Civil Asset Forfeiture: A Look at Substitute Property.

Before returning to the discussion of *United States v. $134,972.34 Seized from FNB Bank*, 2015 U.S. Dist. LEXIS 39888 (N.D. Ala. Mar. 30, 2015) (hereinafter *FNB Bank*), I would like to lay out some hypotheticals:

- Jane has $15,000 in cash. She doesn't want to have to report it, so she opens a bank account and makes three deposits of $5,000. There is no other activity in her account for a week, and then the IRS seizes it.
- John has $20,000 in cash. He breaks it up into four deposits of $5,000 to avoid reporting. John the pays off his $15,000 credit card balance. Then he wires $15,000 from his brokerage account to replenish the account, which is then seized by the IRS.

Jane's case is the easiest to understand: there is $15,000 in her account and all of it was involved in structuring transactions. In John's case, there only appears to be $5,000 in "tainted" money in the account. The civil asset forfeiture provisions deal with this issue; in cases that involve cash, "monetary instruments in bearer form," funds on deposit, or precious metals, some special rules apply. The government doesn't have to identify the specific property that was involved in the underlying offense, and any identical property can be subject to forfeiture if it is found in the same location or account and the seizure occurs within one year of the offense. 18 U.S.C. § 984(a), (b). Under these rules, the $15,000 in "clean" funds in John's account is subject to forfeiture.

Returning to *FNB Bank*, the identical property rules played a pivotal role, since the case involved only withdrawals-the property that was directly involved in the structuring offense was not in the account. Nonetheless, the court held that the cash that remained on deposit was subject to forfeiture.

First, the court held that the timing was sufficient because the violation occurred in October 2013 and the account was seized in August 2014, well within the one year requirement. *FNB Bank*, slip op. at *31. And since the currency in the account was identical property, it was subject to forfeiture. *Id.*, slip op. at *32.

That left a fairly basic question: was the money that was left in the account "involved in" the structuring violation or "traceable to" the violation? If it was then it would properly be subject to forfeiture under 31 U.S.C. § 5317(c)(2).

The court concluded that the funds in the account were "involved in" the structuring violations because they facilitated it. *FNB Bank*, slip op. at *32-*37.

- *First*, the court relied upon two money laundering cases that held that other money in an account facilitated money laundering and was therefore involved in money laundering, *United States v. Seher*, 562 F.3d 1344 (11th Cir. 2009), and *United States v. Puche*, 350 F.3d 1137 (11th Cir. 2003).
- *Second*, the court relied upon *United States v. $255,427.15 in United States Currency*, 841 F. Supp. 2d 1343 (S.D. Ga. 2012), which upheld a civil forfeiture complaint in a structuring case that involved withdrawals.

I am a little troubled by this outcome. While I can certainly see how other funds on deposit in a bank can become involved in money laundering when proceeds of criminal activity are

deposited in the same account, the other funds are “involved” because the whole point of money laundering is to take illegally obtained money and make it appear untainted. I am less comfortable with the idea that money remaining in a bank account was “involved” in a structuring violation when the violation involved withdrawals.

Jim Malone is a tax attorney in Philadelphia; he focuses his practice on federal, state and local tax controversies. This post is intended to provide background on a relevant issue; it is not intended as legal advice.