"Caught in the Crossfire": Protecting the Innocent Owner of Real Property from Civil Forfeiture Under 21 U.S.C. § 881(a)(7)

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INTRODUCTION

Since the enactment of the first criminal forfeiture statutes over two decades ago,1 asset forfeiture has become a potent and effective means of combating two of the most extensive criminal practices carried on in this country: drug trafficking and racketeering.2 Forfeiture involves the confiscation by the government, without compensation, of property illegally used or acquired.3 By targeting the spoils of illegal drug operations, forfeiture laws are a logical deterrent to narcotics dealers and organizations whose activity is motivated and sustained by the prospect of tremendous monetary rewards.4 Unfortunately, this powerful law enforcement weapon does have one serious and undesirable repercussion; that is, innocent owners whose property has been used by others in the

3 See United States v. Eight Rhodesian Stone Statues, 449 F. Supp. 193, 195 n.1 (C.D. Cal. 1978); U.S. Dep’t of Justice, Drug Enforcement Admin., Drug Agent’s Guide to the Forfeiture of Assets 2 (1987 rev.) [hereinafter Guide]. There are two types of forfeiture proceedings: in rem and in personam. Id. at 5. In personam forfeiture is directed against an individual to decide his personal rights and obligations. Id. Forfeiture in rem is directed against the property itself to determine its ownership. Id.
pursuit of the drug trade may find themselves unintended casualties of the war against drugs. Often such owners suffer hardship and at times economic ruin as their homes, businesses, and rental property are forfeited to the government to terminate drug activity that they, as private individuals, were powerless to prevent.

Among the numerous forfeiture provisions adopted by Congress in recent years is subsection 881(a)(7) of title 21 of the United States Code, which provides for the civil forfeiture of real property used to commit or facilitate the commission of a felony under the federal narcotics laws. Recognizing the need for an adequate balance between the urgent demands of law enforcement au-

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authorities and the legitimate interests of innocent owners,\textsuperscript{12} Congress included an affirmative defense within this provision commonly known as the "innocent owner" defense. This defense protects an owner from the harsh effects of forfeiture by allowing him to exempt himself from the forfeiture laws if he is able to establish that the unlawful activity took place without his "knowledge or consent."\textsuperscript{13} Although founded on good intentions, this provision has proved to be an imperfect solution to the plight of the innocent owner since federal courts thus far have been unable to develop a consistent interpretation of the phrase "knowledge or consent."\textsuperscript{14}

This Note will examine the issues associated with civil forfeiture statutes and their impact on innocent property owners. Part One will present a brief history of the law of forfeiture and a description of the current statutory scheme governing civil forfeiture under section 881 of title 21 of the United States Code. Part Two will focus on the "innocent owner" defense to real property forfeiture. It will begin by examining conflicting judicial decisions in the area and then proceed to discuss the two major issues causing this conflict and identify the reasons why courts have been unable to resolve them. Finally, Part Three will propose a three-step analysis for the application of the "innocent owner" defense designed to promote uniformity and predictability in the area.

I. BACKGROUND OF FORFEITURE LAW

A. History

It is a common phenomenon in law, and indeed in all of history, that the traditions, beliefs, and necessities of a previous age give rise to certain rules or doctrines.\textsuperscript{15} Throughout the course of many centuries the reasons giving rise to these rules often disap-

\textsuperscript{12} Each time Congress has broadened the range of property forfeitable under section 881 to improve its potency as a law enforcement weapon, it correspondingly has added new safeguards to protect innocent owners who are affected by this expansion. See Note, Tempering the Relation-Back Doctrine: A More Reasonable Approach to Civil Forfeiture in Drug Cases, 76 Va. L. Rev. 165, 167-71 (1990) (examining legislative history of expansion of "innocent owner" protection).


\textsuperscript{14} See infra notes 44-79 and accompanying text.

\textsuperscript{15} See O.W. Holmes, The Common Law 5 (1881).
Pear and may be forgotten, yet the principles remain. This is true of the law of forfeiture, a practice rooted in the days of the Bible and recorded in the ancient manuscripts of Greece and Rome. The forfeiture of property associated with criminal activity is a long-accepted practice in the United States as well as in England. Still, despite its early roots, the role of forfeiture in this

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16 See id.
17 See Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 681 n.19 (1974) ("adaptation of the [early doctrine of forfeiture] to serve the more contemporary function of deterrence is an example of [the] phenomenon discussed by Mr. Justice Holmes"); O.W. Holmes, supra note 15, at 5-12 (discussing ancient forms of forfeiture as illustration of this observation).

One commentator has criticized the modern-day use of forfeiture stating that "[c]urrent federal . . . civil forfeiture statutes that treat property itself as a wrongdoer are extensions of archaic concepts." Comment, Civil Forfeiture and Innocent Third Parties, 3 N. Ill. U.L. Rev. 323, 325 (1983).

18 See O.W. Holmes, supra note 15. "If an ox gore a man or a woman, that they die: then the ox shall be surely stoned, and his flesh shall not be eaten . . . ." Id. at 7 (citing Exodus 21:28). This well known Old Testament passage was cited by Justice Holmes as a precursor to the modern law of forfeiture. Id. at 6. This Biblical rule, which, in effect, commanded that the ox be forfeited to God, operated irrespective of the guilt or innocence of the animal's owner. See Guide, supra note 3. Still, the misfortunate owner lost all claim to it. Id. But see Finkelstein, The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty, 46 Temp. L.Q. 169, 180-81 (1973) ("offending animal is not 'offered to God' . . . [and] [t]he stoned ox . . . can no more be regarded as a . . . 'forfeiture' than an executed traitor").

19 See O.W. Holmes, supra note 15. Ancient Greek law contained many elaborate provisions governing the forfeiture of objects that were associated with certain wrongs. Id. at 7-8. If a beast or an inanimate object caused death it was to be cast beyond the borders. Id. at 8. Two centuries after Christ, the traveler Pausanias observed that "they still sat in judgment on inanimate things in the Prytaneum." Id.

20 See 7 Twelve Tables 1, translated in 1 S. Scott, The Civil Law 69 (1932). Examples of forfeiture in Roman law can be found as far back as 451 B.C.. Id. at 7. ("[I]f a quadruped causes injury to anyone, let the owner . . . surrender the animal that caused the injury." Id. Although such actions were not based on fault, whoever owned the animal at the time the suit was brought became liable. See O.W. Holmes, supra note 15, at 9.

21 See O.W. Holmes, supra note 15, at 24-25 (tracing history of forfeiture in early English common law); see also Finkelstein, supra note 18, at 180-83. In the early stages of English common law, if a chattel accidentally caused the death of one of the King's subjects, it was forfeited to the Crown and its value was used to pay for Masses said on behalf of the deceased. Id. at 182. This charitable religious purpose was soon discarded however and the practice became nothing more than a convenient source of revenue for the state. Id. Although formally abolished in 1846, this practice still remains the classic example of in rem forfeiture, which is based on the notion that an animal or an inanimate object can itself become tainted with guilt when connected with certain wrongful or criminal acts. See Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 681 (1974). In personam statutory and common-law forfeiture, whereby the property of those convicted of felonies or treason was confiscated, also existed under early English law. Id. at 682. In addition, the Navigation Acts provided for the statutory forfeiture in rem of certain items used in connection with a violation of the customs and revenue laws. Id. at 683. The owner's guilt or innocence
country's criminal justice system has been insignificant at best. That is, until 1970, when Congress resurrected the doctrine by passing the first series of criminal forfeiture statutes in the history of American jurisprudence.

B. The Statutory Scheme

The Comprehensive Drug Abuse Prevention and Control Act of 1970 was passed in response to the "growing menace of drug abuse in the United States." In formulating this legislation, Congress recognized that routine criminal sanctions such as fines and imprisonment were an inadequate deterrent to participants in the drug trade. This was attributed to the fact that, unlike many

was irrelevant to these proceedings and, in making its determination, the court would look solely to the wrongful use of the property itself. See 1 W. Blackstone, Commentaries on the Laws of England 261-62 (1774).

By contrast, the practice of forfeiting chattel was not a feature of early American common law. See Calero-Toledo, 416 U.S. at 682. Nor have American courts or legislatures ever decreed that the property of certain classes of criminals should be forfeited to the government. Id. However, the common-law courts of the colonies exercised jurisdiction in rem over vessels and commodities under both the English and American forfeiture laws. Id. at 683. It is interesting to note that such forfeiture proceedings continued to take place even after the adoption of the United States Constitution. Id.

See Guide, supra note 3, at I. This is at least one reason why few schools offer courses on forfeiture, few legal experts specialize in it, and only a few citizens are even aware of the concept. Id.

Several sources exist containing practical advice to attorneys who are unfamiliar with forfeiture litigation. See, e.g., Russell, supra note 4, at 20 (discussing difficulties of defending forfeiture cases under Comprehensive Crime Control Act but concluding "the defense attorney who reads the statutes carefully with an eye toward limiting their impact can even the odds somewhat in individual cases"); Valukas & Walsh, Forfeitures: When Uncle Sam Says You Can't Take It With You, 14 LITIGATION 31, 37 (1988) (listing ten suggestions for attorneys defending civil forfeiture cases).


See S. REP. No. 225, supra note 2 (discussing purpose underlying Comprehensive Crime Control Act and 1984 amendments). Senate Report 225 states:

Today, few in the Congress or the law enforcement community fail to recognize that the traditional criminal sanctions of fine and imprisonment are inadequate to deter or punish the enormously profitable trade in dangerous drugs which, with its inevitable attendant violence, is plaguing the country. Clearly if law enforcement efforts to combat racketeering and drug trafficking are to be successful, they must include an attack on the economic aspects of these crimes. Forfeiture is the mechanism through which such an attack may be made. Id.; see also 130 Cong. Rec. S13078 (daily ed. Oct. 4, 1984) (statement of Sen. Kennedy) ("overwhelming bipartisan support for this legislation marks the culmination of more than a
other crimes, profit is the main motivation for the exchange of dangerous and expensive drugs and for the rampant violence that inevitably flows from the trade. Thus, through this Act, Congress sought to supplement the more traditional criminal penalties by providing a law enforcement device that would not only punish, but would also strip offenders of their economic gains. That device is the forfeiture of assets.

As originally enacted, section 881 authorized the forfeiture of controlled substances, certain raw materials, containers, and vehicles used in connection with drug activity. Senator Robert Byrd was among the first to express optimism about the use of forfeiture in the war against drugs, stating that “by removing its leaders from positions of ownership . . . and by visiting heavy economic sanctions on their predatory business practices this legislation should prove to be a mighty deterrent to any further expansion of organized crime’s economic power.” By 1978, however, it became apparent that forfeiture was not working as effectively as expected. Thus, Congress decided to increase the efficacy of the forfeiture laws by expanding the range of property subject to forfeiture.

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28 See id.; see also 120 Cong. Rec. S13088 (daily ed. Oct. 4, 1984) (statement of Sen. D'Amato) (“goal of our legislation . . . is nothing less than stripping the drug kingpins of their drug profit empires”).
   (1) All controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of [title 21].
   (2) All raw materials, products and equipment . . .
   (3) All property which is used, or intended for use, as a container for property described in paragraph (1) or (2).
   (4) All conveyances . . . which are used, or are intended for use, to transport . . . property described in paragraph (1) or (2).
32 Cf. 124 Cong. Rec. 23,055 (1978) (statement of Sen. Nunn) (“we were losing the battle as well as the war [against drugs]”).
33 See id. Senator Nunn emphasized that “[w]e cannot forget that profit, astronomical profit, is the base motivation of drug traffickers. The amendment I propose here today is intended to enhance the efforts to reduce the flow of illicit drugs in the United States by
turing so as to include the proceeds of illegal drug transactions. Nonetheless, results fell far short of expectations.

Determined to remedy the system's shortcomings, Congress enacted the Comprehensive Forfeiture Act of 1984 in order to stimulate the under-utilized forfeiture provisions by "eliminating the statutory limitations and ambiguities that have frustrated active pursuit of forfeiture by Federal law enforcement agencies." One such limitation was that, under then existing civil forfeiture law, real property could not be forfeited even when it was found

striking out against the profits from illicit drug trafficking." Id.

Senator John Culver anticipated that the forfeiture of the proceeds of drug transactions would "disrupt drug trafficking by greatly raising the risk of such trafficking, reducing the profits involved and immobilizing certain drug rings by seizing large amounts of their assets." Id. at 23056 (statement of Sen. Culver).


See S. Rep. No. 225, supra note 2. In April of 1981, a report by the General Accounting Office ("GAO"), entitled Asset Forfeiture—A Seldom Used Tool in Combatting Drug Trafficking, announced that the government's record in deterring crime had fallen far below what Congress initially expected. Id. The GAO identified the two major reasons for this failure: (1) federal law enforcement agencies were not aggressive in the pursuit of forfeiture; and (2) the many limitations and ambiguities contained in the forfeiture statutes in effect at that time significantly hampered the ability of forfeiture to function as a forceful deterrent to drug traffickers. Id. The use of the forfeiture laws has apparently increased since that report was issued. See Valukas & Walsh, supra note 22, at 31.

The "relation-back" doctrine first appeared in United States v. Stowell, 133 U.S. 1 (1890). There, the United States Supreme Court held that the property interests of illegal distillers were forfeited at the time of the commission of the offense, thereby allowing the government to avoid claims of subsequent sales, even as to bona fide purchasers. Id. at 16-17. For a thorough examination of the "relation-back" doctrine, see generally Note, supra note 12, passim.

37 S. Rep. No. 225, supra note 2, at 192. Congress was determined to develop a comprehensive program to deal with the drug crisis. See 130 Cong. Rec. S13065 (daily ed. Oct. 4, 1984) (statement of Sen. Biden). "[F]orfeiture of drug trafficker's assets will be a crucial element of the federal anti-drug strategy. This strategy will define how the various agencies will contribute to improving the number and level of forfeiture cases." Id.

Even before Congress enacted a specific provision which would subject real property to civil forfeiture, real property was already subject to criminal forfeiture under the RICO and CCE statutes. See S. Rep. No. 225, supra note 2, at 193-95; see also 18 U.S.C. § 1963 (1988) (under RICO, any interest in real or personal property acquired or maintained in violation of statute is forfeitable). Also, at least two federal courts had held that real property could be subject to civil forfeiture if it constituted, or was traceable to, the "proceeds"
to have been an important or even essential component of drug-related activity. To close this loophole, Congress enacted subsection 881(a)(7) authorizing the forfeiture of all real property used in connection with a felony narcotics violation.


9 See S. REP. No. 225, supra note 2, at 195. The Senate Report accompanying the 1984 amendment which added section 881(a)(7) stated:

Under current law, if a person uses a boat or car to transport narcotics or uses equipment to manufacture dangerous drugs, his use of the property renders it subject to civil forfeiture. But if he uses a secluded barn to store tons of marijuana or uses his house as a manufacturing laboratory for amphetamines, there is no provision to subject his real property to civil forfeiture, even though its use was indispensable to the commission of a major drug offense and the prospect of the forfeiture of the property would have been a powerful deterrent.

Id.

Interestingly, this example of a limitation of the forfeiture law which existed prior to section 881(a)(7) has generated confusion as to whether a “substantial connection” must be demonstrated between the underlying narcotics violation and the subject property in order to expose it to civil forfeiture. Some courts have concluded that the example is an indication of congressional intent that a “substantial connection” is necessary. See United States v. Santaro, 866 F.2d 1538, 1542 (4th Cir. 1989) (“substantial connection” test is “common sense” interpretation of § 881(a)(7)) (citing S. REP. No. 225); United States v. $12,585 in United States Currency, 669 F. Supp. 939, 943 (D. Minn. 1987) (“example and language used in the Senate report illustrate Congress’ intent to subject real property to forfeiture only if the property is substantially connected to illegal drug activity”); United States v. Certain Lots in Va. Beach, 657 F. Supp. 1062, 1065 (E.D. Va. 1987) (“real property may be subject to forfeiture under [§ 881(a)(7)] only where there is a substantial connection between the property and the underlying illegal transaction”) (citing S. REP. No. 225).

Other courts do not agree that the Senate Report implies such an interpretation. For example, in United States v. 916 Douglas Ave., 903 F.2d 490, 493 (7th Cir. 1990), the Seventh Circuit expressed its understanding that “[t]he Senate Report cites some of the more egregious examples created by the loophole in the forfeiture statute” and concluded that “[t]he legislation itself . . . no more demands that the property be ‘substantially connected’ to the underlying offense than it requires that the property be ‘indispensable’ to the crime.” Id.

Commentators have also expressed opposing views of the implications of this passage. Compare Smith, supra note 10, at 328 (arguing that egregious examples in Senate Report are “aimed at highlighting the [drug] problem by use of vivid examples” and do not indicate need for substantial connection) with Note, The Innocent Owner Defense to Real Property Forfeiture Under the Comprehensive Crime Control Act of 1984, 58 FORDHAM L. REV. 471, 478 (1989) (rejecting argument that examples in passage are merely vivid illustrations of drug problem and asserting that passage is indicative of Congressional intent).


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

. . . .

(7) All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to
II. THE INNOCENT OWNER DEFENSE

Subsection 881(a)(7) of title 21 of the United States Code affords an affirmative defense to innocent owners whose real property is subject to forfeiture because it has been misused by others, if they are able to establish that the unlawful activity took place "without . . . [their] knowledge or consent." 41 Unfortunately, this language has generated much confusion, and disturbing inconsistencies have emerged in two major areas. First, courts have had difficulty in determining the true import of the phrase "without . . . knowledge or consent." 42 Second, courts have been unable to agree upon the relevance and applicability of the constitutional defense suggested by the United States Supreme Court in Calero-Toledo v. Pearson Yacht Leasing Co. 43

A. The "Knowledge or Consent" Issue

The innocent owner defense derives from subsection 881(a)(7), which states 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." 44 The difficulty arises because many courts, following a "conjunctive" interpretation, 45 have determined that the word "or," used in this context, should be read to mean "and," and therefore require the property owner to establish both a lack of knowledge and a lack of consent.

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41 See id. Subsection 881(a)(7) was not the first provision of section 881 to contain a defense for innocent owners. See 21 U.S.C. § 881(a)(4) (1970) (as enacted provided defense for owners whose vehicles were stolen and subsequently used in drug transactions); 21 U.S.C. § 881(a)(6) (1981) (providing defense for innocent owners with language identical to that of § 881(a)(7)); see also In re Metmor Fin., Inc., 819 F.2d 446, 449 (4th Cir. 1987) (discussing legislative history of expansion of innocent party protection).

42 See infra notes 44-79 and accompanying text.

43 416 U.S. 663 (1974); see infra notes 113-24 and accompanying text.


45 See Black's Law Dictionary 302 (6th ed. 1990). Black's Law Dictionary defines the word "conjunctive" as that which "[c]onnect[es] in a manner denoting union. A grammatical term for particles which serve for joining or connecting together. Thus, the word 'and' is called a 'conjunctive,' and 'or' a 'disjunctive,' conjunction." Id.
consent in order to qualify for the defense.\textsuperscript{46} Other courts, following a "disjunctive" interpretation,\textsuperscript{47} read the word "or" to mean "or" and permit the owner to prove either that he was without knowledge or without consent.\textsuperscript{48} Proponents of the "conjunctive" approach argue that the "disjunctive" construction is potentially too broad, while those in the "disjunctive" camp decry the "conjunctive" interpretation as too narrow.\textsuperscript{49}

1. Inconsistency in Judicial Interpretation

\textit{United States v. Real Property and Premises Known as 171-02 Liberty Avenue}\textsuperscript{50} was the first case in the nation to allow a property owner to base his subsection 881(a)(7) "innocent owner" defense entirely on a lack of consent, even though his knowledge of the illegal activity had been conceded.\textsuperscript{51} The United States District Court for the Eastern District of New York based its decision

\begin{itemize}
\item \textsuperscript{46} See, e.g., United States v. Lot 111-B, 902 F.2d 1443, 1445 (9th Cir. 1990) ("if the claimant either knew or consented to the illegal activities, the 'innocent owner' defense is unavailable") (emphasis in original); United States v. 4,657 Acres, 730 F. Supp. 423, 427 (S.D. Fla. 1989) ("claimant can succeed on the 'innocent owner' defense under § 881(a)(7) by merely proving that he lacked knowledge of the illegal activity and that he did not consent to the activity") (emphasis added); United States v. 124 East N. Ave., 651 F. Supp. 1350, 1357 (N.D. Ill. 1987) (when tried, claimant "will have an opportunity to prove she had no knowledge of and gave no consent to her husband's alleged unlawful activities") (emphasis added).
\item \textsuperscript{47} See \textit{BLACK'S LAW DICTIONARY}, supra note 45, at 469. A "disjunctive term" is defined by Black's Law Dictionary as "[o]ne which is placed between two contraries, by the affirming of one of which the other is taken away; it is usually expressed by the word 'or.'" \textit{Id.}
\item \textsuperscript{48} See, e.g., United States v. 141st St. Corp., 911 F.2d 870, 878 (2d Cir. 1990) ("claimant may avoid forfeiture by establishing either that he had no knowledge of the narcotics activity or, if he had knowledge, that he did not consent to it"), cert. denied, 111 S. Ct. 1017 (1991); United States v. One 107.9 Acre Parcel, 898 F.2d 396, 398 (3d Cir. 1990) ("party in interest could successfully assert an innocent owner defense by proving either lack of knowledge or lack of consent") (emphasis added); United States v. 6109 Grubb Rd., 886 F.2d 618, 626 (3d Cir. 1989) (claimant may demonstrate innocent ownership "by proving ... that the illegal use of [her] property occurred either without her knowledge or without her consent") (emphasis added); United States v. 171-02 Liberty Ave., 710 F. Supp. 46, 50 (E.D.N.Y. 1989) ("statute ... creat[es] an affirmative defense where the illegal acts giving rise to the forfeiture occurred without the knowledge or without the consent of the owner") (emphasis in original).
\item \textsuperscript{49} \textit{Compare} United States v. 890 Noyac Rd., 739 F. Supp. 111, 114 (E.D.N.Y. 1990) (contending that disjunctive approach would lead to "absurd results" because it allows "an owner to know about, and perhaps even tacitly condone illegal drug activity, and yet still be able to claim that she did not 'know or consent' to the activity") (citation omitted) \textit{with} 141st St. Corp., 911 F.2d at 878 (asserting that conjunctive approach "ignores Congress' desire to preserve the property of innocent owners").
\item \textsuperscript{50} 710 F. Supp. 46 (E.D.N.Y. 1989).
\item \textsuperscript{51} See \textit{id.} at 50.
\end{itemize}
solely on the text of the statute read in light of the "normal canons of statutory construction."62 Reasoning that, unlike the conjunctive "and," the word "or" requires that terms separated by it be read disjunctively, the court concluded that Congress intended such a construction when it deliberately used the word "or" in the provision.63

Although a number of courts in other circuits were quick to endorse this construction,64 some district courts in the Second Circuit were skeptical as to its validity and precedential value and instead adhered to the conjunctive approach.65 This led to disagreement and contradictory results within the Second Circuit until, in *United States v. 141st Street Corp.*,66 the United States

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62 Id. The "normal canons of statutory construction" require that terms separated by the disjunctive word "or" be given their separate meaning unless the context dictates otherwise. Id. (citations omitted). For a survey of contradictory results reached by courts employing these "canons," see infra note 85.

63 See Liberty Avenue, 710 F. Supp. at 50.


65 See, e.g., United States v. 418 57th St., 739 F. Supp. 749, 750-51 (E.D.N.Y.) (criticizing Liberty Avenue court for construing provision in manner inconsistent with express language of statute), rev'd, 922 F.2d 129 (2d Cir. 1990); United States v. 890 Noyac Rd., 739 F. Supp. 111, 113 (E.D.N.Y. 1990) (refusing to follow Liberty Avenue on grounds that issue of statutory construction involved "substantial split of authority and has yet to be decided by the Second Circuit"). But see United States v. 710 Main St., 744 F. Supp. 510 (S.D.N.Y. 1990) (agreeing with Liberty Avenue interpretation and granting relief to claimant who knew of illegal activity but did not consent to it).

66 See, e.g., Noyac Road, 739 F. Supp. at 115-16. Refusing to follow the purely textual analysis of Liberty Avenue, the Noyac Road court instead adopted a common sense approach, stating that the issue is really "whether the phrase ought to be read as a disjunctive or as a compound phrase." Id. at 113 (emphasis in original). Looking to the "context of section 881," the court concluded that a disjunctive approach, giving the owner the option of proving either lack of knowledge or lack of consent, would "lead to absurd results." Id. at 114. The court then pointed to the legislative history of the "innocent owner" language as an indication of legislative intent. Id. Based on remarks made in 1978 by Senators Nunn and Culver in reference to the innocent owner provision in section 881(a)(6), the court concluded that these legislators "clearly" did not intend for the defense to protect owners who had knowledge but did not consent to the illegal activity. Id. Thus, the court in Noyac Road advocated a conjunctive approach requiring that the innocent owner establish a lack of both elements in order to be eligible for the defense. Id. at 115-16.

67 911 F.2d 870 (2d Cir. 1990), cert denied, 111 S. Ct. 1017 (1991). *141st Street Corp.* involved the forfeiture of a six-story building on the west side of Manhattan. Id. at 873. Police testimony at the trial established that, over the course of eighteen months beginning in December of 1986, 24 of the building's 41 apartments had been the subject of drug-trafficking complaints. Id. Other evidence indicated that the building was in fact a thriving center for illegal drug activities. Id. After two successive police raids on the premises, the
Court of Appeals for the Second Circuit addressed this issue. Although it did not analyze the text of the provision in the same manner as the district court had in *Liberty Avenue*, the Second Circuit based its interpretation primarily on the language of the statute itself, which it admitted to be ambiguous. Deciding that the disjunctive approach was correct, the Second Circuit stated: “We conclude that a claimant may avoid forfeiture by establishing either that he had no knowledge of the narcotics activity or, if he had knowledge, that he did not consent to it.”

*United States v. Property Known as 6109 Grubb Road*, a case decided by the United States Court of Appeals for the Third Circuit, illustrates how even judges on the same appellate court can be divided. In *Grubb Road*, the court rejected the govern-
ment's contention that the phrase "without . . . knowledge or consent" should be read conjunctively. Instead, the court adopted a disjunctive approach and held that a wife's knowledge that her husband had engaged in drug trafficking on the family property, which the couple held as tenants by the entirety, did not necessarily preclude her from asserting the "innocent owner" defense. Consequently, the court remanded the case to the district court with instructions that the claimant be given an opportunity first to establish her "no knowledge defense," and then, if that was unsuccessful, to consider whether she had established her "no consent defense." The government's motion for a rehearing on this issue was denied over the vigorous dissent of Judge Greenberg, who viewed the matter as one of "enormous importance" and expressed his conviction that "the panel's opinion is directly contrary to the language of [subsection] 881(a)(7), frustrates its purpose, flies in the face of the very legislative history upon which the panel relied, and is completely inconsistent with the in rem nature of a civil property forfeiture."

Although Judge Greenberg did not believe it was necessary to go beyond what he believed to be the "plain meaning" of the

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63 See id. at 626. "The government argue[d] that if the owner fail[ed] to show lack of knowledge by a preponderance of the evidence, that in itself is sufficient to subject the property to forfeiture." Id. at 623.
64 See id. at 626.
65 Id. at 627.
66 Id. "At the new hearing, [claimant's] burden [would] be to prove at least one negative under the statutory scheme." Id. at 626.
67 See 6109 Grubb Rd., 890 F.2d at 660 (Greenberg, J., dissenting).
68 Id. (Greenberg, J., dissenting).
69 Id. (Greenberg, J., dissenting).
70 Id. at 663 (Greenberg, J., dissenting). The thrust of Judge Greenberg's argument was that the provision, by its terms, is susceptible of only one meaning and that the court's analysis should properly have been limited to the plain meaning of the statute. Id. at 661 (Greenberg, J., dissenting). He agreed that since the terms in the phrase "without . . . knowledge or consent" are separated by the word "or," they are disjunctive. Id. (Greenberg, J., dissenting). However, in his view, this did not mean they were to be understood as establishing two independent defenses. Id. at 662 (Greenberg, J., dissenting). On the contrary, Judge Greenberg believed that because the phrase is disjunctive, each of the terms relate back to the offense so that the claimant would have to disprove both elements in order to prevail. Id. at 661 (Greenberg, J., dissenting). Simply stated, under Judge Greenberg's proposed construction, if an owner failed to establish that the illegal activity took place both without his knowledge and without his consent, he would lose. Id. (Greenberg, J., dissenting).
statute and examine the legislative history of subsection 881(a)(7), he did so anyway to repudiate the majority opinion by demonstrating that the legislative materials that the majority relied upon in fact supported the government's position. 71 Arguing that "it is highly implausible that Congress, in enacting provisions clearly intended to strengthen the forfeiture weapon, [would leave] a massive loophole in them," 72 Judge Greenberg predicted that the court's approach would curtail the government's ability to prosecute forfeiture cases and would foster collusion between spouses by allowing drug dealers to place property in the names of their spouses to thwart potential forfeiture actions. 73

Unlike the Second and Third Circuits, 74 the United States Court of Appeals for the Ninth Circuit recently adopted the conjunctive interpretation. In United States v. Land Known as Lot 111-B, 75 the Ninth Circuit rejected the claimant's contention that although he was aware of the unlawful activity which had taken place on his property, he was nonetheless entitled to the benefit of the innocent owner defense because he had not consented to it. 76 The Ninth Circuit based its decision entirely on one sentence from a congressional joint committee report issued in 1978 which stated that "the property would not be subject to forfeiture unless the owner of such property knew or consented to the [illegal conduct]." 77 The court determined that this statement "leaves no

71 See id. at 663 (Greenberg, J., dissenting).
72 See id. (Greenberg, J., dissenting).
73 See id. at 664-65 (Greenberg, J., dissenting). This fear of spousal collusion was put to rest by the Third Circuit in United States v. One 107.9 Acre Parcel, 898 F.2d 396 (3d Cir. 1990), where the court, in affirming a grant of summary judgment in favor of the government, rejected a claim by a drug dealer's wife that she knew of, but had not consented to, her husband's activity. Id. at 398-99. The 107.9 Acre court concluded that to allow the case to go to trial based solely on her uncorroborated testimony would "make a mockery of the forfeiture provision of this statute in a marital context." Id. at 400. The Sixth Circuit also downplayed the possibility of such collusion in United States v. 2525 Leroy Lane, 910 F.2d 343 (6th Cir. 1990), cert. denied, 111 S. Ct. 1414 (1991), wherein the court stated that "such evasive actions would be undermined by the heavy burden placed upon claimants to prove their innocent ownership status." Id. at 348. The Leroy Lane court also noted that any late conveyance by a drug dealer to his spouse "would be thwarted by the relation-back provision, under which the Government's interest in the property relates back to the time of the commission of the crime." Id. at 349. (citing 21 U.S.C. § 853(h)).
74 Thus far, only the Second, Third and Ninth Circuits have decided this precise issue. See supra notes 57-64 and accompanying text; infra notes 75-79 and accompanying text.
75 802 F.2d 1443 (9th Cir. 1990).
76 See id. at 1445 (since claimant "knew of the illegal activities, his assertion of lack of consent was of no consequence").
77 See id. The court cited the Joint Explanatory Statement of Titles II and III, 95th
doubt as to the proper interpretation of the ‘knew or consented’ language” and concluded that “if the claimant either knew or consented to the illegal activities, the ‘innocent owner’ defense is unavailable.”

2. Source of the Controversy

Four general observations may be made regarding the reasoning employed in these cases and the recurring arguments asserted on both sides of the issue that account for the inconsistent judicial interpretations of subsection 881(a)(7)’s innocent owner defense.

a. Literal analysis

Although the provision is ambiguous, many courts have determined that a literal analysis, based entirely on the language of the statute itself, provides an adequate indication of the meaning of the defense and how it should be applied. This approach has fostered widespread disparity since the terms of the provision readily admit to more than one meaning. As a result, inconsistent
decisions have been rendered by courts that find different "plain meanings" in the phrase "without . . . knowledge or consent." Because the language is, as one court acknowledged, "at best, confusing," this literal approach is an insufficient means of discovering the true import of the defense. Even more disturbing is the fact that this method of interpretation has shifted the focus from issues of policy and substance to the rigid analysis of grammar, syntax and formal logic. Consequently, courts may decide cases without interpreting to mean that an innocent owner must be without both knowledge and consent.

Id. (emphasis in original) (citations omitted).

83 One commentator eloquently discussed the defects of such an approach. See Kernochan, Statutory Interpretation: An Outline of Method, 3 Dalhousie L.J. 333, 344 (1976).

How is one to foretell rationally whether a given provision will strike a court as "plain"? Decisions arrived at by "plain meaning" may in fact confound expectations. There are even instances where judges have found different "plain meanings" in the same statutory language. Indeed, it has been suggested that the characterization of "plain" or "ambiguous" is used by courts as a device to achieve a result arrived at on some other basis, i.e., as a screen for the imposition of judicial views.

Id. (footnotes omitted).

84 141st St. Corp., 911 F.2d at 878.

88 A particularly good example of the unpredictability and disagreement that is fostered by the literal approach is in the use of the so-called "normal canons of statutory construction" to determine the proper interpretation of the defense. In Reiter v. Sonotone Corp., 442 U.S. 330, 338-39 (1979), the Supreme Court set forth the principle that terms separated by the disjunctive word "or" must be given their separate meaning unless the context dictates otherwise. Id. Some courts applying this rule to the innocent owner provision of section 881(a)(7) have concluded that the statutory language requires a disjunctive interpretation. See, e.g., Grubb Rd., 886 F.2d at 626 ("canons" dictate disjunctive approach); United States v. Sixty (60) Acres, 727 F. Supp. 1414, 1419 (N.D. Ala. 1990) (same), vacated on other grounds, 736 F. Supp. 1579 (1990); Liberty Ave., 710 F. Supp. at 50 (use of the word "or" requires terms "knowledge" and "consent" to be read disjunctively). Yet, other courts citing the same rule have concluded that a conjunctive interpretation is appropriate. See, e.g., Grubb Rd., 890 F.2d at 661 (Greenberg, J., dissenting) (since terms in § 881(a)(7) defense are separated by "or," claimant must disprove both "knowledge" and "consent" and this approach is consistent with "canons"); United States v. 890 Noyac Rd., 739 F. Supp. 111, 113-14 (E.D.N.Y. 1990) ("canons" call for conjunctive construction).

One commentator has pointed out that in Reiter, the terms discussed were not cast in the negative as the phrase "without . . . knowledge or consent" is, and therefore the "canons" require a conjunctive interpretation of § 881(a)(7). See Note, supra note 39, at 482.

The use of "canons of statutory construction" as an indication of meaning has been criticized. See W. LaFave & A. Scott, supra note 80 (questioning "whether courts first decide how a defective statute ought to be interpreted and then display whatever canons of statutory construction will make this interpretation look inevitable, or whether the courts actually first use the applicable canons and second reach the result").

88 See supra note 85; see also Note, supra note 39, at 480-81 (logical principle known as De Morgan's theorem requires conjunctive interpretation of phrase "without . . . knowledge or consent").
engaging in the thoughtful reasoning that would ensure predictability and fairness, and provide a sound foundation upon which to base future decisions.\footnote{See Kernochan, supra note 83 ("[t]he discussion that characterizes plain meaning cases has been labeled as 'sterile verbalism' ") (citing H. HART & A. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1265 (temp. ed. 1958)).} 

\textit{b. Legislative history and commentary concerning subsection 881(a)(6)}

In order to compensate for the scarcity of legislative materials available to explain subsection 881(a)(7),\footnote{See, e.g., Grubb Rd., 886 F.2d at 624 (noting "sparse" legislative history of § 881(a)(7)). The addition of a real property provision to section 881 was only a small part of the Comprehensive Crime Control Act of 1984. Id. Much of the legislative history included in the Senate Report accompanying section 881(a)(7) is a discussion of the changes in the Racketeer Influenced and Corrupt Organizations ("RICO") and Continuing Criminal Enterprise ("CCE") statutes. Id. (citing 1984 U.S. CODE CONG. & ADMIN. NEWS at 3374-3404). Only two substantive passages in this Senate Report refer to the newly-enacted real property forfeiture provision but neither of them provides guidance on the proper application of the phrase "without . . . knowledge or consent." The first identifies one of the limitations in the previous law that the new amendment was designed to eliminate. See S. REP. No. 225, supra note 2, at 195; see also supra note 39 (full text of this passage). The second passage describes the structure of the provision itself:

The first amendment would add to the list of property subject to civil forfeiture set out in section 881(a) real property which is used or intended to be used in a felony violation of the Drug Abuse Prevention and Control Act. This provision would also include an "innocent owner" exception like that now included in those provisions permitting the civil forfeiture of certain vehicles and moneys or securities.

S. REP. No. 225, supra note 2, at 215.} many courts have resorted to statements and commentary made with regard to subsection 881(a)(6) for guidance in the application of the innocent owner defense.\footnote{Compare United States v. Lot 111-B, 902 F.2d 1443, 1445 (9th Cir. 1990) (relying on legislative history of § 881(a)(6) and adopting conjunctive approach) with Grubb Rd., 886 F.2d at 625 (legislative history of § 881(a)(6) warrants disjunctive approach).} In so doing, these courts assume that since the innocent owner defense language of both provisions is identical, statements made in reference to subsection 881(a)(6) are necessarily applicable to subsection 881(a)(7).\footnote{See, e.g., Grubb Rd., 886 F.2d at 625 (attention should be given to legislative history of § 881(a)(6) in § 881(a)(6) case); United States v. 890 Noyac Rd., 739 F. Supp. 111, 114 (E.D.N.Y. 1990) (remarking that § 881(a)(6) is applied to identical language of § 881(a)(7)); Monroe Sav. Bank, F.S.B. v. Catalano, 733 F. Supp. 595, 598 n.2 (W.D.N.Y. 1990) (legislative history of § 881(a)(6) clearly applies with equal force to § 881(a)(7)); see also Note, supra note 39, at 484 n.85 (acknowledging relevance of § 881(a)(6) legislative history in interpreting § 881(a)(7) innocent owner defense because of identical language in}
nation of the defenses as they operate under each of these distinct provisions reveals that this assumption is erroneous.

Subsection 881(a)(6) pertains to the "proceeds" of illegal drug transactions and provides for the forfeiture of all valuable assets furnished in exchange for a controlled substance and all receipts, both monetary and nonmonetary, that are traceable to such an exchange. Because the forfeitability of these assets hinges not upon how they have been used, but rather upon how they were obtained, the innocent owner protection provided in this provision takes the form of a bona fide purchaser defense. To qualify as a "bona fide" purchaser, one must acquire property in good faith without knowledge of the illicit activity from which it derived.


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

. . . .

(6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this title, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this title, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

Id.

92 See Valukas & Walsh, supra note 22, at 32. Under section 881(a)(6), the only limitation on the government's authority to confiscate money and other valuable assets is the requirement that these items be the traceable proceeds of an illicit drug transaction. Id. Subsection 881(a)(7), the real estate provision, is not triggered unless the property is used to facilitate such a transaction. Id.


94 See R. Cunningham, W. Stoebuck & D. Whitman, The Law of Property § 11.10, at 783 (1984). Under traditional real property law, the status of bona fide purchaser has two elements: paying valuable consideration and acquiring property in good faith without prior notice. See id. There are three primary types of notice which would defeat a common-law bona fide purchaser defense: (1) actual knowledge; (2) constructive notice of facts visibly apparent on the property itself or readily ascertainable through inquiry of those in possession of it; and (3) constructive notice of information found in public records. Id. at 786.

Because the innocent owner defense provided in section 881(a)(6) uses the term "knowledge" without qualification, some courts have concluded that only a lack of actual knowledge is required to assert the statutory defense. See, e.g., Parcel of Real Estate, 715 F.
During Senate hearings conducted in 1978 concerning the inclusion of this defense as part of subsection 881(a)(6), Senator Culver explained that its purpose was “to protect the individual who obtains ownership of proceeds with no knowledge of the illegal transaction.” Senator Nunn expressed a similar understanding of the provision when he asserted that “a bona fide party who has no knowledge or consent to the property he owns having been derived from an illegal transaction . . . would be able to establish the fact under this amendment and forfeiture would not occur.” It follows that a disjunctive interpretation could never be applied to the “without . . . knowledge or consent” language of this provision because knowledge of the illegal activity from which the property derived immediately disqualifies a subsequent owner from being a bona fide purchaser. Once such knowledge has been established, the owner cannot afterward claim lack of consent to the illegality as a defense.

By contrast, under subsection 881(a)(7), forfeitability does not depend upon the means by which certain assets were obtained, but rather, turns on the use made of an owner’s real property. It is

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Supp. at 362-63 (reasonably prudent title searcher should check for adverse interests caused by government liens but “actual notice” is proper standard under § 881 (a)(6)).

See supra notes 94-96 and accompanying text.

Supp. at 362-63 (reasonably prudent title searcher should check for adverse interests caused by government liens but “actual notice” is proper standard under § 881 (a)(6)).

See supra note 5, at 1275 n.99. While “lack of consent” is specifically listed as a defense under section 881(a)(6), it has “rarely, if ever . . . been used successfully in this context.” Id. (emphasis added). This is particularly significant since it has been stated that “[t]he ‘proceeds’ portion of § 881(a)(6) generates more litigation than any other single section.” Valukas & Walsh, supra note 22, at 32.

The focus under section 881(a)(6) is not on “consent” but on “knowledge.” See Goldsmith & Linderman, supra note 5, at 1275 n.99. There has been disagreement among the courts as to whether knowledge must be actual or merely constructive. See, e.g., United States v. Banco Cafetero Panama, 797 F.2d 1154, 1162 (2d Cir. 1986) (subsequent transferee of drug proceeds entitled to assert § 881(a)(6) “innocent owner” defense if transferee is without actual or constructive knowledge of illegal activity); United States v. Four Million, Two Hundred Fifty-Five Thousand, 762 F.2d 895, 906 (11th Cir. 1985) (statutory “innocent owner” defense turns on claimant’s actual not constructive knowledge), cert. denied, 474 U.S. 1056 (1986).

See 21 U.S.C. § 881(a)(7) (1988) (“which is used, or intended to be used, in any manner or part, to commit, or to facilitate”).

Unlike the section 881(a)(6) defense which operates similarly to a common-law bona fide purchaser defense, the section 881(a)(7) “innocent owner” defense and the common-law bona fide purchaser defense are mutually exclusive. See United States v. Premises Known as 1908-1910, No. 5681 (E.D. Pa. June 26, 1987) (LEXIS, Genfed library, Dist file). In 1908-1910, the claimants purchased real property which was subject to forfeiture pursuant to
conceivable, and not at all unlikely, that the owner of property used by others in an unlawful manner could know of the illegal activity without consenting to it. Under such circumstances, lack of consent is highly relevant in determining whether an individual deserves the benefit of the innocent owner defense. The statements made by Senators Nunn and Culver are inapplicable to subsection 881(a)(7) because they were referring only to the acquisition of the tainted property by a bona fide purchaser and not to subsequent misuse by others.100 Yet, these remarks, and other materials referring to subsection 881(a)(6), have been used in support of the proposition that subsection 881(a)(7) should be given a conjunctive interpretation.101

section 881(a)(7) because it had been used by the original owner to facilitate a felony narcotics violation. Id. In response to the government’s motion for summary judgment in the forfeiture action, the claimants asserted the “innocent owner” defense of section 881(a)(7). See id. The United States District Court for the Eastern District of Pennsylvania stated: “[t]o withstand summary judgment on this basis, the claimants must prove that at the time the act or omission giving rise to the forfeiture occurred: (1) they were owners of the property in question and (2) they had no knowledge of nor gave their consent to the illegal acts committed there.” Id. (emphasis added). Pleading in the alternative, the claimants contended that they were bona fide purchasers. Id. To succeed in this defense they had to prove that they acquired the property without knowing of the forfeiture action which had already been instituted. Id. Thus, in order to assert the statutory “innocent owner” defense, the claimants had to prove that they were already owners at the time of the unlawful activity, but in order to assert the common-law bona fide purchaser defense, they had to prove that they acquired the premises after the illegal activity occurred. Id.; see also United States v. One Single Family Residence, 683 F. Supp. 783, 788 (S.D. Fla. 1988) (“proceeds under section 881(a)(6) necessarily bear the imprimatur of a prior illegal drug transaction”) (emphasis in original).

100 See supra notes 95-96 and accompanying text.

101 See Lot 111-B, 902 F.2d at 1445 (basing decision under section 881(a)(7) entirely on 1978 congressional joint committee report explaining section 881(a)(6)); Grubb Rd., 890 F.2d at 683 (Greenberg, J., dissenting) (legislative history of section 881(a)(6) fully supports conjunctive interpretation of section 881(a)(7)).

Perhaps one of the reasons that no court has pointed out this distinction is that Congress itself did not contemplate the fundamental differences in the two provisions when it enacted section 881(a)(7). The Comprehensive Forfeiture Act that contained the amendment adding section 881(a)(7) was passed so quickly that one court remarked: “this Act was passed so hastily that the use of the term ‘comprehensive’ in its title is more aspirational than descriptive.” Eggleston v. Colorado, 636 F. Supp. 1312, 1315 (D. Colo. 1986), rev’d on other grounds, 873 F.2d 242 (10th Cir. 1989), cert. denied, 110 S. Ct. 1112 (1990). Another commentator reiterated this sentiment saying that “[t]he Crime Control Act sailed through Congress” and calling it a “shotgun attack on serious social issues.” Russell, supra note 4, at 17.

One of the weaknesses of section 881(a)(6) is that it is difficult for prosecutors to trace the proceeds of drug transactions to the purchase of buildings. See Valukas & Walsh, supra note 22, at 32. With this in mind, Congress enacted section 881(a)(7) in order to ease the prosecutor’s burden by providing an additional ground for the forfeiture of real property. Id.
Inconsistency in the application of subsection 881(a)(7) is predictable, and to some extent inevitable, given the inherent tension that exists between the two competing purposes of the provision itself. The forfeiture of real property is meant to be a powerful and unyielding deterrent to drug offenders while the “innocent owner” defense is provided to temper the harsh consequences of forfeiture law. The outcome of a particular case is largely dependent upon which of these competing policies the deciding court considers paramount. These dual objectives give courts substantial leeway to engage in what can amount to results-oriented analysis.

In so doing, Congress may not have considered the fact that, unlike section 881(a)(6), one whose property is subject to forfeiture under section 881(a)(7) could conceivably know about the illegal activity yet still be an innocent party who deserves protection. Cf. S. Rep. No. 225, supra note 2, at 215 (describing § 881 (a)(7) “innocent owner” defense as being “like that now included in those provisions permitting the civil forfeiture of certain vehicles and moneys or securities”). It is only through actual cases arising under the real property forfeiture provision that such situations have been brought to light, and had Congress foreseen this potential dilemma, perhaps it would have provided clearer direction for the courts so as to avoid the confusion that has been created by this provision.

See S. Rep. No. 225, supra note 2, at 191-92. Congress intended forfeiture to be a powerful weapon in the war on drugs. Id. at 191. Yet, Congress also expressed a desire to protect innocent owners from the harsh effects of the provision by including an explicit defense to forfeiture. Id. at 215. Thus, the two purposes of section 881 (a)(7) are: (1) to authorize the civil forfeiture of real property used to commit or to facilitate a felony narcotics violation; and (2) to prevent the forfeiture of property owned by individuals who are blameless with respect to these activities. See 21 U.S.C. § 881(a)(7) (1988).

See 124 Cong. Rec. 23,056 (1978) (statement of Sen. Culver). Senator Culver acknowledged these two competing purposes when he stated that forfeiture was meant to “disrupt drug trafficking by greatly raising the risk of such trafficking,” but then emphasized that the “innocent owner” provision “specifically safeguards the rights of innocent persons.” Id.; see also Note, supra note 12, at 167 (“[a]lthough Congress was primarily concerned with attacking the economic base of the illegal drug trade, it tempered this goal with the need to protect innocent owners from forfeiture”).

Compare Lot 111-B, 902 F.2d at 1445 (congressional “policy would be substantially undercut if persons who were fully aware of the illegal connection or source of their property were permitted to reclaim the property as ‘innocent’ owners”) (adopting conjunctive interpretation) with 141st St. Corp., 911 F.2d at 878 (“allowing a claimant to avoid forfeiture by establishing lack of consent will [not] undermine congressional intent [since] [t]he inclusion of an express defense in the statute indicates that Congress had no desire to see innocent owners lose their property”) (adopting disjunctive approach).

See Clark, Civil and Criminal Penalties and Forfeitures: A Framework for Constitutional Analysis, 60 Minn. L. Rev. 379, 440 (1976) (discussing possibility of courts “fill[ing] obvious gaps in a statute” by referring to legislative purpose, but really substituting their own beliefs about what results are desirable).
d. Judicial constructions of subsection 881(a)(7)

The most obvious explanation for the lack of uniformity in these cases is the surprising tendency by courts to ignore prior judicial constructions of the provision. 106 While legislative intent and the text of the statute itself are the most important tools in the interpretive process, 107 case law injects an additional element of authority that should not be ignored. 108 This is especially true in an area where few legislative materials are available for guidance and the wording of the statute is ambiguous. 109 Still, some courts have rendered decisions without consulting any prior interpretations. 110 Others merely mention prior cases and acknowledge that there is a conflict without attempting to conform to prior decisions. 111 This failure to consult prior case law has heightened the difficulty that courts have had in developing a cohesive body of law concerning the innocent owner defense. 112

106 See supra notes 55-56 and accompanying text (example of inconsistency brought about by refusal of some courts to follow prior judicial constructions).
107 See Kernochan, supra note 83, at 358-60. Professor Kernochan emphasized the importance of prior judicial constructions in the interpretive process:
   The statutory framework of text and intent is always paramount. Each new issue must be resolved in harmony with that framework. Precedent is to be followed only as that framework permits. Within that framework of course, precedent is vital. The methods of dealing with precedent are very similar to those applicable in a common law setting, though the courts here, conscious of treading in legislative domains and hedged by fixed statutory terms, may see themselves as less free to rework, more bound to follow, their own past precedents. Id. at 359 (emphasis in original).
108 Id. at 358.
109 See supra notes 80-101 and accompanying text. (discussing interpretive difficulties stemming from ambiguity of section 881(a)(7) and lack of legislative materials to assist in interpretive process).
110 See, e.g., Lot 111-B, 902 F.2d at 1445 (adopting conjunctive approach without consulting prior case law).
111 See 141st St. Corp., 911 F.2d at 877. The Second Circuit in 141st St. Corp. cited cases from other circuits, and from district courts within the Second Circuit, which had taken opposing views on the “knowledge or consent” issue. Id. However, the 141st St. Corp. court then went on to formulate its own novel approach without following either line of cases. Id. at 878-80; see also Liberty Ave., 710 F. Supp. at 50. In Liberty Avenue, the United States District Court for the Eastern District of New York acknowledged that no other court had ever applied the “innocent owner” provision disjunctively. Id. The court then noted the fact that earlier cases had ruled to the contrary requiring a conjunctive interpretation. Id. at 50 n.5. Instead of attempting to criticize or distinguish this persuasive authority, the court disregarded these prior decisions, stating that “[t]he court can only surmise that the issue has never before been so starkly presented as in the instant case.” Id.
112 See supra notes 50-79 and accompanying text. However, not all courts have failed to consult prior case law. It is interesting to note that Liberty Avenue, which was the first decision to stray from the conjunctive approach, now has its own distinctive following. See
B. The "Calero-Toledo" issue

In *Calero-Toledo v. Pearson Yacht Leasing Co.*, the United States Supreme Court, in now-famous dicta, acknowledged that, although the innocence of an owner is generally not a defense to an *in rem* civil forfeiture, a constitutional defense may be available if the owner is able to prove that he was not only unaware of and uninvolved in the wrongful activity, but also that he "had done all that reasonably could be expected to prevent the proscribed use of his property." In so doing, the Court formulated what has become known as the "*Calero-Toledo* defense." Federal courts have divided over the significance of this dicta as it relates to cases arising under subsection 881(a)(7), and as to whether the standard articulated in *Calero-Toledo* should be incorporated into the statutory "innocent owner" provision.

1. Judicial Confusion Over the "Calero-Toledo Defense"

Three distinct views have been expressed by the federal courts as to the relationship of the constitutionally-based "*Calero-Toledo* defense" to the statutory "innocent owner" defense provided in

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subsection 881(a)(7).\textsuperscript{117} The first is that the dicta in \textit{Calero-Toledo} is not applicable to cases arising under subsection 881(a)(7) because, in \textit{Calero-Toledo}, the Supreme Court was dealing with a statute which did not provide a defense comparable to the “innocent owner” provision contained in subsection 881(a)(7).\textsuperscript{118} Courts embracing this approach conclude that the constitutional defense suggested in \textit{Calero-Toledo} has no bearing on the meaning or application of the statutory defense provided in subsection 881(a)(7).\textsuperscript{119} A second view is that the \textit{Calero-Toledo} dicta is not only relevant to subsection 881(a)(7) cases, but that the entire “\textit{Calero-Toledo} defense” ought to be merged into the statutory “innocent owner” provision.\textsuperscript{120} Under this approach, the dicta is

\textsuperscript{117} See infra notes 118-24 and accompanying text.


A number of courts have rejected the applicability of the \textit{Calero-Toledo} defense to cases involving section 881(a)(7) because the Puerto Rican statute contained no specific “innocent owner” provision. \textit{See, e.g.}, United States v. 4,657 Acres, 730 F. Supp. 423, 427 (S.D. Fla. 1989) (“\textit{[Calero-Toledo] is inapplicable . . . when the ‘innocent owner’ defense is being claimed under 21 U.S.C. § 881(a)(7)”); \textit{Liberty Ave.}, 710 F. Supp. at 49-50 (same). This reasoning has also been employed in connection with section 881(a)(6). \textit{See, e.g.}, United States v. 2639 Meetinghouse Rd., 633 F. Supp. 979, 992 (E.D. Pa. 1986) (constitutional protection against forfeiture unnecessary under statute that provides for “innocent owner” defense).

\textsuperscript{119} See United States v. Route 1, Box 137, 743 F. Supp. 802, 806 (M.D. Ala. 1990) (Supreme Court’s requirement of proof should not control interpretation of explicit statutory exception of § 881 (a)(7) statutory defense); United States v. Sixty (60) Acres, 727 F. Supp. 1414, 1420-21 (N.D. Ala.) (\textit{Calero-Toledo} is inapplicable to § 881(a)(7) statutory defense), \textit{vacated on other grounds}, 736 F. Supp. 1579 (1990); United States v. Certain Real Property, 724 F. Supp. 908, 915-16 (S.D. Fla. 1989) (\textit{Calero-Toledo} test for innocent ownership does not apply to § 881(a)(7) forfeiture action).


The \textit{Calero-Toledo} defense consists of three elements which the claimant must prove: (1) lack of awareness; (2) lack of involvement; and (3) a showing that he did all that reasonably could be expected to prevent the illegal use of his property. \textit{Id.} (citing \textit{Calero-Toledo}, 416 U.S. at 689-90).

Because the \textit{Calero-Toledo} standard requires the claimant to prove both a lack of actual knowledge and that he took all reasonable steps necessary to prevent or discover the illegal activity, \textit{Calero-Toledo} is, in effect, a constructive knowledge standard. “Constructive knowledge” is imputed to those facts which would have been known through the use of reasonable care and diligence. \textit{See} Tusa v. Omaha Auto Auction Inc., 712 F.2d 1248, 1254 n. 5 (8th Cir. 1983); \textit{see also} Rutledge v. Boston Woven Hose & Rubber Co., 576 F.2d 248, 250 (9th Cir. 1978) (one is deemed to have constructive knowledge of those facts discoverable through use of due diligence); Alaska Treadwell Gold Mining Co. v. Mugford, 270 F. 753, 757 (9th Cir. 1921) (when facts are knowable through use of reasonable care and diligence,
used as an additional element of “knowledge” in subsection 881(a)(7) so that in order to establish a lack thereof, the claimant must prove not only that he had no actual knowledge of the activity but also that he did all that could reasonably be expected to prevent the illegal use of his property. Finally, there is a third view suggesting that only the portion of the “Calero-Toledo” dicta requiring the claimant to show that he did “all that reasonably could be expected” should be incorporated into the subsection 881(a)(7) defense. Instead of using this language to supply an additional element of “knowledge,” the “reasonable precautions” standard is used to define the term “consent.” Thus, in order to establish a lack of consent, the owner must prove that he did all that was reasonably necessary to prevent or terminate the unlawful activity once he became aware of it.

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121 See Grubb Rd., 890 F.2d at 663-64 (Greenberg, J., dissenting) (in addition to proving lack of knowledge and consent under § 881(a)(7), claimant must prove he did all that could reasonably be expected to prevent illegal activity); United States v. One Parcel of Real Estate, 715 F. Supp. 355, 358 (S.D. Fla. 1989) (claimant must show “she did not know of the property's connection to drug trafficking and that she took every reasonable precaution to prevent [it]”); United States v. Two Tracts of Real Property Containing 30.80 Acres, 665 F. Supp. 422, 425 (M.D.N.C. 1987) (statutory innocent owner defense “fully comports” with Calero-Toledo defense), aff’d, 856 F.2d 675 (4th Cir. 1988).

122 See 141st St. Corp., 911 F.2d at 879. The third element of the Calero-Toledo defense, requiring the claimant to prove that he did “all that reasonably could be expected to prevent the proscribed use of his property,” has been called both the “reasonable standard,” see 4,657 Acres, 730 F. Supp. at 427, and the “reasonable precaution” standard.” See Note, supra note 39, at 489 n.112; Note, supra note 12, at 188.

123 The Second Circuit recently became the first court to adopt this approach. See 141st St. Corp., 911 F.2d at 879. “[T]o show a lack of consent must a claimant prove that he did all that reasonably could be expected to prevent the illegal activity once he learned of it? We conclude that he must.” Id. The Second Circuit, in 141st Street Corp., went on to explain:

the Calero-Toledo standard is appropriate for Section 881(a)(7) forfeiture cases because, when combined with [the disjunctive] construction of the phrase “knowledge or consent,” it provides a balance between the two congressional purposes of making drug trafficking prohibitive expensive for the property owner and preserving the property of an innocent owner. A claimant with knowledge of the illegal use to which his property is put may depend on the basis of lack of consent, but consent in this situation must be something more than a state of mind.

Id. Thus far, this approach has been considered by at least one other court. See United States v. 8848 S. Commercial St., No. 89-C-3028 (N.D. Ill. Sept. 13, 1990) (LEXIS, Genfed library, Dist file) (quoting 141st Street Corp. but reserving question for trial).

It appears that the application of the “reasonable precaution” standard to the “consent” element of section 881(a)(7) was first proposed in a student-written note. See Note, supra note 39, at 486-91 (discussing proposed construction and underlying policy).

124 See 141st St. Corp., 911 F.2d at 878-79. Consistent with the disjunctive approach, the 141st Street Corp. test operates differently from the second view, which applies the
2. The Significance of the "Calero-Toledo Defense"

The Calero-Toledo dicta identifies the minimum level of protection from forfeiture that is prescribed by the Constitution. While the Constitution does not prevent Congress from enacting a statute that provides greater protection from forfeiture, it operates as a floor to the defense below which the courts may not venture. The first approach, which refuses to incorporate the Calero-Toledo standard into the subsection 881(a)(7) defense, is correct because it recognizes that Congress was exercising its prerogative to provide a broader level of protection to innocent owners than that afforded by the Constitution. It is important to realize that Calero-Toledo was decided before subsection 881(a)(7) was enacted and, had Congress desired merely to codify the Calero-Toledo defense or to incorporate any portion of it into the statutory defense, it would have expressly stated this intention.

Calero-Toledo dicta to the "knowledge" element, because it pertains to owners who concede knowledge but nonetheless assert the statutory defense based on lack of consent. See supra note 121. In the context of the 141st Street Corp. view, the "reasonable precautions" standard does not impose a constructive knowledge requirement because actual knowledge is already established. Cf. 141st Street Corp., 911 F.2d at 878 (common sense dictates that "in order to consent to drug activity, one must know of it"). Instead it places the burden on the claimant to show that he took affirmative action to prevent or terminate the illegal activity. See id. at 879. The court in 141st Street Corp. did not indicate exactly what actions on the part of the owner would be sufficient to meet this high standard. See id.

See Calero-Toledo, 416 U.S. at 688-90.


See L. Tribe, AMERICAN CONSTITUTIONAL LAW 349 (2d ed. 1988) (discussing Congress's ability to provide more protection of individual rights than outside limits under federal constitution established by Supreme Court).

See United States v. Lots 12, 13, 14, and 15, 869 F.2d 942, 947 (6th Cir. 1989) (unlike Calero-Toledo defense, statutory innocent owner defense does not require owner to prove he has done all that could reasonably be expected to prevent proscribed use of property); Liberty Ave., 710 F. Supp. at 50 n.4 (agreeing that statutory defense contained in § 881(a)(7) is broader than Calero-Toledo defense); see also United States v. 2639 Meetinghouse Rd., 633 F. Supp. 979, 992-93 (E.D. Pa. 1986) ("Congress in enacting the innocent owner defense . . . may have determined to give more legal protection to claimants than the Constitution requires").

This fact has been emphasized by a number of courts in rejecting the incorporation of Calero-Toledo. See, e.g., United States v. 4,657 Acres, 730 F. Supp. 423, 427 (S.D. Fla. 1989) (had legislature intended to incorporate Calero-Toledo into § 881(a)(7) it would have); United States v. Certain Real Property, 724 F. Supp. 908, 915 n.15 (S.D. Fla. 1989) (emphasizing that although Calero-Toledo was decided ten years before enactment of § 881(a)(7),
With this in mind, the flaws in the other two views, both of which incorporate the Calero-Toledo language into the "innocent owner" provision, are readily apparent. These approaches take the dicta out of context and use it to place an additional burden on the owner without recognizing that the Supreme Court intended it to be protective of owners.\textsuperscript{128} In Calero-Toledo, the Court simply observed that it might be unconstitutional to forfeit the property of an owner who had taken all reasonable precautions to prevent the illicit use of his property.\textsuperscript{129} It did not suggest, as some courts have concluded, that an owner seeking to avoid a forfeiture always has an affirmative obligation to prove that he has taken such precautions, regardless of whether Congress has provided an independent defense within a forfeiture statute itself.\textsuperscript{130} Thus, these courts have imposed an additional burden on the owner that was neither intended by the Supreme Court nor legislated by Congress.

Interestingly, there is some indication that Congress may be moving toward adopting a "reasonable precautions" standard.\textsuperscript{131} Congress still did not incorporate it into statute).

Another point stressed by the courts is that section 881(a)(4)(c), which was enacted at the same time as section 881(a)(7), explicitly provides that the "reasonable standard" defense must be applied to cases involving the forfeiture of vessels, aircraft and vehicles. See United States v. Route 1, Box 137, 743 F. Supp. 802, 806 (M.D. Ala. 1990); Certain Real Property, 724 F. Supp. at 915; 4,657 Acres, 730 F. Supp. at 427. Note that under section 881(a)(4)(c), an individual will not qualify for the "innocent owner" defense if he acted with "willful blindness" of the illegal activity. 4,657 Acres, 730 F. Supp. at 427 n.15 (citing United States v. One 1980 Bertram 58' Motor Yacht, 876 F.2d 884, 887 (11th Cir. 1989)); see also Goldsmith & Linderman, supra note 5, at 1278 n.113 (improper for courts to apply Calero-Toledo defense rather than defense expressly provided in § 881(a)(7), especially in light of amendment to § 881(a)(4)). But see Grubb Rd., 890 F.2d at 663-64 (Greenberg, J., dissenting) (Congress was aware that Calero-Toledo dicta was often used by courts in cases involving § 881(a)(4) and showed no intent to modify this practice when § 881(a)(7) enacted).

\textsuperscript{128} See Note, supra note 12, at 189-93 (discussing consistent misapplication by courts of Calero-Toledo dicta).

Note also that the third view, which uses the "reasonable precautions" standard to define consent, actually changes the meaning of that standard. See 141st St. Corp., 911 F.2d at 879. Instead of requiring the claimant to take all reasonable steps necessary to discover the activity, as in Calero-Toledo, it requires him to do all that he can to terminate activity that he is already aware of. See id.

\textsuperscript{129} See Calero-Toledo, 416 U.S. at 689.

\textsuperscript{130} See Note, supra note 12, at 193.


The seminal case defining "willful blindness" is United States v. Jewell, 532 F.2d 697, 700-01 (9th Cir.) (individual said to have knowledge when he has reason to be suspicious but deliberately avoids learning truth), cert. denied, 426 U.S. 951 (1976). Professors LaFave and Scott define "willful blindness" as when a person "has his suspicion aroused but then delib-
Given that it has not yet done so, one must conclude that the legislature is still not ready to promote deterrence by eliminating some of the protection now available to "innocent owners" under subsection 881(a)(7). Until such a change is made, courts should not place additional burdens on claimants without legislative approval.

III. SUGGESTED ANALYSIS

Clearly the most effective and definite solution to the disagreement and uncertainty that has arisen over both the interpretation of the phrase "knowledge and consent" and the applicability of the "Calero-Toledo defense" would be a congressional clarification of the meaning of subsection 881(a)(7). Until such a change is made, the federal courts must continue to struggle with the provision as it stands.

With regard to the construction of a statute, Justice Holmes has said that "the general purpose is a more important aid to meaning than any rule which grammar or formal logic may lay down." With this in mind, it is clear that the disjunctive interpretation is the fairer approach to cases arising under subsection 881(a)(7) because it allows the innocent owner defense to fully serve its protective purpose by recognizing that an owner may have knowledge of the misuse of his real property, yet remain blameless if he does not consent to it. Protecting such owners does not defeat or diminish the ability of forfeiture to function as a weapon against drug crimes since exacting punishment against those who are innocent does not serve as a deterrent to those who are guilty. However, one who is truly innocent, must be able to show more than mere subjective disapproval of the illegal act if he is to qualify for a defense based on lack of consent. At the same time, he

erately omits to make further inquiries, because he wishes to remain in ignorance." W. LAFAVE & A. SCOTT, supra note 80, at 218 (quoting G. WILLIAMS, CRIMINAL LAW: THE GENERAL PART 157, 159 (2d ed. 1961)).

See United States v. Route 1, Box 137, 743 F. Supp. 802, 807 n.14 (M.D. Ala. 1990). "Congress apparently is considering an amendment to 881(a)(7) . . . . However in its current form § 881(a)(7) does not place this burden on an owner contesting forfeiture." Id. (citations omitted).

For a detailed proposal of legislative reform aimed at protecting innocent owners, see Goldsmith & Lindeman, supra note 5, at 1297 (identifying three components that well-balanced reform program should include).


See supra notes 50-73 and accompanying text.

See 141st St. Corp., 911 F.2d at 879 (lack of consent must be more than state of
should not be subjected to the rigors of establishing that he did "all that reasonably could be expected to prevent the proscribed use." A line must be drawn between these two extremes defining what constitutes a *meaningful* lack of consent.

It is suggested that the claimant's burden should be to put forth objective evidence corroborating his asserted lack of consent without requiring him to prove that he did everything reasonably possible to terminate the illegal activity taking place on his premises. One district court has concluded that the claimant should only be required to establish that he has taken "*some overt action*" manifesting lack of consent. The first advantage of this standard is that, while it requires the claimant to introduce objective evidence of his actions against the illegal activity, it does not subject him to the inordinate burden of proof of the "reasonable precautions" standard. The second advantage is that activity constituting "*some overt action*" may prove to be more easily identifiable than that which constitutes all reasonable precautions. 

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1 See Sixty Acres, 727 F. Supp. at 1420 (recognizing "nice distinction between doing *everything reasonably necessary* to stop the proscribed activity and doing at least *something* to stop it") (emphasis in original). Commentators have emphasized the difficulties of meeting the burden of proof required under the Calero-Toledo standard. See Strafer, supra note 5, at 847 (Calero-Toledo standard too great an obligation to satisfy due process); Note, State & Federal Forfeiture of Property Involved in Drug Transactions, 92 DICK. L. REV. 461, 471 (1988) ("while Calero-Toledo appears to give innocent owners a defense to forfeiture . . . it undoubtedly leaves the owner with an insurmountable burden of proof").

13 See Sixty Acres, 727 F. Supp. at 1420 (emphasizing difficulty of drawing line between consent and non-consent).

14 Id. The Sixty Acres court denied the claimant's assertion of "lack of consent" because she had taken "*[n]o affirmative action whatsoever*" to stop the illegal activity. Id. at 1421 (emphasis in original).

15 Id. The Sixty Acres court stated that it was "attempting to make a nice distinction between doing *everything reasonably necessary* to stop the proscribed activity and doing at least *something* to stop it." Id. (emphasis in original); see also supra notes 137-39 and accompanying text (recognizing need to reconcile two extremes in defining lack of consent).

16 See United States v. One Boeing 707 Aircraft, 750 F.2d 1280, 1289 (5th Cir. 1985) (acknowledging Calero-Toledo standard is difficult, if not impossible, to define but observing that "*reasonably* is woven into the stout fabric of 'all that can be expected'"), cert. denied, 471 U.S. 1056 (1985).

In Sixty Acres, the court acknowledged that it was "not prepared to state and . . . not required to state" exactly what constitutes "*some overt action*." Sixty Acres, 727 F. Supp. at 1421. It would appear that the requirement of "*some overt action*" is easier to apply than the Calero-Toledo standard because it does not require the court to draw a line in individ-
The combination of the disjunctive approach and the requirement that the owner show he took "some overt action" against the illegal activity in order to establish a lack of consent takes the form of a three-step analysis. First, the claimant should be given an opportunity to establish a lack of actual knowledge. Then, if knowledge is conceded or if the claimant fails to establish a lack of knowledge, the claimant should be allowed to establish a lack of consent to the illegal activity. Finally, the question of whether or not a "meaningful lack of consent" has been established should be determined based on whether the claimant has shown that he took "some overt action" to prevent the activity once it became known to him. If utilized by the courts, it is believed that this three-step approach would foster predictability and consistency in this area of the law.

CONCLUSION

Until Congress or the federal judiciary formulates a more definite approach to the application of the subsection 881(a)(7) "innocent owner" defense, innocent owners will continue to be "caught in the crossfire" not only in the on-going battle between law enforcement authorities and drug traffickers, but also in the conflict that exists among the federal courts over the proper interpretation of the defense. This Note has sought to identify four factors that contribute to this conflict and explain the significance of the constitutional "Calero-Toledo defense" as it relates to the statutory innocent owner provision. Based on these observations, this Note has suggested an approach that would balance the various policies behind the conflict. It is hoped that recognition of these recurring cases determining what level of activity is sufficient to be considered "all that reasonably could be expected." See, e.g., 141st St. Corp., 911 F.2d at 879 (evidence supports conclusion that claimant did not take all reasonable steps to prevent narcotics trafficking); United States v. 4,657 Acres, 730 F. Supp. 423, 428 (S.D. Fla. 1989) (facts support conclusion that claimants did everything reasonable to prevent illegal activity on property). The "overt action" standard merely requires the court to consider a single instance of conduct to determine whether it openly demonstrates lack of consent. See, e.g., Sixty Acres, 727 F. Supp. at 1421 (requiring claimant to show she at least did something to deter husband's illegal conduct).

143 See 141st St. Corp., 911 F.2d at 878 (claimant may establish lack of actual knowledge to qualify for § 881(a)(7) defense).

144 See id. (under disjunctive approach, if claimant is found to have had knowledge he may then establish lack of consent as defense); Grubb Rd., 886 F.2d at 627 (claimant allowed to establish lack of consent if unable to show lack of knowledge).

145 See supra notes 140-42 and accompanying text.
sources of disagreement and the approach suggested in light of them will assist in developing a fair and workable solution to the inconsistency and unpredictability which characterizes case law in this area.

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