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United States v. One 1973 Rolls Royce: The Confusion Continues in Interpreting Drug Forfeiture Statutes

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1995]

*UNITED STATES v. ONE 1973 ROLLS ROYCE: THE CONFUSION
CONTINUES IN INTERPRETING DRUG FORFEITURE
STATUTES*

I. INTRODUCTION

In response to the increasing number of drug crimes in the United States, Congress passed the Comprehensive Drug Abuse Prevention and Control Act of 1970 (Drug Control Act).¹ The Drug Control Act provided the basis for the current forfeiture scheme found in § 881 of Title 21 of the United States Code (§ 881).² The Drug Control Act originally provided for government seizure of illegal substances, the raw materials and equipment relating to the manufacture and distribution of the substances, any item used as a container to transport the substances, all conveyances used to transport the drugs or to facilitate the transactions, and all reports relating to the drug transactions.³ In 1978, Congress amended the Drug

1. Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, Title II, § 511(a), 84 Stat. 1276 (codified as amended at 21 U.S.C. § 881 (1994)); H.R. REP. NO. 1444, 91st Cong., 2d Sess. 3 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4566, 4567. The legislative history of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (Drug Control Act) reveals the principal purpose of the bill:

This legislation is designed to deal in a comprehensive fashion with the growing menace of drug abuse in the United States (1) through providing authority for increased efforts in drug abuse prevention and rehabilitation of users, (2) through providing more effective means for law enforcement aspects of drug abuse prevention and control, and (3) by providing for an overall balanced scheme of criminal penalties for offenses involving drugs.

H.R. REP. NO. 1444, 91st Cong., 2d Sess. 3 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4566, 4567. *See generally* Doug Badow, *War on Drugs or War on America?*, 3 STAN. L. & POL'Y REV. 242 (1991) (discussing problem of drug crimes in America).

2. Comprehensive Drug Abuse Prevention and Control Act § 511; *see* Alice M. O'Brien, Note, "Caught in the Crossfire": *Protecting the Innocent Owner of Real Property from Civil Forfeiture Under 21 U.S.C. § 881(a)(7)*, 65 ST. JOHN'S L. REV. 521, 521 (1991) (explaining Drug Control Act's foundation of today's asset forfeiture). *See generally* Jimmy Gurule, Symposium: *The Ancient Roots of Modern Forfeiture Law*, 21 J. LEGIS. 155, 156-57 (1995) (providing historical overview of forfeiture schemes); Michael F. Zeldin & Roger G. Weiner, *Innocent Third Parties and Their Rights in Forfeiture Proceedings*, 28 AM. CRIM. L. REV. 843, 843-44 (same); Robert E. Blacher, Comment, *Clearing the Smoke From the Battlefield: Understanding Congressional Intent Regarding the Innocent Owner Provision of 21 U.S.C. § 881(a)(7)*, 85 J. CRIM. L. & CRIMINOLOGY 502, 504-08 (1994) (same); Ron Champoux, Note, *Real Property Under Federal Drug Laws: Does the Punishment Outweigh the Crime?*, 20 HASTINGS CONST. L.Q. 247, 249-50 (1992) (same); Damon G. Saltzburg, Note, *Real Property Forfeitures as a Weapon in the Government's War on Drugs: A Failure to Protect Innocent Ownership Rights*, 72 B.U. L. REV. 217, 220-21 (1992) (same).

3. Comprehensive Drug Abuse Prevention and Control Act § 511(a) (codified as amended at 21 U.S.C. § 881(a) (1994)). The Drug Control Act provided in pertinent part:

(723)

Control Act, specifically amending § 881, to increase the scope of civil forfeiture.⁴ This amendment provides that all moneys and other things of value that a party received in exchange for a controlled substance is subject to forfeiture under § 881(a)(6).⁵ In 1984, Congress again amended the Drug Control Act, adding § 881(a)(7) and thereby broadening the

The following shall be subject to forfeiture to the United States and no property right shall exist in them:

- (1) All controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of this title.
- (2) All raw materials, products, and equipment of any kind which are used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance in violation of this title.
- (3) All property which is used, or intended for use, as a container for property described in paragraph (1) or (2).
- (4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1) or (2), except that
- (5) All books, records, and research, including formulas, microfilm, tapes, and data which are used, or intended for use, in violation of this title.

Id.; see Gurule, *supra* note 2, at 157-58 (discussing scope of Drug Control Act); Blacher, *supra* note 2, at 506 (same).

4. See Psychotropic Substances Act of 1978, Pub. L. No. 95-633, Title III, § 301(a)(1), 92 Stat. 3777 (codified at 21 U.S.C. § 881(a)(6) (1988)); Gurule, *supra* note 2, at 158 (discussing 1978 amendments); Blacher, *supra* note 2, at 507 (same).

5. Psychotropic Substances Act § 301(a)(1). The Psychotropic Substances Act amendment to the Drug Control Act provides, in pertinent part:

(6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this title, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this title, except that no property shall be forfeited under this paragraph, to the extent of the 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.

Id. (codified at § 881(a)(6) (1994)).

The legislative history of the Psychotropic Substances Act of 1978 provides:

The criminal justice system can only be effective if there is a meaningful deterrent. It is important that the offender be aware of the risk he [or she] is running. . . . The amendment I propose here today is intended to enhance the efforts to reduce the flow of illicit drugs in the United States by striking out against the profits from illicit drug trafficking.

124 CONG. REC. 23,055 (1978) (statement of Sen. Nunn). Senator Culver similarly stated: "The purpose of the proposed amendment is to help combat the flow of illicit drugs in the United States by striking at profits from illicit drug trafficking." *Id.* at 23,056.

scope of forfeitable property to include all real property used to facilitate a drug transaction.⁶

To ameliorate the potential harshness from the amendments, Congress included an "innocent owner" defense under § 881(a)(6) and (7).⁷ Under § 881(a)(6) and (7), no owner's interest in property shall be forfeited "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."⁸ Subsequently, the Anti-Drug Abuse Act of 1988 added

6. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Title II, § 306(a), 98 Stat. 2050 (codified at 21 U.S.C. § 881(a)(7) (1994)). This amendment to § 881 provides for the forfeiture of:

[a]ll real property, including any right, title, and 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 title 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.

Id.; see Gurule, *supra* note 2, at 158-59 (discussing 1984 amendments); Blacher, *supra* note 2, at 507-08 (same).

Congress further amended § 881(a)(7) in 1988 by adding "(including any leasehold interest)" after "any right, title, and interest." Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, Title V, § 5105, 102 Stat. 4301 (codified at 21 U.S.C. § 881(a)(7) (1994)).

7. 21 U.S.C. § 881(a)(6), (7) (1988). Congress included an "innocent owner" defense in the 1978 amendments to the Drug Control Act, which added the § 881(a)(6) forfeiture of "moneys." Psychotropic Substances Act § 301(a)(1) (codified at 21 U.S.C. § 881(a)(6) (1994)). Senator Nunn stated at the hearings on this amendment:

[W]e did add a provision in the modification to make it clear that a bona fide party who has no knowledge or consent to the property he owns having been derived from illegal transactions, that party would be able to establish that fact under this amendment and forfeiture would not occur.

124 CONG. REC. 23,057 (1978). Additionally, Congress included an "innocent owner" defense to the forfeiture of real property when it added subsection (7) pursuant to the Comprehensive Crime Control Act of 1984. Comprehensive Crime Control Act § 306(a).

The "innocent owner" defense was added in response to § 881's expansive approach to forfeitable property. See Blacher, *supra* note 2, at 503 ("Recognizing the potentially harsh effects of the statute, Congress provided an affirmative defense to owners of real property who are innocent of illegal activity.") In the absence of such a defense, owners who innocently leased or loaned property to others could lose the property in a forfeiture proceeding. *United States v. One 1973 Rolls Royce*, 43 F.3d 794, 799 (3d Cir. 1994). For example, a landlord could forfeit an apartment complex if a tenant was caught dealing drugs from an apartment. *Id.* The "innocent owner" defenses protected these "innocent owners." *Id.* See generally Blacher, *supra* note 2, at 509-10 (discussing Congress' addition of "innocent owner" defenses); Champoux, *supra* note 2, at 253-54 (stating "innocent owner" defense under § 881(a)(7) "easier to mount" than previous constitutional defense which required owner to establish that he was "uninvolved in and unaware of the wrongful activity, but also, that he had done all that reasonably could be expected to prevent the proscribed use of his property" (quoting *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 689 (1974))).

8. 21 U.S.C. § 881(a)(6), (7) (1994).

§ 881(a)(4)(C) to the forfeiture scheme, providing that “no conveyance shall be forfeited . . . 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, consent, or willful blindness of the owner.”⁹

The courts have encountered difficulty in interpreting the precise meaning of the “innocent owner” defense.¹⁰ At the heart of the debate is the proper interpretation of the “without the knowledge or consent” language of § 881(a)(6) and (7).¹¹ More specifically, the issue is whether an owner must establish lack of knowledge *and* lack of consent to avoid

9. The Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, Title VI, § 6075(1)-(3), 102 Stat. 4324 (1988) (codified at 21 U.S.C. § 881(a)(4)(C) (1994)). See generally Michael Goldsmith & Mark J. Linderman, *Asset Forfeiture and Third Party Rights: The Need For Further Law Reform*, 1989 DUKE L.J. 1254, 1267-82 (discussing history behind enactment of § 881(a)(4)(C)). For a discussion of the legislative history of § 881(a)(4)(C), see *infra* notes 104, 115 and accompanying text.

10. Compare *United States v. One 1973 Rolls Royce*, 43 F.3d 794, 814 (3d Cir. 1994) (adopting disjunctive reading of “without the knowledge, consent, or willful blindness” language of § 881(a)(4)(C) as applied to post-illegal-act transferees); *United States v. 1012 Germantown Rd.*, 963 F.2d 1496, 1503 (11th Cir. 1992) (adopting disjunctive interpretation of “knowledge or consent” language of § 881(a)(7) as applied to pre-illegal-act owner); *United States v. 141st St. Corp.*, 911 F.2d 870, 878 (2d Cir. 1990) (adopting disjunctive interpretation of “without the knowledge or consent” language of § 881(a)(7) as applied to owner of apartment building used to facilitate drug transactions), *cert. denied*, 498 U.S. 1109 (1991) and *United States v. 6109 Grubb Rd.*, 886 F.2d 618, 626 (3d Cir. 1989) (adopting disjunctive interpretation of “without the knowledge or consent” language of § 881(a)(7)) with *United States v. 6640 S.W. 48th St.*, 41 F.3d 1448, 1452-53 (11th Cir. 1995) (adopting conjunctive interpretation of “without the knowledge or consent” language of § 881(a)(7) as applied to post-illegal-act transferees); *United States v. 10936 Oak Run Circle*, 9 F.3d 74, 76 (9th Cir. 1993) (adopting conjunctive interpretation of “knowledge or consent” language of § 881(a)(6) and stating that § 881(a)(6) “bars an owner with knowledge of the origin of the property in drug proceeds from asserting ‘the innocent owner defense’ ”); *United States v. 15603 85th Ave. N.*, 933 F.2d 976, 981 (11th Cir. 1991) (adopting conjunctive interpretation of “without the knowledge or consent” language of § 881(a)(6) as applied to pre-illegal-act owner) and *United States v. Lot 111-B*, 902 F.2d 1443, 1445 (9th Cir. 1990) (per curiam) (adopting conjunctive interpretation of “without the knowledge or consent” language of § 881(a)(7)). For an explanation of the conjunctive interpretation versus the disjunctive interpretation, see text accompanying *infra* note 12.

11. See generally Zeldin & Weiner, *supra* note 1, at 848-49 (recognizing two general viewpoints regarding appropriate interpretation of “knowledge or consent” language of “innocent owner” defense); Champoux, *supra* note 2, at 253-56 (discussing courts’ different interpretations of “knowledge or consent” language and discussing courts’ various interpretations of “knowledge” and “consent”); Kirsten M. Dunne, *The Innocent Owner Defense to Real Property Forfeiture Under the Comprehensive Crime Control Act: Does Knowledge Equal Consent?*, 20 J. LEGIS. 81, 81 (1994) (acknowledging circuit split in interpreting “knowledge or consent” language); 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, 478-80 (1989) (noting split among courts in interpreting “knowledge or consent”); O’Brien, *supra* note 2, at 529-42 (discussing inconsistency in courts’ interpretations of “knowledge or consent” language in “innocent owner” defense). For a discussion

forfeiting his or her property (conjunctive approach), or whether an owner needs to establish only lack of knowledge or lack of consent to prevail under an "innocent owner" defense (disjunctive approach).¹² The United States Courts of Appeals are divided on this precise issue.¹³ Furthermore, a related judicial concern is whether the addition of the "willful blindness" language of § 881(a)(4)(C) requires the courts to interpret the "innocent owner" defense of that section differently from the defenses in § 881(a)(6) and (7).¹⁴

This Note explores the various interpretations of § 881's "innocent owner" defenses, focusing on the United States Court of Appeals for the Third Circuit's analysis in *United States v. One 1973 Rolls Royce*.¹⁵ Part II of this Note discusses the background regarding when title to the forfeited property vests in the government.¹⁶ Part III reviews the various approaches that the United States Courts of Appeals have developed to interpret § 881(a)(6) and (7).¹⁷ In doing so, Part III will analyze how different circuits have handled precedent, legislative history, rules of statutory construction and policy-based arguments.¹⁸ Then, Part IV of this Note examines the district court's and the Third Circuit's differing approaches to the interpretation of the "innocent owner" defense of § 881(a)(4)(C) in *United States v. One 1973 Rolls Royce*.¹⁹ Part V analyzes the Third Circuit's

of the various circuit courts' interpretations of the "knowledge or consent" language, see *infra* notes 31-85, 112-53 and accompanying text.

12. See generally Zeldin & Weiner, *supra* note 2, at 848 nn.31-32 (providing exhaustive list of courts adopting conjunctive interpretation and those adopting disjunctive interpretation of "knowledge or consent" language); O'Brien, *supra* note 2, at 530 nn.46 & 48 (providing list of courts adopting conjunctive approach and those adopting disjunctive approach). For a discussion of the cases addressing this issue, see *supra* note 10.

13. For a discussion of the circuit court decisions creating a split on the appropriate interpretation of the "innocent owner" defenses, see *supra* note 10 and *infra* notes 31-85, 112-53 and accompanying text.

14. See *United States v. One 1973 Rolls Royce*, 43 F.3d 794, 812-13 (3d Cir. 1994) (concluding that tests for innocent ownership under § 881(a)(4)(C), (a)(6) and (a)(7) are identical and therefore construction should be consistent). See generally Goldsmith & Linderman, *supra* note 9, at 1274-82 (discussing relationship between subsection (a)(4) and subsections (a)(6) and (7)).

15. For a discussion of the various courts' interpretations of the "innocent owner" defenses of § 881, see *infra* notes 31-72 and accompanying text. For a discussion of the Third Circuit's analysis of the "innocent owner" defenses, see *infra* notes 73-85, 94-100, 112-53 and accompanying text.

16. For a discussion of when title to forfeited property vests in the government, see *infra* notes 23-30 and accompanying text.

17. For a discussion of the circuit courts' approaches to interpreting the "innocent owner" defenses of § 881(a)(6) and (7), see *infra* notes 31-85 and accompanying text.

18. For a discussion of the circuit courts' use of precedent, legislative history, rules of statutory construction and policy-based arguments in interpreting § 881, see *infra* notes 31-85 and accompanying text.

19. 43 F.3d 794 (3d Cir. 1994). For a discussion of the Third Circuit's interpretation of § 881(a)(4)(C)'s "innocent owner" defense in *One 1973 Rolls Royce*, see *infra* notes 94-153 and accompanying text.

opinion in *One 1973 Rolls Royce* in light of the dissenting opinion and other circuit courts' decisions.²⁰ Part VI considers the impact of the Third Circuit's approach to civil forfeiture in drug cases and suggests an answer to the confusion created by Congress' wording of the "innocent owner" defenses of § 881.²¹ In conclusion, Part VII suggests guidelines for practitioners to follow in light of *One 1973 Rolls Royce*.²²

II. THE SUPREME COURT ADDRESSES CIVIL FORFEITURE IN *UNITED STATES V. 92 BUENA VISTA AVENUE*

The United States Supreme Court addressed the civil forfeiture provisions of Title 21 of the United States Code in *United States v. 92 Buena Vista Avenue*.²³ In *92 Buena Vista Avenue*, the Supreme Court allowed the claimant, who had allegedly purchased the property subject to forfeiture with monetary gifts derived from illegal drug transactions, to assert an "innocent owner" defense.²⁴ The government argued that the claimant could not assert an "innocent owner" defense because title to the funds used to purchase the property vested in the government at the time of the illegal act.²⁵ A plurality, however, stated that a person who acquires forfeitable property after an illegal act has occurred, but before forfeiture, may assert the "innocent owner" defense.²⁶ The Court held that title does not vest in the government until the date of forfeiture instead of at the time of the illegal act.²⁷ In so holding, the Supreme Court resolved a dispute among the circuit courts as to when title to forfeited property vested in the government.²⁸ Some circuits had held that title vested in the government at the time of the illegal act, while others had held that title did not vest in the government until the time of forfeiture.²⁹ By its holding, the Supreme

20. For an analysis of the Third Circuit's opinion in *One 1973 Rolls Royce*, see *infra* notes 94-153 and accompanying text.

21. For a discussion of the impact the Third Circuit's opinion will have on drug asset forfeiture cases and a possible solution to the confusion in interpreting § 881, see *infra* notes 180-96 and accompanying text.

22. For a discussion of guidelines for practitioners to follow in light of *One 1973 Rolls Royce*, see *infra* notes 197-202 and accompanying text.

23. 113 S. Ct. 1126 (1993).

24. *Id.* at 1137. In *92 Buena Vista Avenue*, the government sought civil forfeiture of real estate that was allegedly purchased with drug trafficking proceeds. *Id.* at 1130. The respondent received money, which was allegedly from illegal drug transactions, as a gift, and used the funds to purchase the property in question, thereby subjecting the property to forfeiture under § 881(a)(6). *Id.*

25. *Id.* at 1136-37.

26. *Id.*

27. *Id.* at 1137. Prior to *92 Buena Vista Avenue*, some circuits held that title vested in the government at the time of the illegal act. For a comparison of courts that held that title vested in the government at the time of the illegal act with those that held that title vested in the government at the time of forfeiture, see *infra* note 29.

28. See *id.* at 1131.

29. Compare *In re One 1985 Nissan*, 889 F.2d 1317, 1319 (4th Cir. 1989) (stating that "all right, title and interest in the property vested in the government at the

time the proceeds involved or traceable thereto were generated by illegal drug sales" and holding claimant's predecessor in interest possessed no interest in property to pass on to claimants) and *Eggleston v. Colorado*, 873 F.2d 242, 247 (10th Cir. 1989) (stating that when government brings forfeiture action under § 881, "a judgment of forfeiture relates back to the time of the unlawful act, vesting title to forfeited property in the government as of that moment. Forfeiture therefore cuts off the rights of subsequent lienholders or purchasers, subject to the . . . innocent owners exception in section 881(a)(6)"), *cert. denied*, 493 U.S. 1070 (1990) with *United States v. 92 Buena Vista Ave.*, 937 F.2d 98, 102 (3d Cir. 1991) (stating that government's interest vests in property at time of actual forfeiture), *aff'd*, 113 S. Ct. 1126 (1993).

In resolving the dispute as to when the government interest vests in the property, the Supreme Court analyzed § 881(h). *92 Buena Vista Ave.*, 113 S. Ct. at 1136-37. Section 881(h) provides: "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) (1994). Based on this subsection, the Government argued that the proceeds traceable to illegal drug transactions (i.e., the funds used to purchase the property at issue) are a kind of "property described in subsection (a)"; therefore, § 881(h) effectively prevents such property from being the property of anyone other than the United States. *92 Buena Vista Ave.*, 113 S. Ct. at 1136. Therefore, the Government argued under the facts of *92 Buena Vista Avenue*, that title to the illegal proceeds vested in the government at the time of the illegal act. *Id.* Therefore, the funds, with which the respondent purchased the property, could not have been transferred to the respondent in the first place. *Id.*

The Supreme Court disagreed with this analysis and stated that although the proceeds subject to § 881(h) are described in subsection (a)(6), that subsection exempts certain proceeds from being forfeited. *Id.* Subsection (a)(6) exempts from forfeiture proceeds to which the owner can establish an innocent owner defense. *Id.* The court explained:

As the Senate Report on the 1984 amendment correctly observed, the amendment applies only to "property which is subject to civil forfeiture under section 881(a)." [quoting S. REP. NO. 225, 98th Cong., 2d Sess. 215 (1983), *reprinted in* 1984 U.S.C.A.N. 3182, 3398]. Under § 881(a)(6), the property of one who can satisfy the innocent owner defense is not subject to civil forfeiture. Because the success of any defense available under § 881(a) will necessarily determine whether § 881(h) applies, § 881(a)(6) must allow an assertion of the defense *before* § 881(h) applies.

Id. (footnotes omitted).

In conclusion, the Court noted that § 881(h) did not disturb the common-law rights of the Government or the owners of the forfeited property. *Id.* at 1137. According to the Court, "[t]he common-law rule had always allowed owners to invoke defenses made available to them *before* the Government's title vested, and after title *did* vest, the common-law rule had always related that title back to the date of the commission of the act that made the specific property forfeitable." *Id.* Therefore, the Court's holding that title does not vest in the government until forfeiture (as opposed to the time of the illegal act), thereby providing the owner an "innocent owner" defense, is consistent with common law. *Id.*; see Gurule, *supra* note 2, at 168-69 (discussing impact of *92 Buena Vista Avenue* on forfeiture scheme and questioning "whether the circuits that adopted a disjunctive reading of the statute prior to *92 Buena Vista Avenue* will continue to construe the innocent owner defense in the disjunctive when applied to post-illegal act transferees"). See generally Michael D. Dautrich, Note, *The "Innocent Owner" Defense in Civil Drug Forfeitures After United States v. 92 Buena Vista Avenue: Still an Uphill Battle for Third-Party*, 3 WIDENER J. PUB. L. 995 (1994) (providing full analysis of Supreme Court decision in *92 Buena Vista Avenue*); Mosche Heching, *Civil Forfeiture and the Innocent Owner*

Court created a new class of claimants, consisting of post-illegal-act transferees, who could assert the "innocent owner" defense under § 881.³⁰

III. CIRCUIT OVERVIEW

A. Various Circuits' Approaches to the "Innocent Owner" Defense Under § 881(a)(6) and (7)

The United States Court of Appeals for the Second Circuit adopted a disjunctive interpretation of the "knowledge or consent" language of § 881(a)(7) in *United States v. 141st Street Corp.*³¹ In *141st Street*, the Second Circuit concluded that "a claimant may avoid forfeiture by establishing either that he had no knowledge of the narcotics activity or, if he had knowledge, that he did not consent to it."³² The government in this case sought forfeiture of an apartment building used to facilitate narcotics distribution.³³ The owner of the building, however, claimed that he did not know of the tenant's drug activity and that he never consented to such activity.³⁴ Therefore, the owner argued that because he was an "innocent owner," the property was not subject to forfeiture under § 881(a)(7).³⁵

Defense: *United States v. 92 Buena Vista Ave.*, 113 S. Ct. 1126 (1993), 16 HARV. J.L. & PUB. POL'Y 835 (1993) (same).

30. See *United States v. 6640 S.W. 48th St.*, 41 F.3d 1448, 1452 n.9 (acknowledging that before *92 Buena Vista Avenue*, a post-illegal-act transferee's interest in the property was "automatically eradicated because title vested in the government on the date of the illegal act"). For an explanation of the term "post-illegal-act transferee," see text accompanying *infra* note 45.

31. 911 F.2d 870, 878 (2d Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991); see Gurule, *supra* note 2, at 169 (acknowledging Second Circuit's adoption of disjunctive interpretation of "knowledge or consent" language in pre-*92 Buena Vista Avenue* opinion).

32. *141st St. Corp.*, 911 F.2d at 878 (emphasis added). The Second Circuit, noting that courts that have addressed this issue were divided in their approaches, ultimately decided to adopt the disjunctive approach. *Id.* at 877-78. For a discussion of the Second Circuit's analysis of this issue, see *infra* notes 33-43 and accompanying text.

33. *Id.* at 872. The common areas of the building in question were littered with crack vials and crack pipes. *Id.* at 873. "Lookouts" were posted around the building, and "steerers," who directed potential drug purchasers to the area where the drugs were located, loitered near the building and in the lobby. *Id.*

34. *Id.* at 879. The owner claimed that he only learned of the drug activity, at the time of a police raid, and after the raid he instructed the building superintendent not to accept rent from the tenants who had been arrested on drug charges. *Id.* Despite the claimant's assertion that he did not know of the drug activity, the jury concluded that either the owner knew of the drug activity at an earlier time and took no steps to stop it, or that the owner's response was inadequate to assert an innocent owner defense based on lack of consent. *Id.* at 879-80. For a discussion of how the Second Circuit interpreted the consent element of the statute, see *infra* note 40.

35. *Id.* at 876.

In its analysis, the court noted the confusing nature of the language of § 881(a)(7).³⁶ The court resolved the confusion by relying on the "ordinary meaning of the word 'consent.'"³⁷ In doing so, the court found that the "ordinary meaning" of consent is one party's "compliance or approval" of another party's actions or proposals.³⁸ This definition of consent led the Second Circuit to determine that a disjunctive interpretation of "or" was correct.³⁹ The court reasoned that a claimant must prove either lack of knowledge *or* lack of consent; otherwise, the "consent" language would be mere surplusage because the notion of consent necessarily assumes that a claimant has knowledge.⁴⁰ The court noted that if knowledge alone precluded the owner from asserting the "innocent owner" defense—as would be the case under a conjunctive interpretation where the claimant would have to disprove knowledge *and* consent—the consent language would be surplusage.⁴¹ Although Congress intended forfeiture to

36. *Id.* at 878. The court maintained that the plain language of § 881(a)(7) is "at best, confusing." *Id.* On the one hand, the court reasoned that Congress' use of the "disjunctive 'or' suggests that a claimant should succeed by establishing either lack of knowledge or lack of consent." *Id.* On the other hand, the court acknowledged that Congress' use of the word "without," before the pertinent language "knowledge or consent," could be interpreted to mean that an innocent owner must be without both knowledge and consent. *Id.*

37. *Id.*

38. *Id.* More specifically, the court looked to WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY which defined consent as "compliance or approval especially of what is done or proposed by another." *Id.* (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 482 (1971)).

39. *Id.*

40. *Id.* The court engaged in the following analysis:

[I]n order to consent to drug activity, one must know of it. If we were to construe section 881(a)(7) to mean that a claimant's knowledge alone precludes the innocent owner defense (*i.e.*, that a claimant must disprove both knowledge and consent), then "consent" as used in the statute would be totally unnecessary. In other words, the factfinder would never reach the issue of consent once it concluded that the claimant had knowledge. Similarly, under this construction it would be necessary to determine whether the claimant consented only if the factfinder first concluded that the claimant did *not* have knowledge of the drug activity, a result that cannot be squared with the ordinary meaning of the word "consent."

Id.

Aside from relying on the ordinary meaning of the word consent, the Second Circuit also addressed what actions constituted consent. *Id.* at 878-79. The court defined consent in § 881(a)(7) as "the failure to take all reasonable steps to prevent illicit use of premises once one acquires knowledge of that use." *Id.* at 879 (adopting Supreme Court definition of consent from *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974)); see Saltzburg, *supra* note 2, at 224-27 (discussing Supreme Court's analysis in *Calero-Toledo*). Applying this meaning of consent, the court affirmed the jury's determination that the claimant in *141st Street Corp.* did not take all reasonable steps to prevent the narcotics trafficking in the building. *141st St. Corp.*, 911 F.2d at 879. Given the evidence presented at trial, the court concluded that the jury's conclusion was more than supported by the evidence. *Id.* For a discussion of the steps claimant took, see *supra* note 34.

41. *141st St. Corp.*, 911 F.2d at 878.

be a powerful tool in combatting the war on drugs,⁴² the Second Circuit noted that the inclusion of an express defense in the statute indicated Congress' desire for innocent owners not to lose their property.⁴³

In contrast to the Second Circuit, the United States Court of Appeals for the Eleventh Circuit has adopted varying approaches to the "innocent owner" defense depending upon the particular facts of the case.⁴⁴ The Eleventh Circuit distinguishes between pre-illegal-act owners, those who acquired an interest in the property before the illegal drug activity occurred, and post-illegal-act transferees, those who acquired an interest in the property after the drug activity occurred.⁴⁵ Although the Eleventh Circuit is apparently split as to which interpretation to apply to pre-illegal-act owners—in some cases applying the disjunctive approach⁴⁶ and in some cases applying the conjunctive approach⁴⁷—the court has been uniform in its approach to post-illegal-act transferees.⁴⁸

42. *Id.* (citing S. REP. NO. 225, 98th Cong., 2nd Sess. 191-92 (1984), reprinted in 1984 U.S.C.A.N. 3182, 3374-75); see Blacher, *supra* note 2, at 503 ("Congress has determined that the best way to combat illegal trafficking is to remove the incentive by stripping the profits from the drug dealers through asset forfeiture."); Champoux, *supra* note 2, at 247 (stating that Congress enacted § 881 in "an attempt to increase the penalties for felony drug violations" and that § 881(a)(7) "represents an attempt to further solidify and strengthen drug forfeiture provisions" (citing Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837 (1984))); O'Brien, *supra* note 2, at 521 (stating that "asset forfeiture has become a potent and effective means of combating . . . drug trafficking").

43. *Id.*; see Dunne, *supra* note 11, at 81 (acknowledging that "potent" forfeiture provision of § 881 "carves out an exception to its broad reach").

44. Compare *United States v. 1012 Germantown Rd.*, 963 F.2d 1496, 1503 (11th Cir. 1992) (allowing pre-illegal-act transferee to avoid forfeiture by proving either lack of knowledge or lack of consent) with *United States v. 6640 S.W. 48th St.*, 41 F.3d 1448, 1453 (11th Cir. 1995) (stating that under § 881(a)(7) "lack of consent" defense is not available to post-illegal-act transferees); *United States v. 6960 Miraflores Ave.*, 995 F.2d 1558, 1561 (11th Cir. 1993) (concluding in case involving mortgagee claimant that "[i]nnocent owners are those who have no knowledge of the illegal activities and who have not consented to the illegal activities" (emphasis added) (quoting *United States v. 15603 85th Ave. N.*, 933 F.2d 976, 981 (11th Cir.))) and *15603 85th Ave. N.*, 933 F.2d at 981 (holding that "[i]nnocent owners are those who have no knowledge of the illegal activities and who have not consented to the illegal activities" in case involving forfeiture of co-owners interest in property purchased with another's drug proceeds) (emphasis added). For a discussion of the distinction between pre-illegal-act owners and post-illegal-act transferees, see text accompanying *infra* note 45.

45. See Gurule, *supra* note 2, at 169-70 (acknowledging that Eleventh Circuit has differing interpretations of "knowledge or consent" language depending on whether claimant is pre-illegal-act owner or post-illegal-act transferee). For examples of Eleventh Circuit cases that have distinguished between pre-illegal-act owners and post-illegal-act transferees, see *supra* note 44.

46. See *1012 Germantown Rd.*, 963 F.2d at 1503. For a further discussion of *1012 Germantown Road*, see *infra* note 48.

47. See *6960 Miraflores Ave.*, 995 F.2d at 1561; *15603 85th Ave. N.*, 933 F.2d at 981. For a further discussion of *6960 Miraflores Avenue* and *15603 85th Avenue*, see *infra* note 48.

48. See *6640 S.W. 48th St.*, 41 F.3d 1448 at 1452-53 (noting that "[b]ecause the apparent intra-circuit split involves the appropriate interpretation for pre-illegal

The Eleventh Circuit adopted its approach to the "knowledge or consent" language with respect to post-illegal-act transferees in *United States v. 6640 S.W. 48th Street*.⁴⁹ *6640 S.W. 48th Street* involved the forfeiture of property purchased by Maria Mendicuti and Reinaldo Luis as joint tenants.⁵⁰ In April of 1990, a United States Customs Agent received information that implicated Luis in a drug-smuggling operation.⁵¹ From May to July of 1990, informants alleged that Luis held meetings at the defendant property to finalize various plans with regard to the smuggling scheme.⁵² Luis was arrested at the defendant property on September 7, 1990, and retained appellant Jose Larraz as legal counsel.⁵³ On September 12, 1990, Luis transferred his interest in the property to Mendicuti in exchange for ten dollars.⁵⁴ Subsequently, Mendicuti executed a \$50,000 promissory note and a mortgage deed on the property in favor of Larraz to satisfy Luis' legal fees.⁵⁵ On March 5, 1991, the United States filed a civil forfeiture action against the defendant property pursuant to § 881(a)(7).⁵⁶ Larraz then filed a claim on the property on May 24, 1991 alleging that he was entitled to a lien that was superior to the government's as well as claiming an "innocent owner" defense arising from the innocent ownership status of Mendicuti.⁵⁷

In *6640 S.W. 48th Street*, the Eleventh Circuit held that the "lack of consent" defense is not available to post-illegal-act transferees under

act owners, we need not resolve it in this case" and stating that lack of consent defense of § 881(a)(7) is not available to post-illegal-act transferees).

The Eleventh Circuit is split with regard to how to interpret § 881(a)(6) and (7) in cases of pre-illegal-act transferees. In *United States v. 1012 Germantown Road*, the court adopted a disjunctive interpretation of the "knowledge or consent" language of § 881(a)(7), stating that a claimant can prove either lack of knowledge or consent to prevail. 963 F.2d at 1503 & n.3. In *1012 Germantown Road*, a store owner, with knowledge of drug activity occurring on and around his property, asserted an "innocent owner" defense based on his lack of consent to such activity. *Id.* at 1504. The Eleventh Circuit remanded the case after determining that the district court incorrectly instructed the jury as to the definition of consent. *Id.* The Eleventh Circuit decided that the claimant should be entitled to prevail upon establishing lack of consent, even though he had knowledge of the illegal activity. *Id.* at 1503.

In two other cases, however, the Eleventh Circuit stated, "[i]nnocent owners are those who have no knowledge of the illegal activities and who have not consented to the illegal activities." *6960 Miraflores Ave.*, 995 F.2d at 1561 (emphasis added) (quoting *15603 85th Ave. N.*, 933 F.2d at 981).

49. 41 F.3d 1448 (11th Cir. 1995).

50. *Id.* at 1450.

51. *Id.*

52. *Id.* In August, Luis offered \$15,000 as a cash deposit to the informants for their participation in drug smuggling. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* Luis and Mendicuti did not file claims on the property and a default judgment was entered against them. *Id.*

57. *Id.*

§ 881(a)(7) when such transferees had knowledge of the illegal activity.⁵⁸ When the claimant conceded knowledge of his predecessor-in-interest's illegal activity at the time the predecessor transferred the property interest to him, the court applied a conjunctive interpretation to § 881(a)(7)'s "innocent owner" defense, holding that the claimant must establish lack of knowledge as well as lack of consent to prevail.⁵⁹

Because the claimant conceded knowledge of the illegal activity when he received an interest in the property, the court addressed the claimant's assertion that he still qualified as an "innocent owner" because he did not consent to the illegal activity.⁶⁰ The Eleventh Circuit decided that the "lack of consent" defense of § 881(a)(7) is not available to post-illegal-act transferees.⁶¹ The court reasoned that such an interpretation was necessary to avoid an absurd result.⁶² If it allowed a post-illegal-act transferee to assert a "lack of consent" defense, the claimant would be successful every time because, by definition, such a claimant has no opportunity to consent to the illegal activity involving property he or she did not own.⁶³ Thus, the Eleventh Circuit concluded that the policy behind § 881(a)(7) and norms

58. *Id.* at 1453; see Gurule, *supra* note 2, at 169-70 (acknowledging that Eleventh Circuit's interpretation did not allow post-illegal-act transferees to prevail upon establishing lack of consent).

59. 41 F.3d at 1453. The Eleventh Circuit began its analysis in *6640 S.W. 48th Street* by noting that in *United States v. 92 Buena Vista Avenue*, 113 S. Ct. 1126 (1993), a plurality of the Supreme Court stated that title in forfeitable property did not vest in the government until the time of forfeiture, thus allowing post-illegal-act transferees the possibility of asserting an "innocent owner" defense. *Id.* at 1451 (citing *92 Buena Vista Ave.*, 113 S. Ct. at 1137). The Eleventh Circuit also noted that the Supreme Court in *92 Buena Vista Avenue*, did not decide whether a court should examine the owner's knowledge at the time of the transfer or at the time of the illegal act. *Id.* The Eleventh Circuit answered this question in *6640 S.W. 48th Street*, and stated that the knowledge element of the "innocent owner" defense refers to knowledge at the time the owner acquired the interest in the property, instead of at the time of the illegal activity. *Id.* at 1452. In deciding this issue, the Eleventh Circuit relied on its prior decision in *United States v. 6960 Miraflores Avenue*, 995 F.2d 1558 (11th Cir. 1993), where the court suggested that it should look to knowledge at the time of the transfer and not at the time of the illegal act. *Id.* (citing *6960 Miraflores Ave.*, 995 F.2d at 1564).

60. 41 F.3d at 1452.

61. *Id.* at 1453. The Eleventh Circuit noted the circuit split on the issue and decided to use a conjunctive approach in interpreting the "without knowledge or consent" language of § 881(a)(7) as applied to post-illegal-act transferees. *Id.* at 1452-53. The court acknowledged that its two options were to interpret the statute "disjunctively, to afford the defense if the transferee *either* was without knowledge or did not consent, or conjunctively, to afford the defense only when the transferee was without knowledge *and* did not consent." *Id.* at 1452. For a discussion of the holdings of the various circuit courts, see *supra* notes 31-43 and accompanying text and *infra* notes 65-85, 94-153 and accompanying text.

62. *Id.* at 1452; see Gurule, *supra* note 2, at 172 (explaining that consent requirement is meaningless as applied to post-illegal-act transferee because prior to acquiring property, post-illegal-act transferee has no interest in or control over property and therefore is in no position to withhold consent).

63. 41 F.3d at 1452. This result would be true regardless of the claimant's later-acquired knowledge of the activity. *Id.*

of statutory construction warranted its adoption of the conjunctive approach to the "knowledge or consent" language of § 881(a)(7) in cases of post-illegal-act transferees.⁶⁴

The United States Court of Appeals for the Ninth Circuit, in *United States v. Lot 111-B*,⁶⁵ joins the Eleventh Circuit in *6640 S.W. 48th Street* by adopting a conjunctive reading of the "knowledge or consent" language of § 881(a)(7) in a case involving a pre-illegal-act owner.⁶⁶ In *Lot 111-B*, the claimant sought return of property that was forfeited pursuant to § 881(a)(7).⁶⁷ The claimant argued that even if he was aware of the illegal activity occurring on the property, he should prevail if he could prove that he did not consent to the illegal activity.⁶⁸ The Ninth Circuit, however, disagreed with the claimant and, relying upon the legislative history of the statute, determined that Congress intended a conjunctive meaning of the word "or."⁶⁹ The legislative history provided "the property would not be subject to forfeiture unless the owner of such property knew or consented

64. *Id.* at 1452-53. The court described § 881(a)(7) "as reflecting 'two interrelated aims of Congress: to punish criminals while ensuring that innocent persons are not penalized for their unwitting association with wrongdoers.'" *Id.* at 1452 (quoting *United States v. 1012 Germantown Rd.*, 963 F.2d 1496, 1500 (11th Cir. 1992)). Furthermore, the court noted that it must interpret § 881(a)(7) to give it a logical meaning not "at odds" with the purpose. *Id.* The court stated: "We are obligated to construe the provision to avoid an absurd result if another interpretation is more consistent with Section 881(a)(7)'s purpose." *Id.* (citations omitted). The court concluded that "[a]llowing post-illegal act transferees who knowingly take an interest in forfeitable property an innocent owner defense because they were not on the scene early enough to consent to the illegal activity would not serve this purpose and would be an absurd construction of the statute." *Id.*

65. 902 F.2d 1443 (9th Cir. 1990) (per curiam) (pre-92 *Buena Vista Avenue* opinion).

66. *Lot 111-B*, 902 F.2d at 1445. *Lot 111-B* involved a claim for the return of property forfeited under § 881(a)(7). *Id.* at 1444. In a per curiam opinion, the Ninth Circuit first affirmed the district court's finding that the claimant was a "nominal owner" lacking standing to challenge the forfeiture. *Id.* at 1444-45. The claimant owned a 41.65% interest in the property, yet presented little evidence to prove that he was more than a nominal owner. *Id.* The Ninth Circuit also affirmed the district court's alternative holding that the claimant did not qualify as an "innocent owner" because he was aware of the illegal activities occurring on the property. *Id.* at 1445. The court rejected the claimant's argument that even though he knew about the illegal activity, he was still an innocent owner because he did not consent to it. *Id.*

67. *Id.* at 1444.

68. *Id.* at 1445.

69. *See id.* The Ninth Circuit relied on a Joint House-Senate Explanation of the amendment adding § 881(a)(6). *See id.*; Joint Explanatory Statement of Titles II and III of the Psychotropic Substances Act of 1978, 124 CONG. REC. 34,670 (1978), reprinted in 1978 U.S.C.A.N. 9518 [hereinafter Joint Explanatory Statement]. This Joint Explanatory Statement explained that forfeiture is of a penal nature and further reviewed that an innocent owner's property should not be forfeited. *Id.*

to the [illegal conduct].'⁷⁰ From this statement, the Ninth Circuit concluded that if the claimant "either knew or consented" to the illegal activities, the "innocent owner" defense is not available.⁷¹ The claimant had knowledge of the illegal activities, and therefore, the court did not allow the claimant to assert an "innocent owner" defense because he could not establish *both* lack of knowledge *and* lack of consent.⁷²

B. *The Third Circuit's Approach to the Innocent Owner Defense Under § 881(a)(6) and (7)*

Before examining the precise issue the Third Circuit addressed in *United States v. One 1973 Rolls Royce*, it is important to understand the context in which that issue arose. The Third Circuit focused its analysis in *One 1973 Rolls Royce* on the seminal case *United States v. 6109 Grubb Road*.⁷³ *6109 Grubb Road* involved a civil forfeiture of two parcels of property pursuant to § 881(a)(7).⁷⁴ The claimant's husband had used both parcels of

70. *Lot 111-B*, 902 F.2d at 1445 (quoting Joint Explanatory Statement, *supra* note 69, 124 CONG. REC. 34,670, 34,671 (1978), reprinted in 1978 U.S.C.A.N. 9518, 9522-23).

71. *Id.* (emphasis omitted). The court acknowledged that the purpose of the forfeiture provision is to seize all property that has a "substantial connection" to the illegal activity. *Id.* The court reasoned that this policy would be undercut if claimants who had knowledge of the illegal drug activity were allowed to assert an "innocent owner" defense. *Id.*

72. *See id.* at 1445; *see also* *United States v. 10936 Oak Run Circle*, 9 F.3d 74, 76 (9th Cir. 1993) (stating that as applied to post-illegal-act transferee, § 881(a)(6) bars claimant from prevailing if he or she had knowledge of the origin of the property). In *10936 Oak Run Circle*, Eddie Edwards purchased the defendant property on January 5, 1987. *Id.* at 75. Edwards was identified as a member of an organization that distributed cocaine and PCP. *Id.* Edwards was said to have no legitimate source of income and to have made the payments on the property from the sale of narcotics. *Id.* The claimants asserted that, in forgiveness of a debt that Edwards owed them, Edwards transferred the property to the claimants. *Id.* The claimants asserted in their affidavits that this agreement to forgive the debt took place on May 18, 1990. *Id.* The claimants moved into the property on July 19, 1990; the government served a warrant on the property on July 20, 1990; Edwards executed a deed to the property in favor of the claimants on August 6, 1990; the deed was recorded on August 8, 1990; and the claimants asserted a claim to the property as innocent owners on August 8, 1990. *Id.* The Ninth Circuit vacated the district court's judgment of forfeiture and remanded the case to determine if the claimants had "knowledge of the origin of the property in drug proceeds." *Id.* at 76. The court explained that this knowledge includes such that "puts the owner on notice that he [or she] should inquire further." *Id.* Finally, the court stated that "innocence is incompatible with knowledge," thereby applying a conjunctive interpretation to the "knowledge or consent" language of § 881(a)(6). *Id.*

73. 886 F.2d 618 (3d Cir. 1989).

74. *Id.* at 620. In *6109 Grubb Road*, the government filed civil forfeiture proceedings under § 881(a)(7), seeking to have two parcels of real property seized and forfeited. *Id.* The claimant, Jane DiLoreto, resided at the Grubb Road location with her husband Richard and their five children. *Id.* The government instituted forfeiture proceedings after an investigation disclosed that Richard DiLoreto used both parcels to further the trafficking of illegal narcotics. *Id.* The proceedings were stayed pending the outcome of Richard's trial. *Id.* Richard was con-

property to further the trafficking of illegal substances.⁷⁵ Despite possessing an ownership interest in the property at the time of the illegal transaction and conceding that probable cause existed to believe that the premises had been used to commit or facilitate narcotics violations, the claimant contended that she neither had knowledge nor consented to the use of the property for facilitating drug violations.⁷⁶ The district court concluded that she did not prove that she had no knowledge of her husband's drug activities.⁷⁷ Therefore, the court had to decide whether Congress intended for knowledge alone to be sufficient to lose the "innocent owner" defense or whether the claimant could demonstrate that even if she had knowledge, she did not consent to the illegal activities, thus entitling her to the "innocent owner" defense.⁷⁸

In deciding this issue, the Third Circuit examined the legislative history of § 881(a)(6) because the legislative history of § 881(a)(7) was "sparse."⁷⁹ The court specifically noted that Congress had stated, " '[d]ue to the penal nature of forfeiture statutes, it is the intent of these provisions that property would be forfeited only if there is a substantial connection between the property and the underlying criminal activity which the statute seeks to prevent.' "⁸⁰ The court also examined the language of the statute relying on the canons of statutory construction that require the

victed of conspiring to possess with the intent to distribute and distributing cocaine, using the telephone to facilitate the conspiracy, and failing to report income received from the sale of the cocaine. *Id.*

75. *Id.*

76. *Id.* Pursuant to the forfeiture provisions of § 881, the court will order forfeiture once the government establishes probable cause unless the claimant establishes innocent ownership. *Id.* at 623.

77. *Id.* at 623. The Third Circuit found that the district court improperly relied on hearsay depositions in determining that the claimant could not prove that she lacked knowledge of the illegal activities. *Id.* Ultimately, the Third Circuit remanded the case to the district court to determine if the claimant could prove her innocent ownership by a preponderance of the evidence. *Id.*

78. *Id.* at 623-24.

79. *Id.* at 624-25. In resolving this issue of first impression, the court noted that the legislative history of § 881(a)(7) referred to § 881(a)(6) and therefore it was appropriate to look to § 881(a)(6)'s legislative history. *Id.* For a further discussion of the legislative history of § 881, see *supra* notes 1, 5, 7 and *infra* notes 80, 104, 115 accompanying text.

80. *Id.* at 625 (quoting Joint Explanatory Statement *supra* note 69, 124 CONG. REC. 34,670, 34,671 (1978), reprinted in 1978 U.S.C.C.A.N. 9518, 9522). The Third Circuit also noted that the same report stated, " 'the property would not be subject to forfeiture unless the owner of such property *knew or consented* to the fact that [the property was related to illegal drug transactions].' " *Id.* at 625 n.4 (emphasis added) (citation omitted). Although this statement suggests that property would be subject to forfeiture if the owner knew (without consenting) that the property was related to drug transactions, the court did not appear to consider this factor in its analysis. See 124 CONG. REC. 34,670, 34,672 (1978). In contrast to the Third Circuit, the Ninth Circuit relied on the same statement in *United States v. Lot 111-B*, 902 F.2d 1443 (9th Cir. 1990) (*per curiam*), and concluded that a conjunctive approach was appropriate. *Id.* at 1445. For a further discussion of the Ninth Circuit's analysis, see *supra* notes 65-72 and accompanying text.

court to give effect to every word.⁸¹ Finally, the Third Circuit looked to precedent and found that only one other district court had addressed whether the “knowledge or consent” phrase in § 881(a)(7) established independent defenses.⁸² The United States District Court for the Eastern District of New York in *United States v. 171-02 Liberty Avenue*⁸³ concluded that the statute’s language rendered two defenses, *either* lack of knowledge *or* lack of consent.⁸⁴ Based on its findings, the Third Circuit, adopting a

The Third Circuit also acknowledged the remarks of two Senators with regard to the amendment to § 881(a)(6). *6109 Grubb Rd.*, 886 F.2d at 625. Senator Nunn noted that Congress added the innocent owner provision “to make it clear that a bona fide party who has no knowledge or consent to the property he owns having been derived from an illegal transaction, that party would be able to establish that fact under this amendment and forfeiture would not occur.” *Id.* at 625 (quoting 124 CONG. REC. 23,057 (1978)). Additionally, the court noted Senator Culver’s statement:

[T]he original language could have been construed to reach properties traceable to the illegal proceeds but obtained by an innocent party without knowledge of the manner in which the proceeds were obtained. The original language is modified in the proposed amendment in order to protect the individual who obtains ownership of proceeds with no knowledge of the illegal transaction.

Id. (quoting 124 CONG. REC. 23,056 (1978)).

81. *6109 Grubb Rd.*, 886 F.2d at 625-26. The court explained that “in construing a statute we are obliged to give effect, if possible, to every word Congress used.” *Id.* (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979)); see 2A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 46.06, at 119-20 (5th ed. 1992) (“It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute.’ A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . .”) (footnotes omitted). Moreover, canons of statutory construction ordinarily suggest that terms connected by a disjunctive must be given their separate meanings unless the context dictates otherwise. *6109 Grubb Rd.*, 886 F.2d at 626 (citing *Reiter*, 442 U.S. at 339); see 1A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 21.14, at 129 (5th ed. 1993) (“[T]he disjunctive ‘or’ usually . . . separates words or phrases in the alternate relationship. . . .”). *But see id.* (“[H]owever, the word [‘or’] can be interpreted as a conjunctive in a given context. . . . [I]t is important not to read the word ‘or’ too strictly, where to do so would render the language of the statute dubious.”) (footnotes omitted).

82. *6109 Grubb Rd.*, 886 F.2d at 626. The court cited *United States v. 171-02 Liberty Avenue*, 710 F. Supp. 46 (E.D.N.Y. 1989). *6109 Grubb Rd.*, 886 F.2d at 626. *Liberty Avenue* involved a civil forfeiture proceeding against property in a high drug-trafficking area. *Liberty Ave.*, 710 F. Supp. at 47. The owner of the property conceded that he had knowledge of drug trafficking on his property, yet argued that he could assert an “innocent owner” defense by establishing that he did not consent to such activity. *Id.* at 49. The court analyzed the statute under the canons of statutory construction and adopted a disjunctive interpretation of Congress’ use of the word “or.” *Id.* at 50. The disjunctive interpretation gave the words separated by “or” independent meaning. *Id.* (citations omitted). Thus, the *Liberty Avenue* court concluded that the statute created an affirmative defense where the illegal acts giving rise to the forfeiture transpired “without the knowledge *or* without the consent of the owner.” *Id.* at 50.

83. 710 F. Supp. 46 (E.D.N.Y. 1989).

84. *Id.* at 50. For a discussion of the court’s analysis, see *supra* note 82.

disjunctive approach, concluded that a claimant can establish innocent ownership by proving that the illegal use of the property occurred *either* without her knowledge *or* without her consent.⁸⁵

C. *Approaches to § 881(a)(4)(C)*

At the time the Third Circuit addressed the proper interpretation of the "innocent owner" defense of § 881(a)(4)(C), no other circuit court, including the Third Circuit, had expressly confronted the proper interpretation of "or" as used in this section.⁸⁶ Several district courts, however, had evaluated the "innocent owner" defense under § 881(a)(4)(C). For example, in *United States v. 1977 Porsche Carrera 911*,⁸⁷ the United States District Court for the Western District of Texas held that under § 881(a)(4)(C), the claimant has the "burden of establishing that he had no knowledge *and* was not willfully blind to the fact that the [vehicle] was used to facilitate the sale of controlled substances," thereby adopting a conjunctive interpretation of § 881(a)(4)(C).⁸⁸ The court reasoned that "[t]he purpose of the willful blindness theory is to impose criminal liability on people who, recognizing the likelihood of wrongdoing, nonetheless consciously refuse to take basic investigatory steps."⁸⁹ In *1977 Porsche Carrera 911*, the claimant was a criminal defense lawyer asserting an ownership

85. *6109 Grubb Rd.*, 886 F.2d at 626. Several commentators have agreed with this disjunctive interpretation of the "knowledge or consent" language of § 881(a)(6). See Dunne, *supra* note 11, at 85 ("knowledge and consent must receive independent consideration"); Loomba, *supra* note 11, at 492 (advocating disjunctive interpretation and stating "failure to establish 'lack of knowledge' [should] not preclude a claimant from innocent owner status"); O'Brien, *supra* note 2, at 550 (advancing disjunctive approach and "requirement that the owner show he [or she] took 'some overt action' against the illegal activity in order to establish a lack of consent"). *But see* Blacher, *supra* note 2, at 503 (arguing that appropriate interpretation is that claimants must prove lack of knowledge and lack of consent to prevail under "innocent owner" defense).

86. See *United States v. One 1989 Jeep Wagoneer*, 976 F.2d 1172 (8th Cir. 1992). In *United States v. One 1989 Jeep Wagoneer*, the United States Court of Appeals for the Eighth Circuit expressly declined to decide whether a claimant must prove lack of knowledge and lack of consent to prevail under an "innocent owner" defense of § 881(a)(4)(C). *Id.* at 1174 n.1. Because the government conceded that the claimant lacked knowledge and did not raise an issue as to consent, the court found that there was only an issue as to the "willful blindness" of the claimant. *Id.* The court "believe[d] that the concept of willful blindness presupposes the absence of knowledge and consent." *Id.* The opinion focused on the appropriate standard for determining whether a claimant is "willfully blind," and did not engage in the debate between the disjunctive or conjunctive interpretation of § 881(a)(4)(C). *Id.* at 1174-76.

87. 748 F. Supp. 1180 (W.D. Tex. 1990).

88. *Id.* at 1185 (emphasis added); see *United States v. One 1988 Honda Accord*, 735 F. Supp. 726, 730 (E.D. Mich. 1990) (stating that even if claimant did not have knowledge of illegal use of vehicle, claimant was willfully blind with respect to that illegal use and, therefore, vehicle was forfeited under § 881(a)(4)(C)).

89. *1977 Porsche Carrera*, 748 F. Supp. at 1185 (citations omitted).

interest in the vehicle as partial satisfaction of legal fees.⁹⁰ The court concluded that even if the claimant did not have actual knowledge at the time he contracted to receive the car, he was subsequently willfully blind because he did not investigate thereafter into the origin of the vehicle.⁹¹ On the other hand, in *United States v. A Single Story Double Wide Trailer*,⁹² the United States District Court for the District of Delaware stated: “[The claimant] bears the burden of pleading facts that, if proven at trial, would show that if the trailer were used for illicit purposes, it was without his knowledge or without his consent,” thereby adopting a disjunctive interpretation of § 881(a)(4)(C).⁹³

IV. THE THIRD CIRCUIT APPROACH TO INTERPRETING THE INNOCENT OWNER DEFENSE OF § 881(a)(4)(C)

A. *Facts*: United States v. One 1973 Rolls Royce

The Third Circuit, for the first time, interpreted § 881(a)(4)(C) and its “willful blindness” provision in *United States v. One 1973 Rolls Royce*.⁹⁴ The case arose when the government seized attorney Oscar B. Goodman’s Rolls Royce automobile.⁹⁵ Nicodemo Scarfo, Sr., a co-defendant of one of Goodman’s former clients, gave the car to Goodman as reimbursement for the \$16,000 that Goodman paid to the Four Seasons Hotel in Philadel-

90. *Id.* at 1182. The claimant had received the automobile from a client in partial payment for legal services the claimant rendered on behalf of the previous owner of the automobile. *Id.* at 1182. The previous owner had been arrested and charged with serious drug offenses. *Id.*

91. *Id.* at 1185-86. The court noted that the claimant “at least had the responsibility to take the basic investigatory steps necessary to determine that his fees were not being satisfied with a major instrumentality of the crime charged against his client.” *Id.* at 1186.

92. 727 F. Supp. 149 (D. Del. 1989).

93. *Id.* at 152 (emphasis added). In *A Single Story Double Wide Trailer*, the claimant, Charles Peterson, sought to have set aside an order of default judgment and decree of forfeiture entered against the defendant property. *Id.* at 150-51. The initial complaint alleged that the defendant property “either constituted proceeds traceable to or was intended to facilitate illegal drug transactions conducted by Eric Batson.” *Id.* at 150. Batson, however, stated that the trailer belonged to Peterson. *Id.* Peterson accepted a service of summons and complaint concerning the trailer, yet he never responded to any requests from the government. *Id.* at 151. Subsequently, the default judgment was entered. *Id.* In response to the claimant’s argument that the default judgment should be set aside, the court acknowledged that it had discretion to do so if, *inter alia*, the claimant has a meritorious defense. *Id.* In this context, the court explained that to prevail, Peterson would have to be able to prove at trial that the trailer was used without his knowledge or without his consent. *Id.* The court found that Peterson had failed to meet his burden of establishing the existence of a meritorious defense and denied the claimant’s motion. *Id.* at 152, 155.

94. 43 F.3d 794 (3d Cir. 1994). This was a case of first impression for the Third Circuit. *Id.* For a discussion of how the other circuit courts addressed § 881(a)(4)(C), see *supra* note 86 and accompanying text.

95. *Id.* at 799. Oscar B. Goodman is a criminal defense attorney who has represented clients throughout the country. *Id.*

phia for a party given by Scarfo's son.⁹⁶ The party was in celebration of Scarfo, Sr.'s acquittal at a murder trial in which Goodman was one of the defense counsel.⁹⁷ Subsequently, the Federal Bureau of Investigation (FBI) seized the Rolls Royce pursuant to § 881(a)(4), asserting that members of the Scarfo family used the vehicle to transport people to and from meetings related to the Scarfo family's drug distribution activities.⁹⁸ Accordingly, Goodman filed a claim asserting the "innocent owner" defense pursuant to § 881(a)(4)(C).⁹⁹ Goodman alleged that he did not know about, did not consent to, and was not willfully blind to the car's use in drug transactions.¹⁰⁰

B. District Court Analysis

The United States District Court for the Eastern District of Pennsylvania found that Goodman did not prove lack of willful blindness and that alone was "sufficient to defeat his claim of innocent ownership" under § 881(a)(4)(C).¹⁰¹ The district court first examined the meaning of "will-

96. *Id.* Nicodemo Scarfo, Sr., the one time reputed head of the Philadelphia branch of La Cosa Nostra (LCN), purchased the car in January of 1986. *Id.* at 799, 802. He registered the car in Florida to Anthony Gregorio, an associate of Scarfo who lived in Fort Lauderdale. *Id.* at 802.

97. *Id.* at 799.

98. *Id.* at 799-800. The relevant language of § 881(a)(4) provides for forfeiture for "[a]ll conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1), (2), or (9) . . ." 21 U.S.C. § 881(a)(4) (1988).

The Rolls Royce was subject to forfeiture under § 881(a)(4) because the vehicle "was used on two occasions to facilitate drug trafficking." *One 1973 Rolls Royce*, 43 F.3d at 802. The first occasion was in early 1986 when Gregorio drove Scarfo and others to meet a drug dealer from Philadelphia involved in trafficking a raw material used to manufacture methamphetamine. *Id.* At that first meeting, the Philadelphia drug dealer promised to pay Scarfo \$200,000 in "street taxes" so that Scarfo would not interfere with his drug operation. *Id.* The second occasion was in August of 1986 when Scarfo called a meeting of his LCN family members in Fort Lauderdale. *Id.* Gregorio used the vehicle to pick up a member of the Scarfo LCN family from the airport. *Id.* The family member brought \$50,000 in "street taxes" from drug trafficking in Philadelphia. *Id.*

In 1987, the government initiated a series of prosecutions relating to the Scarfo family. *Id.* Goodman was involved as counsel, representing one of the co-defendants who was accused of engaging in an extortion scheme. *Id.* During that trial, Goodman forced a key witness to admit that the Scarfo family engaged in drug trafficking. *Id.*

99. *One 1973 Rolls Royce* 43 F.3d at 800. For the relevant text of § 881(a)(4)(C) providing for the "innocent owner" defense, see *infra* note 100.

100. *Id.* Section 881(a)(4)(C), the basis for which Goodman asserted his "innocent owner" defense provides that "no conveyance 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, consent, or willful blindness of the owner." 21 U.S.C. § 881(a)(4)(C) (1988).

101. *United States v. One 1973 Rolls Royce*, 817 F. Supp. 571, 572 (E.D. Pa. 1993).

ful blindness," as used in § 881(a)(4)(C), in light of other courts' interpretations and in light of Congress' intent.¹⁰² The district court stated: "Lack of willful blindness sufficient to prevail as an innocent owner under § 881(a)(4)(C) means that a claimant must show that he or she has not ignored a signal or suggestion that a vehicle might have been used to facilitate the trafficking of illegal drugs."¹⁰³ The court found that its definition of "willful blindness" comported with Congress' intent in using that language in § 881(a)(4)(C).¹⁰⁴ The court also acknowledged that its interpretation of "willful blindness" corresponded with the historical use of forfeiture generally.¹⁰⁵ Pursuant to its interpretation of "willful blindness," the court concluded that Goodman did not prove that he was willfully blind.¹⁰⁶

Next, the district court questioned whether, after failing to establish lack of willful blindness, Goodman lost his "innocent owner" status or whether he had a "second bite at the apple" by trying to establish either

102. *Id.* at 578-79.

103. *Id.* at 578; accord *United States v. One 1989 Jeep Wagoneer*, 976 F.2d 1172, 1175 (8th Cir. 1992) ("[W]illful blindness involves an owner who deliberately closes his eyes to what otherwise would have been obvious and whose acts or omissions show a conscious purpose to avoid knowing the truth."); *United States v. 1977 Porsche Carrera 911*, 748 F. Supp. 1180, 1186 (W.D. Tex. 1990) (stating that under willful blindness standard, attorney claimant "at least has the responsibility to take the basic investigatory steps necessary to determine that his fees were not being satisfied with a major instrumentality of the crime charged against his client"). For a further discussion of *United States v. 1977 Porsche Carrera 911*, see *supra* notes 87-91 and accompanying text.

104. *One 1973 Rolls Royce*, 817 F. Supp. at 578. The court noted that the bill was initially introduced in the House of Representatives without the willful blindness language, but members of Congress thought that the section "would lead to a 'look-the-other-way' defense." *Id.* (quoting 134 CONG. REC. 24,086 (1988) (statement of Rep. Archer)). The court recognized that this possibility led to the addition of the willful blindness language. *Id.* Representative Young described the additional "willful blindness" language as "address[ing] the cases of individuals who have demonstrated a conscious purpose to avoid the truth." *Id.* (quoting 134 CONG. REC. 33,288 (1988)). Additionally, Representative Jones stated: "[T]hese provisions will provide significant legal rights for the innocent, but still ensure that the guilty will be punished." *Id.* (quoting 134 CONG. REC. 33,313 (1988)).

105. *Id.* (recognizing that from colonial times until recently, common law allowed forfeiture of property used in commission of crimes and no defense existed for innocent owners). The court further explained that its interpretation of the "willful blindness" language "does the least offense to a protection that would-be innocent owners historically did not enjoy at common law." *Id.* at 579. For a list of commentaries discussing the history of forfeiture, see *supra* note 2.

106. *Id.* at 579. The court noted that Goodman was involved in the federal drug trial in 1987 of Scarfo, Sr. and others. *Id.* The court stated that although that case ended in an acquittal, "that does not prevent Mr. Goodman from being on notice to the possibility of the use of the Rolls Royce to facilitate drug trafficking." *Id.* The court further explained that the 1987 federal trial, combined with information elicited by Goodman during cross examination regarding the LCN's involvement in drug trafficking in another trial, led to the court's conclusion that Goodman failed to meet his burden of proving lack of willful blindness. *Id.* at 580-81.

lack of knowledge or lack of consent.¹⁰⁷ Although the court recognized that *6109 Grubb Road* would allow a claimant to prevail by establishing either lack of knowledge or lack of consent, the court concluded that *6109 Grubb Road* did not apply to Goodman's case.¹⁰⁸ First, the court acknowledged that *6109 Grubb Road* interpreted § 881(a)(7), which lacked the willful blindness language, whereas the case at bar involved § 881(a)(4)(C), which specifically included the "willful blindness" language.¹⁰⁹ The court recognized: "The additional words 'willful blindness' cannot be given effect if the innocent ownership defense of § 881(a)(4)(C) is interpreted the way the Third Circuit interpreted the real property innocent ownership defense of § 881(a)(7) in *6109 Grubb Road*."¹¹⁰ Therefore, the court concluded that § 881(a)(4)(C) requires that once a claimant fails to prove a lack of willful blindness, the claimant can no longer prevail as an innocent owner.¹¹¹

C. *The Third Circuit's Analysis of the Proper Interpretation of § 881(a)(4)(C).*

Goodman's appeal presented two issues to the Third Circuit. First, the Third Circuit had to construe § 881(a)(4)(C)'s "willful blindness" language.¹¹² Second, the Third Circuit had to decide whether a claimant could obtain relief under the "innocent owner" defense notwithstanding a

107. *Id.* at 580.

108. *Id.* For a further discussion of *6109 Grubb Road*, see *supra* notes 73-85 and accompanying text.

109. *Id.*

110. *Id.* at 581. The court explained that if it were to interpret § 881(a)(4)(C) in the disjunctive, then the "willful blindness" language would represent "nothing more than a useless third bite at the apple." *Id.* Additionally, the court reasoned that Congress "surely" did not intend to add a more stringent standard of lack of guilty knowledge to a provision that already allowed a claimant to prevail by satisfying one of two lesser standards. *Id.*

111. *Id.*

112. *United States v. One 1973 Rolls Royce*, 43 F.3d 794, 806-12 (3d Cir. 1994). The Third Circuit adopted the definition of willful blindness that it had previously set forth in *United States v. Caminos*, 770 F.2d 361, 365 (3d Cir. 1985). *One 1973 Rolls Royce*, 43 F.3d at 808-09. *Caminos* involved a defendant convicted of knowingly importing cocaine in violation of 21 U.S.C. § 952(a). *Caminos*, 770 F.2d at 362. The defendant attacked the jury instruction on the grounds that the judge did not explain to the jury that to find the defendant guilty of "knowingly" importing cocaine, they must find that the "defendant himself was subjectively aware of the high probability of the fact in question, and not merely that a reasonable man would have been aware of the probability." *Id.* at 365. The Third Circuit, however, held that the district court's instruction, which focused on the defendant's subjective awareness, satisfied the "deliberate ignorance" charge as set forth in *United States v. Jewell*, 532 F.2d 697, 704 (9th Cir.), *cert. denied*, 426 U.S. 951 (1976). *Caminos*, 770 F.2d at 365 (citing *Jewell*, 532 F.2d at 704 (stating that knowledge requirement, aside from "positive knowledge," is met if court instructs, and jury finds, "beyond a reasonable doubt, that if the defendant was not actually aware . . . his ignorance in that regard was solely and entirely a result of . . . a conscious purpose to avoid learning the truth"). Therefore, the application of the deliberate ignorance standard in *Caminos* resulted in the defendant satisfying the requirement of "knowingly" importing cocaine. *Id.* at 366.

The *One 1973 Rolls Royce* court noted that under the deliberate ignorance definition of *Caminos*, "willful blindness is a subjective state of mind that is deemed to satisfy a scienter requirement of knowledge." *One 1973 Rolls Royce*, 43 F.3d at 808. Therefore, in adopting the *Caminos* standard of willful blindness, the *One 1973 Rolls Royce* court employed a subjective test and held that the deliberate ignorance/willful blindness requirement is met only if "the defendant himself was subjectively aware of the high probability of the fact in question, and not merely that a reasonable man would have been aware of the probability." *Id.* (quoting *Caminos*, 770 F.2d at 365).

The court continued, stating that it was not apparent whether the district court applied the subjective standard or an objective standard to Goodman's case and therefore remanded the issue to the trial court with orders that the trial court apply the subjective standard. *Id.* at 810. Moreover, the court mandated that on remand,

Goodman must demonstrate that he was not subjectively aware of a high probability that the Rolls Royce either was used or was going to be used to facilitate an illegal drug transaction, or, if he was, that he took affirmative steps reasonable under the circumstances to determine whether in fact the vehicle was going to be or had been so used.

Id. at 812. The court noted that the mere fact that Goodman knew Scarfo was accused of drug trafficking, would not, by itself show that Goodman was aware of a high probability that the property was tainted. *Id.*

Although the majority could not determine whether the district court employed a subjective inquiry into Goodman's willful blindness, the dissent stated that the district court did apply a subjective test. *Id.* at 821 (Nygaard, J., dissenting). The district court's willful blindness standard read:

Lack of willful blindness sufficient to prevail as an innocent owner under § 881(a)(4)(C) means that a claimant must show that he or she has not ignored a signal or suggestion that a vehicle might have been used to facilitate the trafficking of illegal drugs [O]nce the claimant chooses to ignore the signal, he or she can no longer establish lack of willful blindness to the prior use of the vehicle that would subject it to forfeiture.

Id. (Nygaard, J., dissenting) (quoting *United States v. One 1973 Rolls Royce*, 817 F. Supp. 571, 578 (E.D. Pa. 1993)). In his dissent, Judge Nygaard concluded that he would affirm the district court's finding of willful blindness because the district court employed the appropriate test and found that Goodman ignored obvious signals that the Rolls Royce was tainted and subject to forfeiture when he acquired it. *Id.* at 821 (Nygaard, J., dissenting).

There is a split among the circuit courts, however, with regard to the meaning of "willful blindness." Compare *One 1973 Rolls Royce*, 43 F.3d at 808-09 (adopting subjective standard for willful blindness) and *United States v. One 1989 Jeep Wagoneer*, 976 F.2d 1172, 1175 (8th Cir. 1992) (stating that willful blindness "involves an owner who deliberately closes his eyes to what otherwise would have been obvious and whose acts or omissions show a conscious purpose to avoid knowing the truth") with *United States v. One 1980 Bertram 58' Motor Yacht*, 876 F.2d 884, 888-89 (11th Cir. 1989) (endorsing objective due care standard by requiring owner to do "everything that a truly innocent owner reasonably could be expected to do to insure that his vessel was not to be used illegally"). The Third Circuit in *One 1973 Rolls Royce* also recognized the "willful blindness" debate among scholars in that some believe that willful blindness is merely a surrogate for knowledge, while others find that it is a less culpable state of mind. *One 1973 Rolls Royce*, 43 F.3d at 808 n.12 (citing *United States v. Jewell*, 532 F.2d 697, 706 (9th Cir.) (Kennedy, J., dissenting) ("There is disagreement as to whether reckless disregard for the existence of a fact constitutes willful blindness or some lesser degree of culpability There is also the question of whether to use an 'objective' test based on the reasonable man, or to consider the defendant's subjective belief as dispositive."), *cert. denied*, 426 U.S. 951 (1976)). The Third Circuit found the following

finding that the claimant was willfully blind.¹¹³ The remainder of this Note discusses the Third Circuit's analysis of the second issue.

1. 6109 Grubb Road is *Controlling*

The Third Circuit began its analysis by stating that although its prior decision in *6109 Grubb Road* involved an "innocent owner" defense under § 881(a)(7), and *One 1973 Rolls Royce* involved an "innocent owner" defense under § 881(a)(4)(C), the rationale in *6109 Grubb Road* was equally applicable to *One 1973 Rolls Royce*.¹¹⁴ The court articulated two reasons for treating the cases similarly. First, the court noted that even though "willful blindness" appears only in § 881(a)(4)(C), the legislative history of § 881 signalled that the "innocent owner" defenses are "virtually identical."¹¹⁵ Therefore, the court concluded that the constructions should be

scholarly comments insightful regarding the debate over the appropriate interpretation of "willful blindness": ROLLIN M. PERKINS, *CRIMINAL LAW* 776 (2d ed. 1969) ("One with a deliberate antisocial purpose in mind . . . may deliberately 'shut his [or her] eyes' to avoid knowing what would otherwise be obvious to view. In such cases, so far as the criminal law is concerned, the person acts at his peril in this regard, and is treated as having 'knowledge' of the facts as they are ultimately discovered to be."); GLANVILLE WILLIAMS, *CRIMINAL LAW, THE GENERAL PART* § 57, at 159 (2d ed. 1961) ("To the requirement of actual knowledge there is one strictly limited exception [T]he rule is that if a party has his [or her] suspicion aroused but then deliberately omits to make further enquiries, because he [or she] wishes to remain in ignorance, he [or she] is deemed to have knowledge. The rule that willful blindness is equivalent to knowledge is essential and is found throughout the criminal law."); Robin Charlow, *Wilful Ignorance and Criminal Culpability*, 70 *TEX. L. REV.* 1351, 1429 (1992) ("Although wilful ignorance is usually employed to satisfy a statutory mens rea of knowledge, the most prevalent definitions of the doctrine describe a state of mind that is . . . not as culpable as knowledge."); Ira P. Robins, *The Ostrich Instruction: Deliberate Ignorance as a Criminal Mens Rea*, 81 *J. CRIM. L. & CRIMINOLOGY* 191, 195 (1990) ("Deliberate ignorance constitutes recklessness, rather than knowledge."); Edwards, Comment, *The Criminal Degrees of Knowledge*, 17 *MOD. L. REV.* 294, 298 (1954) ("For well nigh a hundred years, it has been clear from the authorities that a person who deliberately shuts his eyes to an obvious means of knowledge has sufficient mens rea for an offense based on such words as . . . 'knowingly.'"). *One 1973 Rolls Royce*, 43 F.3d at 808 n.12.

113. *One 1973 Rolls Royce*, 43 F.3d at 800. The court concluded that a disjunctive interpretation of the "innocent owner" defense of § 881(a)(4)(C) was appropriate; therefore, a claimant could obtain relief under § 881(a)(4)(C) despite a finding that the claimant was willfully blind. *Id.* at 814. For a discussion of the Third Circuit's analysis in deciding this issue, see *infra* notes 114-19 and accompanying text.

114. *Id.* at 812-13. For a discussion of the Third Circuit's analysis in *6109 Grubb Road*, see *supra* notes 73-85 and accompanying text. For the relevant text of § 881(a)(7), see *supra* note 6. For the relevant text of § 881(a)(4)(C), see *supra* note 100.

115. *Id.* at 809. The court found the following remarks of members of Congress relevant: (1) Representative Shaw stated that the § 881(a)(4)(C) defense is "virtually identical" to the defense for innocent owners under § 881(a)(6) and (7) *id.* (quoting 134 *CONG. REC.* 33,290 (1988)); and (2) Representative Young stated " [t]he concept of willful blindness is essentially part of the proof of lack of knowledge. For this reason, the defense for innocent owners of conveyances seized for drug related offenses is virtually identical to the existing defenses for

consistent—interpret “or” in all the subsections disjunctively so as to keep the defenses “virtually identical.”¹¹⁶ Second, the court reasoned that because the *6109 Grubb Road* court based its decision on the language and structure of § 881(a)(7), placing emphasis on the use of the traditionally disjunctive word “or,” *One 1973 Rolls Royce* mandated the same result in that § 881(a)(4)(C), with the exception of the “willful blindness” language, contained identical language and structure as § 881(a)(7).¹¹⁷ Therefore, the court concluded that “the innocent owner defense of § 881(a)(4)(C) is available to any owner who can prove any one of either a lack of knowledge, lack of consent, or lack of willful blindness.”¹¹⁸ In light of this conclusion, even if Goodman could not prove lack of willful blindness, he would still be entitled to innocent owner status if he could prove that he did not consent to the Rolls Royce’s use in facilitating drug transactions.¹¹⁹

2. Problems Inherent in Adhering to 6109 Grubb Road

The Third Circuit acknowledged that an application of *6109 Grubb Road* to the facts of *One 1973 Rolls Royce* on remand inevitably would en-

innocent owners of real property . . . or other things of value” *Id.* (quoting 134 CONG. REC. 33,290 (1988)).

116. *Id.* at 813.

117. *Id.* The court noted that the mere addition of the language “willful blindness” has no impact on the construction of the section when the other language and structure remains the same. *Id.* The court, however, did not mention the underlying factual difference between the two cases that might mandate a different analysis. *6109 Grubb Road* involved a pre-illegal-act owner while *One 1973 Rolls Royce* involved a post-illegal-act transferee. For a discussion of courts that have made this distinction, see *supra* notes 44-64 and accompanying text.

118. *Id.*

119. *Id.* at 814. In adopting the *6109 Grubb Road* approach, the court rejected the government’s argument that such an interpretation would lead to the “absurd result that every owner could establish an innocent owner defense.” *Id.* at 813. The court’s rejection of the government’s argument stemmed from the court’s and the government’s differing definitions of willful blindness. *Id.* The government assumed that knowledge and willful blindness are mutually exclusive. *Id.* The government argued:

[I]f the court finds that the owner *knew* that the conveyance was used to facilitate drug transactions, it must logically conclude that the owner was *not* willfully blind thereto; concomitantly, . . . if the court finds that the owner was willfully blind to the conveyance having been used to facilitate drug transactions, it must necessarily conclude that the owner lacked knowledge thereof.

Id. In response, the court noted that the government’s premise—that knowledge and willful blindness are mutually exclusive—is false. *Id.* The court referred to its earlier discussion of willful blindness and acknowledged that “proof of willful blindness has been sufficient to prove knowledge in the context of § 881(a)(6) and (7)” and that such proof is also sufficient to establish knowledge in the context of § 881(a)(4)(C). *Id.* Therefore, “an owner’s failure to prove a lack of willful blindness *simultaneously* amounts to a failure to prove lack of knowledge for purposes of the statute.” *Id.* For a further discussion of the court’s interpretation of willful blindness, see *supra* note 112.

able Goodman to prevail in that Goodman did not own the car at the time of the drug transactions.¹²⁰ Therefore, by definition, he could not have consented to the vehicle's use in the illegal activities.¹²¹ Because he was a post-illegal-act transferee, he was not in a position to prevent such use.¹²² Thus, even if the government established that Goodman knew about, or was willfully blind to the car's past improper use at the time he obtained ownership of it, "he could not have consented to such improper use" and would prevail under an "innocent owner" defense.¹²³

The court defended the problematic after-effect of its decision—that a post-illegal-act transferee would always prevail with an "innocent owner" defense—by pointing to the "nearly impenetrable language of the statute" and the intervening Supreme Court decision *92 Buena Vista Avenue*.¹²⁴ The court noted that the *6109 Grubb Road* panel did not mention the possible effect of its interpretation on post-illegal-act transferees because at the time *6109 Grubb Road* was decided,

it was generally assumed that because of the "relation back" provision of the forfeiture statute, 21 U.S.C. § 881(h), which vested title in the United States at the moment of the illegal act, a post-illegal-act transferee could never have better title than the

120. *Id.* at 814.

121. *Id.*; see United States v. 6640 S.W. 48th St., 41 F.3d 1448, 1453 (11th Cir. 1995) (criticizing Third Circuit decision in *One 1973 Rolls Royce*, specifically stating, "[c]lassifying post-illegal act transferees as innocent owners because they had no opportunity to consent creates a sweeping grant of immunity from forfeiture and a gaping loophole in an intentionally comprehensive forfeiture policy"). For a discussion of the relevant facts of *One 1973 Rolls Royce*, see *supra* notes 95-100 and accompanying text.

122. *One 1973 Rolls Royce*, 43 F.3d at 814. The court also acknowledged that Goodman could prevail on remand if he could prove that he did not know the car was being used in an illegal manner at the time of its use, or that if he knew, he took all reasonable steps to prevent it. *Id.*

123. *Id.*

124. *Id.* The court explained:

Filled with negatives, [§ 881(a)(7)'s] language is nearly impenetrable. The difficulty with the *6109 Grubb Road* linguistic interpretation is demonstrated by removing two of the negatives (which should not change the meaning of the statute) and the burden of proof language (which merely indicates who has to satisfy the requirements of the statute without indicating what the party with the burden must show);

[] property shall be forfeited under [§ 881(a)(7)] to the extent of an interest of an owner, by reason of any act or omission . . . committed or omitted with[] the knowledge or consent of the owner.

Parsed with the negatives and the burden of proof language excised, the statute provides that an act or omission committed under either of the two conditions will preclude an innocent owner defense. If an act is committed with knowledge, the vehicle is forfeited, and if it is committed with consent, it is forfeited. Thus, a conjunctive, rather than disjunctive, reading seems plausible.

Id. at 815. For the unaltered text of § 881(a)(7), see *supra* note 6.

United States and could never benefit from the innocent owner defense.¹²⁵

The *One 1973 Rolls Royce* court, however, found its result to be consistent with the canons of statutory interpretation and with § 881(a)(4)(C)'s legislative history and public policy.¹²⁶ The court noted that its disjunctive interpretation of "or" avoided making the "consent" requirement "surplusage."¹²⁷ The court noted that if it interpreted the statute as requiring the claimant to negate both knowledge and consent, the "consent" language would be redundant.¹²⁸ The court stated that "if a claimant established a lack of knowledge, this would necessarily negate any consent to the illegal activity, because 'in order to consent to drug activity, one must know about it.'"¹²⁹ The court determined that its interpretation comported with the standards of statutory construction mandating that each word be given effect and not be relegated to the position of surplusage.

The court, however, did confess that its rationale in *6109 Grubb Road* was vulnerable.¹³⁰ The court admitted that a disjunctive reading of the word "or" between the words knowledge and consent—as opposed to a conjunctive interpretation—"arguably overlooked" the importance of the context of the underlying issue in determining whether to apply a disjunctive or conjunctive interpretation.¹³¹ The court acknowledged that

125. *Id.* at 817. The *One 1973 Rolls Royce* court noted that *92 Buena Vista Avenue* effectively makes the "knowledge or consent" language, as interpreted in *6109 Grubb Road*, applicable to post-illegal-act transferees, therefore "creating the problem of insulating [from forfeiture] certain owners who one reasonably might not consider to be deserving." *Id.* at 818. For a further discussion of the Supreme Court's *92 Buena Vista Avenue* opinion, see *supra* notes 23-30 and accompanying text.

126. *Id.* at 814-18. For a further discussion of the relevant norms of statutory construction, see *supra* note 81 and *infra* note 127. For a further discussion of the legislative history of § 881(a)(4)(C), see *supra* notes 104, 115 and accompanying text.

127. *Id.* at 816. Under standards of statutory interpretation, statutes should be interpreted so as to give effect to each word and avoid making words surplus. See 2A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 46.06 (5th ed. 1992) (stating rule of construction that effect must be given to every word of statute and that no part should be rendered superfluous).

128. *One 1973 Rolls Royce*, 43 F.3d at 816.

129. *Id.* (quoting *United States v. 141st St. Corp.*, 911 F.2d 870, 878 (2d Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991)). The court, however, does not acknowledge that the consent requirement would *not* be redundant if the claimant could not establish lack of knowledge. See Gurule, *supra* note 2, at 172 (advocating approach to interpreting statute which would allow post-illegal-act claimant to prevail if he or she could establish lack of knowledge alone, but requiring post-illegal-act transferee claimant to negate consent if lack of knowledge is not established).

130. *One 1973 Rolls Royce*, 43 F.3d at 814. For the Third Circuit's analysis of a possible conjunctive interpretation of § 881(a)(7), see *supra* note 124.

131. *Id.* at 814-15. The court explained that if a statute provided that "no cars or motorcycles are allowed in the park," a person trying to keep a vehicle out of the park need only show that the vehicle is either a car or a motorcycle." *Id.* at 815 (emphasis added). In this respect, a disjunctive interpretation is appropriate.

whether terms joined by "or" are to be treated conjunctively or disjunctively does not always turn on the use of the word "or" but rather it turns on context.¹³² Nevertheless, the court stated: "We, of course, cannot avoid the holding of [the *6109 Grubb Road*] opinion"¹³³

The Third Circuit also explored the legislative history of § 881(a)(4)(C), (6) and (7) and found little guidance as to whether the "or" should be interpreted conjunctively or disjunctively.¹³⁴ Although parts of the legislative history suggest that Congress intended a conjunctive reading, other parts of the legislative history show confusion as to how

Id. However, the court continued, if a person is trying to bring a vehicle into the park, he or she must show that it is not a car *and* it is not a motorcycle. *Id.* In this respect, a conjunctive interpretation is warranted. *Id.*

132. *Id.* at 815; see *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) (stating terms connected by disjunctive word should be given their separate meanings unless context dictates otherwise); cf. *United States v. Smeathers*, 884 F.2d 363, 364 (8th Cir. 1989) (stating word "or" connotes disjunction except when disjunctive reading would frustrate legislative intent); *United States v. Moore*, 613 F.2d 1029, 1040 (D.C. Cir. 1979) (noting that "or" is usually disjunctive, but this cannon is not "inexorable" when it frustrates legislative intent), *cert. denied*, 446 U.S. 954 (1980). Regardless of the emphasis some courts may have placed on context, the Third Circuit in *One 1973 Rolls Royce* followed a disjunctive reading of "or" in § 881(a)(4)(C). *One 1973 Rolls Royce*, 43 F.3d at 814.

Furthermore, the Third Circuit disregarded a principle used in symbolic knowledge called DeMorgan's Theorem. *Id.* at 815 n.19. DeMorgan's Theorem illustrates how language phrased in the disjunctive can be rephrased in the conjunctive. *Id.* The court noted that the United States District Court for the Eastern District of New York referred to DeMorgan's Theorem in interpreting § 881(a)(7) in *United States v. 890 Noyac Road*, 739 F. Supp. 111, 113-15 (E.D.N.Y. 1990), *rev'd*, 945 F.2d 1252 (2d Cir. 1991). *One 1973 Rolls Royce*, 43 F.3d at 815 n.19. For example, § 881(a)(7) requires an owner to establish that the drug trafficking occurred "without his [or her] knowledge or consent." *Id.* The Third Circuit noted "[s]howing that something was without knowledge or consent is a denial of the alternation; thus according to DeMorgan's Theorem, the owner must show the conjunction of the denial, that is, that there was no knowledge *and* no consent." *Id.* Despite its explanation of DeMorgan's Theorem, the Third Circuit refused to apply this analysis to the issue at bar. *Id.*

133. *Id.* at 814 (citing Third Circuit Internal Operating Procedures 9.1). Third Circuit Internal Operating Procedure 9.1 provides: "It is the tradition of this court that the holding of a panel in a reported opinion is binding on subsequent panels. Thus, no subsequent panel overrules the holding in a published opinion of a previous panel. Court in banc consideration is required to do so." *Internal Operating Procedures of the United States Court of Appeals for the Third Circuit*, PENNSYLVANIA RULES OF COURT, FEDERAL (1995). For a complete discussion of the Third Circuit's analysis in *6109 Grubb Road*, see *supra* notes 73-85 and accompanying text.

134. *One 1973 Rolls Royce*, 43 F.3d at 815 n.20. For a discussion of relevant portions of the legislative history of § 881's "innocent owner" defense, see *supra* notes 1, 5, 7, 80, 104, 115 and accompanying text.

the statute would operate.¹³⁵ Therefore, the Third Circuit noted the legislative history was "not very helpful."¹³⁶

To further justify its reliance on the *6109 Grubb Road* disjunctive approach to the "knowledge or consent" language, the majority recognized that such a construction "ameliorates some of the harsh effects of the forfeiture statute."¹³⁷ The court suggested that due to the ambiguity of the statute and its punitive nature, the court must apply a rule of lenity, resolving the ambiguity in favor of the claimant.¹³⁸ Finally, the court acknowledged that the *6109 Grubb Road* approach avoids the potential constitutional problem of the statute being unduly oppressive.¹³⁹

135. *Id.* The following statement suggested a conjunctive interpretation: "[T]he property would not be subject to forfeiture unless the owner knew or consented to the [illegal conduct]." *Id.* (quoting Joint Explanatory Statement, *supra* note 69, 124 CONG. REC. 34,670, 34,672 (1978)), *reprinted in* 1978 U.S.C.C.A.N. 9518, 9522-23). The Third Circuit noted, however, that this statement

apparently incorrectly intimated that the burden of proof as to knowledge and consent was on the government, something that is clearly not the case, and at least one commentator has concluded from this that the statement may have incorrectly understood other aspects of the statute as well, including whether the owner must prove both lack of knowledge and lack of consent.

Id. at 815-16 n.20 (citing *Loomba*, *supra* note 11, at 484).

136. *Id.* at 816 n.20.

137. *Id.* at 816. The court noted that its interpretation allows "an owner to keep the property when he or she has done everything reasonably possible to prevent its use in drug activity." *Id.* The court cited two cases that allowed for the claimant to assert an innocent owner defense successfully when he knew about the illegal activity but attempted to stop it. *Id.*; see *United States v. 710 Main St.*, 744 F. Supp. 510, 524-45 (S.D.N.Y. 1990) (holding that landlord, whose building was used in drug trafficking, who closed off portions of building, posted signs discouraging drug trafficking, restricted hours of operation of one of businesses and made anonymous phone calls to police to report drug activity, was an innocent owner); *United States v. 171-02 Liberty Ave.*, 710 F. Supp. 46, 50-53 (E.D.N.Y. 1989) (holding that landlord, who after admitting knowledge of drug activities in building, cooperated with police to clean up building, pressed criminal charges against drug dealers and allowed police to tear down fences and doors that dealers had constructed to avoid surveillance, had presented enough evidence to prevail on summary judgment). The Third Circuit neglected to acknowledge, however, that these two cases did not involve post-illegal-act transferees as did *One 1973 Rolls Royce*. For an explanation as to why this distinction is important, see the Eleventh Circuit's analysis in *United States v. 6640 S.W. 48th Street*, *supra* notes 49-64 and accompanying text.

138. *One 1973 Rolls Royce*, 43 F.3d at 819. The court explained that § 881(a)(4) is "punitive and quasi-criminal in nature." *Id.* (citing *Austin v. United States*, 113 S. Ct. 2801, 2810-11 (1993)). The court decided, therefore, that it must apply a rule of lenity pursuant to *United States v. Thompson/Center Arms Co.*, 112 S. Ct. 2102, 2110 & n.10 (1992), which required the court to decide any ambiguity in statutory language in favor of the claimant. *Id.* The court concluded that its disjunctive approach satisfied this requirement. *One 1973 Rolls Royce*, 43 F.3d at 819.

139. *One 1973 Rolls Royce*, 43 F.3d at 816. The court noted that "[w]hen a landlord cognizant of drug transactions occurring at his or her property tries to do everything he or she reasonably can to prevent use of the property in that way, and

3. *Managing the Outcome*

The Third Circuit stated that a possible solution to the problem of applying *6109 Grubb Road* to the facts of *One 1973 Rolls Royce* would be to divide “potentially innocent owners into two categories, pre-illegal-act owners and post-illegal-act transferees, and apply the *6109 Grubb Road* disjunctive test to the first category but the conjunctive test to the second one.”¹⁴⁰ The court, however, declined to engage in such an act of “judicial legislation” without any Congressional guidance.¹⁴¹ Instead, the majority found that it was not unreasonable to insulate post-illegal-act transferees from forfeiture under § 881(a)(4) and (7) and adhered to its analysis and decision.¹⁴² In the end, the Third Circuit summoned Con-

the drug dealing continues, forfeiture of the property may be unduly oppressive.” *Id.*

140. *Id.* at 818. The court noted that the United States District Court for the Southern District of Florida adopted this approach in dealing with § 881(a)(7) in *United States v. 6640 S.W. 48th St.*, 831 F. Supp. 1578, 1585 (S.D. Fla. 1993), *aff'd*, 41 F.3d 1448 (11th Cir. 1995). *Id.* The Eleventh Circuit affirmed this approach on appeal. 41 F.3d at 1453. For a further discussion of *United States v. 6640 S.W. 48th Street*, see *supra* notes 49-64 and accompanying text.

141. *One 1973 Rolls Royce*, 43 F.3d at 818. *But see id.* at 821 (stating that court is “obligated to make sense of the statute and avoid a result that contradicts its purpose”) (Nygaard, J., dissenting).

142. *Id.* at 819. The court noted that the principal goal of § 881(a)(4) and (7) is to “give owners of property an incentive to prevent use of that property in the drug trade.” *Id.* The court acknowledged that people who are not owners at the time of the drug transaction are in no position to prevent such use and requiring forfeiture of their property would “do little to accomplish the ends of those forfeiture statutes.” *Id.*

The Third Circuit also recognized that the Supreme Court’s decision in *92 Buena Vista Avenue* created doubt as to whether the forfeiture statutes reach post-illegal-act transferees who do not learn of the illegal act until after it happened. *Id.* The Third Circuit identified Supreme Court dicta that discussed whether post-illegal-act transferees fall under § 881(a)(6). *Id.* Although the plurality in *92 Buena Vista Avenue* suggested that equitable principles might prevent such owners from using the “innocent owner” defense, the Court avoided resolving the issue and stated “respondent has assumed the burden of convincing the trier of fact that she had no knowledge of the alleged source of [the property].” *United States v. 92 Buena Vista Ave.*, 113 S. Ct. 1126, 1137 (1993). The Third Circuit also pointed to Justice Scalia’s concurring opinion which stated:

I do not find inconceivable the possibility that post-illegal-act transferees with post-illegal-act knowledge of the earlier illegality are provided a defense against forfeiture. The Government would still be entitled to the property held by the drug dealer and by close friends and relatives who are unable to meet their burden of proof as to ignorance of the illegal act when it occurred.

One 1973 Rolls Royce, 43 F.3d at 820 (quoting *92 Buena Vista Ave.*, 113 S. Ct. at 1142 (Scalia, J., concurring)). The Third Circuit argued that if Justice Scalia is right, it is a “defensible” position to place post-illegal-act transferees with post-illegal-act knowledge outside the scope of forfeiture, thereby providing support for the Third Circuit’s application of the *6109 Grubb Road* interpretation of the “innocent owner” defense to post-illegal-act transferees. *Id.*

gress to redraft the statute if the court's interpretation was not as Congress had intended.¹⁴³

D. *The Dissent's Approach in United States v. One 1973 Rolls Royce*

Judge Nygaard disagreed with the majority's opinion that *6109 Grubb Road* should control the court's interpretation of § 881(a)(4)(C).¹⁴⁴ Judge Nygaard noted that because § 881(a)(4)(C) contains the "willful blindness" language that is not used in § 881(a)(6) and (7), the *6109 Grubb Road* approach cannot be effectively applied to § 881(a)(4)(C), especially when post-illegal-act transferees are involved.¹⁴⁵ Judge Nygaard argued that the majority's approach voids the "willful blindness" provision "because a purchaser who is ignorant of a property's illicit use, whether willfully or innocently, can logically neither grant nor deny consent to how his predecessor used it."¹⁴⁶ Therefore, under a disjunctive approach, a post-illegal-act transferee will always be able to prevail if he or she had no legal interest in the property when it was used in the illegal transactions, regardless of whether he or she was willfully blind to the conveyance's taint when he or she received it.¹⁴⁷

143. *One 1973 Rolls Royce*, 43 F.3d at 820 ("Congress should redraft the statute, if it desires a different result.").

144. *Id.* (Nygaard, J., dissenting). Judge Nygaard disagreed with the majority's assertion that the Third Circuit's disjunctive interpretation in *6109 Grubb Road* can be applied to § 881(a)(4)(C). *Id.* (Nygaard, J., dissenting)

145. *Id.* (Nygaard, J., dissenting). Judge Nygaard stated that the legislative history establishes that § 881(a)(4)(C)'s "willful blindness" language is not mere surplusage and therefore should be given effect. *Id.* at 822 (Nygaard, J., dissenting). Because Congress used the "willful blindness" language in § 881(a)(4)(C), and not in § 881(a)(6) and (7) and intended for that language to be given effect, the *6109 Grubb Road* approach, which did not address the "willful blindness" addition, is inapplicable to § 881(a)(4)(C). *Id.* (Nygaard, J., dissenting). Judge Nygaard also argued that *6109 Grubb Road* did not involve a post-illegal-act transferee, thereby making the majority's adherence to the *6109 Grubb Road* court's reasoning that much more suspect. *Id.* at 821 (Nygaard, J., dissenting).

146. *Id.* at 820 (Nygaard, J., dissenting). In Judge Nygaard's view, the application of *6109 Grubb Road's* disjunctive reading to § 881(a)(4)(C) involving willfully blind, post-illegal-act transferees "wholly disregard[s]" that section's "willful blindness" language and Congress' intent to prevent willfully blind owners from benefiting from the innocent owner defense. *Id.* at 822 (Nygaard, J., dissenting). For a discussion of Congress' intent in adding the "willful blindness" language to § 881(a)(4)(C), see *supra* notes 104, 115 and accompanying text.

147. *Id.* at 822 (Nygaard, J., dissenting). Judge Nygaard argued that "[i]f a claimant fails to prove lack of willful blindness, but can alternatively prevail by satisfying the sure-winner defense for a non-owner—lack of consent—then the willful blindness language becomes utterly nullified." *Id.* (Nygaard, J., dissenting). As applied to Goodman, Judge Nygaard noted that even if the district court concludes that Goodman was willfully blind to the Rolls Royce's taint when he received it, that finding will be of no use. *Id.* (Nygaard, J., dissenting). Whether Goodman is found to have been willfully blind or lacking knowledge will be of no import because under either situation, Goodman could not give his consent. *Id.* (Nygaard, J., dissenting). "In other words, willful blindness conceptually presupposes the absence of knowledge and consent." *Id.* (Nygaard, J., dissenting).

To avoid the absurd result from adhering to *6109 Grubb Road's* disjunctive approach, Judge Nygaard supported interpreting the word "or" in light of the context in which it is used so as to give the proper effect to the terms Congress employed.¹⁴⁸ Judge Nygaard concluded that a *conjunctive* reading of § 881(a)(4)(C) as applied to post-illegal-act transferees is necessary because consent to the illegal activity is irrelevant if the claimant is a post-illegal-act transferee.¹⁴⁹ Judge Nygaard stated that such an interpretation is not "judicial legislation."¹⁵⁰

Furthermore, Judge Nygaard discussed the impact of *92 Buena Vista Avenue*. Judge Nygaard noted that the Supreme Court in *92 Buena Vista Avenue*, in dictum, addressed whether post-illegal-act transferees could assert the "innocent owner" defense.¹⁵¹ Judge Nygaard explained that the Supreme Court's statement that equitable doctrines may "foreclose" a claimant "with guilty knowledge of the tainted character of a property" from asserting an "innocent owner" defense, "leaned away from the majority position here."¹⁵² Judge Nygaard concluded that the legislative history of § 881(a)(4)(C)'s willful blindness and the *92 Buena Vista Avenue* dictum supported the district court's analysis.¹⁵³

V. ANALYSIS OF THE THIRD CIRCUIT'S APPROACH IN *UNITED STATES V. ONE 1973 ROLLS ROYCE*

A. *Reliance on 6109 Grubb Road is Misplaced*

In *United States v. One 1973 Rolls Royce*, the Third Circuit, in analyzing the appropriate interpretation of § 881(a)(4)(C), relied upon its reason-

148. *Id.* at 822 (Nygaard, J., dissenting). Judge Nygaard explained that the court must examine the context in which "or" is used because in some instances, "or" should be read as "and." *Id.* at 822 (Nygaard, J., dissenting) (citing *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) (stating that terms connected by disjunctive word must be given their separate meanings unless context dictates otherwise); *United States v. Smeathers*, 884 F.2d 363, 364 (8th Cir. 1989) (noting that "or" connotes disjunction except when disjunctive reading would frustrate legislative intent)).

149. *One 1973 Rolls Royce*, 43 F.3d at 823 (Nygaard, J., dissenting). Judge Nygaard would differentiate between owners who use their property to facilitate drug transactions and willfully blind post-illegal-act transferees. *Id.* at 822 (Nygaard, J., dissenting). He concluded that applying *6109 Grubb Road* to the former would "make sense" but that it could not logically be applied to the latter. *Id.* (Nygaard, J., dissenting).

150. *Id.* at 823 (Nygaard, J., dissenting). Judge Nygaard criticized the majority for its "act of judicial abdication" and concluded that its decision was more than just "judicial restraint." *Id.* at 821 (Nygaard, J., dissenting).

151. *Id.* at 823 (Nygaard, J., dissenting) (citing *United States v. 92 Buena Vista Ave.*, 113 S. Ct. 1126, 1137 (1993)).

152. *Id.* (Nygaard, J., dissenting) (citing *92 Buena Vista Ave.*, 113 S. Ct. at 1137).

153. *Id.* (Nygaard, J., dissenting).

ing in *United States v. 6109 Grubb Road*.¹⁵⁴ Such reliance may have been misplaced. First, the *One 1973 Rolls Royce* majority even noted that “the rationale provided in *6109 Grubb Road* is vulnerable.”¹⁵⁵ In relying upon the *6109 Grubb Road* disjunctive interpretation of the “innocent owner” defense, the court effectively created a class of claimants who will always be able to successfully assert an “innocent owner” defense.¹⁵⁶ Post-illegal-act transferees will always prevail upon establishing lack of consent.¹⁵⁷ Such a result is contrary to Congress’ intent in establishing the “innocent owner” defense; Congress intended to fight illegal drug activity with the forfeiture provisions, not insulate post-illegal-act transferees from forfeiture.¹⁵⁸

Second, *6109 Grubb Road* interpreted § 881(a)(7), which does not include the “willful blindness” language of § 881(a)(4)(C).¹⁵⁹ Therefore, the court’s interpretation in *6109 Grubb Road*, is not binding on a subsequent case’s interpretation of § 881(a)(4)(C).¹⁶⁰ As the dissent acknowl-

154. *Id.* at 814 (citing *United States v. 6109 Grubb Rd.*, 886 F.2d 618 (3d Cir. 1989)). For a further discussion of *United States v. 6109 Grubb Road*, see *supra* notes 73-85 and accompanying text.

155. *Id.*

156. *Id.* According to the court, “the *6109 Grubb Road* approach means that a subsequent owner who did not know about the act creating the taint on the property at or before it was committed would always be an innocent owner under the statute.” *Id.*; see Gurule, *supra* note 2, at 168 (“[T]he post-illegal act transferee will almost always be able to satisfy the lack of consent requirement to qualify as an innocent owner.”).

157. *Id.* The Third Circuit, in *One 1973 Rolls Royce*, acknowledged that Goodman could show that he did not consent to the improper use of the automobile by proving that he did not own the car at the time it was so used; that he was not in a position to prevent such use; and that he did not know that the car was being used in that manner at the time it was so used, or if he did, he did everything that he could to prevent that use. *Id.* Therefore, even if a claimant such as Goodman knew about an automobile’s improper use, or was willfully blind to that fact, at the time he or she obtained ownership of it, he or she could still establish lack of consent, and prevail as an “innocent owner.” See *id.*; see also Gurule, *supra* note 2, at 172 (stating that post-illegal-act transferees would have had no interest in property at time of illegal act and therefore would have had no reason to consent).

158. See Gurule, *supra* note 2, at 157, 172 (recognizing that civil forfeiture is “weapon against illicit narcotics trafficking,” but arguing that allowing post-illegal-act transferees to prevail upon establishing lack of consent will further “sham” transfers of property by the drug defendants to third parties); see also 134 CONG. REC. 24,086 (1988) (stating that without addition of “willful blindness” language, § 881(a)(4)(C) “would lead to a ‘look-the-other-way’ defense,” thereby showing intent of Congress to disallow defense to post-illegal-act transferees). For a further discussion of the legislative history of § 881(a)(4)(C), see *supra* notes 104, 115 and accompanying text.

159. See *United States v. 6109 Grubb Rd.*, 886 F.2d 618, 623 (3d Cir. 1989) (interpreting § 881(a)(7) disjunctively to grant innocent landowner defense upon showing of either lack of knowledge or lack of consent). For the relevant text of the § 881(a)(7) “innocent owner” defense, see *supra* note 6. For the relevant text of the § 881(a)(4)(C) “innocent owner” defense, see *supra* note 100.

160. See *One 1973 Rolls Royce*, 43 F.3d at 821 (Nygaard, J., dissenting) (“I simply do not believe that *Grubb* even applies to post-illegal-act property purchasers who are aware of or willfully blind to their property’s use in facilitating illegal drug transactions.”).

edged, the legislative history established that the "willful blindness" language is not mere surplusage.¹⁶¹ Applying a disjunctive interpretation to § 881(a)(4)(C), in cases involving a post-illegal-act transferee, however, effectively nullifies the "willful blindness" language.¹⁶² Even if a post-illegal-act transferee fails to prove lack of willful blindness, he or she will prevail under the lack of consent defense.¹⁶³ As the dissent noted, this is an "absurd result with respect to willfully blind subsequent owners."¹⁶⁴

B. *The Impact of 92 Buena Vista Avenue*

Furthermore, the Third Circuit decided *6109 Grubb Road* prior to the Supreme Court decision in *92 Buena Vista Avenue*. In contrast, *92 Buena Vista Avenue* was established law when the Third Circuit decided *One 1973 Rolls Royce* and must be taken into consideration.¹⁶⁵ This distinction is important because before *92 Buena Vista Avenue*, the circuit courts were divided as to whether post-illegal-act transferees could assert an "innocent owner" defense.¹⁶⁶ Some circuit courts held that title in the property vested in the government at the time of the illegal act, thereby precluding post-illegal-act transferees from asserting an "innocent owner" defense.¹⁶⁷ Subsequent to *92 Buena Vista Avenue*, however, the courts permitted post-illegal-act transferees to assert an "innocent owner" defense because *92 Buena Vista Avenue* made clear that title did not vest in the government until a judicial determination of forfeiture.¹⁶⁸

The *6109 Grubb Road* court did not address making a distinction between pre-illegal-act owners and post-illegal-act transferees because, in that pre-*92 Buena Vista Avenue* era, a post-illegal-act transferee's interest in the property was eliminated because title vested in the government at the time of the illegal act.¹⁶⁹ Although the *6109 Grubb Road* court did not distinguish between pre-illegal-act owners and post-illegal-act transferees, given

161. *Id.* at 822 (Nygaard, J., dissenting).

162. *Id.* (Nygaard, J., dissenting).

163. *Id.* (Nygaard, J., dissenting).

164. *Id.* (Nygaard, J., dissenting).

165. *See id.* at 820 (Nygaard, J., dissenting) (stating that majority reached its conclusion because of its inability to reconcile *6109 Grubb Road* and *92 Buena Vista Avenue*).

166. For a discussion of the different circuit courts' approaches to whether title vested in the government at the time of the illegal act or at the time of forfeiture, see *supra* note 29.

167. For a list of the circuit courts' holdings on this issue, see *supra* note 29.

168. *See* United States v. *92 Buena Vista Ave.*, 113 S. Ct. 1126, 1136-37 (1993) (holding that until government wins forfeiture judgment, owner of property may assert any available defense). For a discussion of *92 Buena Vista Avenue*, see *supra* notes 23-30 and accompanying text.

169. *See* United States v. 6640 S.W. 48th St., 41 F.3d 1448, 1452 n.9 (11th Cir. 1995) (noting that Congress did not address post-illegal-act transferees when it drafted § 881 because before *92 Buena Vista Avenue* "a post-illegal-act transferee's interest in the property was automatically eradicated because title vested in the government on the date of the illegal act").

the Supreme Court's intervening decision in *92 Buena Vista Avenue*, the Third Circuit should not have foreclosed this approach when deciding *One 1973 Rolls Royce*.¹⁷⁰

In addition, the plurality in *92 Buena Vista Avenue* stated that equitable doctrines may not allow a party "with guilty knowledge of the tainted character of the property" to assert an "innocent owner" defense.¹⁷¹ Although the Third Circuit acknowledged the Supreme Court's dicta, it failed to act upon it.¹⁷² Instead, the *One 1973 Rolls Royce* court found support for its position from Justice Scalia, who suggested in his concurring opinion in *92 Buena Vista Avenue* that it would not be absurd to think that post-illegal-act transferees were out of the scope of forfeiture statutes.¹⁷³

C. Questionable Statutory Interpretation

Aside from precedent, the Third Circuit also relied upon standards of statutory construction in its interpretation of § 881(a)(4)(C).¹⁷⁴ Similarly, the court's analysis in this area was somewhat flawed. The court adhered to a traditional disjunctive interpretation of the word "or," while ignoring the particular context in which the word was used.¹⁷⁵ The context of the "without the knowledge, consent, or willful blindness" language of § 881(a)(4)(C) suggests a conjunctive interpretation because a disjunctive interpretation would ignore the inclusion of the phrase "willful blindness."¹⁷⁶ As Judge Nygaard explained in his dissent, a disjunctive interpretation would allow a subsequent owner, who failed to investigate an "obvious possibility" that his or her property is forfeitable, the ability to always establish "innocent owner" status on the basis of lack of consent.¹⁷⁷ The majority noted that the court "arguably overlooked" the importance

170. See *United States v. One 1973 Rolls Royce*, 43 F.3d 794, 818-19 (3d Cir. 1994) (refusing to create two classes of claimants in its interpretation of "innocent owner" defenses). But see *6640 S.W. 48th St.*, 41 F.3d at 1453 (stating lack of consent defense "is not available to post-illegal act transferees"); Gurule, *supra* note 2, at 172 (advocating legislative amendments to "innocent owner" defense distinguishing between pre-illegal-act owners and post-illegal-act transferees).

171. *92 Buena Vista Ave.*, 113 S. Ct. at 1137.

172. *One 1973 Rolls Royce*, 43 F.3d at 819.

173. *Id.* at 819-20 (citing *92 Buena Vista Ave.*, 113 S. Ct. at 1142 (Scalia, J., concurring)). For the portion of Justice Scalia's concurring opinion that the *One 1973 Rolls Royce* majority relied upon, see *supra* note 142.

174. *Id.* at 814-15. For a discussion of the Third Circuit's interpretation of various standards of statutory construction, see *supra* notes 81, 127 and accompanying text.

175. *Id.* at 822-23 (Nygaard, J., dissenting); see *United States v. 6640 S.W. 48th St.*, 41 F.3d 1448, 1453 (11th Cir. 1995) (interpreting "or" in the conjunctive and requiring post-illegal-act transferee to prove lack of knowledge and lack of consent to prevail as "innocent owner" under § 881(a)(7)).

176. *One 1973 Rolls Royce*, 43 F.3d at 822 (Nygaard, J., dissenting).

177. *Id.* (Nygaard, J., dissenting).

of context in adopting a disjunctive interpretation in *6109 Grubb Road*.¹⁷⁸ Nevertheless, the court adhered to the disjunctive interpretation.¹⁷⁹

VI. IMPACT

As the Third Circuit noted in *United States v. One 1973 Rolls Royce*, the disjunctive interpretation of § 881(a)(4)(C) will result in the ability of all post-illegal-act transferees, who can establish a lack of consent, to assert a successful "innocent owner" defense.¹⁸⁰ In doing so, as the dissent indicated, the majority effectively read out of the statute the "willful blindness" language.¹⁸¹ Moreover, in the face of Congress' intent to use § 881 to fight the increase of drug crimes in the United States, the Third Circuit's interpretation clashes with any possible "crack down" on crime Congress might have achieved.¹⁸²

Separating claimants under § 881(a)(4)(C), as well as under § 881(a)(6) and (7), into pre-illegal-act owners and post-illegal-act transferees would avoid this insulating effect.¹⁸³ The pre-illegal-act owners would benefit from a lack of consent defense and prevail under a disjunctive interpretation, while under a conjunctive interpretation, the post-illegal-act transferees would not be able to avoid forfeiture by asserting a lack of consent defense.¹⁸⁴ Although the Eleventh Circuit adopted this approach in *United States v. 6640 S.W. 48th Street*,¹⁸⁵ the majority in *One 1973 Rolls Royce* declined to engage in such a form of "judicial legislation."¹⁸⁶ Perhaps, however, dissenting Judge Nygaard is correct by stating that instead, the majority engaged in "judicial abdication."¹⁸⁷

178. *Id.* at 814-15.

179. *Id.* at 814.

180. *Id.*; see Gurule, *supra* note 2, at 168 ("The post-illegal act transferee would . . . always qualify as an innocent owner and hold superior title over the government."). Professor Gurule has indicated that a disjunctive interpretation of the "innocent owner" defense as applied to post-illegal-act transferees would "enable a defendant to avoid civil forfeiture entirely by simply transferring his ill-gotten gains to a third-party who had knowledge of the origins of the property, but did not consent to the defendant trafficking in narcotics." *Id.*

181. *One 1973 Rolls Royce*, 43 F.3d at 822 (Nygaard, J., dissenting).

182. See Gurule, *supra* note 2, at 173 (indicating that forfeiture is "potent weapon in the war against drugs" but acknowledging its weakness under current statutory scheme). For a discussion of Congress' intent behind the drug forfeiture statutes, see *supra* notes 1, 5, 7, 80, 104, 115 and accompanying text.

183. See *United States v. 6640 S.W. 48th St.*, 41 F.3d 1448, 1453 (11th Cir. 1995) (applying conjunctive interpretation of § 881(a)(7) to post-illegal-act transferees).

184. See *id.*

185. *Id.* at 1453. The Eleventh Circuit stated, "We decline to follow the Third Circuit's reasoning [in *One 1973 Rolls Royce*]. Classifying post-illegal act transferees as innocent owners because they had no opportunity to consent creates a sweeping grant of immunity from forfeiture and a gaping loophole in an intentionally comprehensive forfeiture policy." *Id.*

186. *United States v. One 1973 Rolls Royce*, 43 F.3d 794, 818 (3d Cir. 1994).

187. *Id.* at 821 (Nygaard, J., dissenting).

If other courts view the Eleventh Circuit's approach as the Third Circuit would—as “judicial legislation”—Congress must respond to the Third Circuit's request for clarification. Congress has introduced two bills directed at the “innocent owner” defense.¹⁸⁸ One of the bills would allow a claimant to prevail if he or she could prove that he or she was *either* without knowledge *or* did not consent to the illegal drug activity.¹⁸⁹ Another bill would result in vast changes to the forfeiture scheme, mandating that forfeiture proceedings only be conducted after the owner of the property was convicted for the relevant crime.¹⁹⁰ Neither of these bills, however, would solve the unique problem presented when the claimant is a post-illegal-act transferee.

Instead, any legislative amendment must take into account the differences between pre-illegal-act owners and post-illegal-act transferees.¹⁹¹ For example, Professor Gurule suggests allowing a pre-illegal-act owner, without knowledge that the property has been used for an illegal purpose, to prevail by merely establishing such lack of knowledge, because forfeiture of his or her property would be unfair.¹⁹² If such pre-illegal-act owner, however, had knowledge of the illegal activity, then he or she would be required to establish lack of consent to prevail under the “innocent owner” defense.¹⁹³ In addressing post-illegal-act transferees, Profes-

188. See Gurule, *supra* note 2, at 160 (citing H.R. 2417, 103d Cong., 1st Sess. (1993); H.R. 3347, 103d Cong., 1st (1994)).

189. See Gurule, *supra* note 2, at 160 (citing H.R. 2417, 103d Cong., 1st Sess. (1993)).

190. See *id.* (citing H.R. 3347, 103d Cong., 1st (1994)).

191. See *id.* at 172; see also *One 1973 Rolls Royce*, 43 F.3d at 823 (Nygaard, J., dissenting) (advocating separating claimants into pre-illegal-act owners and post-illegal-act transferees and applying different tests to the different types of claimants).

192. See Gurule, *supra* note 2, at 172 (advocating adopting disjunctive interpretation if pre-illegal-act owner lacked knowledge of illegal activity); see also *United States v. 1012 Germantown Rd.*, 963 F.2d 1496, 1503 (11th Cir. 1992) (adopting disjunctive interpretation of “knowledge or consent” language of § 881(a)(7) as applied to pre-illegal-act owner); *United States v. 141st St. Corp.*, 911 F.2d 870, 878 (2d Cir. 1990) (same); *United States v. 6109 Grubb Rd.*, 886 F.2d 618, 626 (3d Cir. 1989) (same). *But see* *United States v. Lot 111-B*, 902 F.2d 1443, 1445 (9th Cir. 1990) (*per curiam*) (adopting conjunctive interpretation of “knowledge or consent” language thereby requiring pre-illegal-act owner to prove lack of knowledge *and* lack of consent to prevail under “innocent owner” defense of § 881(a)(7)).

193. See Gurule, *supra* note 2, at 172 (advocating adoption of conjunctive interpretation for pre-illegal-act owners with knowledge because claimant with knowledge should not prevail under “innocent owner” defense if he or she took no action to prevent illegal activity); *id.* (stating that lack of consent “should be construed to mean that the claimant took all reasonable steps to prevent his [or her] property from being used illegally”); see also *Lot 111-B*, 902 F.2d at 1445 (adopting conjunctive interpretation of “knowledge or consent” language thereby requiring pre-illegal-act owner to prove lack of knowledge *and* lack of consent to prevail under “innocent owner” defense of § 881(a)(7)) (*per curiam*). *But see* *Dunne*, *supra* note 11, at 85 n.25 (“Forfeiture upon knowledge alone can lead to an unconscionable result if the owner acquires knowledge of illegal use but has no

sor Gurule favors a conjunctive approach to the "innocent owner" defense, requiring such claimants to prove lack of knowledge because the consent requirement, as applied to such claimants, is rather "meaningless."¹⁹⁴ Although Professor Gurule did not specifically address the "willful blindness" language of the § 881(a)(4)(C) "innocent owner" defense, any legislative amendment must make clear that a post-illegal-act transferee claimant under § 881(a)(4)(C) must also establish lack of willful blindness to prevail.¹⁹⁵ A claimant should not be permitted to prevail by establishing lack of knowledge alone. To do so would render the "willful blindness" language surplusage.¹⁹⁶

VII. CONCLUSION

Practitioners in the Third Circuit must stay abreast of any changes in this area of the law. First, due to the split of opinion among the circuit courts with regard to the interpretation of the "innocent owner" defense of § 881(a)(4)(C), (6) and (7), attorneys must be aware of the Supreme Court's activities.¹⁹⁷ Practitioners must watch for the Supreme Court granting *certiorari* on any cases in these areas.

If the Supreme Court grants *certiorari* on any of these cases, practitioners should focus on how the Supreme Court addresses the unique situation that arises when applying the "innocent owner" defenses to post-illegal-act transferees.¹⁹⁸ Will the Court advance the plurality's view in *United States v. 92 Buena Vista Avenue*, that equitable principles might pre-

reasonable opportunity to act on it prior to governmental seizure." (quoting Eric G. Zajac, *Tenancies by the Entirety and Federal Civil Forfeiture Under the Crime Abuse Prevention and Control Act: A Clash of Titans*, 54 U. PITT. L. REV. 553, 571 (1993)).

194. See Gurule, *supra* note 2, at 172 (stating that such conjunctive interpretation would "prevent sham transfers of property intended to avoid forfeiture and further comport with the intent of Congress, which is to deprive the wrongdoer of his ill-gotten gains"); see also *United States v. 6640 S.W. 48th St.*, 41 F.3d 1448, 1453 (11th Cir. 1995) (requiring post-illegal-act transferees to establish lack of knowledge in order to prevail under "innocent owner" defense of § 881(a)(7)).

195. See Gurule, *supra* note 2, at 172-73 (stating that post-illegal-act transferee must establish lack of knowledge, but failing to address the "willful blindness" language of § 881(a)(4)(C)); see also *6640 S.W. 48th St.*, 41 F.3d at 1453 (stating that post-illegal-act transferee claimant under § 881(a)(7) must establish lack of knowledge to prevail).

196. *United States v. One 1973 Rolls Royce*, 817 F. Supp. 571, 581 (E.D. Pa. 1992) (acknowledging that "willful blindness" language of § 881(a)(4)(C) "cannot be given effect" if disjunctive interpretation is applied to that section), *vacated*, 43 F.3d 794 (3d Cir. 1994).

197. See e.g., Paul M. Barrett, *Justices to Rule on Use of Criminal Case And Forfeiture Suit Against Defendants*, WALL ST. J., Jan. 15, 1996, at B3 (discussing Supreme Court's decision to hear case to decide whether criminal prosecutions accompanied with civil forfeiture suits violate Fifth Amendment guarantee against double jeopardy).

198. For a complete discussion of the various approaches the circuits have adopted regarding the § 881 "innocent owner" defenses, see *supra* notes 31-85, 112-53 and accompanying text.

vent a post-illegal-act transferee with knowledge of the illegal act at the time of the transfer from enjoying the benefit of the "innocent owner" defense?¹⁹⁹ Or will the Court advance Justice Scalia's suggestion that it is not "inconceivable" that post-illegal-act transferees with post-illegal-act knowledge may be afforded a defense to forfeiture of their property?²⁰⁰ If the Court follows the former, the Third Circuit's analysis in *One 1973 Rolls Royce* will not stand.²⁰¹ If, however, the Court adopts Justice Scalia's suggestion, the Third Circuit's analysis will gain support.²⁰²

Until any intervening actions by the Supreme Court or Congress, practitioners must live by the Third Circuit's interpretation of § 881(a)(4)(C) in *One 1973 Rolls Royce*. Attorneys for post-illegal-act transferee claimants will enjoy the leniency of the Third Circuit's approach, while attorneys for the government will struggle to circumvent the impact of the decision.

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199. *United States v. 92 Buena Vista Ave.*, 113 S. Ct. 1126, 1137 (1993). For a further discussion of the *92 Buena Vista Avenue* dicta, see *supra* note 152 and accompanying text.

200. *Id.* at 1142 (Scalia, J., concurring). For a further discussion of Justice Scalia's statements in *92 Buena Vista Avenue*, see *supra* note 142.

201. See *United States v. One 1973 Rolls Royce*, 43 F.3d 794, 823 (3d Cir. 1994) (Nygaard, J., dissenting) (acknowledging Supreme Court's *92 Buena Vista Avenue* dicta and finding conjunctive interpretation of § 881(a)(4)(C) appropriate). For a further discussion of the *92 Buena Vista Avenue* dicta, see *supra* note 152 and accompanying text.

202. See *id.* at 820 (arguing that granting post-illegal-act transferees with post-illegal-act knowledge "innocent owner" defense is not absurd). For a further discussion of Justice Scalia's statements in *92 Buena Vista Avenue*, see *supra* note 142.