Guilty Until Proven Innocent? Protections for Innocent Owners in Civil Forfeiture Cases Under 21 U.S.C. § 881(a) and New York's CPLR Article 13-A

Joseph A. Brintle
Glenn M. Katon

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NOTES & COMMENTS

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NEW YORK’S CPLR ARTICLE 13-A

Section 881(a) of Title 21 of the United States Code¹ authorizes

¹ 21 U.S.C. § 881(a) (1988) provides in pertinent part:
The following shall be subject to forfeiture to the United States and no property right shall exist in them:

(1) All controlled substances which have been manufactured, distributed, or acquired in violation of this subchapter.

(2) All raw materials, products, and equipment of any kind which are used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance in violation of this subchapter.

(3) All property which is used, or intended for use, as a container for property described in paragraph (1), (2), or (9).

(4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1), (2), or (9), except that—

(A) no conveyance used by any person as a common carrier in the transaction of business as a common carrier shall be forfeited under the provisions of this section unless it shall appear that the owner or other person in charge of such conveyance was a consenting party or privy to a violation of the subchapter or subchapter II of this chapter;

(B) no conveyance shall be forfeited under the provisions of this section by reason
civil forfeiture of certain property which is used for, intended to

of any act or omission establishing by the owner thereof to have been committed or
omitted by any person other than such owner while such conveyance was unlawfully
in the possession of a person other than the owner in violation of the criminal laws
of the United States, or of any State; and

(C) no conveyance shall be forfeited under this paragraph to the extent of an in-
terest of an owner, by reason of any act or omission established by that owner to
have been committed or omitted without the knowledge, consent, or willful blind-
ness of the owner.

(5) All books, records, and research, including formulas, microfilm, tapes, and data
which are used, or intended for use, in violation of this subchapter.

(6) All moneys, negotiable instruments, securities, or other things of value fur-
nished or intended to be furnished by any person in exchange for a controlled sub-
stance in violation of this subchapter, all proceeds traceable to such an exchange,
and all moneys, negotiable instruments, and securities used or intended to be used to
facilitate any violation of 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.

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

(8) All controlled substances which have been possessed in violation of this
subchapter.

(9) All listed chemicals, all drug manufacturing equipment, all tableting machines,
all encapsulating machines, all gelatin capsules, which have been imported, ex-
ported, manufactured, possessed, distributed, or intended to be distributed, im-
ported, or exported, in violation of a felony provision of this subchapter or sub-
chapter II of this chapter.

Id. See, e.g., United States v. Certain Real Property Located at 2525 Leroy Lane, 910 F.2d
343, 346 (6th Cir. 1990) (provisions for civil forfeiture found in 21 U.S.C. § 881). See also
United States v. Santoro, 866 F.2d 1538, 1543-44 (4th Cir. 1989) (congressional intent was
for 21 U.S.C. § 881 to be civil in nature); United States v. Two Hundred Eighty Thousand
Five Hundred and Five Dollars, 655 F. Supp. 1487, 1498 (S.D. Fla. 1986) (forfeiture action
under 21 U.S.C. § 881(a)(4) and (a)(6) is civil action). See generally Goldsmith & Linderman,
Asset Forfeiture and Third Party Rights: The Need For Further Law Reform, 1989 DUKE L.J.
881(a)).

Forfeiture is that body of law which authorizes the government to take property without
compensating the owner. See BLACK'S LAW DICTIONARY 650 (6th ed. 1990). "A comprehen-
sive term which means a divestiture of specific property without compensation." Id. Prop-
erty subject to forfeiture falls into two categories. See United States v. Farrell, 606 F.2d
1541, 1544 (D.C. Cir. 1979) (discussion of legal recognition of per se and derivative con-
traband distinction). See also Winn, Seizures of Private Property in the War Against Drugs: What
Process is Due, 41 Sw. L.J. 1111, 1118 (1988) (author suggests four part classification: con-
traband, derivative contraband, proceeds, and derivative proceeds); Note, The Innocent
Owner Defense to Real Property Forfeiture Under the Comprehensive Crime Control Act of 1984,
be used for, or facilitates drug-related activity. Congress enacted the statute to strengthen law enforcement and to attack the economic bases of the drug industry. Many states have also enacted

58 FORDHAM L. REV. 471, 472 n.6 (1989) [hereinafter Note, Innocent Owner Defense] (two types of property seized by forfeiture in connection with narcotics violations: contraband per se and derivative contraband). Contraband per se is property which is itself illegal, such as narcotics and drug paraphernalia. See United States v. Eighty-Eight Thousand, Five Hundred Dollars, 671 F.2d 293, 297 n.9 (8th Cir. 1982) (contraband per se is property which is unlawful to possess). See, e.g., 21 U.S.C. §§ 812, 881(f) (1988) (heroin); 26 U.S.C. § 5615 (1988) (moonshine whiskey); id. at § 5861(d) (1988) (sawed off shotguns).

Derivative contraband is property which was used for or acquired through illegal activity, such as money, vehicles, or real property. See Eighty-Eight Thousand, Five Hundred Dollars, 671 F.2d at 297 n.8 ("derivative contraband" is property which can be lawfully possessed, such as automobiles, boats, planes, and currency, but which becomes forfeitable because of unlawful use). See also supra note 1 (statutory provisions of 21 U.S.C. § 881(a)(5), (4), (5), (6), (7) (1988) (other examples of derivative contraband). See generally Note, Innocent Owner Defense, supra, at 472 n.6 (distinction between contraband per se and derivative contraband).

Civil forfeitures are unique in that they are "quasi-criminal" in nature. See One Plymouth Sedan v. Pennsylvania, 580 U.S. 693, 697 (1965) (all civil forfeiture proceedings based on commission of criminal offenses are "quasi-criminal" in character) (construing Boyd v. United States, 166 U.S. 633, 633-34 (1895)). See generally Note, Civil Forfeiture of Real Property: The Government's Weapon Against Drug Traffickers Injures Innocent Owners, 10 FACE L. REV. 485, 515-19 (1990) [hereinafter Note, Civil Forfeiture] (comparison of civil and criminal forfeiture including analysis of where criminal trial safeguards are applied to civil actions).

* See supra note 1 (pertinent provisions of 21 U.S.C. § 881(a)). See, e.g., United States v. One 1980 Bertram 58' Motor Yacht, 876 F.2d 884, 887 (11th Cir. 1989) (yacht subject to forfeiture on ground it was "intended for use" in transporting controlled substances); United States v. One 1980 Cadillac Eldorado, 705 F.2d 862, 863 (6th Cir. 1983) (intent, not actual presence of controlled substance, is determining factor for civil forfeiture pursuant to 21 U.S.C. § 881(a)).

* See supra note 1 (pertinent provisions of 21 U.S.C. § 881(a)). See also United States v. Steele, 727 F.2d 580, 589 (6th Cir.) (vehicles or conveyances subject to forfeiture where there is probable cause to believe vehicles facilitated transportation of controlled substance), cert. denied, 467 U.S. 1209 (1984); United States v. One 1981 Datsun 280ZX, 563 F. Supp. 470, 473 (D.C. Pa. 1983) (for vehicle to be subject to forfeiture it is sufficient that it is used to "facilitate" purchase, sale or transportation of controlled substance).


* See 124 CONG. REC. 12,790 (1978) (statement of Rep. Carter). "The purpose of [this amendment] is to provide Federal drug enforcement officials with the ability to strike at the profits of illicit trafficking in abusable controlled substances." Id. See also United States v. Premises Known as 526 Liscum Drive, 866 F.2d 213, 217 (6th Cir. 1989) (intent of forfeiture provisions is to deprive criminals of their tools of illegality). See generally Wisotsky, Exposing the War on Cocaine: The Futility and Destructiveness of Prohibition, 1983 WIS. L. REV. 1305, 1364-77 (1983) (discussion of need to use financial controls such as asset seizure to control drug trafficking).
forfeiture statutes for similar purposes.\textsuperscript{7} New York has such a statute,\textsuperscript{8} which has recently been amended to become an even more effective tool for combatting drug trafficking.\textsuperscript{9} Although both statutes are designed to reach property involved in drug transactions,\textsuperscript{10} neither seeks to subject the property of innocent owners to forfeiture.\textsuperscript{11} The federal statute provides an affirmative defense which requires the owner to establish a lack of knowledge or consent to the illegal activity,\textsuperscript{12} while the New York statute requires prosecutors to prove the culpability of the defendant.\textsuperscript{13} This Note


\textsuperscript{9} See N.Y. Civ. PRAAC L. & R. § 1311(1) (McKinney Supp. 1991) (real property instrumentalities can now be forfeited in drug cases).


\textsuperscript{12} 21 U.S.C. § 881(a) (1988) provides in pertinent part: “[N]o property shall be forfeited under this paragraph [(4)(C), (6), (7)], to the extent of the 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.” \textit{Id.}

The affirmative defense is commonly known as an “innocent owner defense.” See United States v. 141st Street Corp., 911 F.2d 870, 876 (2d Cir. 1990) (claimant does not deny that drug activity took place, but rather asserts “innocent owner” defense), \textit{cert. denied}, 111 S. Ct. 1017 (1991). See also United States v. One 1985 BMW 318i, VIN WBAAC8401F0685314, 696 F. Supp. 336, 339-40 (N.D. Ill. 1988) (claimants have three possible routes to defeat civil forfeiture, one of which is to show they fall within protection of what has become judicially recognized as “innocent owner” exception to forfeiture); United States v. Parcel of Real Property Known as 6109 Grubb Rd., 886 F.2d 618, 623 (3d Cir. 1989) (spouse of defendant convicted of drug offenses could show innocent ownership and avoid civil forfeiture of property). \textit{But see} The Palmyra, 25 U.S. (12 Wheat.) 1, 14-15 (1827) (under common law, forfeiture of property in felony cases was part or at least consequence of criminal conviction, therefore innocence of owner was irrelevant).

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will evaluate how well these statutes protect the property of innocent owners.

Part I of this Note will provide an historical background of civil forfeiture. Part II will examine the application of the federal statute, focusing on the construction of the statute's innocent owner provisions. Part III will examine New York's most widely used civil forfeiture statute and its impact on innocent owners. Finally, this Note will propose two alternatives: first, a change in the present statutory construction of the innocent owner provisions; second, a congressional adoption of the New York approach to asset forfeiture. It is submitted that either proposal would better protect the rights of innocent owners, while still preserving the goal of depriving criminals the benefits of their drug activities.

I. HISTORICAL SURVEY OF CIVIL FORFEITURE

A. Civil Forfeiture

Civil forfeiture has a long and rich history. One of the earliest references to civil forfeiture is found in Judaic law, which provided for the forfeiture of an ox when it killed a person. In such a case, the animal was stoned as a sacrifice to God and the owner was not liable for the injury unless he was aware of the dangerous propensities of the animal. One finds similar provisions in...
Roman law. In both biblical and pre-Judeo-Christian practices, an inanimate object which was directly or indirectly responsible for a death was guilty and required religious expiation.

At common law, forfeitures were in the nature of a deodand. Deodand literally means "to be given to God." Thus, property or its value was given to the crown "with the belief that the king would provide the money for masses to be said for the good of the dead man's soul, or insure that the deodand was put to charitable uses." Even after the religious purposes of the deodand had ended, the institution remained as a source of revenue for the crown and a penalty for carelessness.

Although the concept of the deodand never became part of American legal tradition, civil forfeiture proceedings existed in the colonies long before the adoption of the Constitution, and were continued by the federal government almost immediately after its adoption.


19 See 7 TWELVE TABLES 1, translated in 1 SCOTT, THE CIVIL LAW 69 (1932), reprinted in GUIDE TO FORFEITURE, supra note 14, at 2 ("if a quadruped causes injury to anyone, let the owner tender him the estimated amount of the damage; and if he is willing to accept it, the owner shall . . . surrender the animal that caused the injury"). See generally W. DURANT, STORY OF CIVILIZATION, Vol. 3 (1972) (historical perspective on development of Roman law).


21 Id. See also O. HOLMES, THE COMMON LAW 24-26 (1881), reprinted in GUIDE TO FORFEITURE, supra note 14, at 3 ("where a man killeth another with the sword of John at Stile, the sword shall be forfeited as deodand, and yet no default is in the owner") (citing book written in 1550 on the reign of Edward I).

22 Calero-Toledo, 416 U.S. at 681 n.16.

23 Id.

24 Id. at 681. See also O. HOLMES, supra note 21, at 5. Holmes discusses how legal practices remain even after the purpose for those practices disappear.

The reason which gave rise to the rule has been forgotten, and ingenious minds set themselves to inquire how it is to be accounted for. Some ground of policy is thought of which seems to explain it and to reconcile it with the present state of things . . . The old form receives new content, and in time even the form modifies itself to fit the meaning which it has received.

Id. See generally Calero-Toledo, 416 U.S. at 680-683 (discussing development of civil forfeiture); 3 W. HOLDsworth, HISTORY OF ENGLISH LAW 68-71 (3d ed. 1927) (same).


26 Id. at 683.

27 Id. ("almost immediately after the adoption of the Constitution, ships and cargo . . . were made subject to forfeiture under federal law").
B. Modern Civil Forfeiture Distinguished From Criminal Forfeiture

In modern forfeiture proceedings, the operation of two legal fictions enables the civil forfeiture statutes to combat a myriad of criminal activities. The first fiction is that civil forfeiture is, generally, a proceeding in rem, directly against the property; the guilt or innocence of the owner is irrelevant. The second fiction is known as the relation-back doctrine, which dictates that forfeiture takes place at the time of the illegal act.


See infra note 149 (New York civil forfeiture statute is in personam).

See United States v. $152,160.00 U.S. Currency, 680 F. Supp. 354, 356 (D. Colo. 1988) (“A civil forfeiture proceeding is an in rem action which proceeds on the legal fiction that the property itself is guilty of wrongdoing.”); United States v. One Mercedes-Benz 380 SEL VIN No. WDBCA35AJB10331, 604 F. Supp. 1307, 1312 (S.D.N.Y. 1984) (“basic nature of a forfeiture proceeding against vehicle is in rem, reflecting legal fiction that the vehicle itself is guilty of facilitating crime”), aff’d, 762 F.2d 991 (2d Cir. 1985). See also The Palmyra, 25 U.S. (12 Wheat.) 1, 14-15 (1827) (proceeding in rem wholly unaffected by criminal proceeding since property is offender).

See United States v. Property Identified as 3120 Banneker Dr., 691 F. Supp. 497, 499 (D.D.C. 1988). “[I]n contrast to the criminal forfeiture laws, where conviction is a prerequisite for forfeiture of the property . . . property is subject to civil forfeiture, even if its owner is acquitted of - or never called to defend against - criminal charges.” Id. (citing 21 U.S.C. § 853 (1988)). See also $152,160.00 U.S. Currency, 680 F. Supp. at 356 (conviction is not prerequisite to civil forfeiture proceeding).

The issue in an in rem civil forfeiture proceeding is whether the property was connected to the illegality. See United States v. One 1980 Red Ferrari, VIN ZFFAA02A6A032353, 875 F.2d 186, 188 (5th Cir. 1989) (“federal forfeiture statute is in congruence with fourth amendment because it requires a showing of probable cause” that property was used for illicit purpose); United States v. $64,000.00 in U.S. Currency, 722 F.2d 239, 244 (5th Cir. 1984) (“government's burden [under forfeiture statute] is to show probable cause for belief that a substantial connection exists between the property to be forfeited and a crime [as defined by this section]”). See also United States v. $38,600.00 in U.S. Currency, 784 F.2d 694, 697 (5th Cir. 1986) (probable cause threshold in drug forfeiture case “is the same as that which applies elsewhere: 'reasonable ground for the belief of guilt, supported by less than prima facie proof but more than mere suspicion'”) (quoting United States v. $364,960 in U.S. Currency, 661 F.2d 319, 323 (5th Cir. 1981)).


The relation-back doctrine has been applied in several instances to defeat innocent owner standing. See Note, Civil Forfeiture, supra note 2, at 504-05 (discussing application of relation-back doctrine). One case involved forfeiture of property used in a drug smuggling
In contrast to civil forfeiture, criminal forfeiture is a proceeding. See United States v. One Parcel of Real Estate Property With Bldgs., Appurtenances and Improvements Known as the Rod and Reel Fish Camp, 660 F. Supp. 483 (S.D. Miss.), aff'd, 831 F.2d 566 (5th Cir. 1987). The court declared that "forfeiture actually occurs at the moment of the illegal use [and] [t]he condemnation when obtained relates back to the time of the wrongful act and voids all intermediate sales ...." 660 F. Supp. at 487. Generally, illegal use immediately vests title to the property in the United States, and no third party can acquire an interest in the property thereafter. See United States v. $41,905.00 in Currency and Traveler's Checks, 802 F.2d 1339, 1546 (11th Cir. 1986) (illegal use immediately vests title in sovereign and cuts off rights of subsequent third parties).

The Supreme Court relied on the relation-back doctrine long before it was codified. United States v. Stowell, 133 U.S. 1, 16-17 (1890). The Stowell Court announced that "[f]orfeiture takes effect immediately upon the commission of the act; the right to the property then vests in the United States, ... and the condemnation, when obtained, relates back to that time, and avoids all intermediate sales and alienations." Id. But see United States v. One Single Family Residence Located at 2901 S.W. 118th Court, 683 F. Supp. 783, 787 (S.D. Fla. 1988) (rejecting relation-back doctrine). But cf. J.W. Goldsmith-Grant Co. v. United States, 254 U.S. 505, 511 (1921). "[W]hether the reason for [the relation-back doctrine] be artificial or real, it is too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced." Id.

The relation-back doctrine poses particularly difficult problems for bona fide purchasers, mortgagees, assignees or other creditors who acquire an interest in property subsequent to the illegal act. See United States v. Four Parcels of Real Property on Lake Forrest Circle, 870 F.2d 586, 594 (11th Cir. 1989) (court disallowed attorney mortgages and judgment creditor claims on real property); One Parcel of Real Estate Property Known as Rod and Reel Fish Camp, 660 F. Supp. at 486-87 (claimant's lease executed in 1984, but forfeiture occurred in 1979 when illegal actions occurred, even though government did not seize property until 1985). See generally Goldsmith & Linderman, supra note 2, at 1276-78 (discussion concerning whether lien holders, unsecured creditors, and subsequent purchasers qualify as "owners" under 21 U.S.C. § 881(a)).


The forfeiture provision of RICO states that any person who violates any provision of § 1962 shall forfeit:

(1) any interest the person has acquired or maintained in violation of section 1962;
(2) any -
(A) interest in;
(B) security of;
(C) claim against; or
(D) property or contractual right of any kind affording a source of influence over;
any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962; and
(3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962.

Id. RICO prohibits four types of conduct: § 1962(a) prohibits investment of racketeering proceeds in an interstate enterprise; § 1962(b) prohibits acquiring or maintaining an interest in interstate activity through racketeering activity; § 1962(c) prohibits anyone from conducting an interstate enterprise through a pattern of racketeering activity; § 1962(d) prohibits anyone from conspiring to violate the preceding sections. Id.

In contrast to RICO, which seeks criminal forfeiture of criminal gains, the Continuing Criminal Enterprise Act seeks criminal forfeiture of drug related gains. 21 U.S.C. § 853
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ing in personam directly against the defendant. The action may proceed only upon conviction of the defendant. If the defendant is found guilty, any property acquired or maintained through illegality is subject to forfeiture.

Prosecutors generally prefer to proceed under civil rather than criminal forfeiture statutes because of two advantages they offer. First, the prosecutor's burden in a civil action is less stringent than

(1988). The CCE forfeiture provision provides in pertinent part:

Any person convicted of a violation [of this statute] . . . shall forfeit . . .

(1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as a result of such violation;

(2) any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation; and

(3) in the case of a person convicted of engaging in a continuing criminal enterprise in violation of section 848 of this title, the person shall forfeit, in addition to any property described in paragraph (1) or (2), any of his interest in, claims against, and property or contractual rights affording a source of control over, the continuing criminal enterprise.

Id. A continuing criminal activity is defined as leading five or more persons in committing a continuing series of federal drug felonies which produce substantial income. 21 U.S.C. § 848(b)(2) (1988).


See $39,000.00 in Canadian Currency, 801 F.2d at 1218 (criminal forfeiture may be ordered only if defendant convicted). See, e.g., Russello v. United States, 464 U.S. 16, 18 (1985) (after RICO conviction defendant forfeited interest in enterprise acquired in violation of statute); Schmalfeldt, 657 F. Supp. at 587 (defendant's guilt is at issue in criminal forfeiture proceeding).

See Russello, 464 U.S. at 18 (after conviction under RICO, petitioner forfeited interest in property acquired through illegal racketeering enterprise). See also Reed, supra note 34, at 748 (same); Goldsmith & Lindeman, supra note 2, at 1260 (after conviction any property illegally acquired is subject to forfeiture).

Since third party claimants, such as mortgagees, are not parties to the action, they cannot negotiate with the defendant for their property until the resolution of the criminal proceeding. See Goldsmith & Lindeman, supra note 2, at 1263-64. The criminal forfeiture statutes prevent transfer of assets prior to conviction. See $39,000.00 in Canadian Currency, 801 F.2d 1210, 1218 (10th Cir. 1986). "To prevent the transfer of assets before a conviction is obtained, the new criminal forfeiture provisions of title 21 provide a substantial means to freeze an individual's property upon or before the filing of an indictment." Id. (footnote omitted).

See Goldsmith & Linderman, supra note 2, at 1262-63 (authors discuss advantages of civil forfeiture to prosecution).
in a criminal action.\textsuperscript{88} For example, under the federal civil forfeiture statute, once the government has established probable cause\textsuperscript{89} that the property is subject to forfeiture, the burden of proof shifts to the party claiming innocent ownership to show by a preponderance of the evidence that the claimant did not know of or consent to the illegal activity.\textsuperscript{40} In a criminal proceeding the burden remains on the prosecutor to prove each element of the crime beyond a reasonable doubt.\textsuperscript{41} In contrast, the burden of proof under the New York statute varies, but is always below the reasonable doubt standard.\textsuperscript{42} Second, civil forfeiture statutes make available to the prosecutor all relevant discovery areas,\textsuperscript{60} some of which are not available in a criminal proceeding due to the consti-

\textsuperscript{88} Id. See infra notes 40-42 and accompanying text (comparing burden of proof in civil forfeiture proceeding with burden of proof in criminal forfeiture proceeding).

\textsuperscript{89} See United States v. Dickerson, 857 F.2d 1241, 1244 (9th Cir. 1988) (to reach probable cause government must pass point of mere suspicion); United States v. $38,600.00 in U.S. Currency, 784 F.2d 694, 697 (5th Cir. 1986) (probable cause is same for § 881(a) as elsewhere: reasonable ground for belief of guilt, supported by less than prima facie proof, but more than mere suspicion). See generally Goldsmith & Linderman, supra note 2, at 1261 n.31 (discussing probable cause).

Probable cause is generally established by showing a "substantial connection" between property and illicit activity. See, e.g., United States v. $38,000.00 in U.S. Currency, 816 F.2d 1538, 1548 (11th Cir. 1987); United States v. $64,000.00 in U.S. Currency, 722 F.2d 239, 244 (5th Cir. 1984); United States v. One 1979 Porsche Coupe, VIN 92989200514, 709 F.2d 1424, 1426 (11th Cir. 1983).

See, e.g., United States v. One Single Family Residence and Real Property Located at 900 Rio Vista Blvd., 803 F.2d 625, 629 (11th Cir. 1986) (once government establishes probable cause, burden of proof shifts to claimant to show by preponderance of evidence that property is not subject to forfeiture); United States v. One Parcel of Real Estate at 11885 S.W. 46th St., 715 F. Supp. 355, 357 (S.D. Fla. 1989) (same); United States v. One Parcel of Property Located at Route 1, Box 137, 743 F. Supp. 802, 805 (M.D. Ala. 1990) (same). See also Goldsmith & Linderman, supra note 2, at 1261-62 (if government proves probable cause, claimant to property must disprove allegations by preponderance of evidence); Note, Innocent Owner Defense, supra note 2, at 475 (once probable cause is shown, burden of proof shifts to claimant to show either absence of probable cause or applicability of affirmative defense).

\textsuperscript{40} See W. LaFave & A. Scott, Jr., Criminal Law § 1.8, at 58 (2d ed. 1986). "[T]he prosecution must prove, beyond a reasonable doubt, all the elements of the crime charged." Id. (footnote omitted).

\textsuperscript{41} See N.Y. Civ. Prac. L. & R. § 1511(5)(a) (McKinney Supp. 1991) (post-conviction forfeiture crimes require proof by preponderance of evidence); id. § 1511(1)(b) (pre-conviction forfeiture crimes require proof by clear and convincing evidence); id. § 1511(9)(b)(ii) (non-criminal's knowledge of crime must be proven by preponderance of evidence); id. § 1511(9)(b)(v) (specified felony offense must be proven by clear and convincing evidence for real property instrumentality forfeiture).

\textsuperscript{42} See Goldsmith & Linderman, supra note 2, at 1265 n.36 (citing D. Smith, Prosecution and Defense of Forfeiture Cases, § 1.01-02 (1985)).
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tutional protection against self-incrimination. Often, such discovery will not only defeat the claimant’s defenses, but will also provide additional evidence that can be used in the criminal prosecution of the violator of the statute.

II. CALERO-TOLEDO AND CIVIL FORFEITURE UNDER 21 U.S.C. § 881(a)

The recent “war on drugs” prompted the federal government to enact an array of forfeiture statutes. In the area of civil forfeiture, Congress enacted the Controlled Substances Act of 1970. The original law subjected to forfeiture all controlled substances, drug paraphernalia, and conveyances used to transport drugs. The statute was enacted largely in response to a growing narcotics industry, after traditional criminal sanctions proved ineffective due to the enormous financial benefits offered by the trade. Congress now sought to attack the economic bases of the drug

44 See U.S. Const. amend. V. “No person shall be ... compelled in any criminal case to be a witness against himself.” Id.

45 See Goldsmith & Linderman, supra note 2, at 1263 n.36 (citing D. Smith, Prosecution and Defense of Forfeiture Cases, § 1.01-02 (1985)).

46 See United States v. One Parcel of Real Property Known as 6 Patricia Dr., 705 F. Supp. 710, 712-13 (D.R.I. 1989). “Among the increasingly powerful weapons in the federal government’s arsenal for waging its escalating war on drug trafficking in the United States are the mechanisms of civil and criminal forfeiture.” Id. Through civil forfeiture statutes Congress has expanded the war on drugs to every physical object involved in the narcotics industry. United States v. 3120 Banneker Drive, 691 F. Supp. 497, 503 (D.D.C. 1988). As a result, the number of seizures and forfeitures has increased dramatically over the last six years. Winn, supra note 2, at 1111 (1988). A government program was implemented to manage these asset forfeitures in response to this rapid increase in seizures. See Legal Times, Aug. 27, 1990, at 4, col. 1-2.


48 Id. The law was subsequently amended to include forfeiture of proceeds from drug transactions and real property used to facilitate such transactions. See supra note 1 (pertinent statutory provisions).

49 See Stopping “Mother Ships”-A Loophole in Drug Enforcement: Hearing on S.3437 Before the Subcomm. to Investigate Juvenile Delinquency of the Senate Comm. on the Judiciary, 95th Cong., 2d Sess. 42 (1978) [hereinafter Mother Ships] (statement of Peter B. Bensinger). “We recognize that the conviction and incarceration of top-level traffickers does not necessarily disrupt trafficking organizations; the acquisition of vast capital permits regrouping and the incarcerated trafficker can continue to direct operations.” Id. See generally Goldsmith & Linderman, supra note 2, at 1254-56 (discussing forfeiture as effective way to combat narcotics trafficking and racketeering).

50 See Mother Ships, supra note 49, at 42 (traditional criminal sanctions ineffective against lucrative narcotics industry).
industry. Soon after the passage of the civil forfeiture statute, an ancillary problem arose: innocent owners, who neither knew of nor consented to the drug-related activity, found their property being subjected to forfeiture. Such was typical among owners whose property was stolen or who had leased, rented or loaned their property to others engaged in illegal activity. Historically, the only remedies available to the innocent owner were the administrative proceedings of remission and mitigation, which were not statutory defenses but purely matters of administrative grace.

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son Yacht Leasing Co., Pearson Yacht Company leased a yacht to two residents of Puerto Rico. The yacht was seized pursuant to a Puerto Rican statute modeled after 21 U.S.C. § 881(a)(4), when one marihuana cigarette was found on board. The Supreme Court upheld the seizure even though the owners, who were not involved with the commission of the crime, never received notice of the forfeiture or an opportunity to be heard. The Court cited two policy reasons to support the forfeiture: first, civil forfeitures have punitive and deterrent purposes, and second, such forfeitures induce innocent owners to exercise greater care in transferring possession of their property.

Although the innocence of an owner was not traditionally a defense to an in rem forfeiture proceeding, the Calero-Toledo Court did recognize constitutional protections for innocent owners in certain circumstances. An owner would be protected in a situation where the owner had done "all that reasonably could be expected to prevent the proscribed use of [the] property." This

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60 Id.
61 See id. at 665.
62 See id.; P.R. LAWS ANN. tit. 24, § 2512(a)(4) (1979). The statute provides: "All conveyances, including aircraft, vehicles, mount or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property [shall be forfeited to the Commonwealth of Puerto Rico]." See Calero-Toledo, 416 U.S. at 686 n.25 (discussing statute).
63 See Calero-Toledo, 416 U.S. at 693 (Douglas, J., dissenting). "[S]o far as we know only one marihuana cigarette was found on the yacht." Id.
64 Id. at 679-80. The Court held that "this case presents an 'extraordinary' situation in which postponement of notice and hearing until after seizure did not deny due process." Id.
65 Id. at 686.
66 Id. See generally Goldsmith & Linderman, supra note 2, at 1255-56 (forfeiture is effective weapon against narcotics trafficking since traditional criminal sanctions have not deterred drug dealers).
67 See Calero-Toledo, 416 U.S. at 688. Cf. Goldsmith-Grant Co. v. United States, 254 U.S. 505, 507 (1921) (nothing unreasonable with requiring owner of property to make sure it is not used for illegal purposes).
68 See supra note 52 (innocence not traditionally defense to forfeiture).
69 See Calero-Toledo, 416 U.S. at 688-89 (citing Peisch v. Ware, 8 U.S. (4 Cranch) 347, 364 (1808)). For example, "it would be difficult to reject the constitutional claim of an owner whose property" was stolen and then subject to illegal use. Id. at 689. The Court points out that other cases also support this proposition. See also Goldsmith-Grant Co., 254 U.S. at 512 (judgment reserved as to whether forfeiture extends to property stolen from owner or taken without consent); United States v. One Ford Coupe Automobile, 272 U.S. 321, 333 (1926) (same); Van Oster v. Kansas, 272 U.S. 465, 467 (1926) (same).
70 Calero-Toledo, 416 U.S. at 689. The Court suggested in dicta that if the owner was
"reasonable precaution" standard,\textsuperscript{60} sometimes called a "negligence" standard,\textsuperscript{70} is widely considered dicta,\textsuperscript{71} but has been applied as substantive law by many courts.\textsuperscript{72} In fact, the "reasonable precaution" language of \textit{Calero-Toledo} is the only guidance that the Supreme Court has given regarding the constitutional rights of innocent owners.\textsuperscript{73}

Congress has indicated its concern for innocent owners through the enactment of innocent owner defenses in three amendments to the Controlled Substances Act.\textsuperscript{74} The Psychotropic Substances

unaware of and uninvolved in the wrongful activity, and did all that could reasonably be expected to prevent the activity, there might be a constitutional claim of innocent ownership. \textit{Id.}

\textsuperscript{60} See Note, Tempering the Relation-Back Doctrine: A More Reasonable Approach to Civil Forfeiture in Drug Cases, 76 VA. L. REV. 165, 188-93 (1990) (comparing "reasonable precaution" standard to actual knowledge standard).

\textsuperscript{70} See United States v. Premises Known as 2639 Meetinghouse Rd., 633 F. Supp. 979, 998 (E.D. Pa. 1986) (discussing whether statute requires owner lack actual knowledge only or also knowledge that could have been acquired through non-negligent conduct). See also Note, \textit{supra} note 69, at 188-89 (discussing actual knowledge standard).

\textsuperscript{71} See, \textit{e.g.}, United States v. 141st Street Corp., 911 F.2d 870, 879 (2d Cir. 1990) (discussing dicta in \textit{Calero-Toledo} whereby innocent owner may have defense to civil action), \textit{cert. denied}, 111 S. Ct. 1017 (1991); Strafer, \textit{Civil Forfeitures: Protecting the Innocent Owner}, 37 U. FLA. L. REV. 841, 846 (1985) (same); Note, \textit{Innocent Owner Defense, supra} note 2, at 488 (same).

Even if the Court did not intend to expressly adopt this standard, it seems to follow from the Court's language that if the leasing company had done all that could reasonably be expected to avoid having the property put to illegal use, it would have a valid constitutional claim. \textit{See Calero-Toledo}, 416 U.S. at 690.

\textsuperscript{72} See, \textit{e.g.}, \textit{141st St. Corp.}, 911 F.2d at 879 (using \textit{Calero-Toledo} test as standard for determining consent under 21 U.S.C. § 881(a)(7)); United States v. One Parcel of Real Estate, 715 F. Supp. 555, 557-58 (S.D. Fla. 1989) (to maintain innocent owner defense under § 881 (a)(7) owner must not have known of illegal use and must have taken every reasonable precaution to prevent it); United States v. One 1978 Chrysler Le Baron Station Wagon, 648 F. Supp. 1048, 1051 (E.D.N.Y. 1986) (defendant must prove he did all that could reasonably be expected to prevent prescribed use); United States v. One 1976 Lincoln Mark IV, 462 F. Supp. 1383, 1391 (W.D. Pa. 1979) (reasonableness standard determined by individual circumstances of case); United States v. One 1973 Jaguar Coupe, 431 F. Supp. 128, 130 n.3 (S.D.N.Y. 1977) (\textit{Calero-Toledo} left door open for possible affirmative defense that reasonable precaution taken).

\textsuperscript{73} See \textit{Calero-Toledo}, 416 U.S at 689.

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Act of 197876 expanded the civil forfeiture statute to provide for forfeiture of proceeds related to drug activity.76 The Act however, included a defense which protected an owner from forfeiture if he or she could establish that the illicit act occurred "without the knowledge or consent of that owner."77 In 1984, Congress further expanded the scope of § 881(a) by adding subsection (a)(7) which provided for the forfeiture of real property.78 Using language identical to that of subsection (a)(6), subsection (a)(7) also provided an innocent owner defense.79 Finally, in 1988, Congress amended subsection (a)(4) by adding an innocent owner defense to the provision which already authorized the forfeiture of conveyances used in drug activity.80 That addition differed from the innocent owner provisions of (a)(6) and (a)(7) in that it included the requirement that the claimant establish a lack of "willful blindness" to the drug activity.81


Although the innocent owner defenses are essentially the same in each subsection,88 the language has not been interpreted consistently.88 In construing the statute, the first question is whether


80 See supra note 1 (pertinent statutory provisions); supra note 12 (discussion of affirmative defense).


82 See supra note 1 (pertinent statutory provisions); supra note 12 (discussion of affirmative defense).

83 See, e.g., United States v. One 1985 Mercedes, 917 F.2d 415, 419 (9th Cir. 1990) (government must show probable cause that property seized was used or intended to be used in violation of 21 U.S.C. § 881(a)(4)); United States v. 141st St. Corp., 911 F.2d 870,
the phrase "without the knowledge or consent of that owner" should be read conjunctively or disjunctively. Some courts have held that the phrase should be read conjunctively, requiring the claimant to prove both lack of knowledge of the illegal activity and lack of consent to it. Other courts have read the clause disjunctively, allowing an innocent owner to establish either lack of knowledge of the drug activity or the absence of consent to it.

Perhaps the strongest voice for the conjunctive school is that of Judge Greenberg of the Third Circuit. In *United States v. Parcel of Real Property Known as 6901 Grubb Road*, the government brought a forfeiture action under § 881(a)(7) and the majority

878-79 (2d Cir. 1990) (claimant must do all that could reasonably be expected to prevent illegal use), *cert. denied*, 111 S. Ct. 1017 (1991); United States v. One Single Family Residence With Out Bldgs., 894 F.2d 1511, 1516 (11th Cir. 1990) (statute intended to penalize only those significantly involved); United States v. One Parcel of Real Property Known as 6109 Grubb Rd., 886 F.2d 618, 626 (3d Cir. 1989) (innocent owner status proven by preponderance of evidence that illegal use occurred without knowledge or consent); United States v. One 1985 Nissan 300ZX, VIN JN1C214SFX069854, 889 F.2d 1317, 1320 (4th Cir. 1989) (innocent owner status proven by subjective standard used to determine innocent owner status); United States v. One Parcel of Real Property with Bldgs. Appurtenances, and Improvements Known As 190 Colebrook Rd., 743 F. Supp. 103, 106 (D.R.I. 1990) (innocent owners must show absence of knowledge or consent and that property was purchased in good faith); United States v. Sixty Acres, More or Less With Improvements, 727 F. Supp. 1414, 1418-19 (N.D. Ala. 1990) (owner must prove absence of either "consent" or "knowledge" by preponderance of evidence).

See United States v. All Right, Title, and Interest in Property and Premises Known As 710 Main St., 744 F. Supp. 510, 522 (S.D.N.Y. 1990). "[F]irst, however, we must answer a threshold question . . . must a claimant prove both lack of knowledge and lack of consent, or can the defense survive if only one of the two elements is proven?" Id. See also Reiter v. Sonotone Corp., 442 U.S. 330, 337 (1979) (starting point of statutory construction is language of statute).

See United States v. Certain Real Property and Premises Known as 890 Noyac Rd., 799 F. Supp. 111, 115-16 (E.D.N.Y. 1990) (phrase should be construed to read without knowledge and without consent). See also Note, *Innocent Owner Defense*, supra note 2, at n.64 (citations of cases which follow conjunctive reading of innocent owner defenses).

See e.g., United States v. 141st St. Corp., 911 F.2d 870, 878 (2d Cir. 1990) (claimant may show either lack of knowledge or lack of consent); *cert. denied*, 111 S. Ct. 1017 (1991); United States v. Parcel of Real Property Known as 6901 Grubb Rd., 886 F.2d 618, 626 (3d Cir. 1989) (same); Sixty Acres, 727 F. Supp. at 1418-19 (same); United States v. Real Property Known as 19026 Oakmont S. Drive, 715 F. Supp. 235, 237 n.3 (N.D. Ind. 1989) (same); United States v. Certain Real Property and Premises Known as 171-02 Liberty Ave., 710 F. Supp. 46, 50 (E.D.N.Y. 1989) (same). See generally Note, *Innocent Owner Defense*, supra note 2, at 478-86 (discussion of whether statute should be read disjunctively or conjunctively).


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

Id. at 626.
of the court read the language of the defense disjunctively.90 Judge Greenberg's dissent stated that the plain meaning of the statute required a conjunctive reading.91 In further support of his dissent, Judge Greenberg cited the ordinary canons of statutory construction,92 the legislative history of the statute,93 and the fact that Congress, if it wanted the claimant to have two possibilities by which to defeat forfeiture, could have written "without knowledge or without consent."94

By contrast, the court in United States v. Certain Real Property and Premises Known as 171-02 Liberty Avenue,95 which was the first to consider the statutory construction of "or,"96 read the phrase "without knowledge or consent" disjunctively.97 The Liberty Avenue court also relied on the ordinary canons of statutory construction,98 and the ability of Congress to have drafted the statute as "without knowledge and consent."99 In addition, other courts have cited the legislative history of § 881(a) in support of a disjunctive reading.100 That history indicates that Congress wished to expand statutory protections for innocent owners, as well as to expand the government's power to seize drug assets.101

Perhaps more importantly, to require a claimant to disprove knowledge in all cases renders the element of consent irrele-

90 See id.
92 Id.
93 Id. at 663.
94 Id. at 662-63.
96 Id. at 49-50.
97 Id. at 50.
98 Id.
99 Id.
101 See 141st St. Corp., 911 F.2d at 878 ("Congress intended forfeiture to be powerful weapon in the war on drugs"); One Single Family Residence, 894 F.2d at 1513 (two aims of Congress were to expand war on drugs and protect innocent owners); Parcel of Real Property Known as 6901 Grubb Rd., 886 F.2d at 624 (Congress enacted § 881 to attack drug trafficking). See also Goldsmith & Linderman, supra note 2, at 1254 (forfeiture is important weapon in war on drugs).
vant.\textsuperscript{103} Read conjunctively, once there is knowledge the defense fails, and therefore the consent element becomes surplusage.\textsuperscript{103} Finally, the general goal of the forfeiture statute’s amendments is to expand the government’s reach in drug cases,\textsuperscript{104} yet the specific goal of the innocent owner defense is to temper the harsh results imposed on innocent owners under the statute.\textsuperscript{106} It is submitted that a disjunctive reading of the statute is consistent with both goals, while a conjunctive reading is consistent with only the first.


Courts have also struggled in determining when a claimant has knowledge of the illegal use of the property.\textsuperscript{106} In 1985, the Court

\textsuperscript{103} See Note, Innocent Owner Defense, supra note 2, at 485. “A disjunctive interpretation allows each term [in statute] independent significance.” Id.

\textsuperscript{104} Id. at 485-86 n.95 (citing Pettis ex rel. United States v. Morrison-Knudsen Co., 577 F.2d 668, 673 (9th Cir. 1978)). See, e.g., United States v. Menasche, 348 U.S. 528, 538-39 (1955) (courts should “give effect, if possible, to every clause and word of a statute,” rather than emasculate an entire section”) (quoting Montclair v. Ramsdell, 107 U.S. 147, 152 (1883)); Morrison-Knudsen Co., 577 F.2d at 673 (“statutes should not be construed so as to make mere surplusage of any [included] provisions”); Klein v. Republic Steel Corp., 435 F.2d 762, 766 (3d Cir. 1970) (all words and provisions of statute should be given effect and not construed as surplusage); 2A N. Singer, Statutes and Statutory Construction § 46.06 (1984) (statute should be construed so that no part will be inoperative, superfluous, void or insignificant).

\textsuperscript{106} See supra note 101 (cases citing congressional purpose).

\textsuperscript{107} See United States v. 141st St. Corp., 911 F.2d 870, 878 (2d Cir. 1990) (Congress did not intend for innocent owners to lose their property). cert. denied, 111 S. Ct. 1017 (1991); United States v. One Single Family Residence With Out Bldgs., 894 F.2d 1511, 1513 (11th Cir. 1990) (twin aims of Congress were to expand war on drugs and protect innocent owners); United States v. Parcel of Real Property Known as 6901 Grubb Rd., 886 F.2d 618, 624 (3d Cir. 1989) (same).

\textsuperscript{108} See, e.g., United States v. One Parcel of Property Located at 15 Black Ledge Drive, 897 F.2d 97, 102 (2d Cir. 1990) (claimant’s bare denial of knowledge insufficient to preclude summary judgment due to evidence tending to show actual knowledge); United States v. 1980 Red Ferrari, 827 F.2d 477, 480 (9th Cir. 1987) (owner on notice of illegal actor’s connection to vehicle); United States v. $4,255,000.00, 762 F.2d 895, 906 (11th Cir. 1985) (innocent owner defense based on actual, not constructive knowledge), cert. denied, 474 U.S. 1056 (1986); United States v. 8848 South Commercial St., 1990 U.S. Dist. LEXIS 12200 at 37-8 (N.D. Ill. Sept. 15, 1990) (LEXIS, Genfed library, Dist file) (“[I]f the evidence supports a ‘reasonable inference’ of actual knowledge and the claimant fails to come forward within anything more than a naked protestation that he or she really didn’t know of the illicit activity, the claimant’s defense of innocent ownership fails.”). See also United States v. 141st St. Corp., 911 F.2d 870, 876 (2d Cir. 1990) (actual knowledge imputed to owner by his agent), cert. denied, 111 S. Ct. 1017 (1991); United States v. Real Property Located at 2011 Calumet, 699 F. Supp. 108, 110 (S.D. Tex. 1988) (knowledge exists when innocent owner cannot prove lack of knowledge or reason to know).

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of Appeals for the Eleventh Circuit addressed the question of knowledge in *United States v. $4,255,000.00*,¹⁰⁷ and held that "the statutory 'innocent owner' defense turns on the claimant's actual, not constructive knowledge."¹¹⁰ Although most courts have followed this determination,¹⁰⁹ they have not clearly addressed what standard should be used when determining whether there is actual knowledge.¹¹⁰ Although one court has stated that the standard is subjective,¹¹¹ several recent court decisions strongly indicate a trend toward an objective standard.¹¹²

In *United States v. One Single Family Residence Located at 2901 S.W. 118th Court,*¹¹³ the District Court for the Southern District of Florida held that a claimant's conclusory assertions of lack of knowledge were insufficient to overcome objective evidence which tended to show awareness of the drug-related activity.¹¹⁴ In *United


¹⁰⁸ Id. at 906 n.24.
¹¹⁰ See Note, *Innocent Owner Defense,* supra note 2, at 487 (courts have given inconsistent answers to questions of what is needed to establish consent).
¹¹¹ See *United States v. $10,694.00 U.S. Currency, 828 F.2d 233, 235 n.3 (4th Cir. 1987)* ("plain language of § 881(a)(6) . . . does not impose an objective standard" (adopting Eleventh Circuit's holding in *United States v. $4,255,000, 762 F.2d 895, 906 (1985), cert. denied, 474 U.S. 1056 (1986)). *See generally Note,* supra note 69, at 188-96 (recommending actual knowledge standard over negligence knowledge standard derived from *Calero-Toledo).*
¹¹² See, e.g., *United States v. $4,255,000.00, 762 F.2d 895, 906 (11th Cir. 1985)* (sufficient evidence must be presented to support inference of actual knowledge), *cert. denied, 474 U.S. 1056 (1986)*; *United States v. Parcel of Real Property Known as 2301 Caughey Rd., 715 F. Supp. 131, 139-55 (W.D. Pa. 1989)* (absence of specific actual knowledge insufficient to support defense in light of knowledge of general circumstances). *See also Strafer, Civil Forfeitures: Protecting The Innocent Owner,* 37 U. FLA. L. REV. 841, 847 (1985) (claimant who does not suspect illicit use of property has no affirmative duty to act).
¹¹⁴ Id. at 788-89.
States v. 15 Black Ledge Drive," pursuant to a § 881(a)(7) forfeiture, the Court of Appeals for the Second Circuit denied the claimant's innocent owner defense where there was "simply no probative evidence . . . from which a reasonable jury could find for the claimant, given the cocaine found throughout the house, the gun and other drug paraphernalia found in common areas of the house . . . ." The court further stated that "[i]n view of appellant's failure to come forward with any evidence to support her assertions that she had no knowledge of drug trafficking from her residence," her defense must fail. Moreover, in United States v. One 1980 Red Ferrari, the Court of Appeals for the Ninth Circuit stated that where the "circumstantial evidence of knowledge is compelling," the claimant cannot avoid forfeiture without more than mere assertions of ignorance. These holdings indicate that a claimant faced with objective evidence which contradicts assertions of lack of knowledge must put forth other objective evidence to prove lack of knowledge.

Evidence that Congress also envisioned an objective standard to determine the presence or absence of knowledge in the statutory defense is found in the most recent amendment to § 881(a). Subsection (4)(C), added to the statute in 1988, provides that the affirmative defense is not available to the claimant who lacked knowledge through "willful blindness." This amendment evinces congressional awareness that the innocent owner defense should not be available to those who purposefully close their eyes, at least where conveyances are concerned. The objective stan-

When a claimant raises an innocent owner defense, a court which reads the innocent owner defense disjunctively must next determine whether the claimant consented to the illegal activity. Although most courts inevitably invoke the "reasonable precaution" standard established in Calero-Toledo and avoid the consent issue, several courts have rejected the "reasonable precaution" standard. Still others have applied knowledge and con-

124 See, e.g., United States v. Aleman, 728 F.2d 492, 494 (11th Cir. 1984) (actions "pointing in the direction of deliberate ignorance" lead to inference of knowledge (quoting United States v. Batencourt, 592 F.2d 916, 918 (5th Cir. 1979)).

126 See United States v. 141st St. Corp., 911 F.2d 870, 878-79 (2d Cir. 1990), cert. denied, 111 S. Ct. 1017 (1991). To date, 141st St. Corp. has been the only attempt to establish a standard of consent; that standard is the constitutionally minimum "reasonable precaution" standard of Calero-Toledo. See also Note, Innocent Owner Defense, supra note 2, at 486-92 (discussing consent).

127 See, e.g., 141st St. Corp., 911 F.2d 870, 878-79 (2d Cir. 1990) (applying Calero-Toledo as standard for consent), cert. denied, 111 S. Ct. 1017 (1991); United States v. One Parcel of Real Estate at 11885 S.W. 46th St., 715 F. Supp. 355, 358 (S.D. Fla. 1989) (claimant must show "she did not know of the property’s connection to the drug trafficking; and that she took every reasonable precaution to prevent the property’s use in drug trafficking"); United States v. One Single Family Residence with Outbuildings Located at 15621 S.W. 209th Ave., 699 F. Supp. 1531, 1534 (S.D. Fla. 1988) (same), aff’d, 894 F.2d 1511 (11th Cir. 1990); United States v. Real Property Located at 2011 Calumet, 699 F. Supp. 108, 110 (S.D. Tex. 1988) ("The innocent owner defense applies only to owners who can show that they did not know and had no reason to know of the illegal use; were uninvolved in the illegal use; and did all that could reasonably be expected to preclude or discover the illegal use."); United States v. Two Tracts of Real Property Containing 30.80 Acres, More or Less, 665 F. Supp. 422, 425 (M.D.N.C. 1987) (section 881(a)(7), innocent owner defense, “fully comports” with Court’s reasoning in Calero-Toledo), aff'd sub nom. United States v. Reynolds, 856 F.2d 675 (4th Cir. 1988). But see United States v. Lots 12, 13, 14, and 15, Keeton Heights Subdivision, 869 F.2d 942, 946-47 (6th Cir. 1989) (rejecting application of Calero-Toledo); United States v. Sixty Acres, More or Less, 727 F. Supp. 1414, 1420-21 (N.D. Ala. 1990) (Calero-Toledo does not apply to section 881(a)(7) (citing United States v. Parcel of Real Property Known as 6901 Grubb Rd., 886 F.2d 618, 627 (3d Cir. 1989)); United States v. Certain Real Property, 724 F. Supp. 908, 914 (S.D. Fla. 1989) (Calero-Toledo test is inapplicable when innocent owner defense is being claimed under 21 U.S.C. § 881(a)(7) (1988)).

128 See, e.g., Lots 12, 13, 14, and 15 Keeton Heights Subdivision, 869 F.2d at 946-47 (rejecting application of “reasonable precaution” standard established in Calero-Toledo); Sixty Acres, 727 F. Supp. at 1420 (Calero-Toledo does not apply to section 881(a)(7)); Certain Real
sent as the first and second prong of an innocent owner defense analysis and the Calero-Toledo dicta as the third prong. In any case, these courts did not attempt to establish a workable standard for determining the absence or presence of consent.

Recently, however, the Court of Appeals for the Second Circuit held that the standard for consent is the constitutionally minimum "reasonable precaution" standard for innocent ownership established in Calero-Toledo: whether the claimant did all that could reasonably be expected to prevent the illicit use of the property. In United States v. 141st Street Corp., the government sought forfeiture of a six story apartment building on the grounds that it was being used to facilitate the distribution of narcotics. Relying on § 881(a)(7), the owner sought to avoid forfeiture by arguing that it neither knew of nor consented to the narcotic activity. Since the court read "knowledge or consent" disjunctive.


138 See, e.g., One Parcel of Real Estate at 11883 S.W. 46 St., 715 F. Supp. at 358 (claimant must show that "she did not know of the property's connection to drug trafficking, and that she took every reasonable precaution to prevent the property's use in drug trafficking"); Real Property Located At 2011 Calumet, 699 F. Supp. at 110 ("[T]he innocent owner defense applies only to owners who can show that they did not know and had no reason to know of the illegal use; were uninvolved in the illegal use; and did all that could reasonably be expected to preclude or discover the illegal use.") (citing United States v. One Boeing 707 Aircraft, 750 F.2d 1280, 1289 (5th Cir.), cert. denied, 471 U.S. 1126 (1985)); Two Tracts of Real Property Containing 30.80 Acres, More or Less, 665 F. Supp. at 425 (M.D.N.C. 1987) (section (a)(7) innocent owner defense "fully comports" with Court's reasoning in Calero-Toledo).


140 141st St. Corp., 911 F.2d at 879-80.

141 911 F.2d 870 (2d Cir. 1990), cert. denied, 111 S. Ct. 1017 (1991).

142 141st St. Corp., 911 F.2d at 873.

143 Id. at 874. Realty Corporation was the owner of record and Mark Hersh was its president and principal stockholder. Id. at 875. Hersh's uncle was the superintendent of the building, although in many ways he acted as the managing agent. Id. Pursuant to many complaints about drug trafficking in the building, the New York City Police contacted the uncle on three occasions and attempted to contact Hersh, who responded neither to calls nor letters. Id. Suspecting that Hersh might be aware of the drug activity in the building, the police decided not to attempt further contacts with Hersh. Id. After several undercover purchases of narcotics, the officers obtained a seizure warrant for the entire building by applying ex parte to the United States Magistrate as authorized by the statute. Id. See generally 21 U.S.C. § 881(b) (1988) (forfeiture procedure).

Realty Corporation asserted an innocent owner defense, stating that it neither knew of nor consented to the narcotics activity. Id. at 874. However, since Hersh's uncle, who had been contacted by the police on at least three occasions, was aware of the allegations of
tively, the determinative issue became whether the claimant consented. Adopting the language of *Calero-Toledo*, the court stated that consent would exist if the claimant failed to do "all that reasonably could be expected to prevent the illegal activity once he learned of it." The court found that consent existed since the owner had disregarded police notices concerning drug activity in the building and had not otherwise done all that it reasonably could to prevent the drug trafficking. In reaching its conclusion, the court relied upon a three part analysis.

First, the court stated that although the statute's legislative history made no mention of *Calero-Toledo*, that fact alone did not preclude its application. It is submitted that although the legislative history makes no reference to *Calero-Toledo*, that fact alone does not compel the incorporation of the "reasonable precaution" standard any more than it compels a rejection of that standard. This use of legislative history is inappropriate in light of canons of statutory construction which dictate that unless Congress explicitly redefined a word in the statute, its ordinary usage should prevail.

Second, the court concluded that the *Calero-Toledo* standard provided a proper balance between the competing policy objectives of § 881(a), which are to make drug trafficking expensive for the traffickers and to preserve the property of the innocent owner. It is submitted that the "reasonable precaution" standard does not provide an adequate balance between these policy objectives since it favors the goal of attacking the growing drug industry at the expense of the statute's innocent owner protections.

drug activity, his knowledge was imputed to Realty Corporation. *Id.*. The court affirmed the district court decision and held that an owner has consented when he fails to do all that could reasonably be expected to prevent illicit use of the property. *Id.* at 878.

*Id.* at 876-80.

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

*Id.* at 879-80.

*Id.* at 879.

*See* Crane v. Commissioner, 351 U.S. 1, 6 (1947). "[W]ords of statutes . . . should be interpreted where possible in their ordinary, everyday senses." *Id.*; Old Colony R. Co. v. Commissioner, 284 U.S. 552, 560 (1932) (same).

*See* 141st St. Corp., 911 F.2d at 879.

*See, e.g., Joint Explanatory Statement of Titles II and III, 124 Cong. Rec. 17,647,
Finally, the court determined that the "reasonable precaution" standard is appropriate since consent is "more than a state of mind."\(^1\) It is submitted that although the court was correct in concluding that consent is "more than a state of mind," it does not necessarily follow that "failure to take reasonable precaution" is determinative of consent. Rather, this Note proposes that consent requires an owner to exercise a degree of willfulness which is not necessary under a "reasonable precaution" standard. Consent, in its ordinary usage, involves an affirmative act of the will, accompanied by deliberation.\(^2\) In contrast, the "reasonable precau-

\(^{148}\) See \textit{Black's Law Dictionary} 305 (6th ed. 1990) (consent is "concurrency of wills"); \textsc{Restatement (Second) of Torts} \S 892 (1979). The \textsc{Restatement} provides:

(1) Consent is willingness in fact for conduct to occur. It may be manifested by action or inaction and need not be communicated to the actor.

(2) If words or conduct are reasonably understood by another to be intended as consent, they constitute apparent consent and are as effective as consent in fact.

\textit{Id. See also} United States v. One 1985 Chevrolet Camaro Z-28, No. 85-6348 (C.D. Cal. 1986) (held claimant does not have to act affirmatively to prohibit illegal use of property unless there are apparent reasons to suspect illegality). But see Note, Civil Forfeiture, supra note 2, at 502-03 (critical of \textit{One 1985 Chevrolet Camaro}); United States v. Sixty Acres, 727
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tion" standard encompasses carelessness and inattentiveness which are not affirmative acts. In addition, since 21 U.S.C. § 881(a) did not include any innocent owner provisions when Calero-Toledo was decided, for courts to now apply the "reasonable precaution" dicta of Calero-Toledo after the innocent owner amendments is to impose the will of the courts over the express intent of Congress.

III. CIVIL FORFEITURE UNDER NEW YORK’S CPLR ARTICLE 13-A

Article 13-A of New York’s Civil Practice Law and Rules, which subjects instrumentalities and proceeds of drug transactions to forfeiture, differs from 21 U.S.C. § 881 in two fundamental ways. First, the statute applies to the fruits of all felony crimes, although a major reason for enacting the law was the

F. Supp. 1414, 1420 (N.D. Ala. 1990) (“Congress had a little more in mind when it used the word ‘consent’ in § 881(a)(7)").

See United States v. One Mercedes Benz 300 SEL, 604 F. Supp. 1307, 1309, 1311 (S.D.N.Y. 1984), aff’d, 762 F.2d 991 (2d Cir. 1985). For example, an owner who lends his car to a friend for safekeeping has not taken every reasonable precaution to ensure that the car is not used in drug-related activity; the owner could have stored the car in a garage. However, the owner did not willfully consent to the proscribed use of his car by lending it to his friend. Id.

See supra note 74 (first innocent owner defense amendment to statute in 1978).

See N.Y. Civ. Prac. L. & R. § 1311(1) (McKinney Supp. 1991). Section 1311 (1) states: A civil action may be commenced by the appropriate claiming authority against a criminal defendant to recover the property which constitutes the proceeds of a crime, the substituted proceeds of a crime, an instrumentality of a crime or the real property instrumentality of a crime or to recover a money judgment in amount equivalent in value to the property which constitutes the proceeds of a crime, the substituted proceeds of a crime, an instrumentality of a crime, or the real property instrumentality of a crime provided, however, that a judgment predicated upon an action against a non-criminal defendant relating to an instrumentality of a crime shall be limited to the amount of the proceeds of the crime . . . .” Id. (emphasis added to language which became effective November 1, 1990).

The version of the statute which was in force since 1984 was the same as above except it did not provide for forfeiture of real property instrumentalities. See generally 2A J. Weinstein, H. Korn, & A. Miller, New York Civil Practice ¶ 1310.01 (1989) [hereinafter New York Civil Practice] (Article 13-A is powerful tool against criminal activity); Kessler, Quo Vadis? Assessing New York’s Civil Forfeiture Law, 4 Touro L. Rev. 253, 254-57 (1988) (Article 13-A greatly expands scope of forfeiture in New York).

enormity of New York's drug problem.\textsuperscript{148} Second, actions under 13-A are in personam rather than in rem,\textsuperscript{149} allowing claiming authorities\textsuperscript{150} to receive a judgment against the personal assets of an offender.\textsuperscript{151} This in personam characteristic has led to criticism of the statute's civil designation,\textsuperscript{152} given that in personam forfeiture actions are traditionally criminal proceedings due to their penal nature.\textsuperscript{153} Nonetheless, courts have not rejected the legislature's civil designation.\textsuperscript{154} This has allowed prosecutors to bring civil ac-


Instrumentalities or proceeds from crimes which are not drug offenses can only be forfeited if there has been a criminal conviction for the underlying offense. N.Y. Civ. PRAC. L. & R. § 1510(6) (McKinney Supp. 1991) (pre-conviction forfeiture actions pertain only to specified controlled substance or marihuana offenses).


\textsuperscript{149} See N.Y. Civ. PRAC. L. & R. § 1310(11) (claiming authority can be district attorney, attorney general, corporation counsel or county attorney).

\textsuperscript{150} Id. at § 1310(11) (claiming authority can be district attorney, attorney general, corporation counsel or county attorney).


As a result of this in personam nature, it is not even necessary to locate the proceeds of the crime. See A. Greese, FORFEITURE HANDBOOK: LITIGATION UNDER CPLR ARTICLE 13A 33 (New York State District Attorneys' Association 1985). Another advantage for prosecutors proceeding in personam is the ability to attach property outside the jurisdiction. See District Attorney v. McAuliffe, 129 Misc. 2d 416, 420, 493 N.Y.S.2d 406, 409 (Sup. Ct. Queens County 1985) (enjoining sale of property in Pennsylvania). See generally Note, CPLR 13-A: A District Attorney May Attach the Personal Assets of a Defendant, Prior to Conviction, Without Establishing that the Attached Assets are the Proceeds of a Crime, 61 ST. JOHN'S L. REV. 203, 205-06 (1986) ($2 million of personal assets attached by district attorney in Court of Appeals case).


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tions even when criminal charges have been dismissed,\textsuperscript{188} without double jeopardy\textsuperscript{189} constraints.\textsuperscript{190}

Although there are several variables to consider when proceeding under 13-A,\textsuperscript{188} one thing remains constant: actions must be grounded upon the commission of a felony.\textsuperscript{189} The statute provides two basic types of forfeiture actions: "post-conviction" forfeiture actions and "pre-conviction" forfeiture actions.\textsuperscript{190} Post-conviction forfeiture actions must be grounded upon a felony conviction\textsuperscript{191} or criminal activity arising from a common scheme or

of water into navigable waters not deemed criminal after Court asked first, whether Congress indicated a preference for a civil mechanism, and second, whether the statutory scheme was so punitive either in purpose or effect as to negate that intention. \textit{Id. See also} Lipke v. Lederer, 259 U.S. 557, 561-62 (1922) (imposition of double tax for sale of illegal liquor deemed penalty by Court); Boyd v. United States, 116 U.S. 616, 634 (1886) (civil penalty for tax fraud declared criminal). \textit{See generally Note, A Definition of Punishment for Implementing the Double Jeopardy Clause's Multiple-Punishment Prohibition, 90 YALE L.J. 652, passim (1981) (defining punishment for double jeopardy purposes).}


\textsuperscript{189} U.S. CONST. amend. V. "No person shall... be subject for the same offence to be put twice in jeopardy of life or limb..." \textit{Id. See infra} note 154 (discussion of double jeopardy clause's affect on statutes).


\textsuperscript{188} See infra notes 161, 165, 170 and 171 (post- and pre-conviction actions and criminal and non-criminal defendants).

\textsuperscript{189} See N.Y. CIV. PRAC. L. & R. § 1310(5) (McKinney Supp. 1991) (post-conviction forfeiture crime means any felony); id. § 1310(6) (pre-conviction crime means only controlled substance offense or criminal possession or sale of marihuana in first degree); id. § 1310(4-b) (specified felony offenses necessary for real property instrumentality crime require felony conviction).

\textsuperscript{190} See supra notes 161-63 and accompanying text (post-conviction and pre-conviction crimes).

plan of which a conviction is a part. 168 A claiming authority must establish a post-conviction claim by a preponderance of the evidence. 168 In contrast, pre-conviction forfeiture actions require proof of a felony drug offense by clear and convincing evidence. 169 Pre-conviction actions are limited to cases where the underlying felony is a drug offense; 168 however, they allow prosecutors to go after instrumentalities 166 and proceeds 167 of drug transactions even though no criminal charges are brought. 168

The statute draws a further distinction between criminal and non-criminal defendants. 169 A criminal defendant is one who the claiming authority seeks to prove committed the felony and now has an interest in the property which is subject to forfeiture. 170 To prevent the criminal defendant from circumventing the statute by simply transferring his or her interest to another person, an action against a non-criminal defendant may also be brought. 171 Actions against non-criminal defendants consist of more than proving that the property is the instrumentality or proceeds of a crime. 172 The claiming authority must also prove that the non-criminal defendant knew or should have known of the instrumentality's or proceeds' relationship to the crime or that the defend-


170 Id. § 1311(1)(b).

171 Id. § 1510(6).

172 See infra notes 180, 185 and accompanying text (discussion of instrumentalities).

173 See infra notes 178, 179, 181-84 and accompanying text (discussion of proceeds and substituted proceeds).

174 See Kessler, supra note 146, at 271. The name “pre-conviction” is misleading because no conviction is actually necessary to bring the action. Id.

175 See N.Y. Civ. Prac. L. & R. § 1310(9) (McKinney Supp. 1991) (criminal defendant is one with criminal liability who has interest in forfeitable property); id. § 1310(10) (non-criminal defendant is person, other than criminal defendant, who has interest in forfeitable property); id. § 1511(1) (providing for actions against criminal and non-criminal defendants); id. § 1511(5)(b) (special provisions for actions against non-criminal defendants).


177 See id. § 1510(10).

178 See infra note 173 and accompanying text (must show defendant knew or should have known of crime).
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ant fraudulently obtained an interest in the property to avoid forfeiture.178 Such proof must be established by a preponderance of the evidence.174 By putting the burden on the prosecutor to prove the knowledge or consent of non-criminal defendants, the New York statute offers greater protection for innocent owners than the federal statute, which places all burdens on the owner once probable cause has been shown.176 Notably, the personal liability of non-criminal defendants is limited to the amount of the proceeds of the drug transaction,176 unlike criminal defendants who may be liable for the value of an instrumentality even if that value greatly exceeds the amount of any proceeds.177

A. The Reach of New York's Forfeiture Statute

Prosecutors can reach the proceeds of a crime,178 substituted proceeds of a crime,179 or an instrumentality of a crime.180 Proceeds include any appreciation in value181 and the defendant need

174 Id.
176 See supra notes 39, 40 and accompanying text (discussion of probable cause).
178 See supra note 146 (recovery against non-criminal defendants limited to proceeds of crime); Morgenthau v. Citisource, Inc., 68 N.Y.2d 211, 215-16, 500 N.E.2d 850, 855, 508 N.Y.S.2d 152, 155 (1986) (personal bank account with value exceeding proceeds of crime cannot be reached if defendants are non-criminal).
177 See N.Y. CIV. PRAc. L. & R. § 1311(1) (McKinney Supp. 1991). A civil action may be commenced against a criminal defendant to recover a money judgment equivalent in value to the property which constitutes an instrumentality of a crime or the real property instrumentality of a crime. Id. See, e.g., Dillon v. Morgan Oil Terminals Corp., 158 Misc. 2d 155, 159, 525 N.Y.S.2d 719, 721 (Nassau County Ct. 1987) (forfeiture of value of instrumentality substantially in excess of proceeds from grand larceny).
181 New York Civil Practice, supra note 146, at 13-A-8. If a bank robber puts his $10,000 booty in a money market account and earns $1,000 interest, the entire $11,000 is forfeitable. See Kessler, Taking the Profit Out of Crime: Asset Forfeiture, 59 N.Y.S.B.J. 48, 50
not have actually received the benefit of the proceeds. Revisions in the statute which became effective November 1, 1990 include a rebuttable presumption that money found in close proximity to a requisite quantity of a controlled substance or marihuana is proceeds of a pre-conviction forfeiture crime. Substituted proceeds are also reachable, lest the defendant avoid forfeiture by merely converting ill-gotten gains into another form of property. In addition, when property directly and materially contributes to the commission of a felony, it is also forfeitable as an instrumentality of that crime.

(July 1987). Appreciation might be interest earned on money or increased value of real estate. See Kuriansky v. Natural Mold Shoe Corp., 133 Misc. 2d 489, 497, 506 N.Y.S.2d 940, 947 (Sup. Ct. Westchester County 1986). The criminal defendant need not benefit from crime for the proceeds to be forfeited. Id. Also, when a group of defendants participate in a crime they are held jointly and severally for the proceeds. See N.Y. CIV. PRAc. L. & R. § 1311(3)(d) & (e) (McKinney Supp. 1991). The requisite quantity to invoke this presumption is an amount sufficient to constitute a violation of N.Y. PENAL LAW § 220.18 (criminal possession of controlled substance in second degree) or § 220.21 (criminal possession of controlled substance in first degree). Id. Additionally, this presumption applies to money found in close proximity to any quantity of controlled substance or marihuana if possessed in a room other than a public place under circumstances evincing an intent to distribute the drugs. N.Y. CIV. PRAc. L. & R. § 1311(3)(d)(2) (McKinney Supp. 1991).

See NEW YORK CIVIL PRACTICE, supra note 146, at 13-A-9. This broadens the scope of forfeiture by allowing the claiming authority to recover traceable fruits of the underlying crime. Id. It also prevents defendants from hiding assets by merely selling or transferring them. See, e.g., District Attorney of Queens County v. McAuliffe, 129 Misc. 2d 416, 426, 493 N.Y.S.2d 406, 413 (Sup. Ct. Queens County 1985) (attachment of real property purchased with proceeds from extortion).


Vehicles used as instrumentalities in drug offenses are generally proceeded against under another statute. See N.Y. PUB. HEALTH LAW § 3588 (McKinney 1985 & Supp. 1990). This statute pertains only to vehicles, vessels, or aircrafts used to convey, conceal or transport controlled substances. Id. See e.g., Chesworth v. Block, 145 App. Div. 2d 418, 419, 535
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Real property that contributes directly and materially to the commission of a "specified felony offense" was recently added to the list of subject matter forfeitable under the statute. These offenses include only drug offenses and must be indicative of continuing use or sales. Each of the specified felony offenses requires a conviction, although proof of other transactions may be required depending on the severity of the crime for which there was a conviction. If the defendant can provide evidence that the conduct underlying the criminal conviction would not alone


There are three types of specified felony offenses. Subdivision (a) consists of a conviction or guilty plea of criminal sale or possession of a controlled substance in the first or second degree or conviction of conspiracy to commit one of those felonies if the object of the conspiracy is located in the real property which is the subject of the forfeiture action. Id. Subdivision (b) includes the crimes listed in subdivision (a) in addition to criminal sale of a controlled substance in the third, fourth or fifth degrees; criminal possession of a controlled substance in the third or fourth degree; and criminal sale of marihuana in the first degree. Id. However, subdivision (b) applies to engaging in the conduct defined by those statutes on three or more occasions and is conditioned upon at least one conviction or guilty plea. Id. A group of offenses may not constitute a single offense under N.Y. Crim. Proc. Law § 40.10. Id.

A specified felony offense under subdivision (c) consists of a conviction or guilty plea to criminal sale or possession of a controlled substance in the third or fourth degree or criminal possession of marihuana in the first degree. Id. If the conviction was for a possession charge it must be established that there was an intent to sell. Id. In addition, there must be substantial indicia that the defendant used the real property to engage in a continual, ongoing course of conduct involving the unlawful "mixing, compounding, manufacturing, warehousing or packaging" of controlled substances. Id. If the conviction was for criminal possession of marihuana in the first degree, there must be substantial indicia that the real property was used as part of an illegal trade or business for gain. Id.


Real property was initially excluded from the statute out of fear of overzealous prosecutions, i.e., forfeiture of an apartment building because of a drug transaction in the lobby. See Kessler, supra note 182, at 50. Originally, real property was forfeitable only if it was proceeds or substituted proceeds of a crime. Kessler, New York's New Forfeiture Legislation, Part 1, N.Y.L.J., Nov. 5, 1990 at 7, col. 1.

See supra note 186 (types of offenses).

See supra note 186 (when proof of other transactions is required).
establish the elements of one of the specified felony offenses, the claiming authority must prove the commission of such an offense by clear and convincing evidence.\textsuperscript{190}

When proceeding against non-criminal owners of real property there is an extremely high burden of proof.\textsuperscript{191} This serves as a protection for innocent owners and tenants.\textsuperscript{192} The prosecutor must prove all of the following by clear and convincing evidence: (1) commission of a specified felony offense, (2) the defendant knew the property was used for such an offense, and (3) the defendant either knowingly and unlawfully benefitted from the conduct or voluntarily consented to the use of the property for the offenses.\textsuperscript{193} As a result, prosecutors will likely limit real property instrumentality actions to criminal defendants.\textsuperscript{194}

B. Article 13-A's Provisional Remedies

Prosecutors may ask the court for provisional remedies to pre-

\textsuperscript{190} See N.Y. Civ. Prac. L. & R. § 1311(3-a) (McKinney Supp. 1991). If the defendant adduces evidence that the conduct underlying the conviction would not establish the elements of any of the specified felony offenses, "the burden shall be upon the claiming authority to prove, by clear and convincing evidence, that the conduct underlying the criminal conviction would establish the elements" of the specified felony offense. Id.

\textsuperscript{191} See infra note 193 and accompanying text (text of statute).

\textsuperscript{192} See Letter from Assemblyman Silver to Governor at 1 (July 18, 1990) (available from New York State Legislative Service and on file at St. John's law library). "[T]he bill continues and in some cases extends important safeguards to ensure that the property interests of innocent persons, be they tenants, owners, or mortgagees, are protected when the government seeks forfeiture of property." Id. See also Letter from Attorney General to Governor at 2 (July 17, 1990) (available from New York State Legislative Service and on file at St. John's law library). "[C]ertain procedures have been included to protect innocent owners and tenants . . . ." Id.


If the action relates to a real property instrumentality of a crime, the burden shall be upon the claiming authority to prove those facts referred to in subdivision four-b of section thirteen hundred ten of this article by clear and convincing evidence. The claiming authority shall also prove by clear and convincing evidence that the non-criminal defendant knew that such property was or would be used for the commission of specified felony offenses, and either (A) knowingly and unlawfully benefitted from such conduct or (B) voluntarily agreed to the use of such property for the commission of such offenses by consent freely given . . . .

Id.

\textsuperscript{194} See Kessler, supra note 187, at 7, col. 1. Given the high evidentiary burden imposed on prosecutors when proceeding against non-criminal defendants, "it would appear that the prosecutors will restrict the majority of real property forfeitures to actions against criminal defendants." Id.
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vent defendants from disposing of property and assets upon learning of the action being taken against them.\textsuperscript{106} The statute authorizes the remedies of attachment, injunction, temporary receivership, and notice of pendency.\textsuperscript{106} These remedies may be granted when there is a substantial probability that the claiming authority will prevail and that failure to enter the order may result in the property being made unavailable for forfeiture.\textsuperscript{107} The court must also determine that the need to preserve the availability of the property outweighs the hardship imposed on the de-

\textsuperscript{106} See N.Y. Civ. PRAC. L. & R. § 1312 (McKinney Supp. 1991) (provisional remedies generally); Letter from New York State Unified Court System to Counsel of Governor (Oct. 18, 1983) (available from New York State Legislative Service and on file at St. John's law library). "Provisional remedies are available in both pre- and post-conviction actions to prevent a premature disappearance of the proceeds." Id. See also A. GIRESE, supra note 151, at 68-70. Given the nature of at least a large part of the class of persons against whom forfeiture actions are likely to be brought, the utility of the entire statute may be contingent upon the use of these remedies; without them there may be nothing left to forfeit at the culmination of the proceeding. Id. See e.g., Morgenthau v. Citisource, Inc., 68 N.Y.2d 211, 220-24, 500 N.E.2d 850, 857-60, 508 N.Y.S.2d 152, 156-59 (1986) (regarding constitutionality of attachment of assets and preliminary injunction on trust account); Vergari v. Lockhart, 144 Misc. 2d 860, 871-72, 545 N.Y.S.2d 223, 230 (Sup. Ct. Westchester County 1989) (attachment of funds after cocaine conviction); People v. Jackson, 138 Misc. 2d 1015, 1017, 525 N.Y.S.2d 1002, 1004 (Nassau County Ct. 1988) (attachment of assets pending conviction on drug charges); Dillon v. Morgan Oil Terminals Corp., 138 Misc. 2d 135, 137, 523 N.Y.S.2d 719, 721 (Nassau County Ct. 1987) (attachment of tractor trailer instrumentality of grand larceny); Dillon v. Ferrandino, 132 Misc. 2d 334, 334-35, 503 N.Y.S.2d 675, 676 (Nassau County Ct. 1986) (preliminary injunction placed on corporate instrumentality of drug operation); District Attorney of Queens County v. McAuliffe, 129 Misc. 2d 416, 420-21, 493 N.Y.S.2d 406, 409-10 (Sup. Ct. Queens County 1985) (preliminary injunction preventing disposition of real property which was substituted proceeds of extortion).

The Court of Appeals has expressly acknowledged the importance of the use of provisional remedies to preserve the status quo while a criminal action is pending. See Morgenthau v. Citisource, Inc., 68 N.Y.2d 211, 220, 500 N.E.2d 850, 854, 508 N.Y.S.2d 152, 156 (1986). [It would be illogical for the Legislature to authorize the commencement of a forfeiture action prior to conviction but not allow provisional remedies to preserve the status quo during the pendency of the criminal action. A contrary interpretation would contravene the legislative purpose to 'take the profit out of crime.' Id.

The provisional remedies of article 13-A were essentially adopted from article 60. See N.Y. Civ. PRAC. L. & R. § 6001 (McKinney Supp. 1991) (allowing provisional remedies in civil actions).


fendant. If the action pertains to real property, the remedy must not substantially impair the interest of a person other than the defendant.

The modifications in the statute which took effect November 1, 1990 mitigated the harshness of these provisional remedies. Defendants may now move to have a remedy vacated or limited in order to obtain funds for payment of reasonable living expenses, preservation of property, or for payment of bona fide attorney’s fees. Prior to this amendment, courts upheld provisional attachments in the face of defendants’ claims of being denied choice of counsel.

C. Subpoena Dues Tecum Under Article 13-A

The recent changes in 13-A also significantly enhance prosecutors’ ability to prevent the disposition of property subject to forfeiture. Prosecutors can now apply for a subpoena duces tecum under Article 13-A.

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198 See id. § 1312(3)(b). See also infra note 201 (new provision allowing relief in particular circumstances).

Implicit in this section is a due process requirement that the amount of the proceeds can be shown with some degree of certainty; however, a clear standard has not emerged. See Kuriansky v. Natural Mold Shoe Corp., 136 Misc. 2d 684, 686, 519 N.Y.S.2d 88, 90 (Sup. Ct. Westchester County 1987) (plaintiff may use “statistical sampling” method of proving damages); Dillon v. Secular, 132 Misc. 2d 279, 280, 503 N.Y.S.2d 939, 939 (Nassau County Ct. 1986) (determination of amount of proceeds must be based on reasonable inferences due to nature of illicit drug business); Holtzman v. Samuel, 130 Misc. 2d 976, 986, 495 N.Y.S.2d 583, 591 (Sup. Ct. Kings County 1985) (amount of proceeds must be established by “concrete evidence”).

199 N.Y. CIV. PRAC. L. & R. § 1312(3)(C) (McKinney Supp. 1991). See Kessler, supra note 188, at 7, col. 1. The prosecution must show that the remedy sought does not diminish, impair or terminate the lawful property interest of people other than the defendant. Id. If the prosecution does not meet this burden the court can dismiss the application for forfeiture. Id. If the forfeiture sought is a residential lease or statutory tenancy, the court can modify or terminate the defendant’s interest and continue the lawful interests of others. Id.

200 See infra notes 201-02 and accompanying text (discussion of how harshness is mitigated).

201 N.Y. CIV. PRAC. L. & R. § 1312(4) (McKinney Supp. 1991). The attorney’s fees must relate to the forfeiture action or a related criminal matter. Id.


203 See N.Y. CIV. PRAC. L. & R. § 1311-a (McKinney Supp. 1991); infra notes 205-09 and
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cum to locate and determine the nature of potentially forfeitable property. To obtain such a subpoena, the claiming authority must demonstrate reasonable grounds to believe that issuance of the subpoena would be reasonably likely to lead to information about the forfeitable property. The subpoena duces tecum can be obtained without notice to the potential defendant to prevent disposal of the tainted assets once he or she learns of the inquiry. If it is sought without notice, the prosecutor must present a factual basis as to why providing notice might result in the property being made unavailable for forfeiture. This amendment unties the hands of prosecutors who were previously unable to conduct discovery at a level commensurate with other civil litigants.

D. Protections for Innocent Owners

Article 13-A uniquely provides a mechanism for courts to dismiss a forfeiture action or limit it to the amount of proceeds or substituted proceeds of the crime when necessary in the “interests of justice.” The statute lists several factors which courts may

accompanying text (discussion of how subpoena duces tecum increases prosecutors’ power).


Id.

See id. at § 1311-a(5) (prosecutor must state when subpoena is without notice).

Forfeiture actions are aimed at criminals who are “expert and skillful in concealing, transporting or disposing of potentially forfeitable assets.” Kessler, supra note 187, at 7, col. 3. The statute expressly places attorney work product beyond the subpoena’s reach. Id. § 1311-a(3).

See Kessler, supra note 187, at 7, col. 3. “The current provisions of Article 13-A place the claiming authority in the same status as any other civil litigant in civil litigation.” Id.
consider when determining if relief should be granted. These include the seriousness and circumstances of the crime relative to the impact of forfeiture, the adverse impact of forfeiture upon innocent persons, the appropriateness of forfeiture where the criminal proceedings to which the property is connected result in an acquittal, or if the action involves forfeiture of an instrumentality, whether the value of that instrumentality substantially exceeds the proceeds of the crime. If forfeiture of real property is being sought, the court may appoint an administrator to protect the interests of tenants or may otherwise modify or dismiss the action to protect the interests of innocent parties. Although defendants have attempted to invoke the "interests of justice" provision with mixed results, the legislature has sent a clear signal to courts to reject the rigidity of forfeiture statutes such as 21 U.S.C. § 881.

See generally New York Civil Practice, supra note 146, at ¶ 1311.07 ("dismissal in the interest of justice" is unique among forfeiture provisions); Kessler, supra note 146, at 280 ("interest of justice" dismissal is ostensibly unique among forfeiture statutes).

See infra notes 212-16 and accompanying text (discussion of considerations when deciding if "interests of justice" relief is appropriate). See also N.Y. Penal Law § 210.40(3) (McKinney 1988) (criminal counterpart of § 1331 dismissal in "interests of justice").


See id. ¶ 1311(4)(d)(2).

See id. ¶ 1311(4)(d)(3).

See id. ¶ 1311(4)(d)(4). The statute emphatically does not limit itself to the listed considerations. See id. ¶ 1311(4)(d). "Among the factors, considerations and circumstances the court may consider, among others . . . ." Id. (emphasis added).

See id. 1311(4-a)(a)(1).


See A. Girisee, supra note 151, at 60 ("interests of justice" provision answers concern about potential abuse of broad civil forfeiture mechanism); Letter from Attorney General to Governor (July 12, 1984) (available from New York State Legislative Service and on file at St. John's law library) (bill adds safeguards to protect innocent persons).
CONCLUSION

Both the federal and the New York civil forfeiture statutes seek to deprive criminals of their ill-gotten gains, without subjecting innocent owners of property to the harsh effects of forfeiture. The difficulties involved in finding a consistent approach to the innocent owner defenses of 21 U.S.C. § 881(a) can be resolved by reading the statute disjunctively, by adopting an objective standard of actual knowledge, and by adopting a willful standard of consent. Although some courts have chosen to incorporate Calero-Toledo v. Pearson Yacht Leasing Co. into their interpretations of the statute, by doing so they have effectively overshadowed the language of the statute. Courts should refrain from applying the Supreme Court’s pre-amendment language and allow the statutory innocent owner provisions to serve their purpose, which is to protect innocent owners while enforcing federal drug policy.

Congress would do well to consider the way New York has tried to prevent the inadvertent forfeiture of innocent owners’ property. The statute expressly allows courts to consider dismissal of the forfeiture when it would be in the “interests of justice.” Perhaps more importantly, the prosecutor has the burden of proving the owner’s culpable behavior when proceeding against non-criminal defendants. In addition, forfeiture of real property, a particularly harsh sanction, must be the result of drug sales or the commission of continuing offenses. As a result, fewer innocent owners would have their property taken in the interests of fighting the war on drugs.

Joseph A. Brintle & Glenn M. Katon