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MISSOURI UPS THE ANTE IN THE DRUG FORFEITURE “RACE TO THE RES”¹

I. INTRODUCTION

Forfeiture of property under federal law² is big business.³ To the chagrin of state lawmakers, the principal beneficiaries of the federal forfeiture bounty have been state and local law enforcement agencies.⁴ In order to increase their share of the asset forfeiture windfall, many states have enacted forfeiture provisions designed to supplant federal domination of this lucrative source of revenue.⁵ In July 1993, Missouri followed suit by enacting one of the nation’s most stringent state forfeiture statutes.⁶

Missouri’s forfeiture statute ensures a one hundred percent return for the state on seizures conducted pursuant to state authority by preventing federal

1. In *United States v. Alston*, 717 F. Supp. 378 (M.D.N.C. 1989), the court described the competition for forfeiture assets between state and federal governments as “the unseemly race to the res.” *Id.* at 380.

2. Federal law provides for both criminal and civil forfeiture. Criminal forfeitures under 18 U.S.C. § 982 (1988) and 21 U.S.C. § 853 (1988) are in personam proceedings imposed as punishment upon conviction. The majority of civil forfeitures are brought under 18 U.S.C. § 981 (1988) and 21 U.S.C. § 881 (1988). Section 981 provides for seizure of assets related in some manner to money laundering, currency transaction reporting violations, or banking law violations. Section 881 provides for seizure of assets related to violations of federal drug laws.

3. See *Justice Forfeiture Fund Holds 32,000 Properties*, MONEY LAUNDERING ALERT, Aug. 1993, at 3 [hereinafter *32,000 Properties*] (“The inventory of property, including cash, exceeds 32,000 items worth \$1.9 billion. That includes about 5,000 real properties and businesses worth \$886 million and 8,000 cash cases worth \$670 million.”).

4. *Justice Adopts New Code of Ethics in Forfeiture Cases*, MONEY LAUNDERING ALERT, Apr. 1993, at 3 [hereinafter *Justice Adopts New Code*]. Over 3,000 state and local agencies have received in excess of \$1.1 billion in seized assets distributed by the federal government pursuant to equitable sharing programs. *Id.* In 1992 alone, the federal government distributed over \$236 million to state and local agencies that assisted in federal forfeiture proceedings. *32,000 Properties*, *supra* note 3, at 3.

5. See, e.g., WIS. STAT. ANN. § 161.555(1) (West 1989); ILL. REV. STAT. ch. 56 1/2, para. 712(d), 712(f)(3) (1989); LA. CODE CRIM. PROC. art. 167 (West 1991). For further discussion of state statutory forfeiture provisions, see *infra* Part II.

6. Missouri House Bill 562, H.R. 562, 87th Leg., 1st Reg. Sess. (1993), established a new set of provisions governing forfeiture. These provisions are codified at MO. ANN. STAT. §§ 513.647-.653 (Vernon Supp. 1994).

“adoption”⁷ of those seizures.⁸ Missouri’s forfeiture law is also noteworthy because it purports to encompass even those seizures conducted by state and local law enforcement officers pursuant to federal judicial search warrants or as part of a federal investigation.⁹

This Recent Development discusses the purpose, function and, validity of the recently enacted Missouri forfeiture provisions. Part I reviews the evolution of federal forfeiture as a drug interdiction tool. Part II analyzes the conflict between competing federal and state forfeiture provisions. Part III examines Missouri’s new forfeiture legislation. Part IV ultimately concludes that Missouri’s new forfeiture statute impermissibly frustrates Congress’ intent to facilitate cooperative enforcement of federal drug laws. Thus, Missouri’s provision is repugnant to the Supremacy Clause of the United States Constitution.

A. Federal Drug Forfeiture

In 1970, Congress enacted the Comprehensive Drug Abuse and Control Act (CDACA),¹⁰ which authorizes the use of civil forfeiture actions¹¹

7. Prior to the passage of House Bill 562, state or local law enforcement authorities in Missouri would surrender seized assets to a federal agency to initiate federal forfeiture proceedings. Then, acting pursuant to an “equitable sharing agreement,” the federal agency would “adopt” the state seizure and eventually remit up to 85% of the proceeds to the local or state agency responsible for the seizure. In this manner, Missouri’s jurisdiction over forfeitures was effectively bypassed. Judicial validation of this practice provided a strong incentive for Missouri to enact more stringent forfeiture provisions. *See, e.g., United States v. \$12,390.00*, 956 F.2d 801, 805 (8th Cir. 1992) (holding that federal adoption of a seizure made by the St. Louis Police Department preempts state jurisdiction). For a discussion of *\$12,390.00*, see *infra* notes 62-67 and accompanying text.

8. For the full text of Missouri’s anti-adoption statute, see *infra* note 96.

9. For the language of Missouri’s preemption provision, see *infra* note 97.

10. Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, § 511, 94 Stat. 1236 (1970) (codified as amended at 21 U.S.C. §§ 801-971 (1988)).

11. The term “forfeiture” has been explained as follows:

[Forfeiture is the] [d]ivestiture without compensation of property used in a manner contrary to the laws of the sovereign. Whenever a statute provides that upon the commission of a specified act, certain property used in or connected with the act shall be “forfeited,” the forfeiture takes place upon the commission of the act, and a conditional right to the property then vests in the government.

United States v. Eight Rhodesian Stone Statues, 449 F. Supp. 193, 195 n.1 (C.D. Cal. 1978).

For an overview of the historical development of American forfeiture provisions, see 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 (1992); and Michael Schechter, Note, *Fear and Loathing and the Forfeiture Laws*, 75 CORNELL L. REV. 1151, 1153-55 (1990). A comprehensive history of forfeiture law can be found in Jacob J. Finklestein, *The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty*, 46 TEMP. L.Q. 169 (1973).

against any property used or acquired in violation of federal drug laws.¹² Despite being heralded as the ideal weapon for combatting sophisticated criminal enterprises, the CDACA initially failed to meet Congress' expectations.¹³ Subsequent amendments have significantly expanded the reach of the CDACA.¹⁴

Codified at 21 U.S.C. § 881, the federal drug forfeiture statute provides that any asset with a tangential connection to drug trafficking is subject to civil forfeiture.¹⁵ Section 881 forfeiture actions are common because of the relative ease with which they are initiated. Because § 881 provides for in rem proceedings against the property itself,¹⁶ no underlying criminal activity on the part of the owner need be alleged.¹⁷ The forfeiture occurs at the moment of illegal use.¹⁸

To commence a forfeiture proceeding, the government must make a

12. See 21 U.S.C. § 881 (1988). The initial focus of the Act was to seize the illicit profits of organized crime syndicates. *United States v. One 1972 Datsun Vehicle*, 378 F. Supp. 1200, 1205 (D.N.H. 1974). Congress has expanded the scope of the CDACA considerably in subsequent amendments. See *infra* note 14.

13. S. REP. NO. 225, 98th Cong., 1st Sess. 191 (1983). The General Accounting Office cited three major faults in the 1970 Act: (1) federal law enforcement agencies had not aggressively pursued forfeitures due to escalating costs; (2) inherent limitations and ambiguities in the Act impeded its use as an effective law enforcement tool; and (3) the scope of property subject to forfeiture was too limited. *Id.* at 191-94.

14. In 1978, Congress amended the CDACA by enacting § 881(a)(6), which provided for the forfeiture of money, negotiable instruments, securities, and other things of value either used in exchange for a controlled substance or to facilitate a violation of the CDACA. 21 U.S.C. § 881(a)(6) (1988).

The Crime Control Act of 1984 added two additional provisions to § 881. First, § 881(a)(7) added real property to the list of items subject to forfeiture. 21 U.S.C. § 881(a)(7) (1988). Second, § 881(h) added the relation-back doctrine which vests in the United States all right, title and interest in any property described under subsection (a) upon commission of the act giving rise to the forfeiture. 21 U.S.C. § 881(h) (1988 & Supp. IV 1992). Subsequent amendments in 1988 and 1990 added controlled substances, drug manufacturing equipment, drug paraphernalia, and firearms to the list of forfeitable items. 21 U.S.C. § 881(a)(8)-(11) (1988 & Supp. IV 1992).

15. Items subject to forfeiture include: controlled substances, their containers, conveyances used to transport illegal drugs, money and securities, real property, drug manufacturing equipment and paraphernalia, and firearms. 21 U.S.C. § 881 (a)(1)-(11) (1988 & Supp. IV 1992).

16. An in rem proceeding is instituted "against the thing" (in this context, the res) to enforce a right in the thing itself. BLACK'S LAW DICTIONARY 900 (6th ed. 1990). For a discussion of the use of in rem proceedings in civil forfeiture, see *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 683 (1974).

17. Saltzburg, *supra* note 11, at 222 n.31 (stating that "the innocence or guilt of the owner is not an issue in civil forfeiture proceedings"); Patricia M. Canavan, Note, *Civil Forfeiture of Real Property: The Government's Weapon Against Drug Traffickers Injures Innocent Owners*, 10 PACE L. REV. 485, 492 (1990) ("The government does not have to convict or even charge the owner of the seized property with a crime. . . .").

18. 21 U.S.C. § 881(h) (1988 & Supp. IV 1992).

showing of probable cause.¹⁹ The burden then shifts to the claimant of the property²⁰ to prove, by a preponderance of the evidence, either that the property was not used or intended to be used illegally, or that the property is statutorily excepted.²¹ If the claimant fails to prevail on either of these narrow defenses, automatic forfeiture ensues.

B. Federal Drug Interdiction Policies

Prior to 1988, federal anti-drug enforcement efforts were primarily directed against large wholesale and retail suppliers.²² Discouraged by the ineffectiveness of that approach,²³ the Reagan Administration implemented a "zero tolerance"²⁴ policy in March of 1988. The zero tolerance policy expanded the scope of drug enforcement efforts by targeting drug users as well as drug dealers.²⁵ Under this new policy, the number of federal forfeiture proceedings increased dramatically. In the first six weeks following implementation of the zero tolerance policy, customs officials seized 1,135 conveyances valued at more than \$12 million.²⁶ Disgruntled property owners found the policy tyrannical, and horror stories of disproportionate seizures were commonplace.²⁷

19. *United States v. Certain Real Property*, 986 F.2d 990, 995 (6th Cir. 1993) (holding that a requisite showing of probable cause requires "a reasonable ground for belief of guilt, supported by less than prima facie proof but more than mere suspicion") (citations omitted).

20. *United States v. \$22,287.00*, 709 F.2d 442, 446 (6th Cir. 1983).

21. The statute creates exceptions for conveyances used by a common carrier, stolen conveyances, and innocent owners. 21 U.S.C. § 881(a)(4)(A)-(C) (1988).

22. The Reagan Administration's initial interdiction efforts were supply-side oriented, designed to intercept the drugs before they reached the retail market. Schecter, *supra* note 11, at 1152.

23. Initial enforcement successes in south Florida were more than offset by increased drug traffic in other areas of the nation. See Mark Starr & Elaine Shannon, *Reagan's War on Drugs*, NEWSWEEK, Aug. 9, 1982, at 14.

24. President Reagan's cabinet-level National Drug Policy Board endorsed significant additional penalties for possession of even minuscule amounts of drugs. The Board's recommendations included suspension of driver licenses and reduction of federal college and housing subsidies for individuals caught using drugs. Charles Rangel, *Reagan's "Zero Tolerance" is a Zero Drug Policy*, NEWSDAY, June 28, 1988, at 66 (editorial).

25. See Schecter, *supra* note 11, at 1252; Richard Lacayo, *A New Mission Impractical: Zero Tolerance for Users*, TIME, May 30, 1988, at 18. The zero tolerance policy was recommended to the White House by then U.S. Customs Commissioner William von Raab. Von Raab stated that the purpose of the new policy was to put pressure on drug users who would ordinarily go unpunished due to the government's failure to prosecute. Lacayo, *supra*, at 18.

26. Jon Nordheimer, *Tighter Federal Drug Dagnet Yields Cars, Boats and Protests*, N.Y. TIMES, May 21, 1988, at A1.

27. In one instance, a car was impounded after customs inspectors used tweezers to remove one-tenth of a gram of marijuana from the bottom of the driver's purse. Nordheimer, *supra* note 26, at A1. Another car was seized based upon a customs inspector's belief that he smelled the lingering aroma of

Reacting to these perceived abuses, and anticipating a Supreme Court decision restricting the permissible scope of federal seizures,²⁸ the Department of Justice promulgated a code of ethics to regulate the actions of law enforcement personnel in forfeiture cases.²⁹ In addition, congressional legislation has been proposed that would significantly change the drug forfeiture statute by increasing the government's burden of proof in forfeiture proceedings to a clear and convincing evidence standard.³⁰ In spite of these reform efforts, forfeiture remains a fertile source of conflict.

II. THE "RACE TO THE RES"—CONFLICT BETWEEN STATE AND FEDERAL FORFEITURE PROVISIONS

A. *Equitable Sharing Programs*

To the chagrin of the beneficiaries of state forfeiture laws, the federal forfeiture campaign continues to net enormous windfalls for state and local law enforcement agencies. As of April 1993, over \$1.1 billion had been distributed to more than 3,000 agencies³¹ through equitable sharing programs.³² The goal of these programs is threefold: (1) to punish and deter criminal activity; (2) to enhance cooperation among federal, state and local law enforcement agencies; and (3) to produce revenues to enhance

marijuana in the car's interior. *Id.* More substantial seizures included a \$2.5 million yacht and an \$80 million research vessel belonging to Woods Hole Oceanographic Institution seized after traces of marijuana were found in the shaving kit of a crew member. *Id.*

Federal authorities continue to expand the reach of the drug forfeiture statute. Prosecutors recently brought criminal forfeiture proceedings against two law firms alleged to have taken part in a marijuana smuggling ring masterminded by a former client. Mark Hansen, *Law Firm Forfeitures Sought*, A.B.A. J., Nov. 1993, at 14.

28. *Austin v. United States*, 113 S. Ct. 2801, 2801 (1993) (holding that in rem civil forfeitures predicated on violation of the federal drug laws are subject to the Eighth Amendment's excessive fines clause).

29. *Justice Adopts New Code*, *supra* note 4, at 3. The new provisions require a finding of probable cause prior to initiation seizures, as well as adequate notice and prompt resolution of claims. *Id.* See also the discussion of the new Department of Justice Guidelines for adoptive forfeitures *infra* note 93.

30. Civil Asset Forfeiture Reform Act of 1993, H.R. 2417, 103d Cong., 1st Sess. (1993).

31. *32,000 Properties*, *supra* note 3, at 3. Other major recipients of forfeited assets include federal agencies (\$70 million) and foreign governments (\$12.4 million). *Id.*

32. Equitable sharing programs were developed in accordance with 21 U.S.C. § 881(e)(1)(A), which provides that the Attorney General may transfer forfeited property "to any State or local law enforcement agency which participated directly in the seizure or forfeiture of the property." 21 U.S.C. § 881(e)(1)(A) (1988).

forfeiture efforts and strengthen law enforcement.³³ Equitable sharing programs have significantly enhanced drug interdiction efforts.³⁴ However, this success creates tension between state and local law enforcement agencies and the beneficiaries of state forfeiture provisions, who are bypassed when federal authorities adopt state seizures.³⁵

State and local law enforcement agencies are eligible to participate in equitable sharing programs in two ways. First, they may assist a designated federal agency in the investigation or prosecution of violations of federal law that provide for forfeiture as a remedy.³⁶ Second, a state or local law enforcement agency may seize property independently and request that a designated federal agency adopt the seizure and commence administrative forfeiture proceedings.³⁷ Absent legislation establishing prior exclusive

33. OFFICE OF THE DEPUTY UNITED STATES ATTORNEY GENERAL, THE ATTORNEY GENERAL'S GUIDELINES ON SEIZED AND FORFEITED PROPERTY (1990).

34. During the 1987-1991 period, equitable sharing programs facilitated a twenty-fold increase in the amount of funds seized by state and local law enforcement agencies nationwide. Tim Poor & Louis J. Rose, *Police Cooperate With Feds on Seizures*, ST. LOUIS POST DISPATCH, May 5, 1991, at 1A. In addition, the redistribution of assets has improved historically mistrustful relations among local and federal law enforcement agencies. *Id.* Municipal police have embraced the sharing programs wholeheartedly. See Gordon Witkin, *Hitting Kingpins in Their Assets*, U.S. NEWS & WORLD REPORT, Dec. 5, 1988, at 20. Citing the inadequacy of California forfeiture laws, a Los Angeles Police Department Deputy Chief remarked: "We wouldn't have a war on drugs in Los Angeles if it weren't for equitable sharing This program is the greatest thing that ever happened to local law enforcement." *Id.*

35. 1 DAVID B. SMITH, PROSECUTION AND DEFENSE OF FORFEITURE CASES 7-9 (1993).

36. U.S. DEP'T OF JUSTICE, A GUIDE TO EQUITABLE SHARING OF FEDERALLY FORFEITED PROPERTY FOR STATE AND LOCAL LAW ENFORCEMENT AGENCIES 1-2 (1990) [hereinafter EQUITABLE SHARING GUIDE].

37. *Id.* at 2. The designated federal agencies involved in the Department of Justice Forfeiture Program include: the Drug Enforcement Administration, the Federal Bureau of Investigation, the Immigration and Naturalization Service, the Internal Revenue Service, the U.S. Postal Inspection Service, and the U.S. Bureau of Alcohol, Tobacco and Firearms. *Id.*

In addition to the statutory requirements, property in adoptive cases is generally subject to the following minimum monetary thresholds:

Conveyances:

Vehicles	\$ 3,500
Vessels	\$10,000
Aircraft	\$10,000

Real Property:

Land and any improvements	\$20,000 or 20% of the appraised value, whichever is greater
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All Other Property:

Currency, bank accounts, monetary instruments,	\$2,000
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state jurisdiction, a federal agency may adopt state seizures at any time.³⁸ This preemption of state authority is a significant source of tension between constituencies vying for the drug forfeiture dividend.

Both federal and state forfeiture provisions place limitations upon the use of forfeited property. The federal provisions require that the assets distributed through equitable sharing programs be used to supplement, rather than supplant, existing law enforcement resources.³⁹ If agencies comply with these limited requirements, they are eligible to receive up to eighty-five percent of the net proceeds in an adoptive case.⁴⁰ In contrast, the majority of state forfeiture provisions earmark forfeiture proceeds for support of public education.⁴¹ In order to avoid losing this lucrative source of discretionary funding to education, state and local police departments will often allow federal agencies to adopt their seizures, even when state law prohibits federal adoption.⁴² This tactic undermines the goals of equitable sharing programs by promoting a “foot race” between federal agencies and state governments to establish jurisdiction over assets subject to forfeiture.⁴³

jewelry, etc.

CARY H. COPELAND, U.S. DEPARTMENT OF JUSTICE DIRECTIVE NO. 93-1 (Jan. 15, 1993), *reprinted in* 1 SMITH, *supra* note 35, at 7-42 to 7-46.

38. 21 C.F.R. § 1316.91(1) (1990).

39. *See* EQUITABLE SHARING GUIDE, *supra* note 36, at 4 (listing permissible agency uses of forfeiture assets, all related to improving law enforcement).

40. *Id.* at 6. State and local agencies receive an 85% distribution when assets are forfeited administratively or in uncontested judicial proceedings. *Id.* In contested judicial proceedings, the portion of the proceeds allocated for sharing drops to 80%. *Id.* In joint participation cases, the percentage is determined on a case-by-case basis. *Id.*

41. *See, e.g.*, MO. CONST. art. 9, § 7 (providing that all proceeds from state forfeitures are to be distributed to the schools); N.C. CONST. art IX, § 7 (same); WIS. STAT. ANN. § 161.55(5)(b) (West 1989) (stating that fifty percent of forfeiture assets shall be deposited in the school fund).

In Missouri's 1990-1991 fiscal year, schools statewide received \$18 million from the state forfeiture fund. Fred W. Lindecke, *Lawmakers Disagree on Ways to Split Drug Forfeiture Proceeds*, ST. LOUIS POST DISPATCH, Mar. 28, 1993, at 5B. This amount included money from seizures, as well as civil and criminal fines. *Id.* If Missouri is able to reduce the number of federal adoptions through enactment of its anti-adoption statute, the funding available for public education is likely to increase dramatically. The debate over the allocation of drug forfeiture is extremely controversial. *See id.* (reporting a heated debate between Missouri State Representatives Jacob and Whitten).

42. *See, e.g.*, *United States v. One 1979 Chevrolet C-20 Van*, 924 F.2d 120, 122-23 (7th Cir. 1991) (criticizing the local police department's “routine and administrative” disregard of a state statute prohibiting adoptions).

43. *Id.* at 122.

B. *Competing Federal and State Jurisdiction*

Under the common law rule of prior exclusive state jurisdiction, a federal court may not assert in rem jurisdiction over a res already subject to a state court's jurisdiction.⁴⁴ Thus, federal district courts lack jurisdiction over in rem forfeiture actions when a prior forfeiture action is underway in state court.⁴⁵ However, federal jurisdiction is routinely established by filing a peremptory federal forfeiture action, because adoptions are often completed before state judges and prosecutors are aware that a seizure has occurred.⁴⁶

1. *Prior Exclusive State Jurisdiction*

Federal courts have generally upheld the rule of prior exclusive state jurisdiction. In *United States v. \$79,123.49*,⁴⁷ the State of Wisconsin initiated forfeiture proceedings in state court against currency used to purchase marijuana from an undercover state agent.⁴⁸ The court ultimately dismissed the case for failure to comply with a Wisconsin time limitation and ordered the money returned to the claimants.⁴⁹ The next day, while the state court's order was pending, federal authorities filed an action

44. *Penn General Casualty Co. v. Pennsylvania*, 294 U.S. 189, 195 (1935) (holding that "the court first assuming jurisdiction over the property may maintain and exercise that jurisdiction to the exclusion of the other"); see also *Elkins v. United States*, 364 U.S. 206, 221 (1960) ("The very essence of a healthy federalism depends upon the avoidance of needless conflict between state and federal courts.").

The rule seeks "[t]o avoid unseemly and disastrous conflicts in the administration of our dual judicial system, and to protect the judicial processes of the court first assuming jurisdiction." *Penn General*, 294 U.S. at 195 (citations omitted). Although detestable because the "property" involved were slaves, *Hagan v. Lucas*, 35 U.S. (10 Pet.) 400 (1836), provides additional historical precedent for the principle: "A most injurious conflict of jurisdiction would be likely, often, to arise between the federal and the state courts, if the final process of the one could be levied on property which had been taken by the process of the other." *Id.* at 402.

45. See *infra* notes 47-61 and accompanying text. However, if the state forfeiture action is a criminal in personam proceeding, federal and state actions may proceed simultaneously. *United States v. One 1986 Chevrolet Van*, 927 F.2d 39, 44 (1st Cir. 1991); see also *United States v. Winston-Salem/Forsyth County Bd. of Educ.*, 902 F.2d 267, 271 (4th Cir. 1990); *United States v. \$79,123.49*, 830 F.2d 94, 97 (7th Cir. 1987).

46. See *infra* notes 62-74 and accompanying text.

47. 830 F.2d 94 (7th Cir. 1987).

48. *Id.* at 95. The seizure was made pursuant to WIS. STAT. ANN. § 161.555(1), which provided: "An action brought to cause the forfeiture of property seized under [§] 161.555 is an action in rem. The circuit court for the county in which the property was seized shall have exclusive jurisdiction over any proceedings regarding the property." WIS. STAT. ANN. § 161.555(1) (West 1989). Section 161.555 was later amended to provide for in personam actions against the defendant. WIS. STAT. ANN. § 161.555 (West Supp. 1993).

49. 830 F.2d at 95.

against the currency under 21 U.S.C. § 881,⁵⁰ and placed it in a federal asset forfeiture fund.⁵¹ The district court ruled that the federal authorities acquired exclusive jurisdiction when they obtained possession of the assets.⁵² Drawing upon the holdings of *Penn General* and its progeny,⁵³ the Seventh Circuit vacated the decision of the district court.⁵⁴ Because both forfeiture proceedings were in rem, the Seventh Circuit held that the Wisconsin court's assertion of jurisdiction trumped any subsequent assertion of federal jurisdiction.⁵⁵

In *United States v. One 1985 Cadillac Seville*,⁵⁶ the Ninth Circuit agreed with the Seventh Circuit and held that prior assertion of state jurisdiction negated any subsequent federal claim.⁵⁷ In *One 1985 Cadillac*, the District Attorney of Santa Cruz County filed an action for forfeiture⁵⁸ eight days before the Drug Enforcement Administration (DEA) initiated federal forfeiture proceedings.⁵⁹ The Ninth Circuit concluded that absent "some affirmative act of abandonment" by the state, state jurisdiction was proper.⁶⁰ In response to the argument that the state executive

50. Section 881(a)(6) provides in relevant part that "[a]ll moneys . . . furnished or intended to be furnished by any person in exchange for a controlled substance" are subject to forfeiture. 21 U.S.C. § 881(a)(6) (1988).

51. *S79,123.49*, 830 F.2d at 96.

52. *Id.*

53. *See supra* note 44.

54. 830 F.2d at 99. The district court judge had reasoned incorrectly that the state court's continuing jurisdiction was in personam, rather than in rem. *Id.* at 96.

55. The Seventh Circuit rejected the United States' argument that its mere possession of the res established federal jurisdiction. The court concluded: "[P]ossession obtained through an invalid seizure neither strips the first court of jurisdiction nor vests it in the second. To hold otherwise would substitute a rule of force for the principle of mutual respect embodied in the prior exclusive jurisdiction doctrine." 830 F.2d at 98 (citation omitted).

See also *United States v. One 1979 Chevrolet C-20 Van*, 924 F.2d 120 (7th Cir. 1991). In *One 1979 Chevrolet C-20 Van*, the Seventh Circuit also denied federal jurisdiction over assets subject to forfeiture even though the filed state action had been dismissed. *Id.* at 123. The court held that the authorities were bound by applicable state forfeiture provisions "to seek a turnover order from the circuit court of the county in which the van was seized." *Id.* (citing ILL. REV. STAT. ch. 56 1/2, para. 712(d) (1989)).

56. 866 F.2d 1142 (9th Cir. 1989). The caption of the case is misleading because the significant property at issue was \$434,097.00 in cash. *Id.* at 1144.

57. *Id.* at 1145.

58. *Id.* at 1144. In rem state jurisdiction was premised on CAL. HEALTH & SAFETY CODE § 11470 (West 1991).

59. 866 F.2d at 1144. Although the circumstances of the federal seizure were unclear, the court surmised that some type of "cooperative arrangement" was in effect between the state and federal law enforcement authorities. *Id.*

60. *Id.* at 1145.

had approved the DEA seizure, the court noted that the rule of *Penn General* promotes harmony between courts, not bureaucrats.⁶¹

2. *Prior Exclusive Federal Jurisdiction*

In recent decisions, federal courts generally have not found encroachment on state jurisdiction when federal adoption of a state law enforcement seizure occurs prior to the initiation of a forfeiture action in state court. The Eighth Circuit ruled in accordance with this principle in *United States v. \$12,390.00*.⁶² In *\$12,390.00*, although no state court forfeiture proceeding had commenced, local law enforcement officers had executed a search warrant issued by a state court and subsequently filed a return of warrant with the same court listing currency as having been seized.⁶³ On this basis, the claimants maintained that the state court acquired exclusive jurisdiction.⁶⁴ Dismissing this interpretation, the court reasoned that the absence of state forfeiture proceedings, coupled with the lack of state custody over the res,⁶⁵ militated in favor of exclusive federal jurisdiction.⁶⁶ By condoning the federal adoption initiated without the consent or knowledge of the state court, the Eighth Circuit implicitly authorized the local police department's end run around state jurisdiction.⁶⁷

61. *Id.* The Ninth Circuit was similarly unpersuaded by the district court's possession of the res. *Id.* See also *United States v. \$2,542.00*, 754 F. Supp. 378, 380 (D. Vt. 1990). In *\$2,542.00*, the federal district court concluded that it did not have jurisdiction because, regardless of the Vermont State Police's decision to have the forfeiture adopted by federal authorities, a motion for dismissal was pending in state court. *Id.* at 382-83. According to David Smith, "[t]his decision gives claimants an unwarranted incentive to race to the state courthouse with a Rule 41(e) motion before a state police seizure is 'adopted' by the feds." See 1 SMITH, *supra* note 35, ¶ 9.01 at 9-30.

62. 956 F.2d 801 (8th Cir. 1992).

63. *Id.* at 805.

64. *Id.*

65. After federal administrative forfeiture proceedings had commenced, but five months prior to the filing of a federal forfeiture claim, the state court heard and granted claimants' motion for return of the property. *Id.* at 803.

66. *Id.* at 805-06. The court relied on the analogous Missouri Court of Appeals decision in *Conrod v. Missouri State Highway Patrol*, 810 S.W.2d 614 (Mo. Ct. App. 1991). In *Conrod*, the claimant sought the return of \$10,750 seized during a traffic stop when a narcotics dog signaled the presence of drugs on the currency. 810 S.W.2d at 616. The state police subsequently turned the money over to DEA to commence federal forfeiture proceedings. *Id.* The court concluded that because no Missouri court had assumed jurisdiction over the currency, the state circuit court was without jurisdiction to rule on claimant's motion for summary judgment. Thus, the adoption was proper. *Id.* at 617.

67. The decision in *\$12,390.00* significantly undermines the authority of state courts to determine the disposition of assets seized within their jurisdiction. The state court was unaware that federal forfeiture proceedings had been initiated until claimants brought their motion. 956 F.2d at 803. For

In *United States v. Certain Real Property*,⁶⁸ the Sixth Circuit reemphasized that the filing of a forfeiture claim in state court is crucial to the determination of whether the state can assert exclusive jurisdiction over forfeited assets. The court upheld federal adoption of seized real property, even though adoption took place after the state took affirmative steps that triggered administrative, though not judicial, forfeiture proceedings under Michigan law.⁶⁹ In *Certain Real Property*, the police seized the claimant's home because he had remodeled the attic for the purpose of cultivating marijuana.⁷⁰ The court rejected the claimant's contention that receipt of notice that the state had seized his property pursuant to Michigan law was sufficient to establish state jurisdiction.⁷¹ Even though compulsory state forfeiture proceedings were underway,⁷² the Sixth Circuit ruled that the federal district court properly exercised jurisdiction because there were no actions pending against the property in state court at the time of

a discussion of this problem under Louisiana law, see *infra* notes 84-89.

As part of its discussion of the jurisdictional issue, the court rejected the government's claim that, because the res was no longer within the jurisdiction of the district court, the Eighth Circuit lacked jurisdiction. 956 F.2d at 803-05. Abandoning the traditional notion that failure to preserve the res results in the loss of jurisdiction, the Eighth Circuit concluded that appellate jurisdiction was proper for several reasons. *Id.* at 803-04. First, it is fundamentally unfair to allow the government to invoke the jurisdiction of the court and then avoid appellate review of a favorable holding. Second, the res in this case, currency, is fungible and a portion of it remained in the possession of the United States. Third, the remainder of the money was distributed to the St. Louis Police Department, which cannot be considered an innocent purchaser because it conducted the initial seizure. Thus, the DEA could seek return of the money from the St. Louis Police Department, or in the alternative, compensate claimants with money from the Asset Forfeiture Fund. *Id.* at 804-05.

68. 986 F.2d 990 (6th Cir. 1993).

69. *Id.* at 994.

70. *Id.* at 992. Although beyond the scope of this Recent Development, there are numerous unresolved issues relating to the subject of real property forfeiture, including the resale of forfeited property and the residual interest of innocent owners. For discussion of these and other related issues, see generally Paul DeBole, *Forfeiture Under Drug Law Raises Tax, Title Issues*, MICH. LAW. WKLY., July 27, 1992, at 28 (discussing issues presented in the resale of forfeited property, including good title, title insurance, and real estate tax issues); Alice Marie 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 (1991); Brad A. Chapman & Kenneth W. Pearson, Comment, *The Drug War and Real Estate Forfeiture Under 21 U.S.C. § 881: The "Innocent" Lienholder's Rights*, 21 TEX. TECH. L. REV. 2127 (1990).

71. *Certain Real Property*, 986 F.2d at 993.

72. Real property is subject to forfeiture under MICH. COMP. LAWS ANN. § 333.7521 (West 1992). After notice of seizure has been provided to the property owner, Michigan law requires that the agency responsible for the seizure promptly notify the county prosecutor of the seizure. *Id.* § 333.7523(1)(b). After the claimant has filed a claim and a cost bond, or where no bond is filed after 20 days, the prosecutor must "promptly institute forfeiture proceedings" in state court. *Id.* §§ 333.7523 (1)(c), (1)(d), (3).

the adoption.⁷³ Since the federal district court was the only court “attempting to exercise” jurisdiction over the res, federal adoption of the property was appropriate.⁷⁴

3. State Statutory Jurisdiction

Frustrated by the federal courts’ refusal to recognize state forfeiture jurisdiction in the absence of a formal state court forfeiture action, states developed a variety of statutory schemes designed to secure state jurisdiction over the res.⁷⁵ However, the Fourth Circuit’s decision in *United States v. Winston-Salem/Forsyth County Board of Education*⁷⁶ raises significant doubts as to the effectiveness of these state statutes. In *Winston-Salem*, the Fourth Circuit upheld the transfer of \$10,638 in forfeited currency from the Winston-Salem Police Department to the DEA against challenges based on two distinct provisions of North Carolina law.⁷⁷

First, the court limited the application of a North Carolina constitutional provision which seemingly required that all forfeiture proceeds be used for public education.⁷⁸ The court noted that the provision specifically referred to forfeitures resulting from “any breach of the penal laws of the state,” and distinguished federal adoptive seizures arising from violations of federal law.⁷⁹ Because the Winston-Salem Police Department initially seized the

73. The court stated:

Therefore, it is the filing of the forfeiture complaint in the state court which brings the res within the jurisdiction of the state courts. We reject the contention that receipt of ‘notice of seizure’ from the seizing agency translates into the state court’s exercise of jurisdiction over the claimant’s real property.

986 F.2d at 994.

74. *Id.* at 994 (citing *\$12,390.00*, 956 F.2d at 801; *One 1986 Chevrolet Van*, 927 F.2d at 44; *One 1985 Cadillac Seville*, 866 F.2d at 1146). In its analysis, the *Certain Real Property* court stressed that the lack of a forfeiture action in state court precludes the assertion of state jurisdiction. 986 F.2d at 994. This conclusion is in accord with the authorities cited above. However, it ignores the fact that but for the federal adoption, the property would definitely have been forfeited under state law. MICH. COMP. LAW ANN. § 333.7523(1) (West 1992). Under the Eighth Circuit’s holding in *\$12,390.00*, this appropriation of state jurisdiction constitutes encroachment regardless of whether a state forfeiture action has formally been filed. 956 F.2d at 805.

75. See *supra* notes 5, 41.

76. 902 F.2d 267 (4th Cir. 1990).

77. *Id.* at 273.

78. *Id.* The North Carolina Constitution provides: “[T]he clear proceeds of all penalties and forfeitures and of all fines collected in the several counties for any breach of the penal laws of the State, shall belong to and remain in the several counties, and shall be faithfully appropriated and used exclusively for maintaining free public schools.” N.C. CONST. art. IX, § 7.

79. *Winston-Salem*, 902 F.2d at 273. The Fourth Circuit was influenced by a North Carolina Supreme Court decision, *State ex rel. Thornburg v. Currency in the Amount of \$52,029.00*, 78 S.E.2d

currency based on federal drug violations, the court determined that the proceeds were not subject to North Carolina's educational funding directive.⁸⁰

Second, the Fourth Circuit, when determining the validity of the adoption, refused to consider the police departments' alleged violation of state law.⁸¹ The Board of Education alleged that by transferring the forfeited assets to the DEA, the police department violated a state statute which required that seized property be retained for evidentiary purposes.⁸² Citing earlier forfeiture cases, the court held that the federal government's authority to adopt a seizure does not depend on the authority of the initial agency to transfer the property.⁸³ Accordingly, the court upheld the adoption without addressing the state law issue. The sweeping federal adoptive power conferred by the Fourth Circuit may be limited, however, if state law explicitly provides for exclusive state jurisdiction over forfeitures.

In *Scarabin v. Drug Enforcement Administration*,⁸⁴ the Fifth Circuit held that under Louisiana law, state court jurisdiction commences at the moment of seizure and continues until it is affirmatively relinquished.⁸⁵ In *Scarabin* the plaintiff sought the return of \$12,360 in cash seized by the local sheriff's office during a drug search pursuant to a state court warrant. The sheriff's office then sought adoption of the seizure by transferring a

1, 6 (N.C. 1989), and an opinion by the North Carolina Attorney General, 47 Op. N.C. Att'y Gen. 1 (1988), both holding that § 7 of the state Constitution applied only to forfeitures resulting from penal violation of North Carolina law. 902 F.2d at 273.

80. *Id.* at 273.

81. *Id.* at 272.

82. *Id.* The Board's statutory claim was premised on N.C. GEN. STAT. § 15-11.1(a) which provides that property seized by a state or local law enforcement officer must be kept "under the direction of the court or magistrate as long as necessary to assure that the property will be produced at and may be used as evidence in any trial." N.C. GEN. STAT. § 15-11.1(a) (1993).

83. 902 F.2d at 272. The Fourth Circuit relied on *United States v. One Ford Coupe Auto*, 272 U.S. 321, 325 (1926) ("It is settled that where property declared by a federal statute to be forfeited because used in violation of federal law is seized by one having no authority to do so, the United States may adopt the seizure with the same effect as if it had originally been made by one duly authorized."); and *United States v. One 1956 Ford Tudor Sedan*, 253 F.2d 725, 727 (4th Cir. 1958). *Winston-Salem*, 902 F.2d 272.

84. 966 F.2d 989 (5th Cir. 1992).

85. *Id.* at 993. State court jurisdiction was based on article 167 of the Louisiana Code of Criminal Procedure, which provides:

When property is seized pursuant to a search warrant, it shall be retained under the direction of the judge. If seized property is not to be used as evidence or is no longer needed as evidence, it shall be disposed of according to law, under the direction of the judge.

LA. CODE CRIM. PROC. ANN. art. 167 (West 1991).

cashier's check for the amount seized to the DEA. The *Scarabin* court vigorously criticized the federal government's handling of the forfeiture,⁸⁶ and, because the DEA never had actual possession over the claimant's currency, rejected the DEA's contention that the res was forfeited administratively.⁸⁷ Expressing its displeasure with the attempt of the sheriff's office to circumvent Louisiana law,⁸⁸ the court found the equitable sharing arrangement to be an unsanctioned encroachment on state law.⁸⁹ Although the Fifth Circuit, applying *Penn General*, validated preexisting state jurisdiction, neither the *Scarabin* court nor the Louisiana statute purported to prohibit federal adoption of state forfeitures altogether.⁹⁰

III. MISSOURI FORFEITURE LAW

Spurred by perceived abuses of existing state forfeiture statutes,⁹¹ and perpetually outpaced in the "unseemly race to the res,"⁹² Missouri recently enacted stringent new forfeiture provisions. If upheld against expected legal challenges, these new provisions will profoundly affect future

86. The court was incensed that even after all state charges against *Scarabin* were dismissed, he was nevertheless forced by the DEA to appear before the Fifth Circuit on three separate occasions. 966 F.2d at 995.

87. The sheriff's office turned over a check, rather than cash, which constituted the actual res, to the DEA in a vain attempt to establish in rem jurisdiction. *Id.* at 991. The court held that because the DEA never possessed the actual res, it did not have in rem jurisdiction. *Id.* at 990 ("In sum: no funds, ergo no forfeiture, ergo no jurisdiction. Q.E.D.").

88. *Id.* at 991. Louisiana law would have required the sheriff's office to return the \$12,360 to *Scarabin*. However, on the same day that the state court ordered that the property be seized pursuant to its warrant, the sheriff's office surrendered the cashier's check to the DEA for adoption "without the knowledge, much less the authority, of the state court." *Id.*

89. *Id.* The court was also upset by the apparent deception with which the arrangement was undertaken. *Id.* ("NFL sportscasters might call the handoff from the Sheriff's Office to the DEA, followed by the lateral back from the DEA to the Sheriff's Office, a 'flea-flicker' play.")

90. See 1 SMITH, *supra* note 35, ¶ 9.01 at 9-29 (commenting that no state forfeiture statute attempts to invalidate federal adoptions because doing so "would throw into question the legal basis for thousands of federal forfeiture cases—a result that neither the states nor the federal government could abide").

91. The *St. Louis Post Dispatch* ran a series of articles criticizing the perceived abuse of forfeiture proceedings in Missouri that contributed to the Missouri Legislature's enactment of new forfeiture legislation. See, e.g., Tim Poor & Louis J. Rose, *Forfeiture Scrutiny Brings Change*, ST. LOUIS POST DISPATCH, Dec. 29, 1991, at 1A; Tim Poor & Louis J. Rose, *Forfeiture "Adoption" Policy May Rob Citizen of Due Process*, ST. LOUIS POST DISPATCH, Dec. 17, 1991, at 7A; Tim Poor & Louis J. Rose, *Paralyzed Student May Lose His Car for Possessing \$40 Worth of Drugs*, ST. LOUIS POST DISPATCH, Dec. 15, 1991, at 1A; Tim Poor & Louis J. Rose, *Officer Seizes Sports Car, Ends Up As Its New Owner*, ST. LOUIS POST DISPATCH, May 5, 1991, at 1A.

92. *United States v. Alston*, 717 F. Supp. 378, 380 (M.D.N.C. 1989).

forfeiture actions in Missouri, and possibly elsewhere.

On July 13, 1993, Governor Mel Carnahan signed Missouri House Bill No. 562 into law.⁹³ This legislation represents a bold effort on the part of Missouri lawmakers to assert control over assets forfeited in Missouri.⁹⁴ Like the Louisiana statute addressed in *Scarabin*,⁹⁵ the Missouri statute vests control of any res seized pursuant to state authority in the pertinent state court from the moment of seizure.⁹⁶ However, the Missouri statute significantly enlarges the scope of state jurisdiction by including "any property seized by state or local peace or reserve officers who are detached to, deputized or commissioned by or working in conjunction with [a] federal agency. . . ."⁹⁷

93. The Missouri Legislature voted to enact the new state forfeiture provisions despite the issuance by the Department of Justice of a new adoptive forfeiture policy designed to allay the concerns of state lawmakers. The new federal policy requires that state or local seizures that are part of ongoing state investigations or prosecutions should be pursued in state court absent specific circumstances that may make federal forfeiture more appropriate. Such factors include: (1) inadequate state laws or forfeiture experience, (2) unique management or disposition problems requiring the assistance of the U.S. Marshals Service (e.g., property or businesses), (3) significant delay causing diminution in value of asset or adverse effect on innocent owner of asset, and (4) if for any reason, the pertinent prosecutor declines to initiate state forfeiture proceedings. CARY H. COPELAND, U.S. DEPARTMENT OF JUSTICE DIRECTIVE NO. 92-1 (Jan. 15, 1993), *reprinted in* SMITH, *supra* note 35, at 7-44 to 7-45.

94. For the text of the new provision, see *infra* notes 96-97.

One possible motivation for Missouri's new forfeiture legislation may have been the serious impact on state coffers arising from the Eighth Circuit's decision in *\$12,390.00*. See discussion *supra* notes 62-67 and accompanying text. That decision enabled Missouri law enforcement agencies to successfully prevent the sharing of any forfeiture proceeds seized by its own agents with other state agencies. *Id.*

95. See *supra* notes 84-90 and accompanying text.

96. Missouri's new anti-adoption provision states:

No state or local law enforcement agency may transfer any property seized by the state or local agency to any federal agency for forfeiture under federal law until the prosecuting attorney and the circuit judge of the county in which the property was seized first review the seizure and approve the transfer to a federal agency. The prosecuting attorney and the circuit judge shall not approve any transfer unless it reasonably appears the activity giving rise to the investigation or seizure involves more than one state or the nature of the investigation or seizure would be better pursued under federal forfeiture statutes. No transfer shall be made to a federal agency unless the violation would be a felony under Missouri law or federal law.

MO. ANN. STAT. § 513.647(1) (Vernon Supp. 1994). The new statutory provisions also include additional forfeiture reforms. Section 513.647(2) sets forth procedural, evidentiary, and notification requirements that must be followed prior to a transfer. Section 513.651 restricts the use of forfeited funds to "investigation or prosecution of criminal activity, the execution of court orders arising from such activity, the enforcement of drug-related crimes, training, drug education, and the safety of both the citizens and law enforcement officers." Section 516.653 further requires that law enforcement agencies receiving funds from federal forfeitures must acquire an independent audit of the proceeds received and provide a copy of the audit to the state auditor's office.

97. Section 513.649 provides in full: "Any property seized by state or local peace or reserve officers who are detached to, deputized or commissioned by or working in conjunction with the federal agency shall remain subject to the provisions of this section and sections 513.647 and 513.651." MO.

This provision is unique among state forfeiture statutes in that it encroaches upon the powers vested in state and local police operating under the authority of federal statute.⁹⁸ Specifically, it appears to encompass seizures conducted pursuant to federal judicial search warrants or as part of a federal investigation, so long as the seizures were conducted by state or local law enforcement personnel. Given this seeming encroachment, significant questions exist as to the validity of Missouri's forfeiture statute under the Supremacy Clause of the United States Constitution.

IV. SUPREMACY CLAUSE PREEMPTION

The Supremacy Clause⁹⁹ binds the judges of every state to the laws of the United States and permits Congress to preempt state law.¹⁰⁰ In *Capital Cities Cable, Inc. v. Crisp*,¹⁰¹ the Supreme Court identified the three ways in which federal law may preempt state law: (1) if Congress expresses a clear intent to preempt state law; (2) if Congress intends to occupy an entire field of law; and (3) if due to an inherent conflict, compliance with both state and federal law is impossible.¹⁰² Although a federal and a state statute may regulate a particular field of law jointly, the federal statute trumps any state law with which it conflicts.¹⁰³

In the area of federal forfeiture, Congress has not hesitated to exercise its preemption power.¹⁰⁴ The federal statute addressing the application of state law in forfeiture contexts, 21 U.S.C. § 903, is analogous to the third prong of the *Capital Cities* test.¹⁰⁵ Section 903 requires application

ANN. STAT. § 513.649 (Vernon Supp. 1994).

98. See *infra* notes 107-09 and accompanying text for a discussion of the authority of the DEA to deputize state and local law enforcement officers.

99. U.S. CONST. art VI, cl. 2. ("This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.")

100. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 210-11 (1824).

101. 467 U.S. 691 (1984).

102. *Id.* at 699.

103. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525-26 (1977).

104. See, e.g., 21 U.S.C. § 881(c) (1988) (providing that assets seized for violation of federal drug statutes "shall be deemed to be in the custody of the Attorney General, subject only to the orders and decrees of the court or official having jurisdiction thereof").

105. Section 903 provides:

No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, *unless there is a positive conflict between that provision of this*

of state law unless the state law “positively conflicts” with the federal statute.¹⁰⁶ Even under this relatively relaxed standard, certain provisions of Missouri’s new forfeiture statute may be vulnerable to preemption under § 903.

The DEA is responsible for the development and implementation of federal drug laws and for the enforcement of those laws in cooperation with state and local governments.¹⁰⁷ In addition, pursuant to 21 U.S.C. § 878, the DEA Administrator may delegate certain of the powers and functions vested in him to state and local law enforcement officers.¹⁰⁸ By statutorily granting this authority, Congress intended to implement an effective drug enforcement program utilizing the coordinated efforts of federal, state, and local law enforcement agencies.¹⁰⁹

Section 513.649 of Missouri’s forfeiture statute¹¹⁰ extends the jurisdiction of the state provisions to property seized by state and local law enforcement agencies, potentially including situations in which these agencies are acting under a federal drug enforcement program. Thus, this provision directly conflicts with 21 U.S.C. § 878,¹¹¹ because it attempts to regulate the same state and local police officers on which the federal provision bestows superseding federal authority. Congress intended to promote participation of federal, state, and local law enforcement officers in multi-jurisdictional drug task forces when it enacted § 878.¹¹² Missouri’s statute is a direct effort to circumvent this intent, and thus, is subject to preemption.

Although section 513.649 of the Missouri statute is subject to preemption, § 903 should not apply to section 513.647 of Missouri’s forfeiture provision.¹¹³ Section 513.647, like the Louisiana statute considered in

subchapter and that State law so that the two cannot consistently stand together.

21 U.S.C. § 903 (1988) (emphasis added).

106. *Id.*

107. Subpart R—Drug Enforcement Administration, 28 C.F.R. § 0.101(a) (1993).

108. Section 878 provides in pertinent part:

Any officer or employee of the Drug Enforcement Administration or any State or local law enforcement officer designated by the Attorney General may . . . execute and serve search warrants . . . issued under the authority of the United States; . . . *make seizures of property* . . . and perform such other law enforcement duties as the Attorney General may designate.

21 U.S.C. § 878(a)(2), (4), (5) (1988) (emphasis added).

109. See H.R. REP. 1444, 91st Cong., 2d Sess., Pt. 1, at 52 (1970) (calling for “cooperation between all of the Federal enforcement authorities and the State and local enforcement authorities”).

110. See *supra* note 96 and accompanying text.

111. See *supra* note 108.

112. See *supra* note 109.

113. See *supra* note 96.

Scarabin,¹¹⁴ permissibly provides for exclusive state jurisdiction from the moment of seizure premised upon the notion of judicial harmony set forth in *Penn General*.¹¹⁵ Under the doctrine of prior exclusive jurisdiction, this provision can coexist with the federal forfeiture provisions. Because it does not directly conflict with federal law, section 513.647 should not be subject to preemption.

IV. CONCLUSION

Where, as here, a positive conflict exists between state and federal law, the Supremacy Clause requires the application of federal law. Missouri's forfeiture provision, at least to the extent that it interferes with the ability of the federal government to delegate authority to state and local law enforcement agencies, should be preempted to avoid frustrating the anti-crime objectives of the federal forfeiture laws.

Preemption does not end Missouri's ability to get state jurisdiction. The preemption of section 513.649 does not upset the precedent of *Penn General*. Nor does 21 U.S.C. § 903 prevent a state from asserting prior exclusive jurisdiction over assets seized pursuant to state authority. It merely prevents a state from impermissibly encroaching upon the sphere of federal authority granted in 21 U.S.C. § 878 and guaranteed by the Supremacy Clause. Existing Department of Justice guidelines and policies regulating adoptive forfeitures¹¹⁶ already adequately safeguard Missouri's interest in forfeiture proceeds. Thus, there is little need for Missouri's aggressive, and arguably unconstitutional, legislation.

Frans J. von Kaenel

114. 966 F.2d 989 (5th Cir. 1992). See *supra* notes 84-90 and accompanying text.

115. See *supra* note 44 and accompanying text.

116. See *supra* note 93.