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Of Forfeiture, Facilitation and Foreign Innocent Owners: Is a Bank Account Containing Parallel Market Funds Fair Game?

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Abstract

Based on sworn testimony that 680 bank accounts in the United States containing nearly $400 million' were the "operating accounts" of the Medellin cartel, U.S. District Judge William C. O'Kelley issued an order temporarily restraining them on April 16, 1990.

KEYWORDS: bank account, funds, market

Of Forfeiture, Facilitation and Foreign Innocent Owners: Is a Bank Account Containing Parallel Market Funds Fair Game?

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I. INTRODUCTION

A. *Seize first, ask questions later: Operation Polar Cap and the Hawaii All Monies Cases*

Based on sworn testimony that 680 bank accounts in the United States containing nearly $400 million[1] were the "operating accounts"

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1. Mary Hladky, *Lawyers of Many Stripes Watch Money Seizure Cases in Ha-*

of the Medellin cartel, U.S. District Judge William C. O'Kelley issued an order temporarily restraining them on April 16, 1990.[2] Within weeks almost 580 of those accounts were released.[3] The government then sought civil forfeiture of the remaining 100 accounts, 88 of which were in the Southern District of Florida representing in excess of $17.6 million.[4] Almost two years later, claims to 82 of those accounts have been fully resolved returning 94 percent of the funds seized. The dispute over one account has been partially resolved returning thus far 86 percent of its funds. Approximately $830,000 has been forfeited and less than one million dollars is still in dispute.[5]

In May 1989, the federal government sought civil forfeiture of twenty-four bank accounts seized in Miami and New York and transferred to Hawaii in what has become known as the *All Monies* cases.[6]

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waii, MIAMI REVIEW, May 11, 1990, at 1, 4.

2. United States v. Pablo Emilio Escobar-Gaviria, Cr. No. 89-086-A (N.D. Ga., April 16, 1990). This order was entered pursuant to 21 U.S.C. section 853(e)(2) (Supp. 1992) which provides for a temporary restraining order against the property of a defendant in a criminal case when an information or indictment has not yet been filed seeking forfeiture of the property. The issuance of such an order requires the government to demonstrate probable cause to believe that the property would, in the event of the owner's conviction on the imminent criminal charges, be subject to forfeiture. In other words, the 680 bank accounts were seized based on the false verification that they were owned by the defendants in the criminal case pending in Atlanta, Georgia. *See* United States v. Eighty-Eight (88) Designated Accounts Containing Monies Traceable to Exchanges for Controlled Substances, 740 F. Supp. 842, 844 n.2, 850-51 (S.D. Fla. 1990) [hereinafter *Eighty-Eight Designated Accounts*].

3. Mike McQueen, *Prosecutors Face Tough Questioning on Frozen Funds*, THE MIAMI HERALD, June 9, 1990, at 4B.

4. United States v. Eighty-Eight (88) Designated Accounts Containing Monies Traceable to Exchanges for Controlled Substances, No. 90-1203-Civ-NESBITT (S.D. Fla. - amended Complaint filed May 21, 1990).

5. Of the 78 claimants who have settled with the government, the following chart shows the number of claims corresponding to the percentage of funds returned:

100%	95-99%	90-94%	75-89%	66-74%	50-65%
44	13	9	8	2	2

In addition, four accounts were forfeited in full: two were by default, in one case the claim was withdrawn; and one forfeiture was by stipulation. Of the total $830,000 forfeited, more than half, $450,000, was by one claimant who settled with respect to seven Miami accounts and an unknown number of New York accounts.

6. All of the cases are styled *United States v. All Monies [the amount seized] In Account No. [ ] [name of claimant]*. For ease of reference, after the initial full citation, these cases will be hereinafter referred to as *All Monies* - [name of the claimant].

The cases were filed in Hawaii as a result of a criminal indictment concerning

Of the $11.3 million seized from the twenty-four accounts, the federal government has returned in excess of $9.5 million. The federal government lost three cases on the merits, two on improper venue grounds, and settled the remainder. The federal government was able to retain the accounts of the drug trafficker, which it won by default.[7]

In 1991 alone, more than $643 million in cash and property was "stripped from drug traffickers and other criminals" by the United States government.[8] As the claimants in the Polar Cap and *All Monies* cases can testify, some of that money came from innocent owners who succumbed to the economic reality (some would say coercion) that the cost of litigating a civil forfeiture case can often exceed the amount at issue. Moreover, victory in such cases very rarely leads to the recovery of attorney's fees.[9]

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drug trafficking filed in Hawaii. *See* United States v. Emilio Melendez-Bernal, No. 89-00647 DAE (D. Haw. 1989). Melendez was convicted of conspiracy to import cocaine into the United States.

7. The author would like to express his appreciation to Hendrik Milne, Esquire, for his assistance in providing information about, and unreported memorandum decisions in, the *All Monies* cases. The statistics referred to in the text are derived from his Reply Brief for Appellant at 15, United States v. All Monies ($572,426.63) in Account Number 2785800-1 in the Name of Wadi Kahhat, *appeal filed*, Nos. 91-15847, 91-15944, and 91-16159 (9th Cir. Feb. 19, 1992). With attorney's fees and interest, the government may return to claimants, in the aggregate, more than 95 percent of the amount of money it seized.

8. DEP'T OF JUSTICE ASSET FORFEITURE PROGRAM ANN. REP. 8 (Mar. 30, 1992). The number of asset forfeitures has grown at an average annual rate of 99% since 1985. Since 1985 more than $2.4 billion worth of property has been forfeited. Significantly, most of this money has been reinvested in law enforcement. *Id.* In other words, those agencies involved in a forfeiture receive a portion of the proceeds. More than $830 million in forfeited property has been shared with state and local law enforcement agencies. *Id.* at Foreword. This "reinvestment' process gives an entirely new meaning to the expression "you eat what you kill." Further, the inclusion of this profit like motive calls into question the neutrality of law enforcement. No longer are police and special agents just "doing their job." Now they are working for increased resources including, in particular, larger budgets. *See* Winn, *Seizures of Private Property in the War Against Drugs: What Process is Due?*, 41 SW. L.J. 1111, 1127-28 (1988).

9. In Operation Polar Cap, the government was ordered to pay the attorneys' fees of one claimant under the Equal Access to Justice Act, 28 U.S.C. section 2412, because it seized and attempted to forfeit more than $106,000 when its best argument for probable cause entitled it to seize only $13,600. United States v. Eight-eight (88) Designated Accounts, 740 F. Supp. 842 (S.D. Fla. 1990).

In an *All Monies* case, thus far the government has been ordered to pay one claimant his attorney's fees. U.S. v. All Monies ($637,944.57) in Account No. 29-0101-62 (Abusada), No. 89-00386 DAE (D. Haw. September 11, 1991).

Both established and emerging legal principles are being applied to the civil forfeiture of bank accounts pursuant to 21 U.S.C. § 881(a)(6)[10] and 18 U.S.C. § 981(a)(1)(A)[11] with uncertain results. Section 881(a)(6) seizures are based on allegations that a bank account, or its contents, are traceable proceeds of an exchange for narcotics or were used to facilitate drug trafficking. Title 18 U.S.C. § 981(a)(1)(A) provides for seizure of monies or other property which was involved in a money laundering transaction.[12] There are several defenses which an owner of a bank account may interpose to recover his seized funds. The innocent owner defense under both applicable statutes and, in proceeds cases, the lowest intermediate balance defense are the principle defenses.[13] This article analyzes the basis for, and de-

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10. Title 21 U.S.C. section 881(a)(6) (Supp. 1992) makes the following property subject to forfeiture:

> All monies, 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 the subchapter, all proceeds traceable to such an exchange, and all monies, negotiable instruments, and securities used or intended to be used to facilitate any violation of the subchapter, 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.

11. 18 U.S.C. section 981(a)(1)(A) (Supp. 1992) makes the following property subject to forfeiture:

> Any property, real or personal, involved in a transaction or attempted transaction in violation of section 5313(a) or 5324 of title 31, or of section 1956 or 1957 of this title, or any property traceable to such property. However, no property shall be seized or forfeited in the case of a violation of section 4313(a) of title 31 by a domestic financial institution regulated by the Securities and Exchange Commission or a partner, director or employee thereof.

Id.

12. By property involved in a money laundering transaction, I refer to all four predicate crimes in 18 U.S.C. section 981(a)(1)(A): section 1956 [money laundering], section 1957 [engaging in monetary transactions and property derived from specified unlawful activity], 31 U.S.C. section 5313(a) [currency transaction reporting requirement], and 31 U.S.C. section 5324 [prohibiting structuring transactions to evade the reporting requirement of 31 U.S.C. § 5313(a)]. Section 981(a) also provides for the forfeiture of property derived from many other acts including certain acts which are violations of the law of a foreign jurisdiction. *See* 18 U.S.C. § 981(a)(1)(B),(C),(D), and (E) (Supp. 1992).

13. Claimants to any type of property sought to be forfeited under these statutes

fenses to, seizures of bank accounts funded with purchases of U.S. dollars on the parallel markets of Latin America.

B. *Procedure in Civil Forfeiture Cases*

Civil forfeiture proceedings follow the Federal Rules of Civil Procedure except where they are inconsistent with the Supplemental Rules for Certain Admiralty and Maritime Claims.[14] Typically, the government seizes a bank account, in whole or in part, with a seizure warrant based on a verified application and later files a verified complaint for forfeiture *in rem* to initiate civil forfeiture proceedings.[15] The distinguishing characteristic of such a proceeding is that it is "in rem." The defendant is the property to be forfeited, the property is the "guilty" party.[16] The government may seize property without proof of the

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may also raise defenses of undue delay and the property's non-involvement in the alleged illegal activity.

14. Title 21 U.S.C. section 881(b) and Title 18 U.S.C. section 981(d) incorporate the procedure of the customs laws. The customs laws in turn are governed by the Supplemental Rules for Certain Admiralty and Maritime Claims which provide for the application of the Rules of Civil Procedure except to the extent they are inconsistent with the Supplemental Rules. SUPPLEMENTAL RULE A. One significant consequence of the application of the Supplemental Rules is that the pleading requirement is more stringent than the liberal notice pleading of Federal Rule of Civil Procedure 8. *See* SUPPLEMENTAL RULE E(2). The particularity requirement has been honored by some courts because of the drastic consequence of the government seizing and holding property. *See* United States v. $38,000 in United States Currency, 816 F.2d 1538, 1548 (11th Cir. 1987) (government may not seize and continue to hold property upon conclusory allegations that defendant property is forfeitable); United States v. $39,000 in Canadian Currency, 801 F.2d 1210, 1216-19 (10th Cir. 1986).

15. The other common method of seizure is when the government files a verified complaint for forfeiture *in rem* and obtains an ex-parte warrant of arrest *in rem* simultaneously. *See* 21 U.S.C. § 881(d) (Supp. 1991), 18 U.S.C. § 981(d) (Supp. 1991). This article will discuss only judicial forfeitures because of the relative infrequency of administrative forfeitures of bank accounts and the consequent lack of ability to analyze the deliberative process involved in administrative determinations. At a recent seminar there was a discussion of a not yet implemented Department of Treasury decision to use administrative forfeiture for bank accounts of less than $500,000. If implemented, this policy would move most bank account seizures into the administrative realm.

16. *See* Piety, *Scorched Earth: How the Expansion of Civil Forfeiture Doctrine Has Laid Waste to Due Process*, 45 U. MIAMI L. REV. 911, 916-927 (1991) (explaining how property can be "guilty" and a thorough critique of civil forfeiture doctrine); Winn, *supra* note 8; Finkelstein, *The Goring Ox: Some Historical Perspective on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty*, 46 TEMP

owner's complicity in the illegal conduct subjecting the property to forfeiture.

Civil forfeitures are hybrids of criminal, civil and admiralty practice. After the concept of guilty or tainted property, the most unusual aspect of civil forfeiture procedure is the burden of proof structure. As plaintiff, the government has the initial burden of demonstrating the existence of probable cause to believe that a substantial connection exists between the property to be forfeited and the underlying criminal activity.[17] The government's burden of proof is not to establish forfeitability beyond reasonable doubt, nor by clear and convincing evidence, nor by preponderance of the evidence. Rather, to show probable cause to believe that property is subject to forfeiture, the government's burden is less than *prima facie* proof, but more than mere suspicion.[18]

The nature of probable cause in civil forfeiture cases has four attributes: First, it is the same legal standard as that applied in a criminal context for arrests and search and seizure warrants.[19] Second, as in the criminal context, the government may prove probable cause using hearsay which would be excluded by the Federal Rules of Evidence in a typical civil case.[20] Third, the court, not a jury, determines probable cause.[21] Fourth, in determining probable cause, judges must view the evidence not with clinical detachment, but by applying their common sense to the realities of normal life.[22]

Once the government demonstrates probable cause, the burden of proof shifts to the claimant.[23] In order to prevail, the claimant must establish, by a preponderance of the evidence, that the property sought to be forfeited (e.g., all or certain funds in a bank account) was not

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L.Q. 169 (1973).

17. United States v. $4,255,000, 762 F.2d 895, 903 (11th Cir. 1985), *cert. denied*, 747 U.S. 1056 (1986).

18. *Id.*

19. United States v. Premises and Real Property at 4492 S. Livonia Rd., Livonia, New York, 889 F.2d 1258, 1267 (2d Cir. 1989), *cert. denied*, 111 S. Ct. 1017 (1991).

20. U.S. v. Property Known as 6109 Grubb Road, 886 F.2d 618, 622 (3d Cir. 1989).

21. 19 U.S.C. § 1615 (Supp. 1992).

22. *$4,255,000*, 762 F.2d. at 904; Wilson v. Attaway, 757 F.2d 1227 (11th Cir. 1985); United States v. Herzbrun, 723 F.2d 773, 775 (11th Cir. 1984). For example, the Eleventh Circuit allowed, in effect, judicial notice of "the fact that Miami has become a center for drug smuggling and money laundering." *$4,255,000*, 762 F.2d at 904.

23. 19 U.S.C. § 1615 (Supp. 1992).

used in violation of the applicable statute, or that he is an innocent owner as defined in the applicable statute.[24] The claimant is entitled to a jury trial conducted under the Federal Rules of Evidence on his affirmative defenses.[25] A central feature of a parallel market bank account forfeiture case is explaining to the fact-finder the foreign client's culture, especially the purchase of dollars on the parallel market.

II. LATIN AMERICAN PARALLEL MARKETS

A monetary parallel market is commonly understood to be a non-government means of exchange of different national monies. Parallel markets are also called black, grey and unofficial markets. The legality of participating in a parallel market is a function of the law of the country where the money is being traded.[26] The parallel market is a free market in the sense that one can purchase dollars at a negotiated exchange rate, rather than at the official rate established by a foreign government.

Money exchangers, known as cambistas in Latin America, operate as brokers of funds, often not even taking possession of the dollars that they sell. For example, a dollar purchaser pays his cambista local currency, check or wire transfer depending on the size of the transaction. In return the cambista provides dollars in cash, money order, wire transfer or check. Checks are usually from a third party with the payee's name filled in at the time of the transaction. Wire transfers come either from the cambista's account or directly from the account

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24. 21 U.S.C. § 881(a)(6) (Supp. 1992) and 18 U.S.C. § 981(a)(2) (Supp. 1992). *See* United States v. One Single Family Residence, 933 F.2d 976, 979 (11th Cir. 1991); *$4,255,000*, 762 F.2d at 904; United States v. One 1944 Steel Hulk Freighter, 697 F.2d 1030 (11th Cir. 1983).

25. *See* United States v. One 1976 Mercedes Benz 280S, 618 F.2d 453, 469-71 (7th Cir. 1980) (Sprecker, J., dissenting).

26. For example, there is no prohibition under Peruvian law regarding the exchange of national monies. In Colombia prior to February, 1991, participation in the parallel market was a "contravention cambiaria," a violation of the regulations governing exchange controls. Decreto 444 which established this regulation was in force from 1967 through January, 1991. A violation of Decreto 444 was not a "delito," a crime, and was not punishable by imprisonment. Rather, it was punishable by an administrative sanction of forfeiture of the amount of money that was involved in the transaction and a potential penalty of up to 200% of the amount forfeited. A person who was sanctioned under this provision and did not pay their fine was subject to administrative arrest and incarceration. Enforcement of this regulation was lax to say the least. And as noted, it was repealed in February, 1991.

of the person from whom he is buying dollars.[27]

The demand for dollars is fueled by individuals and businesses who need to maintain dollar accounts for a variety of reasons. Foreign individuals and businesses have held dollar accounts in the United States for more than a century for different reasons including personal security (i.e., concern over the lack of confidentiality of bank records which has led to violence, extortion and kidnapping) and preservation of wealth (due to the lack of stability of certain banking systems, high levels of devaluation of local currencies against the dollar, tax avoidance, and the perception of better investment opportunities available in the United States). Latin American importers have also maintained dollar accounts in the United States for a variety of reasons including a desire to escape the cost, delay and bureaucratic inconvenience of buying dollars from the [United States] government. Furthermore, the money in these accounts is used to purchase contraband products because they are unable to buy dollars from an official source for these purchases.[28] Additionally, if the rate of exchange for dollars is more favorable on the parallel market, people could easily purchase dollars in the official market may choose to purchase on the parallel market.

Cambistas obtain their supply of dollars from the parallel market in the form of cash, money orders and checks (usually with the payee left blank) and wire transfers. Their sources include tourists needing local currency, local residents who have received funds from family members living abroad, the return of flight capital, the under-invoicing of merchandise legitimately imported into their country, and sellers of contraband including coffee, gold, emeralds, cattle and, of course, drugs.

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27. The account from which the cambista transfers dollars must, of course, be located in a country which permits dollar denominated deposits. Cambistas operate from a casa de cambio (money exchange) or simply, a cambio. Often, the dollar purchaser does not pay the cambista until he receives the confirmation that his bank has received the funds.

The reported decisions on the parallel market involve exchanges of dollars for Colombian pesos or Peruvian intis. *See $4,255,000*, 762 F.2d at 899; United States v. All Monies ($477,048.62) in Account No. 90-3617-3, Israel Discount Bank, New York (Leloach), 754 F. Supp. 1467 (D. Haw. 1991).

28. Such products include electronics and clothing which are imported without being registered and, therefore, without paying taxes or tariffs.

III. APPLICATION OF CIVIL FORFEITURE STATUTES TO DOMESTIC BANK ACCOUNTS

The civil forfeiture provisions of the Controlled Substance Act[29] were amended in 1978 to include forfeiture of proceeds of illegal drug transactions.[30] The purpose of the amendment, codified at 21 U.S.C. § 881(a)(6), was to strengthen the attack on drug traffickers by confiscating their profits.[31]

Bank accounts are subject to the risk of seizure when the United States government believes they are sufficiently related to drug trafficking or money laundering.[32] In the simplest proceeds case, the government may develop proof that a drug seller uses a bank account strictly for the deposit of dollars earned in drug sales. The government can also trace the proceeds if they are transferred to another account. The first account, the account into which the funds obtained in exchange for the drugs were placed, is called either a "primary" or a "direct recipient" account. The account which receives the transfer of funds is called the "secondary" or "indirect recipient" account. Under the above scenario the direct recipient account would be subject to forfeiture as proceeds traceable to an exchange for a controlled substance.[33]

As for the secondary account, the amount seizable[34] is equal to the amount of money transferred into it from the direct recipient account, or its account balance at the time of seizure, whichever is lower. These

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29. Comprehensive Drug Abuse Prevention and Control Act, 21 U.S.C. § 853 (1970).

30. Comprehensive Drug Abuse Prevention and Control Act, Pub. L. 95-633, 92 Stat. 3777 (1978).

31. *See* 124 CONG. REC. S23055-56 (1978) (comments of Senators Nunn and Culver).

32. In particular, the dollars must be proceeds traceable to drug violations, used to facilitate the violations, constitute property involved in money laundering transactions or any property traceable to such money laundering property.

33. 21 U.S.C. section 881(a)(6) (Supp. 1992). Depending on the nature in which the deposits to the direct recipient account were made (e.g., repeated cash deposits in amounts less than $10,000 with intent to avoid the filing of currency transaction reports) 18 U.S.C. section 981(a)(1)(A) (Supp. 1992) would also subject the direct recipient account to forfeiture through the incorporation of 31 U.S.C. section 5324 (Supp. 1992) (structuring).

34. "Seizable" is used herein to denote the government's presumptive ability to seize the asset and subject it to forfeiture proceedings. Since a claimant does not have the opportunity to assert his defenses until after the seizure, "seizable" does not imply "forfeitable."

funds are seizable regardless of the secondary account owner's lack of participation in, or even lack of knowledge of, the criminal activity leading to the deposits into the direct recipient account.

A. *Traceable Proceeds or "Follow the Dirty Money"*[35]

If a drug seller uses the cash he obtained in an exchange for drugs to purchase a car, the car is seizable. Likewise, if he writes a check from his account (the contents of which are exclusively proceeds of drug transactions) to purchase a car, that car is also seizable as a proceed traceable to the original exchange for drugs.[36] The federal government may seize assets which are far removed in time, place and nature from the original consideration earned from the illicit drug sale, provided it can trace the asset seized to the drug violations.[37] In the context of bank accounts, the government can also seize funds that have been transferred through numerous bank accounts so long as the funds seized are, in fact, traceable to drug violations. The government must

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35. Although this traceable proceeds section discusses money earned from drug sales, all of the principles discussed are equally applicable to money derived in violation of one of the four predicate statutes enumerated in 18 U.S.C. section 981(a)(1)(A) (Supp. 1992). That is to say, since the enactment of section 981(a)(1)(A), a broad range of assorted criminal activity independent of narcotics may provide the initial funds which may be traced and seized.

36. By the same token, the cash or funds used to pay for the asset purchased by the drug dealer is also seizable. There is a debate concerning whether or not the government could forfeit *both* the cash and the asset purchased with the cash. *See $4,255,000*, 762 F.2d at 905; United States v. Banco Cafetero Panama, 797 F.2d 1154, 1161 (2d Cir. 1986).

37. *See* Joint Explanatory Statement of Titles II and III, Psychotropic Substances Act of 1978, Pub. L. No. 95-633, *reprinted in* 1978 U.S.C.C.A.N. 9518, 9522; *Banco Cafetero*, 797 F.2d at 1158.

The government is not entitled, however, to seize bank accounts when it cannot trace tainted funds into them. Although this proposition should be self-evident, in at least three of the *All Monies* cases: *All Monies (Abusada)*, *supra* note 9; All Monies (Kahhat), No. CV-89-00687-HMF (D. Haw.); and United States v. All Monies ($76,285.91) in Account No. 95-6, in the Name of Henry Feiger, Civ. No. 89-00471-HMF (D. Haw); the government did just that. The government claimed that there was a connection between the defendant accounts and a money laundering operation based on tenuous evidence which did *not* include the tracing of even a dollar from the money laundering ring to the defendant accounts. *See All Monies (Abusada)*, 746 F. Supp. at 1438; *All Monies (Fieger)*, *supra* this note (March 5, 1990 - claimant's motion for summary judgment on probable cause granted), *set aside*, (August 7, 1990 - granting motion to dismiss on venue grounds); *All Monies (Kahhat)*, *supra* this note (August 8, 1990 - summary judgment granted on reconsideration).

have probable cause to connect the property with narcotics activity, but it need not link the property to a specific transaction.[38] The government does, however, have the burden of tracing a specific amount of money into a secondary account it seizes.[39]

If money is transferred from a secondary account after it receives tainted funds, how can the funds traceable to those deposits be identified? The nature of the proof necessary for tracing has been the subject of a limited number of reported decisions. The seminal case in this area, *United States v. Banco Cafetero Panama*,[40] adopted trust accounting principles to analyze whether the funds seized by the government were properly traceable to an exchange for narcotics in a section 881(a)(6) case. The court approved two approaches to determine whether an account contained traceable proceeds: "drugs-in, last-out,"

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38. *See, e.g., $4,255,000*, 762 F.2d at 903-04; *Banco Cafetero*, 979 F.2d at 1160. Examine the government's burden: it must only show probable cause, that is less than *prima facie* proof, to believe that a substantial connection exists between the property to be forfeited and the applicable criminal activity without even having to prove any specific drug violations *and* the government may prove probable cause with hearsay. Even calling it a burden seems a misnomer.

39. United States v. William Savran & Associate, Inc., 755 F. Supp. 1165, 1183 (E.D.N.Y. 1991) (before the burden shifts to a claimant to show which funds in the account were clean funds "the government must first demonstrate that a *precise amount* of proceeds from the fraudulent scheme were deposited in a specific bank accounts which also contained untainted funds . . . .") (emphasis in original) (citing D. Smith, PROSECUTION AND DEFENSE OF FORFEITURE CASES, ¶ 4.03(4)(d) (1991)). *Contra* United States v. All Funds and Other Prop., Acct. No. 031-217362, 661 F. Supp. 697, 700-701 (S.D.N.Y. 1986) (claimants consisted of a felon convicted of laundering in excess of $150,000,000, two corporations which he controlled and used in his money laundering operation and another individual as receiver of the same company's assets; probable cause for forfeiture of the accounts because of vast nature of money laundering operation, no proof required as to any particular amount of money or account, burden placed on claimants to show that funds were not drug proceeds). This court cited *Banco Cafetero Panama* for placing the tracing burden on the claimants by selectively quoting the decision: "The risk of uncertainty in determining the traceability of [the money linked to drugs] is placed squarely on the claimant." *Id.* at 701 (citing *Banco Cafetero*, 797 F.2d at 1161). However, the full sentence from *Banco Cafetero* is: "Under the Congressional scheme, the risk of uncertainty in determining the traceability of proceeds of drug sales is placed squarely on the claimant, *once probable has been established.*" *Banco Cafetero*, 797 F.2d at 1161. Moreover, in *Banco Cafetero* the government had traced specific amounts of drug money into the accounts and was resolving the issue of who bore the burden of distinguishing clean funds from dirty funds *after* the government proved how much money in the accounts was dirty and there were intervening transfers.

40. 797 F.2d 1154 (2d Cir. 1986).

or "drugs-in, first-out."[41] Since the enactment of section 981(a)(1)(A), these approaches could be rephrased as "tainted money in - last out" or "tainted money in - first out." These approaches are employed when a tainted deposit cannot be closely matched with a tainted withdrawal.[42]

Assume $25,000 of proceeds of drug transactions withdrawn from an account owned by a drug trafficker is used to purchase a car. The car dealer then deposits the $25,000 into his dealership's account which contained $100,000 in clean money at the time of the tainted deposit.

1. If there are no intervening transactions in the car dealership's bank account between the deposit of the $25,000 and when the government comes knocking, $25,000 from that account is seizable;[43]

2. If the only transaction after the tainted deposit is the car dealership's transfer of $10,000 out of its operating account to open a time deposit, the government may seize $15,000 from the operating account and the entire time deposit under the tainted money-in, first-out approach or, the government could seize $25,000 from the operating account under the tainted money-in, last-out approach; and

3. If the only transaction after the tainted deposit is the dealership's transfer of $120,000 from its operating account to open a time deposit, the government may seize $25,000 from the time deposit under the tainted money-in, first-out approach or the $5,000 balance remaining in the operating account and $20,000 from the time deposit under the tainted money-in, last-out approach.

An important limitation on the government's ability to seize funds from a secondary account is known as the lowest intermediate balance rule.[44] Under this rule, no matter how much tainted money is put into the account if, after the last tainted deposit, the account balance goes to zero and then is brought back to a positive balance with clean funds prior to the government's seizure of the account, no funds in the ac-

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41. *Id.* at 1159. *Banco Cafetero* also discussed the accounting principle using a pro rata share method which would taint that portion of any withdrawal corresponding to the ratio of the amount of the tainted deposit to the funds in the account immediately after the deposit. *Id.* The pro rata share method was neither approved nor disapproved by the court.

42. *Banco Cafetero* assumes that if a tainted deposit can be precisely matched to a withdrawal then that withdrawal is presumptively tainted and vice-versa. In such instances there is no need to resort accounting principles.

43. Under a version of the facilitation theory in use by the government today and approved by one federal judge, the government could seize and seek forfeiture of the entire $125,000. *See infra* text accompanying notes 70-79.

44. *Banco Cafetero*, 792 F.2d at 1159.

count are traceable proceeds. In other words, the lowest balance after the last tainted deposit and before the seizure of the account will be the most money the government could prove is traceable to an illegal transaction.

Although no published opinion has applied the lowest intermediate balance to limit the amount of forfeitable funds to something less than a tainted deposit, numerous unreported decisions and settlements have been based on the lowest intermediate balance rule.[45] This rule is viewed as an affirmative defense to a seizure because it is used to rebut the government's claim to have seized tainted funds. The claimant always has the right to prove that the government was simply wrong and that the funds seized are not tainted. The lowest intermediate balance rule provides the claimant with one very straight forward way of limiting the amount of forfeitable funds.

In situations where the government has not had access to the account records prior to seizure, this burden is appropriately placed on the claimant.[46] However, if the government has in fact had access to the account's records demonstrating the lowest intermediate balance defense prior to seizure, the claimant will be able to show that the government did not have probable cause to seize any funds in excess of the lowest intermediate balance.[47] Likewise, if the government purports to have traced funds from a direct recipient account through one or more indirect recipient accounts prior to the deposit into the claimant's account, then the government, in order to show probable cause to seize funds from the claimant's account, should have the burden of establish-

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45. In United States v. Proceeds Deposited in Account No. 01008054, Bank of Credit and Commerce International, No. 88-1581-Civ-T13(C) (M.D. Fla. February 8, 1990) (granting summary judgment in favor of the claimant on the basis that a negative balance in the interim between the deposit of the tainted funds and the government's seizure of the account was proof that none of the funds in the defendant account at the time of the seizure were tainted proceeds; $400,000 was returned to the claimant).

This author is personally familiar with dozens of cases which have been settled by applying the lowest intermediate balance theory to the facts alleged by the government. Often this leads to the return of all or all but a small portion of the funds in an account. For example, in *Eight-eight (88) Designated Accounts*, *supra* note 3, at least thirty-two claims were resolved by agreement based on the application of the lowest intermediate balance rule returning $1,912,084.08 *to the claimants.*

46. *See, e.g., Banco Cafetero*, 797 F.2d at 1161.

47. *See, e.g.*, United States v. Gavilan, 849 F.2d 1246, 1249 (9th Cir. 1988) (allowing award of attorney's fees pursuant to the Equal Access Justice Act (EAJA), 28 U.S.C. section 2412, where the government knew of clear affirmative defense).

ing that the funds actually deposited in the claimant's account were tainted under the applicable tracing rules including lowest intermediate balance. After all, it is the government, not the claimant, who has access to the account records of the intervening accounts prior to the seizure.[48]

B. *Facilitation, or "Follow the Dirty Money and Watch It Grow"*

Under 21 U.S.C. § 881(a)(6) any money used or intended to be used to facilitate any violation of the Controlled Substances Act is subject to forfeiture. The sole reported decision concerning facilitation in a § 881(a)(6) bank account seizure, *United States v. All Monies ($477,048.62) in Account No. 90-3617-3 (Leloach)*,[49] found that property was "used to facilitate" if it made "the underlying criminal activity less difficult or more or less free from obstruction or hinderance."[50] The court also found that the connection between the property to be forfeited and the illegal activity must be "substantial," that is, more than incidental or fortuitous, but not necessarily indispensable to the commission of the offense.[51]

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48. Indeed, if the records of such intervening transfers are available to the government for tracing purposes, the records of the account balances should also be available. In such a case, the government's failure to apply the lowest intermediate balance rule, if appropriate, to limit the amount eventually seized, could subject the government to sanctions under Federal Rule of Civil Procedure 11 for failure to conduct a reasonable inquiry into the facts giving rise to probable cause. Recovery for a claimant in such circumstances might also be available under EAJA, or if the government fails to obtain a certificate of reasonable cause (28 U.S.C. § 2465).

49. 754 F. Supp. 1467 (D. Haw. 1991).

50. *Id.* at 1473 (citing United States v. Schifferli, 895 F.2d 987, 990 (4th Cir. 1990)).

51. *Id.* (citing *Schifferli*, 895 F.2d at 989-90 and United States v. Premises Known as 3639-2nd Street, N.E., 869 F.2d 1093, 1096 (8th Cir. 1989). In *Schifferli*, a dentist's office was forfeited pursuant to 21 U.S.C. section 881(a)(7) which provides that all real property which is used to commit or to facilitate the commission of a violation of the Controlled Substances Act is forfeitable. The dentist was convicted of writing illegal prescriptions and his office was forfeited because it made it easier for him to hold himself out as a person authorized to write prescriptions. *Schifferli*, 895 F.2d at 991.

In United States v. Rivera, 884 F.2d 544 (11th Cir. 1989), the government sought criminal forfeiture pursuant to 21 U.S.C. section 853(a)(2) of a ranch and all of the assets associated with it on the basis that the rancher used his ranch as a cover for a heroin distribution business. The rancher was convicted and the jury found that his

In *All Monies (Leloach)*, the claimant, Henry Leloach, was a cambista in Peru who used the defendant account both to receive dollars sent by his customers purchasing intis, and to send dollars to his customers purchasing dollars. At the time of seizure approximately one-half of the funds in the defendant account were proceeds directly traceable to the bank account of a narcotics trafficker containing the proceeds of his crimes. The government was able to establish probable cause for forfeiture of the entire account using the facilitation theory based on the following facts:

1. Melendez, a man convicted of conspiracy to import cocaine into the United States, identified the defendant account as one that he "controlled."[52] Melendez was a partner in Dirimex, another Peruvian casa de cambio,

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twenty-seven quarter horses were used to facilitate his drug trafficking but, interestingly, rejected the government's contention that the ranch was also used to facilitate the crimes. *Id.* at 546. The rancher used the ranch's telephone to transact most of his drug business and tape recordings of those telephone conversations revealed that he bought and distributed heroin using code words, the same words that he used to conduct his horse breeding business: "horses," "halters," "bails of hay," and "lead lines." *Id.*

There are numerous decisions upholding the forfeiture of conveyances, usually automobiles, on the basis of their facilitation of the narcotics transaction even though their involvement was indirect. *See, e.g.*, United States v. One 1977 Lincoln V Coupe, 643 F.2d 154, 157 (3d Cir.), *cert. denied*, 454 U.S. 818 (1981) (automobile forfeitable because its presence "with its hood up" provided a convenient cover whereas two men alone in an alley might have appeared suspicious); United States v. One 1968 Ford LTD Four Door, 425 F.2d 1084, 1085 (5th Cir. 1970) (car forfeitable because it ran interference for fleeing felons); United States v. 1980 BMW 320I, 559 F. Supp. 382, 385 (E.D.N.Y. 1983) (car forfeitable because it provided a means of surveillance, was the look-out car); United States v. One Mercury Cougar XR-7, 666 F.2d 228, 230 (5th Cir. 1982) (car forfeitable because it laid the groundwork for the illegal activity by transporting the participants to search for a landing strip and storage building for the marijuana to be received).

Title 21 U.S.C. sections 881(a)(4) and (a)(7), however, have broader facilitation language than that found in sections 881(a)(6) or 18 U.S.C. section 981(a)(1)(A). Section 881(a)(4), after referring to the property to be forfeited states "which are used, or are intended for use, to transport, or *in any manner* to facilitate the transportation, sale, . . ." and section 881(a)(7) states "which is used, or intended to be used *in any manner or part*, to commit, or to facilitate the commission of . . . ." (emphasis added). Neither section 881(a)(6) nor section 981(a)(1(A) contain the "in any manner" broadening provision. Since these three subsections are all part of the same statute, and indeed the same paragraph, section 881(a), it must be presumed that Congress intended that they be treated differently.

52. *All Monies (Leloach)*, 754 F. Supp. at 1475.

2. Dirimex transferred funds into Leloach's account 38 times from 1987 through May 4, 1989 - only 23 days before the account was seized.[53] $2,500,000 were tainted. The $2,500,000 laundered through the defendant account was more than five times the amount actually seized.[54]

3. Leloach used his account to transfer money not only to his customers, but also to Dirimex's customers pursuant to the instructions of Melendez and Melendez's associates at Dirimex.[55] In fact, various deposits to and disbursements from Leloach's account had Melendez's handwritten name entered by either the claimant or one of his employees. The claimant could not explain why Melendez's name was written in his records and, in fact, contended that he dealt directly with another person at Dirimex.[56]

Based on the above facts, the court granted the government's motion for summary judgment on probable cause for forfeiture of the entire account based on the facilitation theory under both 21 U.S.C. § 881(a)(6) and 18 U.S.C. § 981(a)(1)(A). The court's discussion of the factual basis for probable cause concerned exclusively the use of the account to facilitate money laundering rather than drug trafficking.[57] The court did not distinguish between the nature of the underlying criminal activity which must be facilitated in order to forfeit the account and did not attempt to explain how the account facilitated a violation of the drug laws as opposed to the money laundering laws.[58]

What was the substantial connection between the portion of the account which was not traceable to a narcotics transactions and the narcotics transactions themselves? How did the clean money in the account make the underlying drug sales activity less difficult, less ob-

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53. *Id.* at 1476. Leloach's records indicated, and apparently the government did not contest, that out of approximately 370 deposits into his account in 1988 and 1989, only 34 came from Dirimex. *Id.* at 1481. Since Dirimex was also a cambio and cambios broker funds, the fact that the funds "came" from Dirimex does not mean they came from an account titled Dirimex's name. The nature of the government's proof was *not* that all of Dirimex's money was dirty, but rather that, on occasions, Dirimex brokered funds supplied by Melendez. Further, many of the 34 deposits came from accounts which the government did not seek to prove were affiliated with drug trafficking.

54. *Id.*

55. *Id.* at 1474.

56. *Id.*

57. *All Monies (Leloach)*, 754 F. Supp. at 1473-76.

58. Although unstated, the court appears to have concluded that if an account is used to facilitate the laundering of drug proceeds it, *ipso facto*, facilitates the underlying drug crimes. The validity of this assumption is less than obvious.

structed or less hindered? A possible answer may be found in the court's conclusion that the account "provided a repository for the drug proceeds in which the legitimate money could provide a 'cover' for those proceeds, thus making it more difficult to trace the proceeds."[59] This answer, however, merely assumes that post-facto laundering of drug proceeds facilitates the underlying crime itself. This conclusion is not self-evident, especially in light of the other laws specifically criminalizing such laundering activity (e.g., 18 U.S.C. §§ 1956, 1957) and making such property forfeitable (e.g., § 981(a)(1)(A)).

All Monies (Leloach) is also significant because it is the first reported decision finding that section 981(a)(1)(A) reaches property, such as a bank account, which facilitates a violation of the predicate statutes.[60] Section 981(a)(1)(A) does not contain the word "facilitate." Rather it makes forfeitable any property "involved" in a transaction or attempted transaction in violation of the predicate acts. To graft the facilitation theory onto section 981(a)(1)(A), the court looked to the clear legislative intent "to include the money or other property laundered (the corpus), any commissions or fees paid to the launderer, and any property used to facilitate the laundering offense."[61]

The seizure of bank accounts based on allegations of money laundering facilitation has been addressed in only one other reported deci-

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59. *Id.* at 1475-76. Tracing the proceeds, however, does not make the actual drug sales, the underlying criminal activity, less difficult, less obstructed or less hindered. The difference between the nature of the criminal activities which must be facilitated under section 881(a)(6) and section 981(a)(1)(A) is one which received no attention in *All Monies (Leloach)*, probably because there was also a section 981(a)(1)(A) forfeiture claim. In any bank account case involving only a section 881(a)(6) seizure, this could be a critical distinction. However, since the enactment of section 981(a)(1)(A) and in its revision in 1988, there is unlikely to be a bank account seizure involving only section 881(a)(6).

60. *Id.* at 1473. Apparently, the first decision interpreting section 981(a)(1)(A) to include facilitation is United States v. Real Property Including any Building Appurtenances and Improvement Thereon Located at 4643 W. Kennedy Boulevard, 1990 WL 305391 (M.D. Fla. February 12, 1990). The court denied emergency motions for the return of property seized pursuant to section 981(a)(1)(A). The claimants argued that seizure under section 981(a)(1)(A) was limited to the corpus, the amount actually laundered, in this case $25,000, rather than the real estate and liquor licenses, in effect the businesses of the claimants. The court upheld the seizure of the businesses based on the legislative history authorizing seizure of property used to facilitate the laundering offense. *Id.*

61. *All Monies (Leloach)*, 754 F. Supp. at 1473 (citing 134 CONG. REC. S17365 (1988)).

sion.[62] In *United States v. Certain Funds on Deposit in Account No. 01-0-71417*, (*Certain Funds*) the government sought forfeiture of several accounts under the direct control of alleged participants in a scheme to illegally obtain credit union funds.[63] The account owners transferred the tainted funds into the defendant accounts which had previously contained only clean money.[64] The claimants argued that the government could seize only the amount that was traceable to the alleged illegal activity.[65] The court rejected that argument, adopting the government's contention that "limiting the forfeiture of funds under the circumstances to the proceeds of the initial fraudulent activity would effectively undermine the purpose of [section 981(a)(1)(A)]."[66] The court cited *All Monies (Leloach)* and held that clean money which facilitated the money laundering was forfeitable: "[c]riminal activity such as money laundering largely depends upon the use of legitimate monies to advance or facilitate the scheme. It is precisely the commingling of tainted funds with legitimate money that facilitates the laundering and enables it to continue."[67]

Although no reported decisions other than *All Monies (Leloach)* have addressed the facilitation argument in the context of bank accounts which received money from parallel market purchases, there are two unreported decisions addressing this point.[68] Unlike *All Monies (Leloach)*, *Certain Funds* and *United States v. Real Property Located at 4643 W. Kennedy Blvd.*,[69] these two cases do not involve allegations that the owners of the account were knowing participants in the underlying criminal activity.

In *United States v. Security Pacific Int'l Bank Account No. 13934*, the government seized a money market account with an approx-

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62. United States v. Certain Funds on Deposit in Account No. 01-0-71417, 769 F. Supp. 80 (E.D.N.Y. 1991) [hereinafter *Certain Funds*].

63. *Id.* at 81-83.

64. *Id.*

65. *Id.* at 83.

66. *Id.* at 84.

67. *Certain Funds*, 769 F. Supp. at 84-85.

68. United States v. Security Pacific Int'l Bank Account No. 13934, No. 90-2222-Civ-MARCUS (S.D. Fla. April 25, 1991); United States v. Certain Accounts, Together with All Monies on Deposit Therein, No. 91-1018-Civ-KING (S.D. Fla. February 21, 1992).

69. United States v. Certain Real Property Including Any Building Appurtenances Thereon Located at 4643 W. Kennedy Boulevard, 1990 WL 305391 (M.D. Fla. Feb. 12, 1990).

imate balance of $39,700 and a time deposit with an approximate balance of $740,000 after the claimant attempted to deposit 76 money orders totalling $40,000 into a *prior* money market account.[70] He purchased the money orders from a cambista in Barranquilla, Colombia. His bank refused the deposit, in part because many of the money orders were sequentially numbered. Pursuant to the claimant's request, the bank returned the money orders and he sought a refund from the cambista. The claimant returned the money orders to his cambista for two refund checks which he deposited into his account. They were returned unpaid. Approximately one month later, the claimant exchanged the two unpaid refund checks for five personal checks totalling $39,000 from an associate of the cambista and deposited them into his money market account. After the deposit of the five checks but before the seizure, the claimant closed the account, opened a new money market account, and transferred the contents of the former to the latter.[71]

The court found that the following facts offered by the government established probable cause to believe that the new money market account *and the time deposit* were used to facilitate money laundering and structuring:

1. The cambista used by the claimant was involved in money laundering. The seventy-six money orders originally intended for deposit into the claimant's account were later sent for deposit to a bank in New York by "criminal cohorts" of the "extensive money laundering organization" who "whited-out" Security Pacific as the payee.[72]

2. The claimant's money market account automatically shifted its contents into a time deposit at prearranged intervals so that interest would accumulate at a higher rate and at the expiration of the time deposit its contents were returned to the money market account.[73]

3. The IRS determined *after* the seizure of the accounts that the associate of the cambista who gave the claimant the five checks for $39,000 had other bank accounts which contained the proceeds of structured activity[74] and that the accounts contained three deposits to-

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70. Order Denying Claimant's Motion for Summary Judgment, Security Pacific Int'l Bank Account No. 13934, No. 90-2222-Civ-MARCUS (S.D. Fla. April 25, 1991) (all the money orders were for amounts less than $10,000) [hereinafter *Security Pacific*].

71. *Id.*

72. *Id.* at 10.

73. *Id.* at 11.

74. *Id.* The opinion is not clear but seems to indicate that the five checks actually deposited in the claimant's account were not drawn from the bank accounts containing

talling $63,000 from Miami bank accounts of another individual involved in the money laundering scheme.[75]

In denying the claimant's motion for summary judgment because there was a real dispute as to whether there was probable cause *at the time of the seizure*, the court reasoned as follows:

> The defendant accounts are property traceable to the scheme because of the attempted deposit of the seventy-six money orders with Merlano's account number on the back. Additionally, Merlano has apparently admitted that although the money orders were not deposited, he was able to "cash" the money orders with Mr. Logreira [the man who gave him the five checks for $39,000 in exchange for the two NSF checks from the cambista]. Further, the government asserts, the bank accounts were roll over accounts directly traceable to the account into which the seventy-six money orders were to be deposited. Based on these asserted facts, the government argues that claimant's motion for summary judgment should be denied . . . We agree.[76]

This decision is not carefully reasoned. Merlano's attempt to deposit the seventy-six money orders does not violate any predicate act leading to forfeiture since there was no evidence that he acted with the intent to launder the structuring proceeds. In fact, the government agent testified that he had no knowledge or reason to believe that Merlano was part of the "extensive money laundering organization" or that he participated in "whiting-out" the money orders.[77] This admission alone should have deflated the facilitation claim.

Even assuming the cambista had the intent to launder funds when she sold the money orders to Merlano, neither Merlano's original money market account nor the funds contained therein were property involved in an attempted money laundering transaction as a result of the failed deposit. The cambista did not know the account the money orders were going to be deposited into nor how much money was in that account. What the court failed to take into account was that property, in order to become tainted, must be used in an illicit manner by

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proceeds of structured activity.

75. *Security Pacific*, No. 90-2222-Civ-MARCUS at 11-12. *See also* Supplemental Response to Claimants' Motion for Summary Judgment at 13, *Security Pacific*, (March 5, 1991) and Reference No. 218199-005348 and the contents thereof (listing the Castro amounts).

76. *Security Pacific*, No. 90-2222-Civ-MARCUS at 14.

77. *Id.* at 8.

someone who has control of it. Although a person without wrongful intent can have his property seized as traceable proceeds of property which has been tainted by someone else, no other person can place a taint on his previously clean property. The only property involved in an attempted transaction in violation of 18 U.S.C. § 1956 and, therefore, subject to forfeiture, were the money orders themselves. If they had been deposited into the account, the funds corresponding to their value would have been seizable as traceable proceeds. However, the remaining funds in the account would not have been seizable.

The court relied on information acquired *post-seizure* that Merlano deposited the $39,000 arguably traceable to the attempted deposit and erroneously concluded that both of the "accounts [the new money market and the time deposit - approximately $800,000] are property traceable to the scheme . . . ."[78] Based on the evidence available at the time of the seizure concerning the failed deposit of the money orders and their ultimate attempted re-deposit, the government did not have probable cause to seize anything. The seizure of the accounts was, therefore, unlawful.[79] Only $39,000 was properly traceable to the new money market account. Funds are traceable only if, in fact, they are transferred. Without Merlano's intent to launder the money, the failed deposit does not lead to any traceable proceeds.[80]

Moreover, the only taint as to the $39,000 provided by Logreira in the form of five checks, was that they were exchanged for two NSF checks which were in turn exchanged for the seventy-six money orders.

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78. *Id.* at 14.

79. The evidence concerning the actual deposit of the $39,000 was volunteered by the claimant in an attempt to have his account freed. In addition, the evidence regarding the other three deposits, which the government also contended were structuring proceeds, came as a result of discovery during the case. Since *all* of the evidence regarding money being rolled over or deposited into the accounts came as a result of an unlawful seizure the evidence should have been suppressed. Since it was the only evidence which would have supported seizure of any funds in the account, all of the funds should have been released. *See* United States v. Six Hundred Thirty-Nine Thousand, Five Hundred Fifty-Eight Dollars ($639,558) in U.S. Currency, 955 F.2d 712 (D.C. Cir. 1992); United States v. One 1985 Cadillac Seville, 866 F.2d 1142, 1146 (9th Cir. 1989); United States v. One 1977 Mercedes Benz, 708 F.2d 444, 450 (9th Cir. 1983); United States v. Certain Real Property on Hanson Brook, 770 F. Supp. 722 (D. Maine 1991); United States v. Leslie, 598 F. Supp. 254 (D. Vermont 1984).

80. The government used the facilitation argument in the previous cases to seize an entire account where there was proof the account holder intentionally deposited tainted funds for the purpose of commingling them with clean money and thereby furthering the laundering activity. *See supra* text accompanying notes 36-56.

Once the money orders were exchanged for the two NSF checks and certainly by the time the two NSF checks were exchanged for the five clean checks,[81] the funds were, at most, property traceable to property involved in an attempted structuring transaction rather than the property involved in the attempted structuring violation itself. To conclude that after several exchanges the five checks were still property involved in the underlying attempted transaction, rather than merely property traceable to such property, stretches the facilitation theory beyond the breaking point. It would subject to seizure the full contents of the account into which the tainted funds were deposited and then all of the funds in every subsequent account into which any funds from that first account were deposited. The *Security Pacific* court applied the facilitation theory in such a way that if a single tainted dollar can be traced into an account, the entire account is seizable and every time a dollar leaves that account it infects all of the funds in all future transferee accounts, etc.[82] This absurd result is a consequence of the court's failure to limit the facilitation theory to accounts under the control of a wrongdoer.

A recent unreported decision which does a better job of parsing the complicated provisions of section 981(a)(1)(A) is *United States v. Certain Accounts, Together with All Monies on Deposit Therein.*[83] The district court granted various claimants' motions to dismiss the government's verified complaint based on facts similar to those present in *Security Pacific.* In *Certain Accounts*, the government sought the

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81. The fact that the remitter of the five checks also had bank accounts, other than the one from which he drew the five checks, which contained proceeds of structured activity, may make the five checks suspicious but it certainly does not give rise to probable cause to believe that they are also proceeds of structured activity.

If, as the opinion implies but does not make clear, the claimants' new money market account received deposits directly from other accounts containing the proceeds of structured activity, then it would be subject to forfeiture but only to the extent of the amount of the deposits. The only basis for seizure of the entire $740,000 in the time deposit would have been if the deposits to the money market account traceable to the structured activity totalled $800,000 *and* all of those funds were transferred from the money market account to the time deposit prior to seizure.

This case was settled with the claimant forfeiting $125,000 approximately $900,000 (with interest). The amount forfeited is roughly the amount of all the arguably traceable deposits plus interest.

82. *See, e.g.*, United States v. Pole No. 3172, Hopkinton, 852 F.2d 636, 639 (1st Cir. 1988) ("forfeitability does not spread like a disease from one infected mortgage payment to the entire interest in the property acquired prior to the payment").

83. No. 91-1018-Civ-KING (S.D. Fla. Feb. 21, 1992).

forfeiture of entire account balances of thirty-one Miami bank accounts, twenty-seven of which, the "indirect recipient" accounts, had received funds from the other four and from an unidentified number of New York "direct recipient" accounts into which structured deposits were placed. Checks drawn on the direct recipient accounts were signed by the account-holder in blank and transported to Medellin, Colombia and Caracas, Venezuela where they were subsequently made payable to the claimants of the indirect recipient accounts and deposited into their accounts.[84]

The court held that the entire balance of the direct recipient accounts was property "involved in" the crime of money laundering and, therefore, subject to forfeiture. Secondly, the court found that the checks written on the direct recipient accounts were property "traceable to" property "involved in" money laundering.[85] The court, however, rejected the effort to forfeit the entire balances in the *indirect* recipient accounts, rather than just the amounts traceable to the direct recipient accounts. The government argued that the entire contents of the indirect recipient accounts were property involved in money laundering because they were facilitating the concealment of the tainted one. The court characterized the argument as creating a syllogism under which a tainted deposit from direct recipient account would subject all the funds in the indirect recipient accounts, and any subsequent accounts into which they were transferred, to forfeiture. Under the theory proposed by the government, no separate showing of "taint," i.e., intent to launder money, other than the mere tracing of tainted funds would be required to seize the entire balance in the indirect recipient account.[86] As the court observed:

> Like a contagious disease, each direct account could contaminate any account that had dealings with it. The indirect accounts could then conceivably pass on the infection to other accounts, and so forth *ad infinitum*. The outer limits of this theory would be bounded only by Plaintiff's imagination.
> This court rejects such a theory. The government's argument here would stretch facilitation theory — itself something of a bootstrap — to the breaking point. As the account in question becomes more distant from the initial illegal transaction, so too does probable cause to forfeit become more attenuated. This court holds that the

84. *Id.* at 3.
85. *Id.* at 13.
86. *Id.*

> government must allege facts other than the mere tracing of checks written against a suspect account. Under the Supplemental Rules, therefore, additional facts that give rise to the requisite "reasonable belief" that there is "substantial connection" to money laundering must be pled with particularity. A contrary rule would yield untenable results.[87]

During oral argument on the motions to dismiss, the court posed a hypothetical question: "If money from demonstrably dirty accounts was used to make unsolicited $50 donations to Miami police officers, would the government have probable cause to seize the entire balances of all of those officers' accounts?"[88] The government responded affirmatively citing as safeguards to an unjust result its discretion in bringing the suit and the innocent owner defense. The court noted that these safeguards were inadequate stating "[t]he Supplemental Rules guarantee protection above and beyond plaintiff's good judgment, however well intentioned it may be."[89] As alluded to by the government in *Certain Accounts*, the claimant's ultimate defense is innocent ownership.[90]

C. *Innocent Ownership*

Claimants to property seized under sections 881(a)(6) or

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87. *Id.* at 13-14 (emphasis in original). In a footnote the court added: "This holding does not mean that money launderers may insulate themselves from the forfeiture laws by adding more layers to their financial network. The court simply holds that the government must provide some reasonable basis to conclude that probable cause can be shown *as to each layer* at trial, without sole reliance on the fact of transfer from one account to another." *Id.* at 14 n.11.

88. *Certain Account*, No. 91-1018-Civ-KING at 14 n.12 (summarizing the hypothetical question which is paraphrased based on the recollection of the several observers present at hearing).

89. *Id.* The court dismissed the complaint as to the entire balance of all the indirect recipient accounts with leave to amend. The government then attempted to settle some of the twenty-seven cases on the basis that the amount it could trace into the indirect recipient accounts would be forfeited and the balance would be returned with interest. For the claims it did not settle, the government filed new complaints against only the traceable amounts, or where it had some evidence of facilitation, it filed against the entire account balances.

90. There are those who have not derived much comfort from this safeguard since it places the burden on the claimant to prove a negative, that she did not know the funds were derived from drug trafficking or one of the other specified predicate crimes. Moreover, the government maintains possession of the funds during the litigation.

981(a)(1)(A) may defeat forfeiture if they prove not just that they are innocent of the underlying crime but also that their ownership of the seized property is innocent. This section attempts to explain how a person wholly innocent of any predicate act under section 881(a)(6) or section 981(a)(1)(A) might fail to qualify as an innocent owner.

Under section 881(a)(6) no property shall be forfeited "by reason of any act or omission established by [its] owner to have been committed or omitted without the knowledge or consent of that owner." This innocent owner provision was enacted to clarify the "original language which could have been construed to reach properties traceable to the illegal proceeds but obtained by an innocent party without knowledge of the matter in which the proceeds were obtained."[91] The legislative intent was further clarified by Senator Culver who said it was written "in order to protect the individual who obtains ownership of proceeds with no knowledge of the illegal transaction."[92] Section 981(a)(2) provides the same innocent owner defense as section 881(a)(6) except that it is limited to the claimant's lack of knowledge, making no provision for lack of consent.[93] Section 981(a)(2) has not been construed by a circuit court of appeals and has no legislative history. Therefore, the innocent owner provisions are not discussed separately below because there is no analytical basis to distinguish section 981(a)(2) from the knowledge component of section 881(a)(6).

Despite the relatively straight forward language used in the statutes and the statement of purpose in the legislative history, the circuit courts of appeal do not appear to agree on the nature of the claimant's burden in proving lack of knowledge. The First, Fourth and Sixth Circuits, as suggested by the plain language of the statute and its legislative history, have held that a claimant must show only that he did not have actual knowledge that the property to be forfeited was the pro-

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91. Remarks of Senator Culver, 124 CONG. REC. 23056 (1978).

92. *Id.* Senator Nunn added that the purpose of the innocent owner provision was "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." Remarks of Senator Sam Nunn, 124 CONG. REC. 23057 (1978).

93. Title 18 U.S.C. section 981(a)(2) explicitly provides that a lienholder who was without knowledge of the illegal activity may also qualify as a innocent owner: "No property shall be forfeited under this section to the extent of the interest of an owner or lienholder by reason of any act or omission established by that owner or lienholder to have been committed without the knowledge of that owner or lienholder." However, there is no legislative history available on section 981(a)(2).

ceed of the underlying criminal activity.[94] The Fifth Circuit may also have adopted the actual knowledge standard.[95] However, a claimant who remains free from actual knowledge of the illegal acts underlying a traceable proceed by "sticking his head in the sand" will be deemed to have the requisite knowledge.[96]

The Second Circuit has not interpreted the section 881(a)(6) innocent owner provision but in section 881(a)(7) cases a claimant must show that either she did not have actual knowledge or, if she did, that she did not consent to the illegal use of her real property.[97] If the claimant has actual knowledge, in order to be an innocent owner she must prove a lack of consent by showing she did all that could reasonably be expected to prevent the illegal activity once she learned of it.[98] In the context of a section 881(a)(6) case these circuits are likely to follow the actual knowledge standard.[99]

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94. United States v. One Urban Lot Located at 1 Street A-1 Valparaiso, Bayamon, Puerto Rico, 865 F.2d 427, 430 (1st Cir. 1989); United States v. Lots 12, 13, 14 and 15, Keeton Heights Subdivision, Morgan County, Kentucky, 869 F.2d 942, 946-47 (6th Cir. 1989); United States v. $10,694.00 U.S. Currency, 828 F.2d 233-34 (4th Cir. 1987) (discussing section 881(a)(6)).

95. United States v. Lot 9, Block 2 of Donnybrook Place, Harris County, Texas, 919 F.2d 994, 999 (5th Cir. 1990) (discussing section 881(a)(7)).

96. United States v. 1980 Red Ferrari, VIN No. 9A0034335, Oregon License No. GPN-835, 827 F.2d 477, 480 (9th Cir. 1987)[hereinafter *1980 Red Ferrari*].

97. United States v. Certain Real Property (890 Noyac Road), 945 F.2d 1252, 1260 (2d Cir. 1991); United States v. Certain Real Property (418 57 Street), 922 F.2d 129, 131-32 (2d Cir. 1990); United States v. 141st Street Corp., 911 F.2d 870, 876-880 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1017 (1991).

98. *141st Street Corp.*, 911 F.2d at 879.

99. The Second Circuit read the "without the knowledge or consent" language of section 881(a)(7) in the disjunctive. That is, if the claimant fails to prove the absence of actual knowledge, she can still prevail if she shows that she did not consent to the use of the property for an illegal purpose. It involves owners of property whose occupants (tenant or husband) who used the real property in an illegal manner subjecting it to seizure. Once knowledge has been established, in order to give meaning to the term consent, the courts have imposed a duty on the claimant to prove that instead of merely acquiescing in the illegal conduct, which would have been consent, they took affirmative steps to prevent it. In other words, once knowledge has been established a claimant would automatically lose on the consent issue, unless she demonstrates that she took affirmative action to stop the illegal activity. Without imposing this requirement, the alternative available to the claimant of showing consent becomes meaningless. A claimant should prevail on an innocent ownership claim under section 881(a)(6) if they demonstrate their lack of knowledge and the government is unable to rebut that showing.

The Third Circuit has also adopted the disjunctive approach to section 881(a)(7)

Whether or not a claimant must do more than disprove actual knowledge that the funds were proceeds of specified illegal transactions is not clear in the Ninth and Eleventh Circuits due to inconsistent and ambiguous holdings.[100] In its first section 881(a)(6) innocent owner decision the Ninth Circuit required the claimant to prove the absence of actual knowledge, did not mention a negligence or all reasonable efforts test and found on the facts presented that the circumstantial evidence of knowledge was compelling.[101] However, in its next section 881(a)(6) decision, the court did not cite its prior decision or analyze the issue before announcing that the claimant's failure to exercise due care precluded reliance upon the innocent owner defense.[102] Not only is this latter decision suspect for its failure to address the plain language of section 881(a)(6) and the legislative history, but it cites as support a Ninth Circuit decision involving section 881(a)(4) in 1977 prior to the amendment to section 881(a)(4) adding a statutory innocent owner defense.[103] In a January 1992 unpublished decision, the Ninth Circuit, without citing to either of its prior section 881(a)(6) cases, applied the actual knowledge test.[104]

In the Eleventh Circuit, like in the Ninth Circuit, the quantum of knowledge necessary to be an innocent owner is not clear at this time.

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but sidestepped the issue of whether "knowledge" means actual knowledge. United States v Parcel of Real Property Known as 6109 Grubb Road, Millcreek Township, Erie County, Pa., 886 F.2d 618, 626 (3d Cir. 1989). The trial court had adopted an actual knowledge test. *Grubb Road*, 708 F. Supp. at 698, 702 (W.D. Pa. 1989).

100. There are no definitive decisions in the Third, Seventh, Eighth, Tenth and D.C. Circuit Courts of Appeal on the section 881(a)(6) innocent owner standards.

101. *1980 Red Ferrari*, 827 F.2d at 478-79.

102. United States v. $215,300, U.S. Currency, 882 F.2d 417, 420 (9th Cir. 1989) (citing United States v. One 1972 Chevrolet Blazer, 563 F.2d 1386, 1389 (9th Cir. 1977)).

103. *Id.* Section 881(a)(4) was not amended until November 18, 1988 to provide for an innocent owner defense. *See* Pub. L. 100-690, § 6075(1)-(3), 102 Stat. 4181, 4324 (1988).

In United States v. One Parcel of Land, Known as Lot 111-B, Tax Map Key 4-4-30-71 (4), Waipouli, Kapaa, Island and County of Kauai, State of Hawaii, 902 F.2d 1443 (9th Cir. 1990), the court seemed to adopt an actual knowledge standard in a section 881(a)(7) case. *Id.* at 1445 (the intent of the forfeiture statute "would be substantially undercut if persons who are fully aware of the illegal connection or source of their property were permitted to reclaim the property as 'innocent' owners.") (rejecting the disjunctive reading of knowledge or consent in requiring the claimant to prove both that he did not know nor did he consent to the illegal activities).

104. United States v. U.S. Currency, $584,091, 952 F.2d 1400 (9th Cir. 1992) (unpublished disposition text in WESTLAW).

In its first section 881(a)(6) decision addressing innocent ownership, the court explicitly stated that the standard was actual knowledge rather than constructive knowledge.[105] In the footnote following this statement the court questioned the government's invocation of *Calero-Toledo v. Pearson Yacht Leasing Co.*,[106] which articulated a constitutional defense to forfeiture if a claimant could show that "he had done all that reasonably could be expected to prevent the proscribed use of his property." However, in the same footnote the court concluded that because it found that the claimant failed to meet the actual knowledge standard it would "leave for another day the question of the applicability of the *Calero-Toledo* dicta to forfeiture actions under 21 U.S.C. section 881(a)(6)."[107]

Five years later the court seemed to adopt the actual knowledge test for the application of the innocent owner provision in a section 881(a)(7) case.[108] The following year in another section 881(a)(7) case, the court explicitly held that "[a]pplication of the innocent owner defense turns on the claimant's actual, rather than constructive, knowledge."[109] Then, just two months later in *United States v. One Single Family Residence Located at 15603 85th Avenue North, Lake Park, Palm Beach, County Florida* (*15603 85th Avenue North*), a panel of the Eleventh Circuit including one of the same judges who had just adopted the actual knowledge test, applied the "reasonably possible" language of *Calero-Toledo* to an unusual section 881(a)(6) case.[110]

In *15603 85th Avenue N.*, two brothers contributed funds to the construction of a house that they owned jointly. The district court found that the funds of the bad brother were exclusively the product of drug trafficking, but that the funds of the good brother were from legitimate sources. However, the district court also concluded that the good brother had actual knowledge that his brother's funds were derived from drug trafficking. The Eleventh Circuit held that legitimate funds are forfeitable when they are knowingly commingled with bad funds.[111]

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105. *$4,255,000.00*, 762 F.2d at 906.

106. 416 U.S. 663 (1974)

107. *$4,255,000.00*, 762 F.2d at 906 n.24.

108. United States v. One Single Family Residence, Located at 15621 S.W. 209th Ave., Miami, Florida, 894 F.2d 1511, 1513 (11th Cir. 1990).

109. United States v. Real Property at 5000 Palmetto Dr., Fort Pierce, St. Lucie County, Florida, 928 F.2d 373, 375 (11th Cir. 1991) (citing *$4,255,00.00*, 762 F.2d at 906).

110. 933 F.2d 976, 982 (11th Cir. 1991) (footnote omitted).

111. *Id.* at 982.

After finding that the "good brother" had actual knowledge of the commingling of legitimate and drug funds, the court held he could still be spared forfeiture as an innocent owner if he proved that he did everything reasonably possible to withdraw his commingled funds or dispose of the property upon learning of the illegal nature of the other funds.[112]

The court's decision can be interpreted as upholding the actual knowledge test while at the same time allowing a claimant who has actual knowledge of the illegal source of the funds to show that he did not consent to commingling his legitimate funds with those from an illegal source. This is essentially the same approach that the Second and Third Circuits have followed.[113] On the other hand, the court did hold the "reasonably possible" language of *Calero-Toledo* applicable to a section 881(a)(6) case for the first time.[114]

The failure of the Ninth Circuit, and possibly the Eleventh, to follow the plain language of the statute and instead impose a negligence standard derives from the Supreme Court's dicta in *Calero-Toledo*. In this 1974 decision, a pleasure yacht was leased by its owners to Puerto Rican citizens. Fourteen months after it was leased, Puerto Rican authorities discovered one marijuana cigarette on board and sought its forfeiture pursuant to a Puerto Rican forfeiture statute.[115] The authorities conceded that the yacht's owner was not involved in the lessee's activities and "had no knowledge that its property was being used in connection with, or in violation of [Puerto Rican law]."[116] Recognizing the extraordinarily harsh result of allowing forfeiture of the yacht under such circumstances, the court noted the existence of "serious constitutional questions."[117] One such constitutional question was whether an owner who proved not only that she was uninvolved in and unaware of the wrongful activity, but also that she had done all that reasonably could be expected to prevent the proscribed use of her property, could suffer its forfeiture.[118]

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112. *Id.* (citing *141st Street Corp.*, 911 F.2d at 878-879).

113. *See 141st Street Corp.*, 911 F.2d at 876-80; *Grubb Road*, 886 F.2d at 626.

114. *Id.*

115. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 1663, 1664-65, 1694 (1974) (Douglas, J., dissenting).

116. 416 U.S. at 668.

117. *Id.* at 689.

118. *Id.* The Court rejected the application of this defense in the case stating "no allegation has been made or proof offered that the company did all that it could reasonably do to avoid having its property put to an unlawful use." *Id.* at 690. In other words,

Unlike section 881(a)(6) and section 981(a)(2), the Puerto Rican statute at issue in *Calero-Toledo* did *not* provide a statutory innocent owner defense. The *dicta* in *Calero-Toledo*, therefore, must be read as a defense of last resort. In other words, it is only applicable as a saving provision, when there is no statutory innocent owner defense. There is simply no legitimate basis to substitute a negligence test based on a constitutional defense for a statutory defense which specifically requires that a claimant only prove that she did not know or consent to the illegal activity.

There is no suggestion in the legislative history of section 881(a)(6) to explain or justify the basis for a negligence standard in the place of an actual knowledge standard. In fact, the enactment of the statutory innocent owner defense after *Calero-Toledo* has been interpreted as a congressional rejection of such a heavy burden.[119] Moreover, the First and Sixth Circuits which have adopted the actual knowledge standard have explicitly rejected the application of the "all reasonable efforts" test.[120]

D. *Application of the Innocent Owner Defense in Parallel Market Cases*

In a case involving a Colombian cambio which received cash from its customers, the Eleventh Circuit applied the actual knowledge standard and affirmed the forfeiture of more than $4,255,000 in a bank account and more than $3,686,000 in cash.[121] More than $240,000,000

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because the claimant had not raised a constitutional claim for which there was no prior case law support, it was sunk.

119. *316 Units of Municipal Securities*, 725 F. Supp. at 180.

120. *One Urban Lot*, 865 F.2d at 430 (unlike *Calero-Toledo*, "we have a statute that provides for an exception for innocent owners. 21 U.S.C. section 881(a)(6). This statute does not in any way limit innocent owners to those who have done all that reasonably could be expected to prevent the proscribed use of the property. *Calero-Toledo*. In fact, the statute specifically refers to the knowledge and consent of the owner as the appropriate considerations in determining who is accepted."); *Lots 12, 13, 14, and 15*, 869 F.2d at 947 ("[t]he constitutional question [raised in *Calero-Toledo*] is not presented here, because the statute with which we are concerned [section 881(a)(7)] imposes no requirement that a person who claims the status of an innocent owner establish that he has done all that he could reasonably be expected to do to prevent the proscribed use of his property").

121. *$4,255,000*, 762 F.2d at 902. Although the Eleventh Circuit decision indicates in one place that the $4,255,000 was currency, it indicates the to the contrary at a later reference and the district court decision is consistent with the latter reference.

in cash was deposited to the defendant account in less than eight months.[122] In addition to the numbing amount of money involved and the fact that it was all in cash, the claimant made several statements and made one request of the bank demonstrating his "gnawing belief that the funds being dealt with were tainted."[123] Since *$4,255,000* is a case with facts which are not likely to be repeated and involve the cambista himself, it is of limited predictive value in determining the limits of actual knowledge.

There are however two instructive decisions among the Hawaii *All Monies* cases. In *All Monies (Leloach)*, the claimant was a Peruvian cambista who bought his dollars from another cambista.[124] Considering itself bound by the Ninth Circuit's decision in *$215,300*, the district court required the claimant to prove not only that he did not know of the illegal activity or willfully blind himself to it, but also that he "did all that reasonably could be expected to prevent the illegal use of his . . . account."[125]

The facts examined by the court focused on the legitimacy of the claimant's money exchange business. The court appears to have broken down the concept of legitimacy into two issues: whether the currency exchange business itself was legitimate and then whether Leloach's cambio in particular was legitimate. The court accepted Leloach's contention that his business operated within the monetary laws in Peru, but was unable to resolve whether or not the company violated Peruvian anti-flight capital laws.[126] The court then examined whether the claimant's cambio account was under the effective control of the money laundering organization. The court found numerous admissible facts indicating that it may have been under the actual control of Dirimex, another Peruvian cambio, as well as the particular partner of Dirimex who was the money launderer.[127] The court also noted several facially

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See 762 F.2d at 898, 904; 551 F. Supp. at 316 (S.D. Fla. 1985).

122. *$4,255,000*, 762 F.2d at 904.

123. *Id.* at 906. Claimant approached the vice president of the bank and asked if the government could seize the account. When advised that such a seizure was possible, the claimant asked if the bank would make his company a loan to cover the funds on deposit in the account in order to thwart a forfeiture. This conversation took place six months before the seizure. *Id.* at 900.

124. 754 F. Supp. at 1482 (for pertinent facts of this case, *see supra* text accompanying notes 53-57).

125. *Id.* at 1478.

126. *Id.* at 1478-79

127. *Id.* at 1479-80.

suspicious aspects of claimant's conduct of his money exchange business, but acknowledged the claimant's explanations and denied both the claimant's and the government's motions for summary judgment on the innocent ownership defense.[128]

The innocent owner issue was resolved favorably to the claimant in *All Monies (Abusada)*, who also purchased tainted dollars from Dirimex, but for personal use rather than in a commercial setting.[129] In *All Monies (Abusada)*, the court granted the claimants' summary judgment motion because they met their burden of establishing their innocent ownership defense.[130] The claimants produced unrefuted business records indicating that the transfers into their account were made through what they believed was a legitimate money exchange house. Claimants also swore they had no knowledge of the drug trafficker or of his illegal operation.[131] With respect to the money transferred into their account which the government contended was tainted, the claimants presented evidence that they paid for those transfers with money from their domestic Peruvian bank accounts.[132] In short, the govern-

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128. United States v. All Monies ($477,048.62) in Account No. 90-3617-3, Israel Discount Bank, New York, New York, 754 F. Supp. 1467, 1479 (D. Haw. 1991). The cambio's dollar bank account was maintained in New York, the records were kept there, the claimant never saw the records personally, and when the claimant's wife went to New York, she destroyed the records. The claimant did not want any paper trail in Peru connecting him with wealth because people who are known to be wealthy are subject to violence, kidnapping and extortion. *Id.* The claimant admitted that he never asked the people from Dirimex where they obtained their dollars. He contended, however, that such questions would have been futile because of the common practice of Peruvian cambistas to guard the confidentiality of their sources. *Id.* at 1480. He also offered two reasons for that confidentiality: a cambista who discloses his source can lose it to a competitor and inquiry into the sources of money may compromise the physical safety of both the clients and the people asking the questions because of the violence which can result if personal wealth becomes known. *Id.*

Of approximately 370 deposits into the subject account in 1988 and 1989, only 34 were the product of transactions between the claimant and Dirimex. Moreover, many of the 34 deposits came from accounts as to which the government did not offer any evidence to prove they were affiliated with drug trafficking.

129. 746 F. Supp. at 1440.

130. *Id.*

131. *Id.*

132. *Id.* In fact, at the time of seizure the government was unable to trace any tainted funds in the account. Approximately one year later, the government was able to trace approximately one-third of the account balance to allegedly tainted accounts. The court then held that an illegal seizure would not preclude forfeiture so long as the government could establish probable cause for the forfeiture without using evidence

ment failed to present evidence to rebut the claimants' proof that they neither knew nor consented "to any of the illegal activity taking place with respect to the defendant account."[133]

In the context of a bank account seizure, the illegal activity which the claimant must actually know of can only mean that the funds deposited into the account were proceeds of drug trafficking or money laundering. If the claimant is "without knowledge of the matter in which the proceeds were obtained" he is an innocent owner.[134] A foreign owner does not lose his innocence merely because he knows that the funds coming into his account were involved in a violation of a capital flight restriction, a currency exchange regulation or a tax law of his country.[135]

Once the claimant testifies that he did not know the dollars he purchased from the cambista were proceeds of drug trafficking or money laundering and the government has no evidence to show that his purchase was anything other than a typical parallel market purchase, can the government properly argue that the mere act of purchasing dollars on the parallel market demonstrates knowledge that the dollars purchased were tainted by drug crimes or money laundering? Clearly not. The appropriate inquiry is a subjective one: whether the claimant in a particular case had the requisite knowledge, not whether some tainted funds are laundered through the parallel market. Because virtually no claimant knows he is buying tainted money, whether a particular claimant has the requisite knowledge will turn, in almost all cases, on whether he was willfully blind.

In the legislative history of the Money Laundering Control Act of 1986, Congress gave explicit guidance on what would constitute knowledge in the money laundering context by citing[136] the leading case on willful blindness: *United States v. Jewel*.[137] In considering willful blindness to be the equivalent of knowledge, the *Jewel* court emphasized that the requisite state of mind was only different from positive knowl-

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tainted by the illegal seizure. *Id.* at 1438 (citing United States v. One 1985 Cadillac Seville, 866 F.2d 1142, 1146 (9th Cir. 1989); United States v. One 1977 Mercedes Benz, 708 F.2d 444, 450 (9th Cir. 1983)).

133. *Id.*

134. *See supra* text accompanying notes 90-91.

135. *See* 18 U.S.C. § 981(a)(1)(A) (Supp. 1992) (laws requiring filing of currency transaction reports, forbidding structuring of deposits, money laundering, or engaging in monetary transactions in property derived from specified unlawful activity).

136. SENATE REP. 99-433 at 9-10.

137. 532 F.2d 697 (9th Cir.) *cert. denied*, 426 U.S. 951 (1976).

edge "so far as necessary to encompass a calculated effort to avoid the sanction of the statutes while violating its substance."[138] Congress elaborated on this definition of knowledge by giving contrasting examples:

> Thus a currency exchanger who participates in a transaction with a known drug dealer involving hundreds of thousands of dollars in cash and accepts a commission far above the market rate, could not escape conviction, from the first tier of the offense, simply by claiming that he did not know for sure that the currency involved in the transaction was derived from crime. On the other hand, an automobile car dealer who sells a car at market rates to a person whom he merely suspects of involvement with crime, cannot be convicted of the offense in the absence of a showing that he knew something more about the transaction or the circumstances surrounding it.[139]

To prove innocent ownership a claimant must credibly testify only that he did not know his cambista had any involvement in money laundering. The claimant must do no more. Requiring a claimant to have asked the cambista where he purchased his dollars would be an exercise in futility. Commercial considerations render it futile.[140] A

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138. *Id.* at 704 (citation omitted).

139. SENATE REP., *supra* note 137. While the Senate's examples are given in the context of criminal *mens rea*, the same standard of knowledge should apply in a civil forfeiture setting. After all, in civil forfeitures it is the claimant who has the burden of proving the absence of the requisite knowledge.

Large numbers of foreign citizens' accounts have been seized and subjected to forfeiture until they could prove that the government had not properly traced the funds or that they were innocent owners. In contrast, very few car dealership accounts have been seized; why not more? Could it be that car dealers have more political clout than non-residents? Imagine the howls of protest in Washington if 680 or even 88 had their operating accounts seized the same day. Does the government merely give car dealers or jewelers, rather than Colombians and Peruvians, the benefit of the doubt? Is it is because the example given by the Senate could be superficially read to condemn currency exchangers and exonerate car dealers? Seriously though, there is a shared perception in Colombia that innocent Colombian citizens are being made the scapegoats for the failure of the United States to conquer its drug problem.

140. Cynics might argue that is futile because a crooked cambista will never indicate that his sources are drug traffickers and money launderers. Assume a claimant had asked his cambista to identify the sources of his dollars and the cambista responded by saying that he got his dollars from tourists, exporters of legitimate goods who did not declare all of their receipts, wealthy Colombians/ Peruvians (that he personally knows are not involved in drug trafficking or money laundering) who want to exchange their dollars for pesos/intis in order to repatriate their capital, etc. Surely a

cambista is a broker. If he reveals his source of funds he runs the risk that his customers will deal directly with each other.[141] Additionally, the identification of sources of wealth is also discouraged if not outright refused because of the violence in the form of extortion, kidnapping and sometimes murder of wealthy individuals.[142] So long as the claimant has a good faith belief that he is not buying the proceeds of drug trafficking or money laundering, his account should be immune from forfeiture under the current state of the law. Purchasing in the face of suspicion that some of the funds available on the parallel market are tainted does not rise to willful blindness that the dollars his cambio is selling are, in fact, tainted. Even in Congress' example the car dealer who merely suspected his customer of involvement with crime, did not have the requisite knowledge.[143]

In the few claims still unresolved from Operation Polar Cap (IV) as well as in the *All Monies* cases, the government has attempted to defeat the innocent owner defense by expert testimony as to the percentage of tainted funds in the Colombian and Peruvian parallel markets. While it is beyond the scope of this article to opine on the validity of the research methods used to calculate such results, it should be noted that the estimates range from 25 percent to 60 percent on the Colombian parallel market.[144] The actual percentage of tainted funds in the parallel markets is a subject of intense debate.[145] Since the actual numbers are inherently unknowable any precisely stated percentage is unreliable.

While the actual percentage may be debated by economists and statisticians, the actual number is irrelevant for purposes of an innocent owner defense. It is the claimant's knowledge, not the expert's, that is relevant. A claimant may believe that drug traffickers launder money in the parallel market. However, if he has never had, and is not aware of any specific instances where *his* cambista has dealt in tainted funds, that should be sufficient to satisfy an actual knowledge/willful blind-

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claimant is not under an affirmative obligation to confirm the truth of the cambista's statement. *See, e.g., Banco Cafetero*; 797 F.2d at 1162 (claimant bank has no duty to investigate the source of its customer's deposits).

141. *See All Monies (Leloach)*, 754 F. Supp. at 1480.

142. *Id.* at 1479.

143. *See supra* text accompanying note 140.

144. Grosse, *Colombia's Black Market and Foreign Exchange*, forthcoming in WORLD DEVELOPMENT (1992).

145. *See* Deposition of Norman Bailey at 4, *Eighty-Eight (88) Designated Accounts*, No. 90-1203-Civ-NESBITT (S.D. Fla. January 29, 1991).

ness standard. To insist on more than that would, at a minimum, entail the application of the defense of last resort, the constitutionally based negligence standard. As discussed above, this is not the standard applicable to a statute which specifically provides an innocent owner defense.[146]

IV. CONCLUSION

The government has probably seized more than five hundred bank accounts based on purchases of dollars in the parallel markets of Latin America without any reason to believe that the owners of these accounts knew of the drug trafficking or money laundering source of some of the deposits. In terms of case specific results, this policy and its execution have been a dismal failure. More than 95 percent of the funds seized have been returned to claimants who are not themselves cambistas based on defenses of a lowest intermediate balance and/or innocent ownership. The government's lack of selectivity in applying the facilitation theory has resulted in the seizure of entire accounts instead of only seizing the traceable proceeds. Such prosecutorial indiscretion has imposed significant hardship on hundreds if not thousands of innocent bystanders in our war on drugs. Whether the *in terrorem* effect of such improvident actions truly jeopardizes the activities of the real money launderers or merely staggers our international banking and investment communities by driving innocent owners to other shores remains to be seen.

146. *See* notes 91, 115, 116 and surrounding text.