent-owner defense without resolving anything that may arise in the merits portion of the trial.[13] So resolving factual disputes in standing issues does not always implicate the merits, but in many cases, it may.

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[13] Under proposed Rule G, however, the standing requirements would be the same as the ownership requirement, and the rule is designed so that only those claiming innocent ownership could prevail. Under that scheme, disputed questions of material fact concerning standing would *always* implicate the merits of the dispute. If the claimant did not assert an innocent-owner defense under proposed Rule G, the government could prevail by filing a summary judgment motion pursuant to G(7)(g).

Courts do not generally make this determination, of course. Instead, they ordinarily apply the "colorable interest" test across the board, limiting the standing inquiry to the perceived minimal Article III requirements. That approach effectively avoids resolving merits issues before trial.

The reasons for avoiding resolving merits issues before trial are obvious. Nevertheless, standing is consistently treated as a matter of law for the court. So it might be argued that courts *can* resolve whatever factual disputes are necessary to establish standing—their declining to do so is simply a matter of discretion. And if this is the case, if a statute makes a merits issue a matter of standing, can a court not resolve that issue as a matter of law? That appears to the approach taken in proposed Rule G.

This approach, however, may not avoid implicating the right to a trial by jury. For this reason, the Eighth Circuit has held that disputed issues of facts going to the merits could not be decided, even when they were part of the standing inquiry. The court stated disputes going to the existence of Article III standing—which requires only a colorable showing of an interest—could be resolved. But in that case, according to the court's recitation, "the *disputed* issue was statutory standing." *One Lincoln Navigator*, 328 F.3d at 1014 (8th Cir. 2003). Since it implicated the merits, even though it was a standing issue, it needed to be decided in accordance with Rule 56 standards. *Id.* So making a requirement a matter of *statutory standing* did not, in that case, insulate it from the rule that merits issues must be resolved at trial—by a jury, if demanded—or by conventional pretrial standards.

3. In Personam *Cases Compared.*

In conventional standing cases, courts often likewise avoid resolving merits issues, even while acknowledging that standing is a matter of law for the court. It is settled that courts can, in certain cases, resolve disputed issues of fact going to standing at a pretrial hearing. *See Duke Power Co. v. Caroline Env'l Study Group, Inc.*, 438 U.S. 59 (1978) (basing decision on factual findings of court after four-day hearing); *Warth v. Seldin*, 422 U.S. 490, 501 (1975) ("[I]t is within the trial court's power" to resolve standing on the basis of evidence.). Alternatively, standing may be contested at various stages in the litigation. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) ("At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice .... In response to a summary judgment motion, however, the plaintiff can no longer rest on such 'mere allegations,' but must 'set forth' by affidavit or other evidence 'specific facts,' Fed. R. Civ. P. 56(e), which for purposes of the summary judgment motion will be taken to be true.").

Determining which approach to take is not always clear. But "[a] clear answer ... can be given for cases in which some element of standing is identical with the claim on the merits." 13A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure*, § 3531.15 (2d ed. 1984). For example, "[i]t would be folly to attempt to dispose of the injury element of standing by a preliminary hearing" on a merits issue. *Id.* In other words, if "it would be impossible to prove the injuries alleged for the purposes of establishing standing without also addressing the merits, a preliminary hearing of the type available in disposing of a motion to dismiss would not offer an appropriate forum for evaluating the issues." *Barrett Computer*

Services, Inc. v. PDA, Inc., 884 F 2d 214, 220 (5th Cir. 1989). *See also Gwaltney of Smithfield v. Chesapeake Bay Found* , 484 U.S. 49 (1987) (summary judgment appropriate for merits issues); *United States v. SCRAP*, 412 U.S. 669 (1973) (same).

In a standard *in personam* case, where the plaintiff's standing is at issue, even when standing issues are left unresolved initially, they must eventually be established in order for the plaintiff to prevail. Because the elements of standing "are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Defenders of Wildlife*, 504 U.S. at 561. "[A]t the final stage, those facts (if controverted) must be 'supported adequately by the evidence adduced at trial." *Id.* Ordinarily, then, a plaintiff will not prevail unless genuine disputes of material fact relevant to standing are ultimately resolved in the plaintiff's favor.

This is not always the case in civil forfeiture proceedings. Because claimants are not plaintiffs, they are not required to put on any case at all at trial. As we have seen, a claimant's interest in the property may be fully litigated as a part of an innocent-owner defense, but it may not. And even if the claimant is found not to be an owner at trial, he may still prevail based on a lesser interest in the property. Indeed, under most cases, the claimant need not ever establish that he actually has a minimal interest necessary for standing. Because courts have treated the issue as merely a threshold one, once it is established the claimant has a colorable interest in the property, he need not put on any case at all.[14] For a civil forfeiture claimant, standing is not an

[14]Under proposed Rule G, the standing inquiry would be much more closely tied to the claimant's case at trial. The showing required for standing would be identical to the showing required for the innocent-owner defense. Nevertheless, a claimant with a colorable innocent-owner defense may choose, for strategic reasons, not to put on the affirmative defense, but instead rely on the government to fall short on its forfeitability showing. And even if they do put the defense on, they may fail to establish the defense, but prevail nonetheless. There is, in other words, no "indispensable part" of her claim that must be established at trial. A claim may be successful without ever making out the elements of standing beyond making a colorable showing.

"indispensable" part of the claim at trial.[15] A claim may be successful without ever making out the elements of standing beyond making a colorable showing.

This is a fundamental concern for the government. An unwillingness to resolve claimants' standing by delving into the merits means that claimants can successfully challenge a forfeiture even if they do not, in a sense, have a genuine claim. So long as claimants create a genuine issue of fact on standing, or establish a "colorable" interest, they may prevail even if they could not show their interests to be real ones at trial. The fact that they *could* rely on such a showing at trial protects them from every having to make such a showing. So claimants with no real interest are permitted to put the government to its proof without putting on any evidence themselves. And they may be able to gain possession of the *res* despite having no genuine claim to it.[16]

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[15]In a recent case, the district court responded to this situation by imposing a requirement that the claimant establish standing at trial. *United States v. $57,790.00*, 263 F. Supp. 2d 1239, 1245 (S.D. Cal 2003). The court understood *Defenders of Wildlife*, which recognized that plaintiffs must establish each standing element "in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation" to imply a requirement that claimant's establish standing at trial, as they were required in *Defenders of Wildlife*. 263 F. Supp. 2d at 1242 (quoting *Defenders of Wildlife*, 504 U.S. at 561). The problem is, claimants are not plaintiffs, and they do not bear the burden of proof on standing at trial, so this application appears to be an extension of—and not merely an application of—*Defenders of Wildlife*.

[16]There is little discussion in the literature of just what happens to the property following a successful challenge. But it seems clear that the claimant does not, by successfully challenging the forfeiture, automatically receive the property. The forfeiture action resolves only that the government must relinquish the property. When the *res* is real property, the government will presumably simply undo the seizure. When a bank account is frozen, a successful challenge should similarly result in the account's being unfrozen. Where the seized item is an automobile or a quantity of cash, the claimant may get possession of the property after a successful challenge. If the claimant is the person from whom the property was seized, it may make sense to simply return the item whence it came.

Where the claimant has never actually established an interest in the property, it is not clear what should be done. For the result of the adjudication will be that the government does not have the right to the property. But there will be no conclusion that the claimant has any interest in the property either. The claimant may have shown only a colorable interest in the property. If no one else has claimed the property, then that colorable showing may be enough to get possession of the *res*. It should be noted, however, that even with possession, however, the claimant will not have established a right to the property against any other potentially interested property. Only the government's rights are adjudicated at a civil forfeiture proceeding.

The proposed change would undoubtedly have the effect, in at least some cases, of calling on the court to resolve issues that are also merits issues. The questions whether this is (1) permissible, and (2) advisable, must therefore be addressed. Among the relevant considerations may be that these merits issues may never by resolved, even when a claim is successful.

If it is thought that courts should not resolve these merits issues, one option may be to resolve standing issues at trial prior to the government's case on forfeitability. *Cf.* 13A Wright, Miller & Cooper, § 3531.15 ("It may be possible to arrange the trial to present standing issues first, so that undue waste is avoided if the case must be dismissed."). That would avoid any concern with the court resolving merits issues prematurely, and would still leave standing as a threshold issue, in the sense that it would be resolved prior to the government's case.

4. Policy Considerations and Congress.

One difficulty with such an approach is that appears, on its face, to alter the order and burdens of proof Congress crafted in CAFRA. One of CAFRA's primary purposes was to change the burdens of proof to make it more difficult for the government to forfeit property, and easier for potential claimants to challenge such forfeitures.

Current standing requirements were not changed fundamentally by the passage of CAFRA. It has long been true that a claimant could get to trial on no more than a showing of a colorable interest in the property. And the claimant could always potentially prevail without ever fully establishing the existence of that interest. The important differences are elsewhere, primarily that such a claimant would carry the burden with respect to the separate issue of forfeitability. There was less incentive to challenge forfeitures before CAFRA, and the cost to the government was not as high. But the basic rules of standing that the government now seeks to change were fairly clearly settled before CAFRA, including the time during which Congress was considering CAFRA.

Most likely, the ability to easily challenge a forfeiture with only a facially colorable interest in the property was a consequence not foreseen at the time of CAFRA's adoption. It is the result of an intentional change to the burdens of proof together with an essentially unchanged standing doctrine, so it may have been foreseeable, but it not clear that it was actually considered.

Whether it is good or bad depends, in large part, on which kinds of mistakes are viewed as more acceptable. When a nominee prevails, he does so even though he has no legitimate claim to the property. There is no reason to be concerned for his interests, because in such a case, he has no "real" interests. But if he prevails because the government fails to prove forfeitability, then the government has no legitimate claim to the property either. There is no particular reason the claimant should win, but there is no more reason the government should necessarily prevail.

The law-enforcement benefits of proposed Rule G are clear. Litigating forfeitability has costs for the government other than the chance it may lose. Doing so requires putting on evidence of criminal activity—evidence it may have very good reasons for keeping confidential. Straw claimants may be able to extract settlements in such cases. If the government does move forward, wrongdoers may gain valuable information about government investigations. Proposed Rule G avoids these problems by defaulting for the government. If a claimant does not have a genuine

interest in the property, the government will prevail no matter how strong its case on forfeitability.

On the other side, one might think it worse for the government to obtain property by forfeiture to which it does not actually have a right. One may think that it is especially important that the government not mistakenly deprive citizens of their property. The burdens the government faces in establishing its right to the property, in this view, are necessary to ensure that it does not take property without justification. Whether these considerations are more or less forceful than the reasons for enhancing the burden on claimants with respect to standing issues requires a determination of what weight to give competing considerations.

In any event, before deciding whether the new rule better reflects public policy, it must be determined whether requiring judicial resolution of what may be merits issues is permissible and advisable. And one must also consider whether the change would be consistent with the balance of the burdens Congress created in CAFRA.

VIII. Conclusion

The proposed changes to standing requirements in Rule G would effectively address what is, by all appearances, a legitimate concern about the potential for abuse of civil forfeiture challenges. But the proposal raises a number of significant questions. It may exclude what are now treated as legitimate claims. It would also require the resolution by the court of factual issues that may be involved in the merits of the claim. And although the proposal is directed at legitimate concerns, there are competing policy considerations that must be considered. These policy choices may be seen as the province of Congress, which exercised its authority and put its mark on this area of the law in adopting CAFRA.

Justice Department View on Standing Issues Outlined by Ed Cooper

Overview

As both Prof. Cooper and Ned Diver have noted, the Government has two separate interests at stake in this matter, one procedural and one substantive. First, the Government would like Rule G to establish a clear procedure for challenging a claimant's standing to contest a forfeiture matter, whether by means of a motion to dismiss on the pleadings (draft Rule G(7)(c)), a motion for judgment based on lack of standing following an evidentiary hearing and findings of fact made by the court (draft Rule G(7)(d)(i)), or a motion for summary judgment pursuant to Rule 56 on the ownership prong of the innocent owner defense (draft Rule G(7)(g)). Moreover, the procedure should make clear that the determination of standing must be made before the claimant has the opportunity to move to dismiss the complaint under Rule 12(b) (draft Rule G(7)(b)). These procedural provisions are desired not only to provide clear guidance in an uncertain area of the law, and thus avoid unnecessary litigation and inconsistency between districts, but also to ensure that the Government has a means of weeding out forfeiture challenges brought by persons who have no legitimate interest in the property, however that interest may be defined.

Second, the Government would like Rule G to equate the legitimate interest that defines the person entitled to challenge a forfeiture action with the statutory definition of "owner" enacted by Congress as part of CAFRA. Plainly, raising the standing threshold would address what both Cooper and Diver have recognized as a legitimate concern that the Government not be required to litigate forfeiture cases with nominees, straw owners and other persons with no real stake in the outcome.

While the procedural and substantive aspects of Rule G are interrelated – the higher the standard for establishing standing, the more potent the procedural tools would be – we agree with Prof. Cooper's conclusion that the procedural provisions in the current draft of Rule G could be retained with minimal revision even if the subcommittee decides not to adopt the substantive definition of standing now set forth in the first sentence in Rule G(7)(d)(i) and Rule G(5)(a)(i)(B). Accordingly, we address the most salient issues regarding the procedural and substantive issues separately.

Procedural Issues

1. Rule G(7)(b)(i).

Rule G(7)(b)(i) provides that the court must resolve the issue of standing (however it is defined) before allowing a claimant to challenge the forfeiture on procedural grounds. In short, the Department of Justice continues to feel very strongly that only persons with standing should be allowed "to put the United States to the burden of selecting a proper court [and] properly pleading a forfeiture claim." Cooper Notes at 2. If it were otherwise, in an *in rem* forfeiture action, any person reading about the forfeiture in the newspaper could file a claim and move to dismiss a forfeiture on venue, jurisdiction, or statute of limitations grounds, or any other matter

falling within the purview of Rule 12(b). (There is currently a federal prisoner who is routinely filing forfeiture claims in cases that appear in the weekly notice in the Wall Street Journal even though he hasn't the slightest connection to the property.)

We may disagree about what the substantive threshold for standing should be, but there cannot be serious disagreement that a threshold showing of some kind must be made before allowing the claimant to challenge the forfeiture. Thus, the Department feels strongly that the phrase "with standing to contest the forfeiture action" must be retained in Rule G(7)(b). For the same reason, we think that the requirement that the claimant respond to Rule G(5)(c)(1) interrogatories must be retained in Rule G(5)(c)(2).

2. Interplay of Rules G(7)(c), (d) and (g)

However the substantive question is resolved, the Department believes that it is important to set forth the three separate methods of challenging standing embodied in Rules G(7)(c), (d) and (g). A typical case might illustrate how these provisions could be applied.

Suppose the Government seizes a pile of cash from an automobile during a traffic stop and believes, based on the circumstances, that it is drug money. And suppose that claims to the money are then filed the following persons: the driver (who has a possessory interest but does not claim to be the owner of the money), a passenger in the car (who did not know that that money was even in the car, but who asserts that his presence in the car is sufficient to establish standing), a woman who claims to be the owner of the money which she says came from the sale of a ranch in Mexico, and a person who claims that the putative true owner owes him a gambling debt and that the seized money was intended to be used to pay that debt.

Rule G(5)(a)(i)(B) requires that the claimant identify his or her interest in the property. (That requirement would remain, even if the word "ownership" is deleted.) Thus, the Government could use Rule G(7)(c) to move to dismiss any claim that failed to allege any interest at all, or that alleged an interest that was insufficient as a matter of law to satisfy the substantive standing requirement. For example, even under the "colorable interest" standard that prevails under current law, the passenger who was in "naked" or unknowing possession of the seized currency would lack standing,[1] as would the person who claimed only to be an unsecured creditor of the true owner.[2] Accordingly, Rule G(7)(c) would be the vehicle for moving to dismiss two of the four claims on the pleadings. Moreover, if the standing threshold were equated with

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[1] *See United States v. $557,933.89, More or Less, in U.S. Funds*, 287 F.3d 66, 71 n.1 (2d Cir. 2002) (reaffirming that naked possession alone is insufficient for standing, but if courier files a verified claim asserting ownership, he has standing).

[2] *See United States v. One-Sixth Share*, 326 F.3d 36 (1st Cir. 2003) (person with an in personam judgment against the property owner has no secured interest in any particular asset, and therefore lacks standing to contest the forfeiture of specific property).

"ownership" as defined by CAFRA, Rule G(7)(c) would also be the vehicle for moving to dismiss the claim of the driver to the extent that he was a bailee who could not or would not identify the bailor.[3] Even under the current draft of the Rule, however, the claim of the woman asserting that she was the true owner of the currency would survive a motion to dismiss on the pleadings under Rule G(7)(c) because she would have asserted the requisite ownership interest.[4]

Rule G(7)(d)(i), however, would be the means for testing the validity of the woman's claim that she was the true owner of the property. When a similar issue arose in a recent case in San Diego, the claimant contended that her assertion of ownership in the pleadings was sufficient to satisfy the threshold standing requirements, and that she should not be required to establish the nature of her interest at a pre-trial evidentiary hearing. But the district court disagreed. "Claimants in essence argue that the court must in all instances accept a claimant's representation regarding ownership, no matter how dubious," the court said. Such a rule, the court concluded, "would . . . have the effect of encouraging unscrupulous individuals who do not truly have an interest in the property to file a claim, perhaps at the encouragement of the true owner who does not wish to reveal the owner's identity for fear of prosecution." *United States v. $57,790.00 in U.S. Currency*, 263 F. Supp.2d 1239 (S.D. Cal. 2003). Thus, under Rule G(7)(d)(i), the claimant would have to produce documentary evidence substantiating her claim that the seized cash was derived from the sale of her ranch in Mexico.

Finally, Rule G(7)(g) provides that the issue of ownership may be resolved on a motion for summary judgment even though the court has not yet found that the property is subject to forfeiture. As both Diver and Cooper point out, if ownership and standing are equated, this does little more than Rule G(7)(d)(i). Both provisions would have the effect of advancing the ownership determination to the beginning of the case so that it was made before the Government was required to establish forfeitability. There might be a case, however, where because of the peculiar sequence of events the Government was unable to rebut the claim of ownership at the time of the pre-trial hearing pursuant to Rule G(7)(d)(i), but later, once it received discovery from additional sources, was able to file a motion for summary judgment under Rule G(7)(g).

The real significance of Rule G(7)(g), however, would come if standing and ownership are *not* equated. In that case, a Rule G(7)(d)(i) motion for judgment for lack of standing might fail, but a

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[3] Whether the assertion of a possessory interest by a bailee who refuses to identify the bailor is sufficient to satisfy the standing requirements of current law is uncertain. In a case currently pending in the Southern District of Iowa, Claimant argues that a possessory interest by a knowing custodian is sufficient to satisfy the "colorable interest" standard. The Government argues that it does not, unless the custodian identifies the bailor. *United States v. $244,320 in U.S. Currency,* Civil No. 4:03-CV-40019 (S.D. Iowa), motion for judgment on the pleadings filed July 21, 2003.

[4] *See United States v. $39,400 in U.S. Currency*, No. 01cv16255-IEG(LSP) (S.D. Cal. Aug. 12, 2002) (claimant who denied ownership at time currency was seized but later filed claim asserting ownership has standing).

Rule G(7)(g) motion for summary judgment based on lack of ownership would succeed, and could be made before the court resolved the issue of forfeitability. In other words, Rule G(7)(g) is a "fall back" provision that would allow the Government to advance the ownership issue ahead of the forfeitability issue in the fraction of cases where the criteria applicable to Rule 56 are satisfied, even if the substantive definition of standing is not otherwise changed by Rule G(7). Accordingly, in our example, if the substantive definition of standing remained unchanged, the woman asserting that the seized cash was derived from the sale of a ranch might be able to adduce sufficient evidence to establish a "colorable interest" in the property for purposes of Rule G(7)(d)(i), but might not be able to survive a motion for summary judgment under Rule G(7)(g).

3. The "innocence" prong of a motion for summary judgment

Both Diver and Cooper point out that Rule G(7)(g) would also have the effect of allowing the Government to prevail by showing, per Rule 56, that the claimant was not "innocent," within the meaning of Section 983(d), and thus could not prevail in the forfeiture case, even if the claimant was an "owner," and even if there was a material issue of fact on the forfeitability issue that precluded the entry of summary judgment for the Government on that point. We see nothing wrong with that. There is no public policy consideration that militates in favor of requiring a trial on the forfeitability issue where the evidence is clear that, in any event, the person claiming the property participated in the commission of the offense giving rise to the forfeiture or otherwise cannot satisfy the statutory definition of an innocent owner. Nevertheless, we appreciate that this raises an issue entirely separate from the standing question that the subcommittee may wish to consider at the appropriate time.

4. The Seventh Amendment issue

Diver and Cooper both also raise an issue regarding the application of the Seventh Amendment to civil forfeiture cases. There is a Seventh Amendment right to a jury trial in civil forfeiture cases. Whether that applies only to the forfeitability issue or also to the innocent owner defense is not clear. If the innocent owner defense itself is not constitutionally required, *see Bennis v. Michigan*, 516 U.S. 442 (1996), it may be that the Seventh Amendment right does not apply to that defense.

Nevertheless, even if the jury right does apply to all aspects of the trial on the merits, including the right to establish an affirmative defense, it does not follow that that the court would be precluded from resolving the standing issue without the jury if standing and ownership were equated. Standing remains a threshold matter for the court regardless of what the criteria for establishing standing might be. Standing is standing and ownership is ownership: they are two different concepts – one a threshold question for the court, the other an element of the claimant's affirmative defense for the jury – even if the same definition is applied to each term.

Criminal forfeiture cases provide a useful analogy. Following the entry of a judgment of forfeiture in a criminal case, the court holds an ancillary proceeding in which third parties have

the opportunity to show that they, not the defendant, were the true owners of the property. Ownership is the only issue in the ancillary proceeding, *see* 21 U.S.C. 853(n)(6) (third party must prove that he had a superior interest in the property at the time of the offense, or was a bona fide purchaser for value), yet there is neither a statutory nor a constitutional right to a jury trial on that issue.[5] To the contrary, the court is empowered to determine, on its own, whether the third party is the true owner of the forfeited property. Of course, in criminal cases, the ownership issue is both a threshold issue and a dispositive issue on the merits, because once the third party establishes that he is the true owner of the property, he prevails regardless of whether the property was forfeitable and regardless of the claimant's innocence. But the point is that if the court in a criminal case can determine ownership as a threshold matter, surely it can make the same determination in a civil case without violating the Seventh Amendment.

Substantive Issues

The Government's view on the substantive issue was accurately summarized by Ned Diver when he wrote that "The Government appears to accept that only innocent owners are genuinely entitled to prevail in a civil forfeiture challenge." Diver Memo at 18 n.8. In essence, it is the Department's view that the Government should only be put to its proof in a forfeiture case when the party on the other side has an actual legal interest in the property that is of the kind that Congress has recognized as worthy of statutory protection. *See United States v. $557,933.89, More or Less, in U.S. Funds*, 293 F.3d 66, 79 (2d Cir. 2002) ("The function of standing in a forfeiture action is therefore truly threshold only—to insure that the government is put to its proof only where someone with a legitimate interest contests the forfeiture."). Accordingly, Rule G would require every claimant to establish ownership, as defined by CAFRA in Section 983(d)(6), before the Government would have to establish the forfeitability of the property.

As Ned Diver points out, "Under the current system, because the government must go first, if neither party has a genuine right to the property, the default is in favor of the claimant." Diver Memo at 19. In other words, "By granting standing to those with an interest in the property less than ownership, it is implicit in the law that people other than innocent owners may rightly prevail in a civil forfeiture challenge." *Id.* The consequence is that "claimants with no real interest are permitted to put the government to its proof without putting on any evidence themselves. And they may be able to gain possession of the *res* despite having no genuine claim to it." *Id.* at 28.

It is the Department's view that this is a defect in current law that should be changed. Accordingly, "Under proposed Rule G, by contrast, those potential claimants would lose the right to contest the forfeiture." *Id.* at 19. Instead, the true owner would be required to file a claim in her own right and contest the forfeitability of the property or establish an innocent owner

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[5] *See United States v. Holmes*, 133 F.3d 918, 1998 WL 13538 (4th Cir. 1998) (Table) (third party has statutory right to have court determine if he had a superior ownership interest in the property, but no Seventh Amendment right to a jury trial on that issue).

defense.

1. Should the Government win by default?

Both Diver and Cooper raise several concerns with this approach. One theme running through the latter part of Ned Diver's memo is the notion that the issue in a civil forfeiture case should be the Government's right to the property, not the claimant's, and that therefore it is the claimant, not the Government, that should win by default when neither party can meet its evidentiary burden (*i.e.*, when the Government cannot establish forfeitability but the claimant cannot establish that the property actually belongs to him either). In this view, any person with a colorable interest in the property will serve as a proper antagonist in the forfeiture proceeding, ensuring that the Government never succeeds to an interest in property to which it is not entitled. *See* Diver Memo at 21, 29-30.

We fundamentally disagree with this view of civil forfeiture proceedings. The Department of Justice undertakes tens of thousands of civil forfeiture cases every year. The Drug Enforcement Administration alone handles approximately 13,000 forfeiture cases, of which 80 percent are not contested by anyone, and are therefore concluded by the agency without any judicial involvement. There are also hundreds of judicial forfeiture cases in which the Government prevails by default (because no one files a claim), or where the claim is dismissed because of some procedural defect or for lack of standing even under the lenient "colorable interest" test. In all of these cases, the Government obtains title to the property without having to establish forfeitability; in none of these case is it considered necessary for a court to appoint a representative of the public to contest the forfeiture action and ensure that the Government has a statutory right to the property.

In the Department's view, a case in which a person with no true legal interest in the property files a claim is indistinguishable from a case in which no one files a claim at all, or in which the claim that is filed is defective. If it is not necessary – as a matter of law or policy – to require the Government to establish the forfeitability of the property in the thousands of cases in which no claim is filed, there is no reason to require the Government to establish forfeitability in the relatively small number of cases in which a colorable but inadequate claim is filed. Or stated differently, if property may be forfeited in thousands of cases without anyone's contesting the Government's ability to establish the forfeitability of the property, there is no need to relax the standing requirement to ensure that someone is able to challenge the forfeitability of the property in the fraction of cases where the person filing a claim has a "colorable interest" but is not an owner.

2. Using the statutory definition of owner

If it is accepted that a line must be drawn somewhere between contested and uncontested cases, the obvious place to drawn that line is where Congress drew it when it enacted CAFRA. It is the Department's view that Section 983(d)(6) reflects Congress's considered determination that only

certain categories of claimants were entitled to contest a forfeiture action, and that only those claimants were entitled to the statutory protection embodied in the innocent owner defense.

We acknowledge that this is not necessarily so. Congress could have decided that anyone with a colorable interest in the property could contest the Government's attempt to establish forfeitability, but that once forfeitability was established, only a narrower class of "owners" would be entitled to the protection of an innocent owner defense. But the debate over what Section 983(d)(6) would contain belies that notion. Whereas there is little or no discussion of "standing" as a separate concept in the legislative history of CAFRA, a great deal of attention was paid to whether to include or to exclude various parties such as lienholders, bailees, nominees, donees, spouses asserting marital interests, and beneficiaries of constructive trusts, to cite only some examples, in the drafting of the definition of owner in Section 983(d)(6). As Ned Diver suggests, it may not be a coincidence that Congress ultimately included in the definition of owner those persons who were traditionally found to have standing under pre-CAFRA case law, and excluded those who did not. *See* Diver Memo at 22. Indeed, it is our view that Congress used the standing cases as a guide to defining "owner" precisely because it intended 1) that "owner" should be defined broadly so that most of those who were entitled to contest forfeiture actions under pre-CAFRA law would be entitled to do so under the new law, and 2) that the definition of owner in Section 983(d)(6) would therefore be coextensive with the requirements for establishing standing.

Accordingly, it is the Department's view that raising the standing threshold so that it equates with the definition of owner enacted by CAFRA would be consistent with congressional intent, and would address the Government's legitimate concern that it not be required to litigate forfeiture matters with nominees, straw owners and others who have no real interest in the property.[6]

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[6] We acknowledge, as Prof. Cooper has pointed out, that the term "owner" is defined not only in terms of the federal statute, but also in terms of state law. Thus, while Section 983(d)(6) limits the categories of persons who may seek to establish an innocent owner defense, each of the terms in that definition, *e.g.*, "ownership interest," "lien," "leasehold," etc., would be defined in terms of state law. *See United States v. U.S. Currency, $81,000.00*, 189 F.3d 28, 33 (1st Cir. 1999) (state law determines person's ownership interest in a joint bank account); *United States v. 1989 Lear Jet*, 25 F.3d 793, 797 (9th Cir. 1994) (state law determines existence and extent of lienholder's interest).