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1992]

CRIMINAL LAW—FORFEITURE—THIRD CIRCUIT HOLDS
GOVERNMENT IS ENTITLED TO FORFEITURE OF PROPERTY INTEREST
HELD IN TENANCY BY THE ENTIRETIES DESPITE ONE SPOUSE'S
INNOCENT OWNER DEFENSE

United States v. 1500 Lincoln Avenue (1991)

I. INTRODUCTION

In *United States v. 1500 Lincoln Avenue*,¹ the Third Circuit recently held that, in a federal civil forfeiture action under 21 U.S.C. § 881(a)(7), a guilty spouse's interest in property held in tenancy by the entireties is forfeitable despite the other spouse's innocent owner defense.² The Third Circuit reversed the district court's ruling that a spouse's innocent owner defense barred forfeiture of any property interest held in tenancy by the entireties.³ Both the Eleventh and Sixth Circuits have also ad-

1. 949 F.2d 73 (3d Cir. 1991).

2. *Id.* at 75, 77-78. The Third Circuit held that the proper interpretation of 21 U.S.C. § 881(a)(7) "permits the immediate forfeiture of the interest of the guilty spouse and thus serves the goal of forfeiting property used in illegal drug activities." *Id.* at 77. The innocent owner maintains a life estate in the property and a right of survivorship entitling the innocent spouse to a fee simple absolute should the guilty spouse predecease him or her. *Id.* at 78. The government therefore is entitled to the guilty spouse's share of the estate if the tenancy by the entireties is severed or the innocent spouse dies before the guilty spouse. *See id.* at 77-78. For a discussion of the Third Circuit's reasoning, see *infra* notes 56-93 and accompanying text. For a discussion of the facts of *1500 Lincoln Avenue*, see *infra* notes 39-55 and accompanying text.

3. *1500 Lincoln Ave.*, 949 F.2d at 77-78. The district court reached this result by fully protecting the innocent spouse's interest in the property, which, under Pennsylvania law, is viewed as a whole, indivisible interest in the entire estate, thus leaving no forfeitable interest for the government. *Id.* at 75.

In its decision, the district court relied on the reasoning of the Eleventh Circuit in *United States v. 15621 S.W. 209th Avenue*, 894 F.2d 1511 (11th Cir. 1990). *Id.* For a discussion of *15621 S.W. 209th Avenue*, see *infra* notes 21-26 and accompanying text. The district court noted that denying forfeiture of any property interest did not leave the government without a remedy. *1500 Lincoln Ave.*, 949 F.2d at 75. In accord with the Eleventh Circuit, the district court concluded that the government could "file a *lis pendens* against the property and thereby preserve its ability to seek forfeiture of any separate interest in the property" later acquired by the guilty spouse as a result of severance of the tenancy by the entireties. *Id.* at 75-76; see also *15621 S.W. 209th Ave.*, 894 F.2d at 1516-17 n.6 (suggesting government may file *lis pendens* where interest in tenancy by entirety is not presently forfeitable). A *lis pendens* is defined as: "A pending suit. Jurisdiction, power, or control which courts acquire over property in litigation pending action and until final judgement." BLACK'S LAW DICTIONARY 932 (6th ed. 1990). The purpose of a *lis pendens* is to provide notice that the property is subject to pending title litigation. *Id.* Thus, by filing a *lis pendens* against the property, the government preserves its right to litigate the forfeiture action at a later date. *1500 Lincoln Ave.*, 949 F.2d at 75-76.

The Third Circuit criticized the district court's approach for two reasons.

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dressed the issue of forfeiture of entireties property when one spouse is an innocent owner, and each arrived at a slightly different solution than the Third Circuit.⁴

Underlying the issue of forfeitability are two competing policies. On the one hand, the government has a strong interest in the forfeiture of property used to commit drug offenses.⁵ On the other hand, the Constitution demands protection of the property interests of innocent owners.⁶ In *1500 Lincoln Avenue*, the Third Circuit balanced these competing policies differently than the Eleventh and Sixth Circuits and arrived at an interpretation of 21 U.S.C. § 881(a)(7) that best serves both the interests of the innocent owner and the government.⁷

Id. at 78. First, the district court's approach "frustrate[d] the strong governmental interest in forfeiture." *Id.* Second, the district court's approach "would create substantial procedural difficulties." *Id.* For example, after the filing of a *lis pendens*, several years may pass before the guilty spouse acquires a separate interest in the property. *Id.* Only then could the government litigate its forfeiture claim. *Id.* By the time the guilty spouse eventually acquires a separate interest in the property, the government's ability to prove its case may have diminished because evidence becomes stale over time. *Id.* Moreover, the guilty spouse has full enjoyment of the property during this time. *Id.* For a further discussion of these criticisms, see *infra* notes 83-89 and accompanying text.

4. *United States v. 15621 S.W. 209th Ave.*, 894 F.2d 1511 (11th Cir. 1990); *United States v. 2525 Leroy Lane*, 910 F.2d 343 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 1414 (1991). For a discussion of the Eleventh Circuit's decision, see *infra* notes 21-26 and accompanying text. For a discussion of the Sixth Circuit's decision, see *infra* notes 27-35 and accompanying text. Additionally, the Fourth Circuit addressed the issue in an unpublished opinion, and followed the Eleventh Circuit's approach. *United States v. 35 Acres*, No. 90-7376, 1991 U.S. App. LEXIS 18705 (4th Cir. Aug. 15, 1991) (*per curiam*) (unpublished decision upholding district court's conclusion that no property interest was presently forfeitable to government where husband and wife owned property in tenancy by entireties and wife was innocent owner).

5. See, e.g., *1500 Lincoln Ave.*, 949 F.2d at 77-78 (21 U.S.C. § 881(a)(7) was intended to promote two goals: forfeiture of property used in drug offenses and protection of innocent owner's property rights); *2525 Leroy Lane*, 910 F.2d at 348 ("Forfeiture statutes serve the ends of law enforcement by preventing further illicit use of the property and by imposing an economic penalty, thereby rendering illegal behavior unprofitable."); *15621 S.W. 209th Ave.*, 894 F.2d at 1513 ("The language of section 881(a)(7) reflects two interrelated aims of Congress: to punish criminals while ensuring that innocent persons are not penalized for their unwitting association with wrongdoers.")

6. See, e.g., *2525 Leroy Lane*, 910 F.2d at 349 ("[F]orfeiture statutes are intended to impose a penalty only upon those who are significantly involved in a criminal enterprise . . ."). The Fifth Amendment to the Constitution requires that "[n]o person . . . be deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

The Constitution requires that the government protect the property interests of innocent owners because forfeiture of an innocent owner's property interests may constitute a taking of property "without due process or just compensation." *15621 S.W. 209th Ave.*, 894 F.2d at 1516 ("Congress could not and clearly did not intend such a result when enacting 881(a)(7).")

7. *1500 Lincoln Ave.*, 949 F.2d at 77-78. The Third Circuit also recognized the argument that the government should obtain a forfeiture of the guilty

II. BACKGROUND

Congress enacted the Comprehensive Forfeiture Act of 1984⁸ to provide the government with stronger weapons to fight the war against drugs: stricter civil forfeiture provisions.⁹ Civil forfeiture offers the government three significant advantages over criminal forfeiture. First, in a civil forfeiture proceeding, the government has a lesser burden of proof than in a criminal forfeiture proceeding.¹⁰ Second, civil forfeiture permits the government to use hearsay evidence, which is generally inadmissible in a criminal proceeding, to meet its initial burden of proof.¹¹ Third, in civil forfeiture proceedings the property is seized at the beginning of the case, whereas in criminal proceedings the property is seized only upon a determination of guilt at the end of the case.¹² Thus, civil

spouse's property interest *immediately*, as opposed to the Eleventh Circuit's *lis pendens* approach and the Sixth Circuit's lien judgement creditor analogy. *Id.* For a discussion of the Eleventh and Sixth Circuits' opinions, see *infra* notes 21-26 & 27-35 and accompanying text respectively. Although the Sixth Circuit appears to reach the same result as the Third Circuit, its opinion is confusing and contradictory. For a discussion of this aspect of the Sixth Circuit's opinion, see *infra* note 32.

8. Comprehensive Forfeiture Act of 1984, 18 U.S.C. § 1963 (1988).

9. Mark A. Jankowski, Note, *Tempering the Relation-Back Doctrine: A More Reasonable Approach to Civil Forfeiture in Drug Cases*, 76 VA. L. REV. 165, 170 (1990) (citing Comprehensive Forfeiture Act of 1984, 18 U.S.C. § 1963 (1988), discussing confusion of courts over application of 21 U.S.C. § 881 and advocating narrow construction of relation-back doctrine).

10. Anton R. Valukas & Thomas P. Walsh, *Forfeitures: When Uncle Sam Says You Can't Take It with You*, 14 LITIG. 31, 34 (1988). "In a civil forfeiture case, the government's initial burden is merely to demonstrate *probable cause* to believe that the property is subject to forfeiture. . . . Then the ultimate burden shifts to the defendant to demonstrate by a preponderance of the evidence that the property is not subject to forfeiture." *Id.* (citations omitted) (emphasis added). Thus, if the defendant fails to rebut the government's "showing of probable cause, the government is entitled to summary judgment." *Id.* In contrast, in a *criminal* forfeiture proceeding, the government has to prove its case beyond a reasonable doubt. *Id.* at 33-34. This differing burden of proof means that the government may obtain civil forfeiture of the defendant's property even though the defendant was acquitted of the related criminal charges. *Id.* at 34.

11. *Id.* The government may only use such hearsay evidence as a means to meet its initial burden of probable cause and not to rebut the defendant owner's defenses. See, e.g., *United States v. 6109 Grubb Rd.*, 886 F.2d 618, 621-23 (3d Cir.) (hearsay can be used to establish probable cause, not to rebut innocent owner defense), *reh'g denied*, 890 F.2d 659, 660 (3d Cir. 1989).

12. Valukas & Walsh, *supra* note 10, at 34. The reason for this distinction is that civil forfeiture is an *in rem* proceeding, which means that the "property itself is guilty and therefore can be forfeited to the government regardless of the owner's guilt or innocence." Jankowski, Note, *supra* note 9, at 171-72. Thus, the government need not bring criminal charges against the person who used the property to commit the drug offense "because the real estate, itself, is guilty." Edith A. Landman & John Hieronymus, *Civil Forfeiture of Real Property Under 21 U.S.C. § 881(a)(7)*, 70 MICH. BAR J. 174, 174-76 (1991). In contrast, criminal forfeiture is an *in personam* proceeding, so forfeiture can only occur upon a determination of the defendant's guilt. Valukas & Walsh, *supra* note 10, at 34.

forfeiture provides the government with a strong weapon for fighting the war against drugs.

The civil forfeiture statute authorizes the forfeiture of real property "which is used, or intended to be used" to commit drug offenses.¹³ Forfeiture is limited, however, by the affirmative "innocent owner" defense, which protects the property interests of an owner "without knowledge or consent" of the drug offense.¹⁴ Thus far, courts have applied state law to determine the extent of the innocent owner's property interest.¹⁵ Generally, state property law recognizing tenancy by the entirety provides that each spouse in such a tenancy owns a complete, indivisible interest in the entirety property.¹⁶ When the federal courts apply state

13. 21 U.S.C. § 881(a)(7) (1988). In 1984, Congress enacted the Comprehensive Forfeiture Act of 1984 to fill the gap in existing forfeiture provisions. Landman & Hieronymus, *supra* note 12, at 174. The Act was later amended to include § 881(a)(7), which provides for the forfeiture of real property used to facilitate drug violations. *Id.* Previously, the government was unable to forfeit real property "unless it could be shown that drug profits were used to acquire the real property," thereby rendering it forfeitable under § 881(a)(6). *Id.* Thus, before § 881(a)(7) was added to the civil forfeiture statute, the government could not forfeit a drug offender's real property even if the government could prove that the real property was "used to receive, store, package, conceal, or process illegal drugs." *Id.* Section 881(a)(7) was intended by Congress to reduce the compelling economic incentives of drug trafficking by rendering "all real property used to promote the drug trade" forfeitable. *Id.* 21 U.S.C. § 881(a)(7) provides:

All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

21 U.S.C. § 881(a)(7). For a discussion of the sparse legislative history of § 881(a)(7), see Lalit K. Loomba, Note, *The Innocent Owner Defense to Real Property Forfeiture Under the Comprehensive Crime Control Act of 1984*, 58 *FORDHAM L. REV.* 471, 483-84 (1989).

14. 21 U.S.C. § 881(a)(7) ("no property shall be forfeited . . . to the extent of an interest of an owner" who does not consent to, or has no knowledge of, the illegal drug activity). For a further discussion of the innocent owner defense, see Loomba, Note, *supra* note 13, at 471-92. For an in-depth discussion of the legislative history relating to the innocent owner defense, see Jankowski, Note, *supra* note 9, at 183-88.

15. See, e.g., *United States v. 2525 Leroy Lane*, 910 F.2d 343 (6th Cir. 1990) (applying Michigan law to determine innocent owner's property interest), *cert. denied*, 111 S. Ct. 1414 (1991); *United States v. 15621 S.W. 209th Ave.*, 894 F.2d 1511 (11th Cir. 1990) (applying Florida law to determine innocent owner's property interest).

16. See, e.g., *15621 S.W. 209th Ave.*, 894 F.2d at 1514 (under Florida law "each spouse's interest [in a tenancy by the entirety] comprises the whole or entirety of the property and not a divisible part"); *Clingerman v. Sadowski*, 519 A.2d 378, 380 (Pa. 1986) (under Pennsylvania law in tenancy by the entirety "each spouse is seized of the whole or the entirety and not a divisible part

law to determine the parties' property interests under the federal forfeiture statute, however, it results in uneven application of the federal statute because of the differences in property law from state to state.¹⁷

thereof"). Currently, only the following 15 jurisdictions recognize tenancy by the entireties where each spouse has an "indivisible interest" in the whole property: Delaware, the District of Columbia, Florida, Hawaii, Indiana, Maryland, Michigan, Mississippi, Missouri, North Carolina, Pennsylvania, Rhode Island, Vermont, Virginia and Wyoming. *15621 S.W. 209th Ave.*, 894 F.2d at 1519 n.9. Arguably, New Jersey became the sixteenth state when it adopted a statutory provision preventing spouses from altering their tenancy by the entirety interests in any way without the written consent of the other spouse. *Freda v. Commercial Trust Co.*, 570 A.2d 409, 411 (N.J. 1990) (quoting N.J. STAT. ANN. § 46:3-17.4 (West 1989)).

Generally, tenancy by the entireties requires five unities:

[M]arriage—the joint owners must be married to each other; title—the owners must both have title to the property; time—they both must have received title from the same conveyance; interest—they must have an equal interest in the whole of the property; and control or possession—they both must have the right to use the entire property.

15621 S.W. 209th Ave., 894 F.2d at 1514. Moreover, tenancy by the entireties can only be severed by the death of a spouse, divorce, mutual agreement, or a joint conveyance of the property. *Clingerman*, 519 A.2d at 381. Thus, "if only one spouse is a debtor, entireties property is immune from process, petition, levy, execution or sale." *Klebach v. Mellon Bank*, 565 A.2d 448, 450 (Pa. Super. 1989), *appeal granted*, 593 A.2d 420 (Pa. 1990) (per curiam).

Several other states, however, recognize a lesser form of tenancy by the entireties which is susceptible to execution for the indebtedness of one spouse, subject to the protection of the nondebtor spouse's interest. *See, e.g.*, *United States v. 5205 Mount Howard Court*, 755 F. Supp. 169, 172 (W.D. Ky. 1990) (creditor of one spouse can obtain and sell debtor spouse's survivorship interest in entireties property); *Third Nat'l Bank v. Knobler*, 789 S.W.2d 254, 255 (Tenn. 1990) (right of survivorship in tenancy by entirety can be conveyed by one spouse or attached by judgment creditor of one spouse); *V.R.W., Inc. v. Klien*, 503 N.E.2d 496, 499 (N.Y. 1986) ("[E]ach tenant may sell, mortgage or otherwise encumber his or her rights in the [tenancy by entirety] property, subject to the continuing rights of the other [spouse]."); *Hoyt v. American Traders*, 725 P.2d 336, 338 n.1 (Or. 1986) (judgment creditor of husband obtained saleable lien on tenancy by entirety property); *Lowe v. Morrison*, 711 S.W.2d 833, 834 (Ark. 1986) (judgment creditor of one spouse can obtain lien on debtor spouse's interest in tenancy by entirety property but cannot defeat interest of nondebtor spouse). Thus, in these states, because a creditor can obtain and sell the debtor spouse's survivorship interest in the tenancy by the entireties property, the government will likewise be able to compel immediate forfeiture of the guilty spouse's interest. *See, e.g.*, *5205 Mount Howard Court*, 755 F. Supp. at 172-73. The innocent spouse, however, maintains his or her "right to and interest in the entire estate." *Id.* at 173. For a further discussion of *5205 Mount Howard Court*, see *infra* note 17.

17. For example, in *5205 Mount Howard Court* the court found that, under Kentucky law, one spouse's creditor can obtain and sell the debtor spouse's survivorship interest in the tenancy by the entireties property. Therefore, the court held that the government will likewise be able to compel immediate forfeiture of a guilty spouse's interest. *5205 Mount Howard Court*, 755 F. Supp. at 172-73. A recent Hawaii decision, however, held that no forfeiture of tenancy by the entireties property can occur if one spouse is an innocent owner because Hawaii law prevents any lien by the creditors of one spouse from attaching against the entireties property, and allows property held in tenancy by the entireties to be

Courts have discussed the possibility of formulating a federal common law to solve this problem by providing one uniform set of rules to govern the determination of parties' property interests in federal forfeiture actions.¹⁸ Presently, no such federal common law exists.¹⁹ The courts have therefore struggled to harmoniously combine federal forfeiture statutes with state property law.²⁰ As a result, when confronted with the issue of civil forfeiture of property held in tenancy by the entireties where one spouse is an innocent owner, the United States Courts of Appeals have adopted different approaches.

For example, the Eleventh Circuit addressed this issue in *United States v. 15621 S.W. 209th Avenue*.²¹ The Eleventh Circuit concluded that

"conveyed free and clear of any judgment against one spouse." *United States v. Property Entitled in the Names of Alexander Morio Toki & Elizabeth Mila Toki*, 779 F. Supp. 1272, 1284 (D. Haw. 1991). Thus, "a lis pendens filed against the property would be wholly ineffectual" if the property "can be conveyed free and clear of any judgment or lien against one spouse." *Id.* at 1284. The court concluded that "under Hawaii law, if one spouse owning property as a tenant by the entireties is an innocent owner, then the U.S. cannot obtain an interest in the property." *Id.*

18. *See, e.g., 2525 Leroy Lane*, 910 F.2d at 347 (Sixth Circuit refused to create federal common law of forfeiture to govern treatment of property interests); *15621 S.W. 209th Ave.*, 894 F.2d at 1517-20 (same). The Eleventh Circuit articulated three primary reasons for declining to adopt a federal common law: (1) Congress did not provide for the preemption of state law in this situation; (2) the state property law is not in direct conflict with federal law—the federal law calls for the protection of an innocent owner's interest, and the state law merely defines that interest; and (3) a federal rule would be unnecessary because of the lack of frequency of cases requiring its application. *15621 S.W. 209th Ave.*, 894 F.2d at 1517-19. *But see 2525 Leroy Lane*, 910 F.2d at 353 (Krupansky, J., dissenting) (strongly advocating creation of federal common law to clearly define property interests of parties to civil forfeiture actions). In his dissent, Judge Krupansky stated three primary reasons in favor of adopting a federal common law: (1) to provide uniformity in the application of federal forfeiture statutes; (2) to conform with the Supremacy Clause, which requires federal law to prevail over state law in cases of conflict and ambiguity; and (3) to prevent tenancy by the entireties from becoming a safe haven for drug traffickers. *2525 Leroy Lane*, 910 F.2d at 353-56 (Krupansky, J., dissenting).

19. *See, e.g., 2525 Leroy Lane*, 910 F.2d at 347, 353 (Sixth Circuit refused to establish federal common law of property); *15621 S.W. 209th Ave.*, 894 F.2d at 1517-20 (same).

20. *But see Property Entitled in Names Toki*, 779 F. Supp. at 1284 (Hawaii law absolutely prevents forfeiture of tenancy by entireties property where one spouse is innocent owner).

21. 894 F.2d 1511 (11th Cir. 1990). The facts of *15621 S.W. 209th Avenue* are similar to those in *1500 Lincoln Avenue*. The government instituted a civil forfeiture action under § 881(a)(7) against the Aguileras' tenancy by the entireties property after Mr. Aguilera was convicted of trafficking in cocaine. *Id.* at 1512. The district court determined that Mrs. Aguilera was an innocent owner within § 881(a)(7). *Id.* The district court then held that no interest in the property was forfeitable to the government "[b]ecause under Florida law, an entireties estate cannot be forfeited due to the independent criminal conduct of one spouse when the other spouse has not participated in and has no knowledge of the crime." *Id.* The government appealed to the Eleventh Circuit and argued for a one-half interest in the entireties property. *Id.*

the civil forfeiture statute only authorized forfeiture of “whatever interest remains in the property *after* the innocent owner’s interest has been excepted.”²² Thus, the court held that no property interest could be forfeited “at the present time.”²³ The Eleventh Circuit, however, did not leave the government completely without remedy.²⁴ Rather, the court noted that the United States could preserve its forfeiture claim by “filing a *lis pendens* against the property” and thus be able to seek forfeiture of any separate interest the guilty owner may later acquire in the property.²⁵ The Eleventh Circuit’s approach therefore completely precludes forfeiture of property held in tenancy by the entireties where one spouse is an innocent owner *until* the entireties estate is severed.²⁶

Under a similar analysis, in *United States v. 2525 Leroy Lane*,²⁷ the Sixth Circuit held that the government was entitled to *immediate* forfeiture of the guilty spouse’s interest.²⁸ Although the Sixth Circuit agreed

22. *Id.* at 1516 (emphasis added). The Eleventh Circuit stated:

Reading subsection (h) of section 881 in tandem with subsection (a), it becomes clear that the “right, title and interest” that vests in the United States upon commission of the unlawful act comprises only so much of the property as is “subject to forfeiture” under the appropriate division of subsection (a).

Id. For the text of § 881(h), see *infra* note 44. The court noted that under the language of § 881(a)(7), everything but Mrs. Aguilera’s interest was forfeitable. *15621 S.W. 209th Ave.*, 894 F.2d at 1516. Applying Florida law, the court determined Mrs. Aguilera’s interest in the entireties property constituted all “right, title and interest” in the property, thus leaving nothing to forfeit to the government. *Id.* The court, however, stated that it had not determined that:

Mr. Aguilera’s interest cannot be forfeited because Florida law prohibits forfeiture of entireties property as a result of the illegal act of one spouse. Rather we hold that Mrs. Aguilera’s interest, protected from forfeiture by federal statute, encompasses the whole property and nothing remains to forfeit to the United States.

Id. at 1516 n.5.

23. *15621 S.W. 209th Ave.*, 894 F.2d at 1516. The Eleventh Circuit also discussed the government’s argument that the court should adopt a federal common law instead of applying Florida property law to determine Mrs. Aguilera’s property interest. *Id.* at 1517. For a discussion of the Eleventh Circuit’s rejection of a federal common law of property, see *supra* note 18.

24. *15621 S.W. 209th Ave.*, 894 F.2d at 1516-17 n.6.

25. *Id.* Mr. Aguilera could acquire a separate interest in the property if Mrs. Aguilera predeceased or divorced him, or if they took any other action that would destroy the tenancy by the entireties. *Id.* Upon the severance of the entireties estate, the interests of the spouses would be “distinct and separable so that forfeiture of his interest in the property would not affect her rights.” *Id.*

26. *Id.* at 1516. For a discussion of the shortcomings of the Eleventh Circuit’s approach, see *infra* notes 83-88 and accompanying text.

27. 910 F.2d 343 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 1414 (1991).

28. *Id.* at 349. The facts of *2525 Leroy Lane* are similar to those in *1500 Lincoln Avenue* and *15621 S.W. 209th Avenue*. Mr. and Mrs. Marks owned the real property located at 2525 Leroy Lane in tenancy by the entireties. *Id.* at 345. The government filed a civil forfeiture complaint against the property after Mr. Marks was convicted of several drug offenses. *Id.* The government stipulated that Mrs. Marks had a valid innocent owner’s defense under § 881(a)(7). *Id.* The parties agreed, however, to sell the real property on the condition that the

with the Eleventh Circuit's reasoning,²⁹ the court distinguished *2525 Leroy Lane* from *15621 S.W. 209th Avenue* on its facts because the real property in *2525 Leroy Lane* had previously been sold.³⁰ For purposes of that case, the parties agreed to take the same interest in the proceeds "as they had in the real estate."³¹

In order to best protect the interests of the parties, the Sixth Circuit placed the proceeds from the sale of the property into an escrow account.³² The Sixth Circuit then applied Michigan law to determine the innocent spouse's property rights in the tenancy by the entirety and analogized the government's position to that of a "judgment creditor of

parties would have the same interest in the proceeds of the sale as they would have in the real property itself. *Id.*

The district court reached the same result as the Eleventh Circuit and held that no forfeiture could occur because Mrs. Mark's interest encompassed the entire property, and her status as an innocent owner precluded forfeiture of any of her interest in the property. *Id.* The government then appealed. *Id.*

29. *Id.* at 352 ("Our opinion in the present case is consistent with the conclusions reached by the Eleventh Circuit.").

30. *Id.* The *2525 Leroy Lane* court stated: "The distinguishing feature in the case before the Eleventh Circuit is that the real property in question had not been sold, and therefore whatever future interest the Government might have in the property would be protected by the filing of a *lis pendens*." *Id.*

31. *Id.* at 345. Under Michigan law, a tenancy by the entireties would normally be destroyed by the sale of the property through a "joint conveyance of the property" by the spouses. *Id.* at 351. In the present case, however, the parties agreed to treat the proceeds of the sale as if "they retained the same qualities as entireties property," and the requisite joint agreement to convey was not satisfied. *Id.*

32. *Id.* at 352. The *2525 Leroy Lane* court left the management of the escrow account to the district court. *Id.* The district court was also required to decide the exact scope of the parties' interest in the property. *Id.* The Sixth Circuit, however, noted that under Michigan law "[e]ach tenant by the entirety is entitled to share equally in the rents and profits derived from the entireties property. Thus, it may be that Mrs. Marks would be entitled to half of the interest from the fund of money." *Id.* In his dissent, Judge Krupansky criticized the Sixth Circuit's holding for several reasons, including the immense administrative burden of managing the escrow fund placed on the district court. *Id.* at 356 (Krupansky, J., dissenting). He also criticized the inconsistency of the court's holding; it expressed approval of the Eleventh Circuit's decision but reversed the district court's holding, which had followed the same reasoning as the Eleventh Circuit. *Id.* (Krupansky, J., dissenting).

Moreover, the Sixth Circuit's resolution seems grossly unfair to Mrs. Marks. A tenant by the entirety should be able to enjoy the entire property for the remainder of the entireties estate. See, e.g., *1500 Lincoln Ave.*, 949 F.2d at 77-78 (innocent owner should maintain all property rights inherent in tenancy by entirety despite illegal conduct of guilty spouse). Mrs. Marks, however, is not entitled to control the money in the escrow account during her life and may in fact receive only half of the interest generated from the property. *2525 Leroy Lane*, 910 F.2d at 352. This result is inconsistent with the Sixth Circuit's express approval of the Eleventh Circuit's interpretation in *15621 S.W. 209th Avenue*. See *15621 S.W. 209th Ave.*, 894 F.2d at 1518 ("We nevertheless cannot escape our conviction that Congress equally intended full protection of the interests of innocent owners.").

one spouse."³³ Under Michigan law, a creditor of one spouse can attach upon that spouse's interest in the entireties estate and obtain satisfaction of the debt to the extent of the debtor spouse's interest upon severance of the tenancy by the entireties.³⁴ Thus, when and if the entireties estate is severed, the government is entitled to the guilty spouse's one-half interest in the property.³⁵

In *1500 Lincoln Avenue*, the Third Circuit declined to follow either the Eleventh or Sixth Circuit's approach.³⁶ Rather, the Third Circuit held that the government *does* have an immediate forfeitable interest in property held in tenancy by the entireties even when one spouse is an innocent owner.³⁷ Yet, the Third Circuit's approach also fully protects the innocent spouse's interest in the property, including the right to full enjoyment of the property during his or her life, as well as the right of survivorship incorporated in the tenancy by the entireties.³⁸

III. FACTS OF *1500 LINCOLN AVENUE*

Mr. Leonard A. Bernstein and his wife, Linda M. Bernstein, owned Pentown Pharmacy and the underlying property as tenants by the entireties.³⁹ The United States filed a complaint for civil forfeiture of that property, alleging that Mr. Bernstein had illegally diverted prescription drugs from the pharmacy.⁴⁰ The government conceded that Mrs. Bern-

33. *2525 Leroy Lane*, 910 F.2d at 346-47, 351. The court held that Mrs. Marks had an indivisible interest in the property and a survivorship interest entitling her to a fee simple absolute in the property upon the death of Mr. Marks. *Id.* at 347. The court noted that although the government may acquire Mr. Marks' interest in the entireties estate, it cannot take his place because of the requirement of marriage in a tenancy by the entireties. *Id.* at 351. Thus, the government cannot obtain a meaningful interest in the property until the entireties estate is severed. *Id.* at 356 (Krupansky, J., dissenting).

34. *Id.* at 352.

35. *Id.* This includes severance of the entireties estate by sale of the property, divorce, mutual agreement, etc. *Id.* However, if either of the spouses should die, the whole estate goes to the holder of the living spouse's survivorship interest. *Id.* The right of survivorship entitles a surviving spouse to the whole tenancy by the entireties estate in fee simple absolute upon the death of the other spouse. *Id.* at 346-47. Thus, if a guilty spouse's death caused the severance of the entireties estate, the innocent spouse would take a fee simple absolute leaving the government with *no* interest in the property.

36. *United States v. 1500 Lincoln Ave.*, 949 F.2d 73, 75, 78 (3d Cir. 1991). For a discussion of the Third Circuit's criticism of the Eleventh Circuit's approach, see *infra* notes 84-89 and accompanying text.

37. *1500 Lincoln Ave.*, 949 F.2d at 77-78.

38. *Id.* at 78.

39. *Id.* at 74. The Bernsteins obtained title to the property in October 1979. *Id.*

40. *Id.* Prior to the civil forfeiture action, Mr. Bernstein was indicted on 51 drug-related offenses, pled guilty to nine counts, and received a ten year sentence. *Id.* at 75. A confidential government informant assisted the government's investigation by making five controlled purchases of drugs from Mr. Bernstein at the pharmacy without presenting a prescription. *Id.*

stein had a valid innocent owner's defense to the forfeiture action because she did not know of or consent to any of the criminal events occurring at the pharmacy.⁴¹ The government, therefore, limited its forfeiture claim to Mr. Bernstein's interest in the pharmacy.⁴²

In the district court, the government asserted three arguments relating to the interpretation of the property interests of the parties. First, the government argued that Mr. Bernstein's interest in the property constituted the whole estate, and, because his entire interest was forfeitable, no interest remained for Mrs. Bernstein to retain as an innocent owner.⁴³ Second, the government contended that Mr. Bernstein's illegal use of the property had severed the tenancy by the entireties, leaving the government and Mrs. Bernstein as tenants in common, each with a one-half interest in the property.⁴⁴ Finally, the government argued that

41. *Id.* For a discussion of the innocent owner defense, see Loomba, Note, *supra* note 13.

42. *1500 Lincoln Ave.*, 949 F.2d at 75.

43. *Id.* This first government position is the converse of the Eleventh Circuit's reasoning in *15621 S.W. 209th Avenue*. Moreover, this position is consistent with the fact that the government was only seeking Mr. Bernstein's interest in the property, even though it would result in complete forfeiture of the property to the government. The government argued for forfeiture of Mr. Bernstein's *complete* interest in the property. *Id.* Because Mrs. Bernstein's interest is exactly the same as her husband's interest, her complete interest in the property must also be forfeited. The government, however, did not advocate this result because it conceded that the result would be unfair to Mrs. Bernstein. *Id.*

44. *Id.* Section 881(h) states: "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." 21 U.S.C. § 881(h). This section is the statutory codification of the "relation-back doctrine" which requires that title to the forfeitable property vest in the government *at the time* the drug offense is committed. Jankowski, Note, *supra* note 9, at 170, 175-76.

In the district court, the government argued that the guilty spouse's illegal activity severed the entireties estate. *1500 Lincoln Ave.*, 949 F.2d at 75. This means that according to 21 U.S.C. § 881(h), the guilty spouse's interest vested in the government upon commission of the drug offense, thereby exterminating the unities of time, title, possession and marriage, and thus severing the tenancy by the entireties. *Cf.* *United States v. 11885 S.W. 46 St.*, 751 F. Supp. 1538, 1539 (S.D. Fla. 1990) ("When any of the unities is destroyed, the tenancy by the entireties ceases."), *rev'g*, 715 F. Supp. 355 (S.D. Fla. 1989) (reversed in accordance with Eleventh Circuit's opinion in *United States v. 15621 S.W. 209th Avenue*, 894 F.2d 1511 (11th Cir. 1990)). The government seemed to conclude that the government and the innocent owner hold title to the property as tenants in common, each holding a one-half interest in the property. *1500 Lincoln Ave.*, 949 F.2d at 75; *see also* *United States v. 11885 S.W. 46 St.*, 715 F. Supp. 355, 359 (S.D. Fla. 1989) (holding that tenancy in common is created when unity of tenancy by entireties is destroyed, leaving government and innocent spouse as cotenants, each having one-half interest in property), *rev'd*, 751 F. Supp. 1538, 1540 (S.D. Fla. 1990) (in accordance with *United States v. 15621 S.W. 209th Avenue*, 894 F.2d 1511 (11th Cir. 1990), court ordered property held in tenancy by entireties not subject to forfeiture when valid innocent owner defense exists).

Prior to *1500 Lincoln Avenue*, however, the Third Circuit held that the relation-back doctrine does not subject property held by an innocent owner to for-

forfeiture was required "except to the extent of the interest of the innocent owner."⁴⁵

The district court rejected the government's first and second arguments, holding that Mrs. Bernstein's innocent owner defense completely barred the government's forfeiture action.⁴⁶ The court noted that the innocent owner retains her full interest in the property under § 881(a)(7).⁴⁷ Thus, the only property interest forfeitable to the government is that interest existing *beyond* the interest of the innocent owner.⁴⁸ To determine the innocent owner's interest, the district court relied on Pennsylvania law, which requires that "a tenant by the entireties has title to the whole property, not to a share of the property."⁴⁹ Hence, the district court concluded that, after protecting Mrs. Bernstein's interest in the whole property, no property interest remained to forfeit to the government.⁵⁰ The district court therefore dismissed the government's forfeiture complaint.⁵¹

The district court also denied the government's motion to alter or amend its judgment.⁵² In that motion, the government argued for for-

feiture. *United States v. 92 Buena Vista Ave.*, 937 F.2d 98, 102 (3d Cir. 1991), *cert. granted*, 112 S. Ct. 1260, and *cert. granted*, 112 S. Ct. 1264 (1992). The *92 Buena Vista Avenue* court reasoned:

Section 881(h) vests title in the United States *in that property described in subsection (a)*. Subsection (a) sets forth that property which is subject to forfeiture and it also provides for "innocent owner" defenses. Consequently, the property referred to in subsection (a) does *not* include property that has been exempted from forfeiture by means of an innocent owner defense. Logically then one must first ascertain whether the property at issue is not forfeitable because of an innocent owner defense before applying section 881(h).

Id. (footnote omitted). For the text of § 881(a)(7), see *supra* note 13.

45. *1500 Lincoln Ave.*, 949 F.2d at 75. The government asserted this argument in support of its motion to alter or amend the district court's judgment. *Id.* Specifically, the government argued that Mrs. Bernstein would retain the same property rights as she had under the tenancy by the entirety, including a life estate in the property and a right of survivorship should her husband predecease her. *Id.* The government maintained, however, that it would be entitled to Mr. Bernstein's individual interest should the tenancy by the entireties be severed. *Id.*

46. *Id.* In dismissing the government's complaint, the district court held "that a spouse's innocent owner defense bars a civil *in rem* forfeiture action against property held in a tenancy by the entirety." *Id.* (quoting unpublished district court order).

47. *Id.* (district court relied on Eleventh Circuit's opinion in *15621 S.W. 209th Avenue*).

48. *See id.* The innocent owner's interest is completely protected, but if any additional property interest exists, then that interest may be forfeited to the government.

49. *Id.* ("a tenancy by the entireties is an 'indivisible' 'unitary' estate").

50. *Id.*

51. *Id.*

52. *Id.* For a discussion of the government's third argument that would

feiture of all property interests not belonging to the innocent owner.⁵³ However, in accordance with the Eleventh Circuit in *15621 S.W. 209th Avenue*, the district court noted that the government could preserve its right to seek a forfeiture of any separate interest belonging to Mr. Bernstein in the future by filing a *lis pendens* against the property.⁵⁴ The government then appealed to the Third Circuit Court of Appeals.⁵⁵

IV. CASE ANALYSIS

In *1500 Lincoln Avenue*, the Third Circuit began its analysis by examining the applicable forfeiture statute, 21 U.S.C. § 881(a)(7).⁵⁶ The court stated that the statutory language of § 881(a)(7) was subject to “diametrically opposed interpretations.”⁵⁷ One interpretation would require forfeiture of the entire property because each spouse owns the entire estate as a tenant by the entireties.⁵⁸ Under this interpretation, “forfeiture of the guilty spouse’s interest means forfeiture of the whole estate and consequently leaves nothing for the innocent spouse.”⁵⁹ The other interpretation, however, would reach a contrary result by allowing the innocent spouse to retain his or her entire interest in the property, thus leaving no interest subject to forfeiture.⁶⁰ The Third Circuit further noted that other intermediate interpretations existed, such as forfeiture of one-half of the property.⁶¹

permit Mrs. Bernstein to keep her interest in the property, yet forfeit Mr. Bernstein’s interest to the government, see *supra* note 45 and accompanying text.

53. *1500 Lincoln Ave.*, 949 F.2d at 75.

54. *Id.* at 75-76; see also *United States v. 15621 S.W. 209th Ave.*, 894 F.2d 1511, 1516-17 n.6 (11th Cir. 1990) (recognizing possibility that government might later acquire guilty spouse’s interest in property upon severance of tenancy by entireties by filing *lis pendens*). For a definition of *lis pendens*, see *supra* note 3.

55. *1500 Lincoln Ave.*, 949 F.2d at 76.

56. *Id.* The Third Circuit summarized § 881(a)(7) by stating: “[I]f property is used to commit or facilitate a drug offense, the statute calls for forfeiture of any interest in that property except for the interest of an innocent owner” *Id.* For the text of § 881(a)(7), see *supra* note 13.

57. *1500 Lincoln Ave.*, 949 F.2d at 76; cf. Jankowski, Note, *supra* note 9, at 166 (“Confusion exists because courts are reluctant to implement the extensive forfeiture that section 881 provides.”).

58. *1500 Lincoln Ave.*, 949 F.2d at 76.

59. *Id.* For a discussion of the argument advocating forfeiture of the whole property, see *supra* note 43 and accompanying text. Although this all-encompassing interpretation of § 881(a)(7) has been advocated by the government in several cases, no court has adopted it thus far. See, e.g., *United States v. 15621 S.W. 209th Ave.*, 894 F.2d 1511, 1515-16 (11th Cir. 1990) (declining to forfeit guilty spouse’s interest before protecting innocent spouse’s interest).

60. *1500 Lincoln Ave.*, 949 F.2d at 76. For a discussion of the interpretation advocating no forfeiture, the approach taken by both the Eleventh Circuit and the district court below, see *supra* notes 21-26 & 46-50 and accompanying text respectively.

61. *1500 Lincoln Ave.*, 949 F.2d at 76. In the district court, the government asserted this one-half division of property interpretation of § 881(a)(7) as its

The *1500 Lincoln Avenue* court then reviewed the legislative history of § 881(a)(7) and found that two competing policies existed behind the enactment of the forfeiture provision.⁶² The court first recognized the strong governmental interest in complete recovery of all forfeitable assets. This interest stemmed from Congress' motivation to win the war against drugs on an economic level by depleting the financial resources of drug offenders.⁶³ Yet the court also recognized Congress' desire to protect the property interests of innocent owners.⁶⁴ The court noted, however, that the legislative history failed to instruct courts on how to

second argument. *Id.* at 75. For a full discussion of this argument, see *supra* note 44 and accompanying text. This argument was temporarily successful in a Florida district court case in which the court held that an innocent spouse became a tenant in common with the government upon forfeiture of her husband's interest in their property held in tenancy by the entireties, but this decision was later reversed. *United States v. 11885 S.W. 46 St.*, 715 F. Supp. 355, 359 (S.D. Fla. 1989) (holding that government and innocent spouse each retained one-half interest in property), *rev'd*, 751 F. Supp. 1538, 1540 (S.D. Fla. 1990) (in accordance with *15621 S.W. 209th Avenue*, court ordered property held in tenancy by entirety not subject to forfeiture where valid innocent owner defense exists); see also *United States v. 2525 Leroy Lane*, 910 F.2d 343, 350 (6th Cir. 1990) (criticizing Florida district court's position in *11885 S.W. 46 Street*, 715 F. Supp. at 359 (S.D. Fla. 1989)), *cert. denied*, 111 S. Ct. 1414 (1991).

A Louisiana district court likewise held that both the innocent spouse and the government were entitled to a one-half interest in property after the guilty spouse's interest was forfeited under § 881(a)(7). *United States v. South 23.19 Acres*, 694 F. Supp. 1252, 1254 (E.D. La. 1988). However, *South 23.19 Acres* is distinguishable from the present case because the property at issue there was community property; under Louisiana law, each spouse owned an undivided one-half interest in community property, which could be divided to satisfy a forfeiture. *Id.* The court therefore did not have to address the issue of forfeiture of property held in tenancy by the entireties where each spouse owns an indivisible interest in the whole property.

Even when a court provides the most protection to the innocent spouse, the guilty spouse's one-half interest is forfeitable if the spouses voluntarily terminate their tenancy by the entireties. See, e.g., *2525 Leroy Lane*, 910 F.2d at 352 (entitling government to one-half interest in property upon severance of entireties estate by divorce, agreement, etc.).

62. *1500 Lincoln Ave.*, 949 F.2d at 76-77.

63. *Id.* The Third Circuit quoted a Senate Report which stated: Profit is the motivation for [drug trafficking] and it is through economic power that it is sustained and grows. . . . Today, few in Congress or the law enforcement community fail to recognize that the traditional sanctions of fine and imprisonment are inadequate to deter or punish the enormously profitable trade in dangerous drugs which, with its inevitable attendant violence is plaguing the country.

Clearly, if law enforcement efforts to combat . . . drug trafficking are to be successful, they must include an attack on the economic aspects of these crimes. Forfeiture is the mechanism through which such an attack may be made.

Id. (quoting S. REP. NO. 225, 98th Cong., 2d Sess. 191 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3374).

64. *Id.* at 77 ("[T]he insertion of the innocent owner defense in 21 U.S.C. § 881(a)(7) shows that Congress did not want to extinguish the interests of innocent owners . . .").

balance these competing policies when applied to forfeiture of entireties property where one spouse is an innocent owner.⁶⁵ The Third Circuit therefore adopted its own statutory interpretation designed to “best serve[] the two goals that 21 U.S.C. § 881(a)(7) was intended to promote.”⁶⁶

In balancing these two competing policies, the *1500 Lincoln Avenue* court relied on Pennsylvania property law to determine the interest of the innocent owner.⁶⁷ Under Pennsylvania law, a tenancy by the entireties exists when property is held jointly by a husband and wife.⁶⁸ Each spouse owns the whole property and that ownership is not divisible.⁶⁹ This indivisibility means that neither spouse can unilaterally sever the estate, and the creditors of one spouse cannot levy upon the estate.⁷⁰

The *1500 Lincoln Avenue* court considered the government’s position in the present case.⁷¹ On appeal, the government only sought forfeiture of Mr. Bernstein’s interest in the property and offered Mrs.

65. *Id.* (“Nothing in the legislative history discloses precisely how Congress wanted to balance the interest in forfeiture and the interest of an innocent owner in the circumstances presented by the case now before us.”). For a discussion of the legislative history of the innocent owner defense, see Jankowski, Note, *supra* note 9, at 183-88, and Loomba, Note, *supra* note 13, at 483-84.

66. *1500 Lincoln Ave.*, 949 F.2d at 77.

67. *See id.* For a discussion of the application of state property law under a federal forfeiture statute, see *supra* notes 15-20 and accompanying text.

68. *Clingerman v. Sadowski*, 519 A.2d 378, 380 (Pa. 1986). Tenancy by the entireties is based upon the common law notion that, in the eyes of the law, a husband and wife are “one legal entity.” *Id.*

69. *1500 Lincoln Ave.*, 949 F.2d at 77; *cf.* *Klebach v. Mellon Bank*, 565 A.2d 448, 450 (Pa. Super. 1989) (“[I]f only one spouse is a debtor, entireties property is immune from process, petition, levy, execution or sale.”), *appeal granted*, 593 A.2d 420 (Pa. 1990) (per curiam).

70. *1500 Lincoln Ave.*, 949 F.2d at 77 (citing *Clingerman*, 519 A.2d at 380-81; *Klebach*, 565 A.2d at 450). The *1500 Lincoln Ave.* court stated:

As a tenant by the entireties, Mrs. Bernstein had the right to possess and use the whole property during her life and the right to obtain title in fee simple absolute if her cotenant predeceased her. Similarly, she had protection against a unilateral conveyance by her cotenant of his interest in the estate, as well as protection against a levy upon the property by any creditor of her cotenant.

Id. (citing *Clingerman*, 519 A.2d at 380-81; *Klebach*, 565 A.2d at 450).

Moreover, under Pennsylvania law, tenancy by the entireties can only be severed by the death of one of the co-tenants, divorce, joint conveyance of the estate, or mutual agreement of the co-tenants. *Clingerman*, 519 A.2d at 381. Justice Larsen, in his concurring opinion in *Clingerman*, noted that the “strong policy” underlying the concept of tenancy by the entireties is to “prevent harm to a spouse who does not join in a conveyance of entireties property and to preserve entireties assets from the creditors of one spouse who incurs bad debts.” *Id.* at 385 (Larsen, J., concurring). This policy supports the innocent owner’s defense under § 881(a)(7) because, by definition, the innocent owner did not join in the criminal transaction that subjected the property to forfeiture. 21 U.S.C. § 881(a)(7).

71. *1500 Lincoln Ave.*, 949 F.2d at 77.

Bernstein complete protection of her interest.⁷² Thus, the government's position "substantially narrowed" the court's scope of possible interpretations of § 881(a)(7).⁷³ For example, the court did not have to consider the interpretation initially argued by the government in the district court—that forfeiture of Mr. Bernstein's complete indivisible interest in the property left no interest remaining for Mrs. Bernstein.⁷⁴

The Third Circuit proceeded to examine the three remaining interpretations of the civil forfeiture statute, 21 U.S.C. § 881(a)(7), in light of the two competing policies.⁷⁵ First, the court considered the Bernsteins' interpretation of § 881(a)(7), which precluded forfeiture altogether and thus required dismissal of the government's complaint.⁷⁶ The Bernsteins argued that each of them had an undivided complete interest in the entireties property, and because Mrs. Bernstein was an innocent owner, she retained this entire interest.⁷⁷ Hence, no property interest remained to forfeit to the government.⁷⁸ The Third Circuit rejected the Bernsteins' interpretation of outright denial of forfeiture, however, because it "completely frustrate[d] the strong interest in for-

72. *Id.* On appeal and previously in its motion to alter or amend the district court's judgment, the government asserted that Mrs. Bernstein could "retain full and exclusive use of the property during her life, protection against any alienation without her consent or any attempt to levy upon her husband's former interest, and the right to obtain title in fee simple absolute if her husband predeceases her." *Id.*

73. *Id.* In light of the government's position, the Third Circuit was precluded from extending the degree of forfeiture available to the government in this case. *Id.* Regardless of the government's position, however, it is highly unlikely that the Third Circuit would have been inclined to go beyond its present holding. For instance, not only has the Third Circuit been traditionally cautious of forfeiture, but it has previously stated that "[c]ivil forfeiture could sometimes lead to harsh and surprisingly unjust results." *United States v. 6109 Grubb Rd.*, 886 F.2d 618, 624 (3d Cir.), *reh'g denied*, 890 F.2d 65, 66 (3d Cir. 1989).

Moreover, the Third Circuit has taken a restrictive view of civil forfeiture in the past. In *6109 Grubb Road*, the Third Circuit greatly extended the innocent owner defense to allow an innocent owner to prove that he or she either did not know of the illegal drug activity or did not consent to that activity. *Id.* at 626. For a powerful criticism of the majority's analysis in *6109 Grubb Road*, see *6109 Grubb Road*, 890 F.2d at 660-66 (Greenberg, J., dissenting). Additionally, in *United States v. 92 Buena Vista Avenue*, the Third Circuit extended the innocent owner defense by holding that an innocent owner did not have to be a bona fide purchaser for value. *United States v. 92 Buena Vista Ave.*, 937 F.2d 98, 101-02 (3d Cir. 1991), *cert. granted*, 112 S. Ct. 1260, and *cert. granted*, 112 S. Ct. 1264 (1992).

74. For a discussion of the argument advocating complete forfeiture of the entireties property, see *supra* note 43 and accompanying text.

75. *1500 Lincoln Ave.*, 949 F.2d at 77-78.

76. *Id.* at 77. The Bernsteins argued that no forfeiture was possible at the present time or in the future and "insist[ed] that nothing short of outright dismissal of the government's complaint would fully protect Mrs. Bernstein's interests." *Id.* at 76, 77.

77. *Id.* at 75. This argument was the basis for the district court's dismissal of the complaint. *Id.*

78. *Id.*

feiture of property used in committing drug offenses.”⁷⁹

The Third Circuit then considered the approach taken by both the district court and the Eleventh Circuit.⁸⁰ This interpretation denied forfeiture of any interest in the property at the present time, thus requiring dismissal of the government’s complaint.⁸¹ It did, however, allow the government to preserve its right to seek forfeiture of any separate interest acquired by the guilty spouse in the future, should the tenancy by the entirety be severed.⁸² The *1500 Lincoln Avenue* court rejected this interpretation as well because it frustrated the strong governmental interest in forfeiture.⁸³ The court recognized that this interpretation permitted the guilty to retain title in the entirety property which he or she had used in illegal drug activities.⁸⁴

In addition, the Third Circuit stated that such an interpretation would create “substantial procedural difficulties.”⁸⁵ Although the government would be able to seek forfeiture of any separate interest in the property later acquired by the guilty spouse by filing a *lis pendens*,⁸⁶ the Third Circuit found that this process merely succeeds in postponing the forfeiture adjudication.⁸⁷ Implicit in this postponement is the requirement that the government “refile its forfeiture complaint and prove the underlying criminal conduct long after it occurred,” resulting in a “difficult if not impossible” burden of proof on the government.⁸⁸ For all of these reasons, the court rejected the interpretation of the Eleventh Circuit and the district court.⁸⁹

Instead, the Third Circuit adopted the interpretation advanced by the government in its appeal.⁹⁰ This interpretation requires *immediate* forfeiture of the guilty spouse’s interest, yet also “protects all of the

79. *Id.* at 78.

80. *Id.* at 77; *15621 S.W. 209th Ave.*, 894 F.2d at 1515-16 (holding that government presently has no forfeitable interest in entirety property). Additionally, the Fourth Circuit employed this analysis in an unpublished decision. See *United States v. 35 Acres*, No. 90-7376, 1991 U.S. App. LEXIS 18705 at *3 (4th Cir. Aug. 15, 1991) (per curiam).

81. *1500 Lincoln Ave.*, 949 F.2d at 75, 77.

82. *Id.* at 77-78.

83. *Id.* at 78.

84. *Id.*

85. *Id.*

86. *Id.* at 77.

87. *Id.* at 78. The court stated: “Moreover, this interpretation would create substantial procedural difficulties because it requires the government to postpone prosecution of civil forfeiture proceedings until the guilty spouse acquires a separate interest in the property, an event that may not occur until many years after the criminal conduct.” *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 77. The Third Circuit stated:

Relying on the Sixth Circuit’s recent decision in [*2525 Leroy Lane*,] . . . the government contended that it should at least be able to obtain “any separate interest which [Mr. Bernstein] would be entitled to should he

property rights that the innocent owner enjoyed under the tenancy by the entireties."⁹¹ Thus, the Third Circuit concluded that this interpretation best served the dual purposes of the civil forfeiture statute: forfeiture of property used in drug offenses and protection of the innocent owner's property interest.⁹² Moreover, this interpretation avoids the procedural difficulties encountered under the Eleventh Circuit's interpretation, and instead allows the immediate adjudication of the forfeiture complaint, thereby ensuring the "freshness" of the evidence.⁹³

V. CONCLUSION

In *1500 Lincoln Avenue*, the Third Circuit has rendered a better solution to the problem of forfeiture of entireties property than other courts which have addressed the issue. In the future, the Third Circuit may entertain government arguments for greater forfeiture,⁹⁴ and therefore *1500 Lincoln Avenue* may not be the final line between forfeitable and nonforfeitable interests in tenancies by the entireties.

Nonetheless, *1500 Lincoln Avenue* has three important practical implications. First, it demonstrates that the Third Circuit is seriously concerned with enforcement of punishment for drug related crimes. This concern is evidenced by the court's recognition that drug offenders must forfeit their property interests regardless of the form of property ownership they hold. The Third Circuit has therefore prevented tenancies by the entireties from becoming "safe havens" for drug traffickers' economic benefit. Second, by providing for *immediate* forfeiture, the Third Circuit has solved the procedural problems inherent in the postponement of forfeiture adjudication under the Eleventh Circuit's approach.

Finally, the Third Circuit's decision attained a workable solution for both the government and the innocent owner. *1500 Lincoln Avenue* pro-

survive or divorce [Mrs. Bernstein] or should the entireties be severed in any other manner."

Id. (quoting unpublished district court order) (alteration in original). However, for the reasons explained in *supra* notes 27-35 and accompanying text, the Sixth Circuit decision differs from the approach adopted by the Third Circuit in *1500 Lincoln Avenue*.

91. *1500 Lincoln Ave.*, 949 F.2d at 77-78. The innocent owner's property rights include: exclusive use and possession of the property during the innocent owner's lifetime; protection against conveyance without consent of the innocent owner; protection against creditors of the guilty spouse; and a right of survivorship entitling the innocent spouse to the property in fee simple absolute if the guilty spouse predeceases the innocent spouse. *Id.* at 78.

92. *Id.* at 77-78.

93. *Id.* at 78. The court concluded: "[W]e do not see what purpose would be served by postponing adjudication of the government's right to forfeiture of the interest of the guilty spouse . . . rather than adjudicating that issue when the evidence was still fresh." *Id.*

94. For a discussion of why the Third Circuit may *not* be likely to extend its protection of the government's interest in forfeiture at the expense of innocent owners, see *supra* note 73.

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vides complete protection of the innocent spouse's ownership interests, including the right to full enjoyment of the property during his or her life, as well as the right of survivorship incorporated in the tenancy by the entirety. Additionally, *1500 Lincoln Avenue* awards the government a meaningful property interest, including the guilty spouse's right of survivorship. The Third Circuit has therefore fulfilled the dual goals of the federal forfeiture statute: protecting innocent property owners while arming the government with civil forfeiture provisions that are potent enough to effectively combat the economic allure of drug trafficking.

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