Emory Bankruptcy Developments Journal

Volume 36
Issue 1 *A Tribute to James H.M. Sprayregen*

2020

Is "Policing for Profit" Really a Police Power Exception? Civil Asset Forfeiture as an Excessive Fine and the Police Power Exception to the Automatic Stay

Brittany Temple

IS "POLICING FOR PROFIT" REALLY A POLICE POWER EXCEPTION? CIVIL ASSET FORFEITURE AS AN EXCESSIVE FINE AND THE POLICE POWER EXCEPTION TO THE AUTOMATIC STAY

ABSTRACT

When parallel bankruptcy and civil forfeiture proceedings arise, trustees and creditors are confronted with the issue of whether the police power exception to the automatic stay applies. Courts have widely ruled that civil forfeiture is a police power exception to the automatic stay because of its goal to deter crime and lack of monetary incentive. However, forfeiture has increasingly been viewed as excessive and unrestrained, often used as a tool to acquire funds for local government and law enforcement agencies.

This Comment argues that where a civil forfeiture is an excessive fine or there is an innocent owner, such as a creditor in the bankruptcy proceeding, the police power exception to the automatic stay should not apply. The effect on those actually punished by the fine, the creditors in the bankruptcy proceeding, must be considered.

INTRODUCTION

The United States Supreme Court recently declared that the Excessive Fines Clause of the Eighth Amendment is a fundamental right and therefore incorporated by the Due Process Clause of the Fourteenth Amendment (Due Process Clause).[1] Thus, states may no longer impose excessive fines in the form of *in rem* civil forfeiture.[2] The Supreme Court recognizes the need to protect a wrongdoer from a forfeiture that violates the Excessive Fines Clause, yet when that forfeiture is intertwined with a bankruptcy proceeding, innocent creditors are not given the same consideration. The government is able to remove property from the bankruptcy estate through civil forfeiture as a "police power" exception to the automatic stay. Courts recognize criticism of civil forfeiture and the need for limitation across the entire country, except when the wrongdoer has also declared bankruptcy and it is the trustee striving to keep the property to protect the creditors.

This Comment asserts that public policy, along with the inadequate protections found in the Bankruptcy Code, demands the following solutions: (1) the Eighth Amendment Excessive Fines and Innocent Owner analyses should be conducted by the bankruptcy court when determining whether the automatic stay applies; (2) the culpability of the creditor(s) should also be considered when discussing the Excessive Fine and Innocent Owner defenses; and (3) Congress should enact legislation providing that if the bankruptcy courts cannot retain jurisdiction and the forfeiture proceeds, the Attorney General should at least be accountable to the bankruptcy court when distributing the assets from the forfeiture.

There is an obvious conflict between a civil forfeiture and bankruptcy proceeding because of the dispute over property. The principal purpose of the Bankruptcy Code is to provide debtors with a fresh start, yet the purpose of civil forfeiture is generally understood to be crime deterrence and even punishment in some cases.[3] Crime deterrence and punishment are important purposes, but sometimes the owner of the property is entirely innocent.[4] Even if the owner of the property is not an "innocent owner," creditors should not have to suffer for

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[1] Timbs v. Indiana, 139 S. Ct. 682, 687 (2019).

[2] *Id.* at 691 ("regardless of whether application of the Excessive Fines Clause to civil *in rem* forfeitures is itself fundamental or deeply rooted, our conclusion that the Clause is incorporated remains unchanged.").

[3] *See* Austin v. United States, 509 U.S. 602, 621 (1993) (quoting United States v. Halper, 490 U.S. 435, 448–450 (1989)); Tamara R. Piety, Note, *Scorched Earth: How the Expansion of Civil Forfeiture Doctrine Has Laid Waste to Due Process*, 45 U. MIAMI L. REV. 911, 920 (1991).

[4] *See* Piety, *supra* note 3 (explaining that civil forfeiture statutes are "contrary to natural justice" because they are a form of criminal strict liability) (quoting Beaudry v. United States, 79 F.2d 650 (5th Cir. 1935)).

a debtor's wrongdoings. Civil forfeiture, if allowed to proceed, removes property from the bankruptcy estate and therefore leaves fewer assets for creditors to be repaid what they are owed.

The Excessive Fines Clause and Innocent Owner defense are only relevant when the property forfeited is "facilitating property," because that is when the civil forfeiture is punitive. There are three types of civil asset forfeiture: (1) forfeiture of contraband; (2) forfeiture of proceeds; and (3) forfeiture of facilitating property.[5] This Comment focuses on the third type, forfeiture of facilitating property, because the forfeiture is inherently punitive. Seizure occurs not because of the type of property, but because of the property's use. The punitive nature of this type of forfeiture allows for the argument that forfeiture violates the Eighth Amendment as an excessive fine. First, forfeiture of contraband is the least controversial forfeiture, because it involves the forfeiture of illegal drugs, obscene material, or adulterated food.[6] The purpose of contraband forfeiture is not to punish the owner, but to remove the material from circulation.[7] Additionally, there is no concern about owner's rights with contraband forfeiture because, by definition, possessing the property is illegal.[8] Therefore, contraband forfeiture is not punitive.[9]

Second, forfeiture of proceeds originally meant forfeiture of stolen property.[10] However, courts and federal statute expanded the definition to include "earnings from various illegal transactions."[11] Often, forfeiture of proceeds is used to confiscate money from drug trades because one should not be allowed to profit from criminal activity.[12] The theory of unjust enrichment suggests that the claimant never had a legitimate right to the property.[13] Therefore, forfeiture of proceeds is not punitive either.

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[5] David Pimental, *Forfeitures and the Eighth Amendment: A Practical Approach to the Excessive Fines Clause as a Check on Government Seizures*, 11 HARV. L. & POL'Y REV. 541, 545–46 (2017).

[6] *Id.*

[7] *Id.* at 546.

[8] *Id. See also* One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 699–700 (1965) (explaining that the return of contraband and recognizing property rights in it would violate the express public policy making the items illegal).

[9] *See* Pimental, *supra* note 5, at 546.

[10] *See id.*

[11] *See* Bennis v. Michigan, 516 U.S. 442, 459 (1996); United States v. 92 Buena Vista Ave., 507 U.S. 111, 121 (1993); 18 U.S.C. § 1961 (2019) (federal statute expanding the definition of "forfeiture of proceeds" to include profits from illegal activity).

[12] *See* Pimental, *supra* note 5, at 546.

[13] *See id.*

The third type, forfeiture of facilitating property, or the "instrumentalities" of the crime, is the most likely to raise constitutional issues because the government is taking both licit and legally acquired property.[14] The property is only forfeitable because of how it is used, not what it is. Under this type of civil forfeiture, it is common that the property's true owner is entirely innocent.[15] For example, imagine that someone's car was seized while it was borrowed or stolen because of a possession offense and the owner had no knowledge of the existence of drugs in the vehicle.

If the debtor is an innocent owner like in the aforementioned hypothetical, the debtors' fresh start in the bankruptcy proceeding gets interrupted. This is because the debtors must attempt to prove their innocence in the forfeiture proceeding before their bankruptcy case can proceed. Forfeiture allows the government to seize the property without compensation or regard for any ongoing bankruptcy proceedings. The government can ignore creditors' rights and the entire bankruptcy process. Even more so, there are creditors who expect payment in the bankruptcy proceeding, perhaps even with liens on that property, that the government just told their rights are not as important as the government's own interests.

This Comment first discusses a recent Supreme Court case that incorporates the Excessive Fines Clause, *Timbs v. Indiana*, along with additional public policy arguments surrounding civil forfeiture. Next, this Comment explains why the automatic stay is determinative to parallel forfeiture and bankruptcy proceedings, regarding the relation-back doctrine, jurisdiction, and traditional injunctions. Then, this Comment lists possible expansions of the property of the estate.

The Analysis section first evaluates the inadequacy of seeking an equitable remedy from the Attorney General. Next, the Analysis section outlines how courts interpret and apply the automatic stay in bankruptcy proceedings. The automatic stay is an injunction on any attempts to collect property of the debtor, including litigation, after commencement of a bankruptcy proceeding.[16] Finally, the Analysis section concludes with the importance of using the Excessive Fines Clause and innocent owner defense to prove the police power exception to the automatic stay does not apply.

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[14] *See* Pimental, *supra* note 5, at 547.
[15] *See Bennis*, 516 U.S. at 455.
[16] 11 U.S.C. § 362 (2019).

I. BACKGROUND

Before discussing the importance of the Excessive Fines Clause analysis and innocent owner defense in determining whether the automatic stay applies, it is necessary to understand the public policy issues surrounding civil forfeiture and why the automatic stay is so determinative. First, this section of the Comment discusses *Timbs v. Indiana*, the recent Supreme Court case holding that the Eighth Amendment Excessive Fines Clause is incorporated to the states. Next, this section provides further public policy support for limiting civil forfeiture. Then, there is an explanation of how the automatic stay affects both the relation-back doctrine and the bankruptcy court's jurisdiction. Finally, it becomes clear that the automatic stay determination is crucial because of the inadequacy of an ordinary injunction request and lack of available protections from the Bankruptcy Code.

A. Public Policy

Civil forfeiture is an overused, abusive form of punishment that allows the State to profit off of mistakes of its citizens. The need to limit civil forfeiture has been recognized across the political spectrum and even recently in the Supreme Court. Yet in the context of a bankruptcy proceeding, civil forfeiture is considered a police power exception to the automatic stay. The public policy surrounding civil forfeiture makes it clear why civil forfeiture should not always be considered a police power.

1. Supreme Court Decision Involving Civil Forfeiture

In *Timbs v. Indiana*, decided in February 2019, the Supreme Court held that the Eighth Amendment Excessive Fines Clause is incorporated by the Due Process Clause of the Fourteenth Amendment.[17] The decision makes the arguments regarding parallel civil forfeiture and bankruptcy proceedings especially relevant.

Tyson Timbs used his father's life insurance proceeds to purchase a $42,000 Land Rover.[18] In 2013, the authorities found Timbs with heroin at a traffic stop and charged him with Class B Felony for dealing heroin and one count of

[17] Timbs v. Indiana, 139 S. Ct. 682, 687 (2019) (The Supreme Court granted certiorari to hear Timbs v. Indiana in June of 2018); Nick Sibilla, *Supreme Court Will Decide If Civil Forfeiture Is Unconstitutional, Violates the Eighth Amendment*, FORBES (Jun. 19, 2018, 9:30 AM), https://www.forbes.com/sites/nicksibilla/2018/06/19/supreme-court-will-decide-if-civil-forfeiture-is-unconstitutional-violates-the-eighth-amendment/#750f33137165.

[18] State v. Timbs, 84 N.E.3d 1179, 1181 (Ind. 2017).

conspiracy to commit theft.[19] Nearly two years later, in 2015, Timbs pled guilty to the charges.[20] The court sentenced Timbs to six years—one year in community corrections and five years suspended to probation.[21] Additionally, Timbs paid fees totaling about $1,200 in exchange for his plea.[22] The maximum statutory fine for Timbs' felony dealing charge was $10,000, yet the State also sought to seize his $42,000 vehicle through civil forfeiture.[23] Timbs served his time, paid his fees, remained clean from his addiction for three years, and fought to get his life back on track.[24] Having his vehicle would have helped his reentry to society by allowing him to more easily commute to work and rehab.[25]

Timbs challenged the forfeiture of his vehicle as an excessive fine in the Supreme Court. He is a good example of someone seeking a fresh start in life, similar to a debtor who has filed for bankruptcy. Since the Court held that the Excessive Fines Clause is incorporated by the Due Process Clause, the ability of creditors and trustees to assert this defense in the bankruptcy court is crucial to stopping the property from getting taken out of the estate through civil forfeiture. Further, the interpretation that the excessiveness analysis must account for the owner's possible lack of culpability creates a strategy for creditors to assert this defense in the civil forfeiture forum. Many groups supported Timbs' case and see civil forfeiture as a way for the government to "fill budgetary needs."[26] One city attorney described civil forfeitures as a "gold mine" and a police chief called civil forfeitures "pennies from heaven."[27]

Even the Drug Policy Alliance (DPA), is calling for the end of government abuse of asset forfeiture.[28] The DPA filed an amicus brief in *Timbs* signed by groups all across the political spectrum including the following: "the National Association for the Advancement of Colored People, The Brennan Center for

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[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *See* Institute For Justice, *Supreme Court Asks: Can States Impose Excessive Fines?*, YOUTUBE (Sept. 5, 2018), https://youtu.be/FPml1UTijf0.

[25] *See id*.

[26] Brief of Drug Policy Alliance, et al. as Amici Curiae Supporting Petitioner at 8, Timbs v. Indiana, 138 S. Ct. 2650 (2018) (No. 17-1091).

[27] Dick M. Carpenter II et al., Institute for Justice, *Policing for Profit, The Abuse of Civil Asset Forfeiture* at 15 (Nov. 2015), https://bit.ly/2CoVh7l (surveying state laws) (quoting former Las Cruces, N.M., city attorney Harry S. "Pete" Connelly, Jr. and Columbia, Mo., police chief Kenneth M. Burton); *see also* Brief of Drug Policy Alliance, *supra* note 26, at 8–9.

[28] Press Release, The Drug Policy Alliance, DPA Files Amicus Brief in Supreme Court Case Arguing Excessive Fines Clause Should Rein in Asset Forfeiture Abuses (Sept. 11, 2018), http://www.drugpolicy.org/press-release/2018/09/dpa-files-amicus-brief-supreme-court-case-arguing-excessive-fines-clause.

Justice at NYU Law School, Americans for Prosperity, Law Enforcement Action Partnership, FreedomWorks, Independence Institute (Colorado), Libertas (Utah), Colorado Criminal Defense Bar, Drug Policy Forum of Hawai'i, Rio Grande Foundation (New Mexico) and Alabama Appleseed."[29] The groups are aware of the reality that asset forfeiture is not working in its intended way. Forfeiture, although originally intended to limit drug-trafficking, has targeted mostly low-income individuals with little or no criminal activity connection.[30] Legal Director for the Criminal Justice at the Drug Policy Alliance, Theshia Naidoo, expressed her feelings regarding the amicus brief:

> The brief that the Drug Policy Alliance filed today, flanked by organizations from across the political spectrum, is a powerful argument for reform of a system that has gone unchecked for too long. This coalition brings to the Supreme Court a unique perspective on the constitutional issues that are implicated when the government intrudes into the lives of its citizens.[31]

The Court, recognizing that the "[p]rotection against excessive fines has been a constant shield throughout Anglo-American history[,]" ultimately found that the Excessive Fines Clause is both "'fundamental to our scheme of ordered liberty' and 'deeply rooted in this Nation's history and tradition.'"[32] Therefore, the Court held that the Excessive Fines Clause is incorporated by the Due Process Clause and "there is no daylight between the federal and state conduct it prohibits or requires."[33]

2. Further Public Policy Support for Limiting Civil Forfeiture

Civil forfeiture has been recognized as abusive and overused long before the recent *Timbs* decision incorporating the Excessive Fines Clause by the Due Process Clause. While the War on Drugs is an important fight, it has led to an unprecedented increase in civil forfeiture proceedings.[34] The Institute for Justice, a nonprofit organization actively against unrestricted civil forfeiture, conducted a study finding that annual forfeiture revenue doubled across fourteen states between 2002 and 2013.[35] The result—hundreds of millions of dollars to

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[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] Timbs v. Indiana, 139 S. Ct. 682, 687 (2019) (citing McDonald v. Chicago, 561 U.S. 742, 767 (2010)).

[33] *Id.*

[34] Louis S. Rulli, *Seizing Family Homes from the Innocent: Can the Eighth Amendment Protect Minorities and the Poor from Excessive Punishment in Civil Forfeiture?*, 19 U. PA. J. CONST. L. 1111, 1118 (2017).

[35] Nick Sibilla, *Supreme Court Will Decide If Civil Forfeiture Is Unconstitutional, Violates the Eighth Amendment*, FORBES (Jun. 19, 2018, 9:30 AM), https://www.forbes.com/sites/nicksibilla/2018/06/19/supreme-

law enforcement.[36] Because the proceeds from civil forfeiture often go to the enforcement agency itself, agencies use civil forfeiture as a tool to fund their operations.[37] Agencies mostly seize assets from the poor and people of color.[38]

The fact that the money from forfeitures goes straight to enforcement agencies interferes with one of bankruptcy law's purposes: the fair distribution of the creditor's property to the creditors. State and local enforcement agencies were not originally creditors in the bankruptcy proceeding, so it is unfair that they are able to take property out of the estate and keep most of the proceeds.

Along with the fact that the enforcement agencies are profiting from the forfeitures, civil forfeiture also does more harm than good because of its disparate impact among social and racial classes. Three states—North Carolina, New Mexico, and Nebraska—have eliminated civil forfeiture entirely.[39] In the past four years, there have been reforms to civil forfeiture laws in thirty-three states and the District of Columbia.[40] A huge issue is that civil forfeiture is an in rem action against "guilty" property. Thus, an owner's property can be taken away without the owner ever being convicted of a crime.[41] However, fifteen states now require a criminal conviction for most or all forfeiture cases.[42]

Additionally, we have seen support for limiting forfeiture from Supreme Court justices in instances before *Timbs* as well. In 2017, in a concurrence where the Supreme Court declined to hear the case of Lisa Olivia Leonard, Justice Clarence Thomas wrote, "this system where police can seize property with limited judicial oversight and retain it for their own use— has led to egregious and well-chronicled abuses."[43] Thomas further criticized how "'forfeiture operations frequently target the poor and other groups least able to defend their interests in forfeiture proceedings,' who in turn are 'more likely to suffer in their daily lives while they litigate for the return of a critical item of property, such as a car or a home.'"[44]

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[36] *Id.*

[37] Brief of Drug Policy Alliance, *supra* note 26, at 2.

[38] *Id*.

[39] *Civil Forfeiture Reforms on the State Level*, INST. FOR JUSTICE (2018), https://ij.org/activism/legislation/civil-forfeiture-legislative-highlights/.

[40] *Id.*

[41] *See* Morgan Cloud, *Government Intrusions Into the Attorney-Client Relationship: The Impact of Fee Forfeitures on the Balance of Power in the Adversary System of Criminal Justice*, 36 EMORY L. J. 817, 820 (1987).

[42] *Civil Forfeiture Reforms*, *supra* note 39.

[43] Nick Sibilla, *supra* note 35.

[44] *Id.*

Thomas specifically references discrimination and supports the concept that forfeiture is not only making the fresh start of a bankruptcy proceeding impossible, but also could be causing the bankruptcy itself. The use of civil forfeiture as a tool to discriminate is a serious issue. Recent studies have shown that low-income and minority individuals are disproportionately affected by civil forfeitures.[45] These individuals are often people who cannot afford to hire representation to defend their property.[46] Sometimes, they might be individuals who are already in the process of a bankruptcy proceeding, or who are forced to file bankruptcy because of the unfair seizure of their property.

A research study from 2007 found that civil forfeiture was used more frequently both in areas with a high portion of African-Americans and in communities with higher degrees of economic inequality.[47] Studies continue to show race and income discrimination.[48] The Center for American Progress directly supported the idea that certain forfeitures can substantially interrupt or even ruin a debtor's promise of a fresh start in a bankruptcy proceeding: "The seizing of cash, vehicles, and homes from low-income individuals and people of color not only calls law enforcement practices into question, but also exacerbates the economic struggles that already plague those communities."[49] Under a chapter 13 bankruptcy case, a debtor must file a plan in which future income is given to the trustee to repay creditors before any discharge can be achieved.[50] A seizure of a debtor's home or vehicle can make it very difficult for a debtor to carry out that chapter 13 plan and thus both the creditors and the debtor are affected.

The Center for American Progress asserts the claim that the only thing people in these communities are often doing "wrong" is being disconnected from the financial mainstream, and thus carrying large amounts of cash.[51] Not having

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[45] Louis S. Rulli, *Seizing Family Homes from the Innocent: Can the Eighth Amendment Protect Minorities and the Poor from Excessive Punishment in Civil Forfeiture?*, 19 U. PA. J. CONST. L. 1111, 1117 (2017).

[46] *Id.*

[47] Robert Helms & S.E. Costanza, *Race, Politics, & Drug Law Enforcement: An Analysis of Civil Asset Forfeiture Patterns across US Counties*, 19 POLICING & SOC'Y 1, 13–14 (2007); *see* Rulli, *supra* note 45, at 1140.

[48] *See also* Rebecca Vallas et al., *Forfeiting the American Dream: How Civil Asset Forfeiture Exacerbates Hardship for Low-income Communities and Communities of Color*, CTR. FOR AM. PROGRESS 1, 5 (Apr. 2016), https://cdn.americanprogress.org/wpcontent/uploads/2016/04/01060039/CivilAssetForfeiture-reportv2.pdf. *See generally* Louis S. Rulli, *supra* note 45, at 1140.

[49] Vallas et al., *supra* note 48, at 2.

[50] 11 U.S.C. § 1322 (2019).

[51] Vallas et al., *supra* note 48, at 6; Joe Valenti, *Millions of Americans are Outside the Financial System*, CTR. FOR AM. PROGRESS (2014), https://cdn. americanprogress.org/wp-content/uploads/2014/10/ FDIC-factsheet.pdf.

a bank and carrying a month's rent in cash can make an innocent individual vulnerable to civil forfeiture. State and local law enforcement can have a seizure placed under federal jurisdiction through civil forfeiture and keep up to eighty percent of the proceeds from the seizure.[52] The other twenty percent often goes to federal agencies directly.[53] The government and local agencies should be held accountable for profiting off these vulnerabilities and should not be rewarded with the ability to bypass creditors' rights in bankruptcy proceedings.

Despite the obvious support for limiting civil forfeiture, its power still seems stronger than ever. The fact that the automatic stay does not apply to civil forfeiture because of the "police power exception" is evidence that the government's needs are prioritized over innocent owners and unsecured creditors. However, should there really be a "police power" exception when civil forfeiture is so widely criticized as simply "policing for profit,"[54] and not truly to deter criminal activity?

The Supreme Court supported the "policing for profit" argument by acknowledging that the overuse of civil forfeiture as a source of income for the State is "scarcely hypothetical."[55] Justice Ginsburg cited a previous Supreme Court decision when noting that "fines are a source of revenue," whereas other types of punishment "cost a [s]tate money."[56] Therefore, governmental action where the State stands to benefit, such as civil forfeiture, should be scrutinized more closely.[57]

Justice Ginsburg furthers the argument that there should not be a police power exception to the automatic stay when civil forfeiture is an excessive fine in violation of the Eighth Amendment. This should always be true when the State is seeking to profit and not actually punish a guilty party. In a bankruptcy proceeding, the property is used to pay off creditors before discharge of the debtor's debts. Therefore, allowing the property to remain property of the estate does little to benefit the debtor who may be the wrongdoer, but removing the property through forfeiture harms the innocent creditors.

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52 Vallas, *supra* note 48, at 1.

53 *Id.*

54 *See generally* Carpenter, *supra* note 27 (surveying state laws).

55 Timbs v. Indiana, 139 S. Ct. 682, 689 (2019).

56 *Id*. (citing Harmelin v. Michigan, 501 U.S. 957, 979, n. 9 (1991) (opinion of Scalia, J.)).

57 *Id*. (citing Harmelin v. Michigan, 501 U.S. 957, 979, n. 9 (1991) (opinion of Scalia, J.))

B. The Importance of the Automatic Stay Determination

The importance of the automatic stay to the bankruptcy proceeding is obvious in that all attempts to obtain possession of property that is property of the estate are stayed, including litigation against the debtor or debtor's property in actions that arose pre-petition.[58] The automatic stay allows for fair distribution of a debtor's assets, but also has other crucial implications when there is a parallel civil forfeiture proceeding.

1. The Relation-Back Doctrine is Applicable Without the Automatic Stay

The court in *In re Chapman* recognized that the police power exception to the automatic stay might cause the property to no longer be property of the estate: "[T]he conflict here arises because of the relation-back doctrine and the possibility that the Property, when all is said and done, may not be property of the estate. However, if that happens, it is because that is the appropriate result under the law."[59] The police power exception *could* cause the property to not be property of the estate because the relation-back doctrine only applies after the government has obtained a forfeiture judgment.[60] The government can only obtain the forfeiture judgment if the automatic stay does not enjoin it from doing so. This means for the government to obtain a forfeiture judgment—and thus have the relation-back doctrine be relevant—the police power exception must apply.[61]

The relation-back doctrine, 21 U.S.C. Section 881(h), states that right, title, and interest in forfeitable property "shall vest in the United States upon commission of the act giving rise to the forfeiture . . . ."[62] In other words, if the government prevails in its forfeiture action, then its title relates back to the date the crime was committed and not the date the government came into possession of the property.[63] Thus, the relation-back doctrine is the reason that debtors,

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[58] *See* 11 U.S.C. § 362(a) (2019).

[59] United States v. Klein (*In re* Chapman), 264 B.R. 565, 572 (B.A.P. 9th Cir. 2001).

[60] *See id*. at 569 (quoting United States. v. 92 Buena Vista Ave., 507 U.S. 111, 129 (1993) ("the Government cannot profit from the common-law doctrine of relation back until it has obtained a judgment of forfeiture.")).

[61] *Id.* at 568.

[62] 21 U.S.C. § 881(h) (2018).

[63] Craig Peyton Gaumer, *When Two Worlds Collide: The Relationship and Conflicts Between Asset Forfeiture and Bankruptcy Law*, AM. BANKR. INST. (May 1, 2002), https://www.abi.org/abi-journal/when-two-worlds-collide-the-relationship-and-conflicts-between-asset-forfeiture-and#4; *see also* United States v. Stowell, 133 U.S. 1, 16–17 (1890).

trustees, and creditors may only be able to challenge the forfeiture if both the crime justifying the forfeiture and the forfeiture itself occurred post-petition.

The relation-back doctrine is problematic because it directly affects the rights of innocent third parties. The relation-back doctrine effectively avoids "all sales, alienations and other grants of property interests such as liens that arise after the commission of the illegal act."[64] So, if a debtor purchases property with illegally obtained funds, and a creditor acquires a security interest in that property, the creditor's security interest can be avoided by the forfeiture action.[65]

However, the Court in *United States v. 92 Buena Vista Avenue* aimed to provide a fair outcome in these situations.[66] In that case, the respondent purchased a house using approximately $240,000 from a significant other and occupied it with her three children for years afterward.[67] The government believed the funds used to buy the house were proceeds of illegal drug trafficking. The respondent claimed, however, she had no idea of the origin of the funds and that she had separated from the man who gave her the funds.[68] The Court found the innocent owner defense succeeded over the relation-back doctrine because, although her interest in the property occurred after the alleged illegal act occurred, "[the government] cannot profit from the statutory version of that [the relation-back] doctrine in § 881(h) until respondent has had the chance to invoke and offer evidence to support the innocent owner defense under § 881(a)(6)."[69] Further, the Court also held that the innocent owner defense was not limited to bona fide purchasers.[70]

However, Congress enacted a uniform innocent owner defense for civil forfeiture in 2000 that superseded the decision regarding the bona fide purchaser requirement in *Buena Vista*.[71] The uniform innocent owner defense will be discussed in detail later in this Comment, but for now, it is good law that the relation-back doctrine does not defeat an innocent owner defense as in *Buena Vista*. Therefore, if an innocent owner, whether it be a third-party owner or the trustee itself, is able to assert the defense in relation to whether the police power

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64 Myron M. Sheinfeld et al., *Civil Forfeiture and Bankruptcy: The Conflicting Interests of the Debtor, Its Creditors and the Government*, 69 AM. BANKR. L.J. 87, 93 (1995).

65 *Id*.

66 *See* United States v. 92 Buena Vista Ave., 507 U.S. 111 (1993). *See generally* United States v. 6124 Mary Lane Drive, No. 3:03CV580, 2008 U.S. Dist. LEXIS 57172, at *6 (W.D.N.C. July 29, 2008) (explaining that Congress superseded *92 Buena Vista Ave.* by enacting CAFRA in 2000).

67 *92 Buena Vista Ave.*, 507 U.S. at 115.

68 *Id*.

69 *Id*. at 129.

70 *Id*. at 123.

71 18 U.S.C. § 983(d) (2018); *6124 Mary Lane Drive*, 2008 U.S. Dist. LEXIS 57172, at *6.

exception to the automatic stay applies at all, then the bankruptcy judge could decide whether the relation-back doctrine applies at the same time as deciding if the automatic stay applies.

2. Whether the Automatic Stay Applies Determines Whether the Bankruptcy Court Has Exclusive Jurisdiction

After considering the relevance of the automatic stay to the relation-back doctrine, it is necessary to understand how the automatic stay affects a bankruptcy court's jurisdiction over the property. First, this Comment discusses general jurisdictional issues that arise in parallel bankruptcy and forfeiture proceedings. Then, this Comment explains how the bankruptcy court can retain exclusive jurisdiction through the automatic stay. The bankruptcy court can either retain exclusive jurisdiction or have concurrent jurisdiction with a civil forfeiture proceeding.

a. Jurisdictional Issues–Generally

Courts do not easily give due regard to a bankruptcy court's jurisdiction over property of the estate and often allow civil forfeiture actions to proceed in a non-bankruptcy forum.[72] Some assert that bankruptcy courts should avoid a conflict with a civil forfeiture proceeding through abstention or withdrawal.[73] Courts often use a bankruptcy court's lack of jurisdiction as a reason to disallow injunctions against the government in relation to a forfeiture.[74]

However, the timing of the bankruptcy petition and civil forfeiture is important. The government sometimes allows a bankruptcy court to obtain jurisdiction because it considers its objectives completed if the property is already out of the hands of the debtor and being used to pay off innocent creditors.[75] In general, with criminal forfeiture, it would take significant action from Congress for a bankruptcy court to be able to exercise jurisdiction over a federal criminal case without violating Article III of the Constitution.[76] The answer to the question of jurisdiction is more clear in civil forfeiture proceedings

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[72] *See* Sheinfeld, *supra* note 64, at 101.

[73] *See* Michael S. Linscott, Comment, *Asset Forfeiture (Modern Anti-Drug Weapon): Is Bankruptcy A "Defense"?*, 25 TULSA L.J. 617 (1990).

[74] *See In re* Landmark Land Co., 973 F.2d 283, 289 (4th Cir. 1992); *In re* Smouha, 136 B.R. 921, 928–29 (S.D.N.Y. 1992).

[75] *See* United States v. Salerno, 932 F.2d 117, 120 (2d Cir. 1991) (debtor filed a petition for relief and the government relinquished its interest in the property to the bankruptcy trustee which had been obtained through criminal forfeiture).

[76] Gaumer, *supra* note 63.

because Congress gave district courts the power to delegate civil proceedings to bankruptcy courts.[77]

Section 1334 of the United States Code gives the district courts original and exclusive jurisdiction of all cases occurring under the Bankruptcy Code.[78] The district courts can refer matters to the bankruptcy courts through Section 157: "[A]ny or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district."[79] Congress limited the authority to delegate to bankruptcy courts to "civil proceedings," and no provision allows delegation of criminal proceedings.[80]

Surely, a case where property is seized by the government under forfeiture, that property is arguably part of the bankruptcy estate, and a trustee and creditors have a third-party interest in that property, constitutes "any or all proceedings . . . related to a case under title 11." Additionally, there is some authority for the idea that the case should proceed in the first court to exercise jurisdiction over property. Thus the bankruptcy court should continue to exercise jurisdiction over the forfeiture proceeding when the forfeiture is post-petition.[81] Thus, when there is a post-petition civil forfeiture proceeding, the bankruptcy court should retain jurisdiction first to determine whether the forfeiture is legitimate and to allow for the trustee or creditor to assert its own defenses.

However, 28 U.S.C. § 1355(a) is an additional jurisdictional hurdle, which gives original jurisdiction to the district courts over any "action or proceeding for the recovery or enforcement of any fine, penalty, or forfeiture, pecuniary or otherwise . . . ."[82] Unlike Section 1334 of the United States Code, Section 1355 does not explicitly state that the district courts have "original but not exclusive jurisdiction" of actions pertaining to forfeitures.[83] Section 1355 does state that the district courts have "original jurisdiction, exclusive to the States" over matters pertaining to forfeiture.[84] Therefore, Section 157 allowing the district courts to delegate to the bankruptcy courts civil proceedings relating to title 11 may still apply to civil forfeitures.

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[77] *Id.*

[78] 28 U.S.C. § 1334(a) (2018) ("Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.").

[79] 28 U.S.C. § 157(a) (2018).

[80] Gaumer, *supra* note 63.

[81] *See* Gross v. Weingarten, 217 F.3d 208, 221 (4th Cir. 2000) ("'The court first assuming jurisdiction over property may maintain and exercise that jurisdiction to the exclusion of another' court . . . .").

[82] 28 U.S.C. § 1355(a) (2018).

[83] *See* § 1355; 28 U.S.C. § 1334 (2018).

[84] § 1355(a).

b. How the Bankruptcy Court can Retain Exclusive Jurisdiction

In *In re WinPar Hospitality Chattanooga, LLC*, the United States Bankruptcy Court for the Eastern District of Tennessee analyzed Section 1355 and its relation to a district court's jurisdiction over property seized from the estate through civil forfeiture.[85] The trustee brought an action in the bankruptcy court alleging that the United States violated the automatic stay when it brought a civil forfeiture action against property of the estate in the United States District Court for the Middle District of Florida.[86] The United States asserted the civil forfeiture action post-petition, after a sale of the property to benefit creditors, and claimed the property had been purchased with illegal proceeds from a fraudulent scheme.[87] The question presented to the bankruptcy court was whether the forfeiture action violated the automatic stay.[88] The court conducted both the "pecuniary purpose" and "public policy"[89] tests and determined that the forfeiture action was an exception to the automatic stay as a police power under § 362(b)(4) of the Bankruptcy Code.[90]

Additionally, the trustee argued that the district court did not have jurisdiction over the property in question because the bankruptcy court had exclusive jurisdiction of the property of the estate.[91] The court held that its exclusive jurisdiction was dependent upon the applicability of the automatic stay. If the automatic stay is not applicable, then the bankruptcy court's jurisdiction is concurrent with the district court.[92] The court specifically noted 28 U.S.C. Section 1355(d) in allowing the district court to proceed in the in rem civil forfeiture action without possession of the *res*: "[T]he district court's

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[85] *See* Jahn v. United States (*In re* WinPar Hosp. Chattanooga, LLC), 401 B.R. 289, 294–95 (Bankr. E.D. Tenn. 2009).

[86] *Id.* at 291.

[87] *Id.*

[88] *Id.*

[89] Both the pecuniary purpose and public policy tests are explained in great detail in the Analysis section of this Comment.

[90] *In re WinPar Hosp. Chattanooga, LLC*, 401 B.R. at 294.

[91] *Id.*

[92] *Id.* (citing Chao v. Hosp. Staffing Servs., Inc., 270 F.3d 374, 383 (6th Cir. 2001)):

> [T]he exclusivity of the bankruptcy court's jurisdiction reaches only as far as the automatic stay provisions of 11 U.S.C.§ 362. That is, if the automatic stay applies to an action directed at the debtor or its property, jurisdiction is exclusive in the bankruptcy court. If the automatic stay does not apply–e.g., if an exception to the stay covers the action is question--the bankruptcy court's jurisdiction is concurrent with that of any other court of competent jurisdiction.

Chao, 270 F.3d at 383.

jurisdiction does not depend on its initial possession of the *res,* for it now clearly has the necessary jurisdiction to issue process to bring the *res* before it."[93]

Based off the reasoning in *WinPar Hospitality Chattanooga, LLC*, determining whether the bankruptcy court obtains exclusive jurisdiction over the property turns on the question of whether or not the government's forfeiture falls within the police power exception to the automatic stay. Whether the forfeiture falls within the police power exception to the automatic stay turns on whether the "pecuniary purpose" and "public policy" tests are satisfied.

If the bankruptcy court obtains concurrent jurisdiction, rather than exclusive jurisdiction, the issue then becomes whether the bankruptcy court's decision will hold over in the court with concurrent jurisdiction. The court in *Chao v. Hospital Staffing Servs., Inc.* makes it clear that a bankruptcy court's decision takes priority over a state court's: "If a state court and the bankruptcy court reach differing conclusions as to whether the automatic stay bars maintenance of a suit in the non-bankruptcy forum, the bankruptcy forum's resolution has been held determinative, presumably pursuant to the *Supremacy Clause*."[94] Administrative proceedings before a federal agency would also be declared void *ab initio* if the bankruptcy court found that the stay did apply. However, a conflict between a district court and a bankruptcy court would need to be resolved by appeals from both courts to an appellate court.

3. An Injunction Request on the Forfeiture Proceeding Without the Automatic Stay is Inadequate

In a subsequent action, the trustee in *WinPar Hospitality Chattanooga, LLC* continued to argue that the forfeiture proceeding in the district court should be stayed because the district court did not have concurrent jurisdiction.[95] The trustee asserted that the court gave insufficient attention to the pecuniary purpose and public policy tests.[96] The court emphasized, again, that the stay did not apply because of the Section 364(b) police power exception and therefore the district

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[93] 28 U.S.C. 1355(d) (2018) ("Any court with jurisdiction over a forfeiture action pursuant to subsection (b) may issue and cause to be served in any other district such process as may be required to bring before the court the property that is the subject of the forfeiture action."); *In re WinPar Hosp. Chattanooga, LLC*, 401 B.R at 294.

[94] *Chao*, 270 F.3d at 385 (citing Raymark Indus., Inc. v. Lai, 973 F.2d 1125, 1132 (3d Cir. 1992) (reversing the Bankruptcy Court and holding that automatic stay did apply while also remanding with instructions to vacate the judgment of the state court)).

[95] *In re WinPar Hosp. Chattanooga, LLC*, 404 B.R. at 297.

[96] *Id.* at 296.

court did have concurrent jurisdiction to continue the forfeiture proceeding.[97] The court continued to analyze the outcome as if the trustee asked for an injunction on traditional grounds. According to the Supreme Court, a plaintiff seeking a permanent injunction must establish:

> (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.[98]

The court, applying this test, found that (1) the trustee could not be injured by the proper operation of the federal judiciary; (2) had an adequate remedy available as a claimant to the arrested property in the forfeiture action; (3) the hardships weighed in favor of the district court because all of the forfeiture witnesses were there; and (4) that public interest would be disserved by an injunction because Congress' intent behind the Section 362(b)(4) exception was to combat the risk that criminals could seek refuge through bankruptcy law.[99]

The court made it clear that a forfeiture proceeding cannot be enjoined unless the automatic stay applies. Therefore, trustees and creditors must focus their argument around proving that the police power exception to the automatic stay does not apply. If this battle is lost, the war is then much harder to win. The court claimed that the trustee still has an adequate remedy at law under 18 U.S.C. §§ 982(a)(6)(B) and 983(d),[100] the innocent owner defenses for criminal and civil forfeiture.[101] The court explained that the trustee can argue that he is an innocent owner due to his status as a bona fide purchaser under 11 U.S.C. § 544 (a)(3). If he successfully persuades the district court he is the innocent owner, he will recover the property for the benefit of the bankruptcy estate.[102] If he does not successfully persuade the district court, the bankruptcy court reasoned this is still an equitable result because the trustee still had his adequate day in court.[103]

Despite the court's justification that the innocent owner defense provides the trustee with an adequate alternative in the forfeiture forum, it is more efficient for the bankruptcy court to retain jurisdiction. This way, the bankruptcy court

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97 *Id.*

98 *Id.* at 298 (citing eBay Inc. v. MercExchange, LLC, 547 U.S. 388, 391 (2006)).

99 *Id.* at 298–300.

100 *Id.* at 298.

101 18 U.S.C. §§ 982(a)(6)(B), 983(d) (2018).

102 *In re WinPar Hosp. Chattanooga, LLC*, 404 B.R. at 298.

103 *Id*.

can rule on the innocent owner defense while also deciding whether the forfeiture was a proper police power and if the relation-back doctrine applies. Additionally, the innocent owner defense is not an adequate alternative remedy because the view that the "property is guilty" makes the defense difficult to satisfy.

An injunction on traditional grounds is inadequate. Therefore, the determination of whether the bankruptcy court retains exclusive jurisdiction needs to be decided by the bankruptcy court as an initial step. The question turns on whether the forfeiture is a police power exception, which turns on whether the forfeiture is legitimate. Therefore, the trustee or creditors should be able to assert necessary defenses to the forfeiture to prove its excessiveness, such as the innocent owner and the excessive fines test, in this initial determination in the bankruptcy court.

C. The Only Possible Expansions of the Property of the Estate by the Trustee from the Bankruptcy Code

Since a bankruptcy court can still retain concurrent jurisdiction over the questioned property, even if the automatic stay does not apply, it is necessary to discuss a trustee's possible arguments from the Bankruptcy Code.

There is little guidance in the case law regarding use of the Bankruptcy Code as a defense in the civil forfeiture proceeding. Instead, there are ways the trustee can expand the property of the estate. The Code provides three possible ways to expand the property of the estate to include the forfeited property that are relevant to the interplay between bankruptcy and civil forfeiture: (i) fraudulent transfer; (ii) preferences; and (iii) avoidance. However, expansion of the property of the estate only occurs when property was transferred pre-petition. Therefore, these methods can only be used if (1) the court determines that the automatic stay did not apply, and (2) title to the property was vested to the government before the bankruptcy petition (possibly because of the relation-back doctrine if the illegal act occurred pre-petition).

The success of applying fraudulent transfer, preferences, and avoidance to a civil forfeiture is uncertain. This uncertainty is why a trustee should focus its argument on the principle that an excessive forfeiture, or one where there is an innocent owner, should not be considered a police power exception to the automatic stay.

1. Fraudulent Transfer

A trustee may avoid preferential or fraudulent transfers to creditors under Sections 547 and 548 of the Bankruptcy Code.[104] Section 548 may provide a "potent weapon" for the trustee to retain property seized by the government.[105] The Code provides that a trustee may avoid any transfer of an interest in debtor property or any obligation incurred by the debtor if it was within two years prepetition and the debtor received less than a reasonably equivalent value in exchange for the transfer or obligation.[106]

Certainly, the government seizing a $42,000 truck, the situation in *Timbs*, is not a transfer for a reasonably equivalent value.[107] Therefore, the trustee may be able to argue that the forfeiture is excessive in the bankruptcy court and the bankruptcy court should avoid the transfer to the government.[108] If a forfeiture is "grossly disproportionate to the . . . offense,"[109] then the forfeiture is not a transfer for a "reasonably equivalent value."

However, Section 548 only discusses transfers made within two years before the filing for bankruptcy.[110] Thus, the forfeiture (or at least the crime) would have had to occur prepetition for the trustee to use this argument, which is why the superior claim issue to the excessive fine and innocent owner defenses would arise. The government would argue the property was never property of the estate because the government's title related back to the time of the crime and therefore the trustee could not assert these defenses on behalf of the creditors.

The fraudulent transfer argument has not come up in cases involving civil forfeiture, but it has been argued in foreclosure sales.[111] In *In re Coleman*, the United States Bankruptcy Court for the Southern District of Texas held that a foreclosure sale was a fraudulent transfer for less than a reasonably equivalent value.[112] However, in *BFP v. Resolution Trust Corp.*, the Supreme Court held that the price received at a properly conducted foreclosure sale constitutes

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104 11 U.S.C. §§ 547–548 (2019).

105 *See* Sheinfeld, *supra* note 64, at 110.

106 11 U.S.C. § 548 (a)(1)(A).

107 *See* United States v. 92 Buena Vista Ave., 507 U.S. 111, 122 & 129 (1993).

108 Sheinfeld, *supra* note 64, at 112.

109 Timbs v. Indiana, 139 S. Ct. 682, 684 (2019) (holding that grossly disproportionate to the offense is the established test for whether a fine is excessive).

110 § 548.

111 *See In re* Coleman, 21 B.R. 832 (Bankr. S.D. Tex. 1982).

112 *Id*. at 837 (Bankr. S.D. Tex. 1982) (emphasizing that seventy percent of market value is the threshold for "reasonably equivalent value").

"reasonably equivalent value" under Section 548 of the Code.[113] In such context, a foreclosure sale could not be voided by a bankruptcy trustee as a fraudulent transfer.[114] The Court focused on the fact that the term "fair market value" is left out of Section 548, yet it exists other places in the Code.[115] The Court emphasized that "the 'reasonably equivalent value' criterion will continue to have independent meaning . . . outside the foreclosure context . . . . [and] § 548(a)(2) will . . . continue to be an exclusive means of invalidating . . . foreclosure sales . . . that, while not intentionally fraudulent, nevertheless fail to comply with all governing state laws."[116]

The theory compares well in the civil forfeiture world. Following the Court's reasoning in *BFP*, a civil forfeiture that is not "properly conducted" would not constitute reasonably equivalent value. A forfeiture that is an unconstitutional violation of the Eight Amendment Excessive Fines Clause cannot be considered "properly conducted." Therefore, an excessive forfeiture that is "grossly disproportionate" to the gravity of the offense is for less than a reasonably equivalent value and is not "properly conducted." Thus, a trustee should be able to avoid it under section 548 of the Code.

2. Preferences

Section 547 of the Code governs preferences. The provision allows for the trustee to avoid any transfer of interest of the debtor in property:

> (1) to or for the benefit of a creditor; (2) for or on account of an antecedent debt owed by the debtor before such transfer was made; (3) made while the debtor was insolvent; (4) made— (A) on or within 90 days before the date of the filing of the petition; or (B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and (5) that enables such creditor to receive more than such creditor would receive if— (A) the case were a case under chapter 7 of this title; (B) the transfer had not been made; and (C) such creditor received payment of such debt to the extent provided by the provisions of this title.[117]

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113 Bfp v. Resolution Tr. Corp., 511 U.S. 531, 548 (1994).

114 *See id*.

115 *Id*. at 537 (quoting Chicago v. EDF, 511 U.S. 328, 338 (1994)) ("It is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another.").

116 *Id*. at 533.

117 11 U.S.C. § 547 (2019).

The five requirements listed have to be satisfied in order for the trustee to argue that a forfeiture can be avoided as a preferential transfer.

Regarding the first and second requirement, the government is a creditor seizing property as an antecedent debt owed at the time the transfer was made. The third and fourth requirements demand that the forfeiture be pre-petition and that the debtor was insolvent at the time of the forfeiture. According to Section 101, "insolvent" means "financial condition such that the sum of such entity's debts is greater than all of such entity's property, at a fair valuation . . . ."[118] The definition for insolvent excludes property that may be exempt from property of the estate.[119] In most cases where a forfeiture has resulted in a bankruptcy petition, it is fair to assume that this factor will be satisfied. In fact, § 547(f) assumes the element as well: "[T]he debtor is presumed to have been insolvent on and during the 90 days immediately preceding the date of the filing of the petition."[120]

Now that the first four requirements have been established, the fifth requirement would also be satisfied in parallel forfeiture and bankruptcy proceedings. If not for the forfeiture allowing a transfer of interest in the property, the United States would have received more than it would have under chapter 7 of the Code. Section 726 of the Code lists forfeiture claims as fourth priority.[121] A claim by the government under Section 726(a)(4) is superior in distribution priority only to post-petition interest and the debtor's right to receive any surplus.[122] Congress intended that even unsecured creditors should be protected from the debtor's "wrongdoing." The distribution priority signifies that forfeitures were not meant to be able to seize assets which would have otherwise been distributed to general creditors.[123]

An argument against this tactic may be that a forfeiture cannot be a preferential transfer when it is not voluntary and the debtor did not initiate the transfer of ownership interest. However, voluntariness is not a requirement of

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118 11 U.S.C. § 101(32)(A) (2019).

119 § 101(32)(A)(ii).

120 11 U.S.C. § 547(f) (2019).

121 11 U.S.C. § 726(a)(4) (2019):

> [F]ourth, in payment of any allowed claim, whether secured or unsecured, for any fine, penalty, or forfeiture, or for multiple, exemplary, or punitive damages, arising before the earlier of the order for relief or the appointment of a trustee, to the extent that such fine, penalty, forfeiture, or damages are not compensation for actual pecuniary loss suffered by the holder of such claim . . . .

122 § 726.

123 *See In re* Ryan, 15 B.R. 514, 520 (Bankr. D. Md. 1981); Sheinfeld, *supra* note 64, at 112. *See generally* § 726.

§ 547. In *In re Veteran Plate Glass Company*, a creditor obtained a prepetition judgment against a debtor and, to satisfy the judgment, a writ of execution against the debtor's pickup-truck, printer, and computer.[124] The debtor then filed a chapter 11 petition for bankruptcy and the trustee argued that the creditor had no lien interest in the property.[125] The trustee also asserted that if the creditor did have an interest in the property due to the seizure pursuant to the writ of execution, that interest was subject to avoidance as a preference under Section 547.[126] The court ultimately held that the creditor did have a lien interest based on state law, but that is was avoidable as a preference under Section 547 based on the elements set forth in the Code.[127]

The court in *Veteran Plate Glass Company* concluded that "there is no doubt that the obtaining of a lien interest by seizure, pursuant to a writ of execution constitutes a 'transfer of an interest of the debtor in property' for purposes of the preference provision."[128] The court reasoned that allowing the creditor to be placed in a better position than other unsecured creditors defeats the purpose of the Bankruptcy Code by undermining the equality of distribution among creditors in the same class.[129] A seizure under civil forfeiture has the same effect as a writ of execution and therefore should be avoided to protect other creditors as well.

Additionally, the defendant in *In re Kayajanian* argued against the avoidance of its nondischargeable claim based on a restitution payment that was part of the debtor's probation agreement with a criminal court.[130] The only element at issue was whether the transfer enabled the defendant to receive more than it would from the estate in a chapter 7 liquidation distribution.[131] The defendant argued that it should receive payment in full outside of the estate because its claim was nondischargeable in chapter 7 and therefore the element was satisfied.[132] However, the court found that just because a nondischargeable debt may be paid outside the estate after bankruptcy, that does not create a priority inconsistent with that of a chapter 7 distribution of the estate.[133]

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124 *In re* Veteran Plate Glass Co., 71 B.R. 74, 75 (Bankr. N.D. Ohio 1987).
125 *Id.*
126 *Id.*
127 *Id*. at 75–76.
128 *In re Veteran Plate Glass Co.*, 71 B.R. at 76.
129 *Id.*
130 *In re* Kayajanian, 27 B.R. 711, 712 (Bankr. S.D. Fla. 1983).
131 *Id.*
132 *Id.*
133 *Id.*

If the court applied this rationale and avoided the restitution payment to a criminal court as preference, surely it can be extended to a similar theory of civil forfeiture. The government's claim of forfeiture is not dischargeable under Section 523(a)(7) "to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss . . . ."[134] However, based on *Kayajanian*, the fact that the forfeiture claim is nondischargeable does not affect the trustee's ability to avoid it under Section 527.

3. Section 724 Treatment of Liens

Section 724 of the Code specifically states that "the trustee may avoid a lien that secures a claim of a kind specified in section 726(a)(4)."[135] Section 726(a)(4) includes "any fine, penalty, or forfeiture, or for multiple, exemplary, or punitive damages . . . to the extent that such fine, penalty, forfeiture, or damages are not compensation for actual pecuniary loss suffered by the holder of such claim . . . ."[136] The decision in *Austin* declaring civil forfeitures to be punitive is thus again relevant.[137] An excessive forfeiture—one clearly not for compensation or actual pecuniary loss suffered—would qualify as a claim of a kind specified in Section 726(a)(4). Thus, the trustee could avoid the government's lien under Section 724. The court in *Rice v. United States* specifically stated that the purpose of the trustee's avoidance power under Section 724(a) is to protect unsecured creditors from the debtor's wrongdoings.[138]

The court connects § 724 and § 726 by stating that unsecured creditors benefit from the trustee's avoidance of forfeitures under § 724 because they would be paid under the distribution scheme required by § 726.[139] Essentially, it is evident that § 724 was enacted so that § 726(a)(4) claims, such as civil forfeiture claims, cannot bypass general creditors and receive first priority. It is inefficient and illogical to allow a civil forfeiture proceeding to be conducted, only to then force the trustee to join the government as a party in the bankruptcy proceeding to litigate the issue of excessiveness and determine that the forfeiture was punitive so that the lien can be avoided. The bankruptcy court should retain

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134 11 U.S.C. § 523(a)(7) (2019).

135 11 U.S.C. § 724(a) (2019).

136 11 U.S.C. § 726(a)(4) (2019).

137 *See generally* Austin v. United States, 509 U.S. 602 (1993).

138 Rice v. United States (*In re* Odom Antennas, Inc.), 258 B.R. 376, 384 (Bankr. E.D. Ark. 2001), *aff'd*, *In re* Odom Antennas, Inc., 340 F.3d 705 (8th Cir. 2003).

139 *Id.*

jurisdiction at the start of the proceeding in order to determine the legitimacy of the forfeiture and proper distribution of proceeds of the property of the estate.

II. ANALYSIS

The police power exception to the automatic stay does not apply if the pecuniary purpose and public policy tests are not satisfied.[140] If the police power exception does not apply, then the forfeiture proceeding is stayed and the bankruptcy proceeding continues. Creditors are protected from the debtor's wrongdoing and the forfeiture claim is paid according to the priority listed in the Bankruptcy Code. Public policy against the power of civil forfeiture endorses this result.

First, this section analyzes why creditor protection in the bankruptcy proceeding is critical—because, with the current state of the law, seeking an equitable remedy outside of bankruptcy is inadequate. Second, this section explains the pecuniary purpose and public policy tests in detail while analyzing the police power exception to the automatic stay.

Since an equitable remedy with the Department of Justice is inadequate, the determination that the automatic stay applies to a forfeiture proceeding is crucial. The defenses recognized in the civil forfeiture forum are discussed and their relevance to the determination of automatic stay question becomes clear. The innocent owner defense and excessive fines analysis are determinative in whether the forfeiture qualifies as a "police power" exception to the automatic stay. Therefore, they must be considered by the bankruptcy court while it conducts the pecuniary purpose and public policy tests.

A. Seeking an Equitable Remedy from the Department of Justice is Inadequate

In addition to the public support for limiting civil forfeiture, another reason that a creditor needs additional protections in the context of parallel bankruptcy and forfeiture proceedings is that seeking an equitable remedy from the Department of Justice is often inadequate.

Without the knowledge of a trustee and protection of a bankruptcy proceeding, a creditor's options are limited. Currently, civil forfeiture law itself has two options for handling claims of third parties that were affected by a forfeiture: (1) "innocent owners" may file a proof of claim with the district court

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[140] United States v. Klein (*In re* Chapman), 264 B.R. 565, 569 (B.A.P. 9th Cir. 2001).

or (2) seek an equitable remedy from the Department of Justice ("DOJ").[141] If the district court does not accept the innocent owner defense, and the creditor is forced to seek an equitable remedy by filing a petition for remission, the government has complete discretion in deciding how to distribute the assets from a civil forfeiture to creditors.[142] Unsecured creditors do not have a legally recognized claim, and therefore cannot assert the innocent owner defense.[143] So, unsecured creditors have to rely on filing a petition for remission. If the Attorney General decides not to remit the forfeiture and pay creditors, the district court does not have jurisdiction to review that decision.[144] Therefore, the DOJ, the very organization benefiting from distributing the assets of a forfeiture to creditors, receives unreviewable authority.

The fact that 18 U.S.C. Section 981(d) gives the Attorney General sole discretion in deciding how, if at all, to allocate forfeited assets to creditors effectively replaces bankruptcy law and its purposes.[145] Since the decision is not reviewable by the district court, creditors may be hesitant to challenge the forfeiture on constitutional grounds from the beginning. A creditor, if not successful in the litigation, would have upset the very people it then must ask to pay it its equitable interest.[146]

Civil forfeiture, unlike bankruptcy, does not require similarly situated creditors to be equally paid back. The discretion given to the Attorney General therefore undermines the policy of bankruptcy law. Thus, creditors need the bankruptcy courts as an avenue to protect themselves. If the bankruptcy courts cannot retain exclusive jurisdiction through the automatic stay and the forfeiture proceeds, then a potential solution is that the Attorney General should at least be accountable to the bankruptcy court when distributing the assets from the forfeiture. If the Attorney General was required to work with the trustee in the distribution of the forfeited assets, then at least some of bankruptcy's goal of fairness to creditors would be achieved in the process.

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141 Steven L. Schwarcz & Alan E. Rothman, *Civil Forfeiture: A Higher Form of Commercial Law?*, 62 FORDHAM L. REV. 287 (1993).

142 *Id.*; *see* 18 U.S.C. § 981(d) (2018) ("The Attorney General shall have sole responsibility for disposing of petitions for remission or mitigation with respect to property involved in a judicial forfeiture proceeding.").

143 Schwarcz, *supra* note 142, at 287.

144 *See* United States v. Parcel of Land, 791 F. Supp. 1144, 1149 (S.D. Miss. 1991) (citing United States v. One 1970 Buick, 463 F.2d 1168, 1170 (5th Cir. 1972)).

145 § 981(d).

146 *See generally* Schwarcz, *supra* note 142, at 287.

B. Determining Whether the Automatic Stay Applies

The main question in parallel bankruptcy and civil forfeiture proceedings is whether the property forfeited was, or can be, property of the estate.[147] The question is also the main focus of this Comment—whether the automatic stay should apply when forfeiture is increasingly considered excessive and outside of what is considered a "police power."

Section 541(a) of the Bankruptcy Code (the Code) states that all legal or equitable interests of the debtor in property become property of the estate at the commencement of the bankruptcy case.[148] It is well established that the debtor cannot use bankruptcy as a defense to pre-petition forfeiture because, due to the property already being subject to forfeiture, the debtor has no interest in the property at the commencement of the bankruptcy case.[149] Because this Comment already discussed the methods to expand the property of the estate to include the pre-petition transfer, this Section focuses on post-petition forfeiture. In post-petition forfeiture, a debtor declares bankruptcy before the property is subject to forfeiture.[150] Therefore, the property is already property of the estate when the government tries to assert a right over it through civil forfeiture.

Section 362(a) of the Code provides that all attempts to obtain possession of property that is property of the estate are stayed.[151] This includes litigation against the debtor or debtor's property in actions that arose pre-petition.[152] Reading the Code, it seems apparent that forfeiture actions that occur post-petition should be stayed until the conclusion of the bankruptcy proceeding. However, Section 362(b)(4) grants a police power exception to the automatic stay.[153] Forfeiture proceedings are allowed to proceed and are exempt from the automatic stay because of the police power exception.[154]

The legislative history of Section 362(b) shows that bankruptcy laws are not meant to be a haven for criminal offenders.[155] Congress's intent behind the police power exception was to bar criminal offenders from using bankruptcy as

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147 Gaumer, *supra* note 63.

148 11 U.S.C § 541(a) (2019).

149 Gaumer, *supra* note 63.

150 Gaumer, *supra* note 63.

151 11 U.S.C. § 362(a) (2019).

152 *Id*.

153 § 362(b)(4).

154 *In re* Goff, 159 B.R. 33 (Bankr. N.D. Okla. 1993); *see also* United States v. Klein (*In re* Chapman), 264 B.R. 565, 573 (9th Cir. B.A.P. 2001).

155 *See* Sheinfeld, *supra* note 64, at 112 (citing H.R. REP. NO. 95-595, 95th Cong., 1st Sess. at 342, *reprinted in* 1978 U.S.C.C.A.N. 5787, 5837, 6299).

an escape of consequences for their actions by allowing criminal actions and proceedings to continue in spite of an ongoing bankruptcy case.[156] However, this intent does not explain why the police power exception applies to civil forfeitures as well as criminal forfeitures, and especially pre-conviction civil forfeiture. It seems unclear why innocent owners[157] in a civil forfeiture proceeding should be punished under an exception that was drafted to affect criminals themselves.

In *In re Chapman*, the Bankruptcy Appellate Panel for the Ninth Circuit directly answered the question regarding how the police power exception to the automatic stay relates to civil forfeitures.[158] The debtor's home was subject to a civil forfeiture action because the government alleged it was used for the manufacture and distribution of marijuana.[159] The debtor filed for chapter 7 bankruptcy before there was a ruling on the action, and the court found that the action was excepted from the automatic stay under the police power exception.[160] The government used the relation-back doctrine to argue that the property should have never been property of the estate. Thus, the main issue was whether the automatic stay applied. The court identified two tests for determining when the police power exception to the stay applies in a proceeding: (1) the pecuniary purpose test and (2) the public policy test.[161]

The two tests from *Chapman* are independent of one another and the government can succeed if it satisfies either test.[162] The pecuniary purpose test analyzes whether the government acted primarily to protect its "pecuniary interest" in the debtor's property or acted to protect public safety and welfare. The public policy test determines whether the government's actions were motivated to effectuate public policy or private rights.[163] Effectuating public policy is under the police power exception to the automatic stay, while other motivations, such as pecuniary interests, are not.

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156 *See* Sheinfeld, *supra* note 64, at 112 (citing H.R. REP. NO. 95-595, 95th Cong., 1st Sess. at 342, *reprinted in* 1978 U.S.C.C.A.N. 5787, 5837, 6299). *See also In re* Commerce Oil Co., 847 F.2d 291, 297 (6th Cir. 1988); Commodity Futures Trading Com. v. Co. Petro Mktg. Grp., Inc., 700 F.2d 1279, 1283 (9th Cir. 1983).

157 *See, e.g.*, *Iowa Forfeiture*, INST. FOR JUSTICE (2014), https://ij.org/case/iowa-forfeiture/ (Restaurant owner only accepted cash, meaning she made frequent trips to the bank to keep the money safe, government seized her entire bank account claiming she was "structuring" her deposits to be less than $10,000).

158 *See* United States v. Klein (*In re* Chapman), 264 B.R. 565, 572 (B.A.P. 9th Cir. 2001).

159 *Id.* at 567.

160 *In re Chapman*, 264 B.R. at 567.

161 *Id.* at 569.

162 *Id.*

163 *Id.* (citing Universal Life Church, Inc. v. United States (*In re* Universal Life Church, Inc.), 128 F.3d 1294, 1297 (9th Cir. 1997)).

1. The Pecuniary Purpose Test

The court in *Chapman* found that the pecuniary purpose test was satisfied because "the government's primary motive [was] to punish [d]ebtor and enforce a policy that is meant to deter not only [d]ebtor but others who might be tempted to traffic in illegal drugs."[164] The court emphasized that even though the government will ultimately receive a pecuniary reward, that does not change the primary purpose behind the forfeiture provisions.[165] The purpose is to "punish and deter offenders rather than to compensate and reward the government for pursuing the [p]roperty."[166]

If the owner of the house was a truly innocent owner, the government could not satisfy the pecuniary purpose test. If a third party was merely renting the house to the Chapmans when it was seized because there was marijuana on the premises, how could the government justify punishing the innocent owner under the pecuniary test? Nevertheless, since the Supreme Court's 1974 decision in *Calero-Toledo v. Pearson Yacht Leasing*, forfeiture has largely gone unchecked even in the face of constitutional challenges.[167]

However, in this hypothetical the third-party lessor could assert an Eighth Amendment Excessive Fines argument to prove the government's purpose was to protect its pecuniary interest.[168] A property owner's negligence in approving lessees should not justify the seizure of that property.

Further, this reasoning also extends to entirely separate third-parties. How can the government satisfy the pecuniary purpose test when a trustee brings an innocent owner defense on behalf of secured creditors? The secured creditor likely has no real knowledge of what activities the lessor engages in on the rented property or even who the property was rented to, so they should not be culpable. Thus, since trustees and secured creditors are both "owners" according to the general rules of civil forfeiture and the Bankruptcy Code,[169] the creditors in the bankruptcy proceeding can use the excessive fine argument to prove that the government cannot satisfy the pecuniary purpose test. The trustee should have

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164 *Id.* at 570.

165 *Id.* (describing the purpose of 21 U.S.C. § 881, which is the provision allowing for forfeitures).

166 *Id.*

167 Calero v. Pearson Yacht Leasing Co., 416 U.S. 663, 679 (1974) (holding that forfeiture of an innocent lessor's interest in a yacht, due to the presence of two marijuana cigarettes, did not violate due process).

168 *See* United States v. Ferro, 681 F.3d 1105, 1115 (9th Cir. 2012) (finding that the proper focus of the excessiveness inquiry is the owner affected by the fine, not just the defendant who committed the crime).

169 *See* 11 U.S.C. § 544 (2019); 18 U.S.C. § 983(d)(6)(A) (2018).

the ability to assert the Excessive Fines defense in the bankruptcy forum when parties are litigating the police power exception to the automatic stay.

2. The Public Policy Test

Additionally, the public policy test in *Chapman* was also satisfied because "the government [was] not seeking through the [a]ction to litigate private rights. Instead . . . the government's primary motive . . . [was] to protect the public welfare from the ravages of illegal drugs."[170] Yet, ignoring the private rights of innocent third parties, secured and unsecured creditors, is essentially litigating the private rights. If there is an innocent debtor and innocent creditors, like in the proposed hypothetical, then how can the court justify the government's purpose as weighted heavier than private rights? The reasoning shows why the trustee should be able to assert the innocent owner defense at the time these tests are being conducted by the bankruptcy judge so that the property is never taken out of the estate as an exception to the stay.

3. Additional Interpretations of the Pecuniary Purpose and Public Policy Tests

The *Goff* court, in a case before *Chapman*, noted the importance of the Supreme Court's excessive punishment analysis in *Austin*.[171] The court held that "[t]o the extent that such forfeitures are punitive, they are directed ostensibly against premises and things, but are aimed primarily at particular people who own those premises and things, and who can be made to suffer by taking the property away from them."[172] The court also stated that, when forfeitures are acquisitive, "they are concerned with neither the use of a thing nor the sensibilities of its owner, but are merely an opportunistic grab at value."[173]

Many forfeiture cases exist where the forfeiture can only be described as an intent to punish the debtor or to make money for a government agency and not an exercise of police or regulatory power. The *Goff* court concluded that purely punitive forfeitures are not excepted from the automatic stay under § 362(b)(4).[174] Remedial forfeiture actions would be allowed to proceed under the police power exception, but punitive forfeitures would not be. The *Goff*

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170 *In re Chapman*, 264 B.R. at 570.

171 *See* Goff v. Okla. (*In re* Goff), 159 B.R. 33, 40 (Bankr. N.D. Okla. 1993) (emphasizing the decision in *Austin v. United States* that civil forfeitures are punitive and are subject to the Excessive Fines Clause of the Eighth Amendment).

172 *In re Goff*, 159 B.R. at 40.

173 *Id.*

174 *Id.*

analysis, contrary to *Chapman*, should control where excessive forfeitures cause innocent creditors to suffer from the government seizing property that otherwise would have been property of the estate. Again, this determination should be in the bankruptcy court.

The court in *WinPar Hospitality Chattanooga, LLC*[175] found that a forfeiture action was a police power exception because its purpose was "namely the punishment of a criminal and the deterrence of others who might be like minded" and was so "closely correlated to and dependent on serious criminal activity."[176] This is distinguishable from the case where a forfeiture action is excessive, "grossly disproportionate to the gravity of the offense" and "merely an opportunistic grab at value."

Further, the Court in *Chao v. Hospital Staffing Servivces, Inc*. also gives us additional insight into the "pecuniary interest" and "public policy" tests by explaining that they "are designed to sort out cases in which the government is bringing suit in furtherance of *either* its own or certain private parties' interest in obtaining a pecuniary advantage over other creditors."[177] The Court also followed precedent and refined the "pecuniary interest" test to specifically inquire "whether the action 'would result in a pecuniary advantage to the government vis-a-vis other creditors of the debtor's estate.'"[178] The Court explained that the limitation on the scope of the police power exception follows Congress's intent to not extend the exception for the enforcement of a money judgment:

> Since the assets of the debtor are in the possession and control of the bankruptcy court, and . . . constitute a fund out of which all creditors are entitled to share, enforcement by a governmental unit of a money judgment would give it preferential treatment to the detriment of all other creditors.[179]

With proof that most of the proceeds from a civil forfeiture go directly to the enforcement agencies and help the government pay off debts, allowing an

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[175] Discussed previously in the Jurisdiction section.

[176] Jahn v. United States (*In re* WinPar Hosp. Chattanooga, LLC), 401 B.R. 289, 294 (Bankr. E.D. Tenn. 2009).

[177] Chao v. Hosp. Staffing Servs., Inc., 270 F.3d 374, 389 (6th Cir. 2001) (emphasis added).

[178] *Id*. at 386; *see also In re* Commonwealth Cos., 913 F.2d 518, 523 (8th Cir. 1990) (defining the pecuniary purpose test as whether the "specific acts the government wishes to carry out . . . would result in an economic advantage to the government or its citizens over third parties in relation to the debtor's estate.") (quoting Charter First Mortgage, Inc., 42 Bankr. 380, 382 (Bankr. D. Or. 1984)).

[179] *In re Commonwealth Cos.*, 913 F.2d at 523 (citing S. Rep. No. 989 at 52; H.R. Rep. No. 595 at 343).

exception to the automatic stay would result in a pecuniary advantage to the government "or its citizens" over third parties in the bankruptcy proceeding.[180] If civil forfeiture power continues to be generally unlimited, then creditors need protection from the government's use of the police power exception to gain an advantage in a bankruptcy proceeding.

C. Defenses Recognized in the Civil Forfeiture Forum and How They Should be Used to Defeat the Police Power Exception

The innocent owner defense and the Excessive Fines Clause are both recognized defenses to a civil forfeiture. Both of these defenses are even more relevant in a parallel bankruptcy proceeding. Before discussing the defenses, it is necessary to analyze who would have standing to assert them outside of bankruptcy. This will help to understand why asserting them in the civil forfeiture forum is less favorable to creditors than asserting them in the automatic stay analysis.

1. Standing to Challenge the Forfeiture Outside of the Bankruptcy Proceeding

It is essential to consider who has standing to challenge a civil forfeiture action in the non-bankruptcy forum because a party in the bankruptcy proceeding may only challenge a seizure in the forfeiture proceeding if it has standing to do so in that court.

a. Unsecured Creditors

A claimant to property in an *in rem* civil forfeiture action bears the burden of establishing it has standing to assert his claim.[181] Generally, showing standing only requires the claimant to follow procedures for asserting its claim and alleging a "facially colorable interest" in the property.[182]

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[180] *See id.* (defining the pecuniary purpose test as whether the "specific acts the government wishes to carry out . . . would result in an economic advantage to the government or its citizens over third parties in relation to the debtor's estate.") (quoting Charter First Mortgage, Inc., 42 Bankr. 380, 382 (Bankr. D. Or. 1984)).

[181] Hon. Steven Rhodes, *The Battle Over Forfeited Assets When a Bankruptcy Case Is Pending*, THE PONZI BOOK: A LEGAL RESOURCE FOR UNRAVELING PONZI SCHEMES 9 (Kathy Bazoian Phelps & Hon. Steven Rhodes, 2012); *see, e.g.*, United States v. $148,840.00 in U.S. Currency, 521 F.3d 1268, 1273 (10th Cir. 2008).

[182] *See also* United States v. 2004 Ferrari 360 Modeno, 902 F. Supp. 2d 944, 951 (S.D. Tex. 2012) (citing U.S. States v. $9,041,598.68, 163 F.3d 238, 245 (5th Cir. 1998)). *See generally* Rhodes, *supra* note 181, at 10.

Unsecured creditors specifically do not have standing to contest a civil forfeiture. [183] In contrast, Article III standing simply requires an actual case or controversy,[184] and statutory standing just requires meeting the statutory requirements. [185] The rule is premised on the idea that unsecured creditors cannot assert an interest in any specific asset and therefore do not have a recognizable interest in the property involved in the proceeding.[186] Courts insist that the definition of "owner" under the innocent owner defense has nothing to do with the standing inquiry.[187] However, at the same time, Congress specifically did not list unsecured creditors as an "owner" for the innocent owner defense under the general rules for civil forfeiture proceedings.[188] Courts cite to Congress's intent to not allow unsecured creditors an innocent owner defense under 18 U.S.C. § 983(d) as the reason for denying them standing to challenge the civil forfeiture.[189]

b. Trustees and Secured Creditors

Trustees and secured creditors are different than unsecured creditors. Courts repeatedly suggests that Article III standing to challenge a forfeiture or having a facially colorable interest is not difficult to achieve.[190] Statutory standing simply requires following the steps in 18 U.S.C. § 983(a)(2) and Rule G(5)(a), it has nothing to do with what constitutes an owner according to § 983(d).[191] However, the fact that a trustee and secured creditor are owners under § 983(d) furthers the

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[183] *See, e.g.*, United States v. 6124 Mary Lane Drive, 2008 U.S. Dist. LEXIS 64073, at * 8 (W.D.N.C. Aug. 20, 2008) (finding that "Congress has precluded application of the criminal forfeiture holding . . . that in some circumstances a general unsecured creditor may have a legal ownership interest in specific property" from civil forfeiture proceedings); *see Modeno*, 902 F. Supp. 2d at 954; *see also* United States v. $47,875.00 in U.S. Currency, 746 F.2d 291, 293 (5th Cir. 1984).

[184] Rhodes, *supra* note 181, at 10.

[185] *See, e.g.*, *Mary Lane Drive*, 2008 U.S. Dist. LEXIS 64073, at * 8 (finding that "Congress has precluded application of the criminal forfeiture holding . . . that in some circumstances a general unsecured creditor may have a legal ownership interest in specific property" from civil forfeiture proceedings); *see Modeno*, 902 F. Supp. 2d at 954; *see also $47,875.00*, 746 F.2d at 293.

[186] *See Modeno*, 902 F. Supp. 2d at 954.

[187] Rhodes, *supra* note 181, at 11–12 (citing United States v. Assets Described in "Attachment A" to the Verified Complaint Forfeiture in Rem, 799 F. Supp. 2d 1319, 1327 (M.D. Fla. 2011)).

[188] *See* 18 U.S.C. § 983(d)(6)(B)(i) (2018).

[189] *See, e.g.*, United States v. One Hundred Thirty-Three U.S. Postal Serv. Money Orders Totaling $127,479.24, 780, F. Supp. 2d 1084, 1094 (D. Haw. 2011); *see Modeno*, 902 F. Supp. 2d at 954 (S.D. Tex. 2012) ("Under section 983, an unsecured general creditor does not have standing to contest forfeiture.") (citing 18 U.S.C. § 983(d)(2)(A) (2018) (describing who constitutes an owner for the purposes of the innocent owner defense)).

[190] *See, e.g.*, *U.S. Postal Serv. Money Orders*, 780 F. Supp. 2d at 1094; United States v. Assets Described in "Attachment A" to the Verified Complaint Forfeiture In Rem, 799 F. Supp. 2d 1319 (M.D. Fla. 2011).

[191] Rhodes, *supra* note 181, at 12 (citing United States v. Assets Described in "Attachment A" to the Verified Complaint Forfeiture in Rem, 799 F. Supp. 2d 1319 (M.D. Fla. 2011)).

argument that they both have a "facially colorable interest," and therefore have Article III standing. "Owner" includes someone with an "ownership interest in the specific property sought to be forfeited, including a leasehold, lien, mortgage, recorded security interest, or valid assignment of an ownership interest . . . ."[192] Additionally, § 544 of the Code states that the trustee in a bankruptcy proceeding acts as a lien creditor and as a bona fide purchaser of real property of the debtor.[193] Therefore, trustees and secured creditors are owners within the general terms of civil forfeiture proceedings. An owner has an interest in the property, and therefore satisfies Article III standing.

It makes sense that both trustees and secured creditors would likely have standing to challenge a forfeiture, as they have an actual interest in the property. However, barring unsecured creditors from challenging the forfeiture can be unfair. Unsecured creditors are, perhaps, most affected by the forfeiture since their priority will be lower than both the government's and the secured creditor's priority if the forfeiture is allowed. Therefore, the unsecured creditors are the most likely to not get paid when the government profits from a civil forfeiture. Unsecured creditors need the extra procedural protections of a bankruptcy forum to assert potential arguments.

2. Innocent Owner Defense

Due to the fact that civil forfeiture is an *in rem* proceeding brought against "guilty property," the property of the estate in bankruptcy could be subject to forfeiture even if the debtor has not done anything illegal.[194] 18 U.S.C. § 983(d) describes the innocent owner defense for civil forfeiture proceedings.[195]

Through the CAFRA legislation in 2000, Congress made it clear that the innocent owner defense would not defeat the relation-back doctrine unless the third party could satisfy either paragraph (2) or paragraph (3) of Section 983(d).[196] The burden is on the claimant to prove that it satisfies one of these paragraphs as an innocent owner.[197] Paragraph (2) describes property interests that were already in existence at the time the illegal conduct giving rise to the

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192 18 U.S.C. § 983(d)(6)(A) (2018).

193 11 U.S.C. § 544 (a)(3) (2019).

194 Sheinfeld, *supra* note 64, at 112.

195 18 U.S.C. § 983(d).

196 *See* United States v. 6124 Mary Lane Drive, No. 3:03CV580, 2008 U.S. Dist. LEXIS 57172, at *6–7 (W.D.N.C. July 29, 2008).

197 *See* 18 U.S.C. § 983(d)(1).

forfeiture occurred, while paragraph (3) allows for an innocent owner defense for a property interest acquired after the illegal conduct occurred.[198]

The requirements if the owner had an interest in the property before the illegal activity are that the owner "(i) did not know of the conduct giving rise to forfeiture; or (ii) upon learning of the conduct giving rise to the forfeiture, did all that reasonably could be expected under the circumstances to terminate such use of the property."[199]

The requirements if the owner acquired a property interest after the conduct giving rise to the forfeiture occurred are that the owner "(i) was a bona fide purchaser or seller for value (including a purchaser or seller of goods or services for value); and (ii) did not know and was reasonably without cause to believe that the property was subject to forfeiture."[200] The statute therefore overrules the Court in *Buena Vista* by requiring the "innocent owner" be a bona fide purchaser if the property interest was acquired after the illegal act took place.

The innocent owner defense is relevant to bankruptcy law because, as previously mentioned, Section 544 of the Code states that the trustee in a bankruptcy proceeding acts as a lien creditor and as a bona fide purchaser.[201] Also, 18 U.S.C. § 983(d)(6) states that the term "owner" includes "a person with an ownership interest in the specific property sought to be forfeited, including a leasehold, lien, mortgage, recorded security interest, or valid assignment of an ownership interest . . . ."[202] However, the term "owner" does not include "a person with only a general unsecured interest in, or claim against, the property or estate of another . . . ."[203] Consequently, assuming unsecured creditors would have standing, they are not able to assert an innocent owner defense in a civil forfeiture proceeding because they are not considered "owners" under the relevant statute. Unsecured creditors need the procedural protections of the bankruptcy code in order to have their interests protected.

Courts have made it clear that creditors and trustees may not challenge criminal forfeiture proceedings except when in the context of ancillary proceedings.[204] 21 U.S.C. § 853(n)(2) describes ancillary proceedings:

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198 *See* § 983(d)(2)–(3).

199 § 983(d)(2).

200 § 983(d)(3).

201 *See* Rhodes, *supra* note 181; *see also* 11 U.S.C. § 544 (2019).

202 18 U.S.C. § 983(d)(6)(A) (2018).

203 *See* § 983(d)(6)(B).

204 *See, e.g.*, United States v. Lazarenko, 476 F.3d 642, 648 (9th Cir. 2007); Alice W. Dery, *Interplay between Forfeiture and Bankruptcy*, 66 U.S. ATT'YS BULL. 117, 121–22 (2018) (citing United States v. Cambio

> Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.[205]

However, civil forfeiture does not have that limitation.[206] The property is the defendant in an *in rem* case. So, the court with jurisdiction over the property becomes the exclusive forum for litigating any rights to the property. A problem does arise under 18 U.S.C. § 981(b)(4)(C) because it provides that the taken property shall be deemed to be in the custody of the government until the district court decides otherwise.[207] That could mean a third party would have to assert their interest in the property to the district court. Therefore, Congress should take action to ensure that, while the legitimacy of the forfeiture is being determined, trustees and creditors can assert their defenses to the post-petition forfeiture in the bankruptcy proceeding.

Additionally, it is important for the trustee and creditors that the forfeiture be a civil forfeiture if the conduct giving rise to the forfeiture occurred before the trustee or creditors established their interest in the property. It is important because the innocent owner defense statute for a civil forfeiture, unlike a criminal forfeiture, does not require that the owner acquired the property for value if the conduct giving rise to the forfeiture occurred after the third party established its interest.[208]

The problem with the innocent owner defense is that a claimant's innocence may not defeat a civil forfeiture action because the action is against the property and thus the property is deemed guilty.[209] The theory that the owner may be held accountable for the wrongs of who he trusts with his property is often used to deny the innocent owner defense.[210] The theory suggests that forfeiture is the owner's punishment for negligently allowing the misuse of his property.[211]

Exacto, S.A., 166 F.3d 522 (2d Cir. 1999)).

205 18 U.S.C. § 853(n)(2).

206 *See generally* Dery, *supra* note 204, at 117.

207 § 981(c) ("Property taken or detained under this section shall not be repleviable, but shall be deemed to be in the custody of the Attorney General [or] the Secretary of the Treasury . . . subject only to the orders and decrees of the court or the official having jurisdiction thereof.").

208 *See* Dery, *supra* note 204, at 117, 120.

209 *See* Linscott, *supra* note 73, at 623.

210 *See* Austin v. United States, 509 U.S. 602, 617 (1993).

211 *Austin*, 509 U.S. at 615.

Given the difficulty of the innocent owner defense, the Excessive Fines argument is an important alternative.

3. Excessive Fines Clause

A property owner can use an Excessive Fines argument to avoid the forfeiture. The amendments to civil forfeiture law under CAFRA incorporate guidelines to review a forfeiture for proportionality.[212] 18 U.S.C. § 983(g)(1) states that a claimant may petition the court "to determine whether the forfeiture was constitutionally excessive."[213] If the forfeiture is not proportional to the "gravity of the offense," then the court shall either reduce or eliminate the forfeiture.[214]

a. Determining the Test for Whether a Forfeiture Is "Excessive"

The Eighth Amendment to the United States Constitution states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[215] The Excessive Fines Clause has been interpreted to mean that excessive fines shall not be imposed.[216] *Austin v. United States* was one of the first cases to limit forfeiture under the Eighth Amendment.[217] In *Austin*, the Supreme Court held that civil forfeitures are a form of punishment and subject to the Excessive Fines Clause.[218] The Court reasoned that "even assuming that [civil forfeiture statutes] serve some remedial purpose . . . '[A] civil sanction that cannot fairly be said *solely* to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term.'"[219] However, the Court left the test for determining whether a forfeiture is constitutionally "excessive" for consideration in the lower courts.[220] After the *Austin* decision, the lower courts developed three different tests to determine whether a forfeiture

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[212] United States v. Ferro, 681 F.3d 1105, 1112–13 (9th Cir. 2012).

[213] 18 U.S.C. § 983(g)(1) (2018).

[214] §§ 983(g)(2)–(4).

[215] U.S. CONST. amend. VIII.

[216] Timbs v. Indiana, 139 S. Ct. 682, 687 (2019); Melissa A. Rolland, *Forfeiture Law, the Eight Amendment's Excessive Fines Clause and Unites States v. Bajakajian*, 74 Notre Dame L. Rev. 1371, 1383 (1999).

[217] Austin v. United States, 509 U.S. 602, 628 (1993); Rolland, *supra* note 216, at 1383.

[218] *See Austin*, 509 U.S. at 622.

[219] *Id.* at 621 (quoting United States v. Halper, 490 U.S. 435, 448–450 (1989))

[220] *Id.* at 622–23.

is an excessive fine: (1) the instrumentality test; (2) the proportionality test; and (3) a hybrid test.[221]

First, the instrumentality test states that "the property forfeited must have a close enough relationship to the crime that the property is deemed an instrumentality of the crime . . . ."[222] However, the majority in *Austin* did not entirely agree with Scalia's instrumentality test by not limiting the lower courts to that single factor.[223]

Second, the proportionality test looks at: (1) the gravity of the offense in comparison to the harshness of the punishment; (2) the punishment imposed compared to the punishment for other crimes of a similar gravity; and (3) the punishment given compared to the punishment for the same crime in other jurisdictions.[224]

Lastly, the hybrid test looks at both the relationship of the property to the crime and the gravity of the offense in comparison to the harshness of the forfeiture.[225] The hybrid test, which was applied by the Ninth Circuit, was reviewed by the Supreme Court of the United States in *United States v. Bajakajian*.[226] The Supreme Court held that the instrumentality portion of the hybrid test was not necessary because the forfeiture was a fine where the government sought to punish the individual.[227] Therefore, the test for excessiveness of a punitive forfeiture only involves a proportionality determination.[228] The Court held in *Bajakajian* that a punitive forfeiture violates the Excessive Fines Clause "if it is grossly disproportional to the gravity of a defendant's offense."[229] The Court cited to *Austin* to determine the appropriate test is the proportionality test, indicating that the test for a "punitive" forfeiture still applies to both civil and criminal forfeitures.[230]

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[221] Rolland, *supra* note 216, at 1385.

[222] *Id.*; *see Austin*, 509 U.S. at 627 (Scalia, J., concurring) ("The question is not how much the confiscated property is worth, but whether the confiscated property has a close enough relationship to the offense.").

[223] Melissa A. Rolland, *Forfeiture Law, the Eighth Amendment's Excessive Fines Clause and Unites States v. Bajakajian*, 74 Notre Dame L. Rev. 1371, 1385 (1999).

[224] *Id.* at 1386; *see* Solem v. Helm, 463 U.S. 277, 278 (1983*)*; *see also* Harmelin v. Michigan, 501 U.S. 957, 1001 (1991).

[225] Melissa A. Rolland, *Forfeiture Law, the Eighth Amendment's Excessive Fines Clause and Unites States v. Bajakajian*, 74 Notre Dame L. Rev. 1371, 1388 (1999); *see* United States v. 6380 Little Canyon Rd., 59 F.3d 974, 983 (9th Cir. 1995).

[226] United States v. Bajakajian, 524 U.S. 321, 326 (1998) (forfeiture case where the respondent failed to report that he was attempting to leave the United States with more than $10,000 in cash on him).

[227] *Id.* 333–34.

[228] *Id.* at 334.

[229] *Id.*

[230] *Id.*; *see* Austin v. United States, 509 U.S. 602, 621–22 (1993); *see also* Alexander v. United States, 509

Finally, in *Bajakajian*, the Court analyzed the level of the respondent's culpability and the harm that the respondent caused in determining that the forfeiture was excessive and "grossly disproportional" to the offense.[231] Thus, the decision from the Supreme Court in *Bajakajian* clarified that the instrumentality and hybrid tests were not necessary as the proportionality test was the proper inquiry when determining whether a forfeiture is excessive.

The majority of courts have interpreted the Supreme Court's decision in *Bajakajian* narrowly to mean that, "as long as a penalty is not grossly disproportionate in relation to its associated offense, it is not barred by the Eighth Amendment."[232] These courts have all devised a similar set of factors for determining what "grossly disproportional means."[233] The set of factors includes: (1) the essence of the crime of the defendant and its relation to other criminal activity; (2) whether the defendant fits into the class of persons for whom the statute was principally designed; (3) the maximum sentence and fine that could have been imposed; and (4) the nature of the harm caused by the defendant's conduct.[234] However, the Court in *Bajakajian* did not mandate the consideration of any rigid set of factors.[235]

Therefore, other courts, such as the First Circuit, have required courts to consider an additional factor: whether the fine or forfeiture would be so severe as to destroy a defendant's livelihood.[236] There are three main arguments that support considering ability, or inability, to pay as an additional factor. First, the Supreme Court in *Bajakajian* found that the forfeiture was grossly disproportionate to the gravity of the offense because the government seized such a large amount of money for the minor offense of not reporting the money.[237] Therefore, the Court did not need to analyze any other factors such as the defendant's income or livelihood. Second, the defendant's financial ability is considered in other parts of the Eighth Amendment, such as the Excessive

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U.S. 544, 559 (1993).

[231] *Bajakajian*, 524 U.S. at 337.

[232] Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 HASTINGS CONST. L.Q. 833, 834 (2013).

[233] United States v. Castello, 611 F.3d 116, 120 (2d Cir. 2010).

[234] *Id.* ("Four factors, distilled from *Bajakajian*, guide our analysis . . . . To see how these factors work, it is useful to consider the Supreme Court's approach in *Bajakajian*."); United States v. Varrone, 554 F.3d 327, 331 (2d Cir. 2009).

[235] United States v. Mackby, 339 F.3d 1013, 1016 (9th Cir. 2003) ("*Bajakajian* does not mandate the consideration of any rigid set of factors . . . . We have, nevertheless, looked to factors similar to those used by the Court in *Bajakajian* in our Excessive Fines Clause cases.").

[236] *Id.*; *see also* United States v. Levesque, 546 F.3d 78, 83 (1st Cir. 2008).

[237] United States v. Bajakajian, 524 U.S. 321, 337–39 (1998); *see* McLean, *supra* note 232, at 852.

Bail Clause.[238] Third, considering a defendant's livelihood in the excessiveness analysis is consistent with the historical analysis of the Excessive Fines Clause.[239]

In *Timbs*, the Supreme Court also provided support for the new inability to pay factor.[240] The fact that a defendant's livelihood is often an important factor in determining the excessiveness of a forfeiture provides additional support for determining the legitimacy of the forfeiture in the bankruptcy forum, before property is taken from the estate as an exception to the automatic stay.[241] This is because a bankruptcy judge, in an ongoing bankruptcy proceeding, would have the most knowledge about the defendant-debtor's livelihood.[242] This argument could ultimately serve as a defense raised by trustees or creditors.[243]

b. Importance of "Ability to Pay" as an Additional Factor

If "ability to pay" is recognized as an additional factor in the test for excessiveness, then a debtor who has filed bankruptcy, or even a secured creditor who is relying on their repayment in the bankruptcy proceeding, is more likely to have the fine declared unconstitutional under the Eighth Amendment.

The other factors from the proportionality test are also helpful to many excessive fine arguments in a parallel bankruptcy and forfeiture proceeding. One of the goals of bankruptcy is to give the debtor a fresh start and to repay creditors, and the test for whether a forfeiture is excessive is if it is "grossly disproportionate" to the gravity of the offense. Considering those two concepts together, it is reasonable to conclude that it is grossly disproportionate to interfere with the debtor's fresh start and set them back further while also making it harder for creditors to receive payment. This is especially true when the "offense" is as simple as forgetting five bullets in your center console or owning a restaurant that only accepts cash.[244]

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238 McLean, *supra* note 232, at 852.

239 *Id.*

240 Timbs v. Indiana, 139 S. Ct. 682, 688 (2019) (quoting 4 W. Blackstone, *Commentaries on the Laws of England* 372 (1769)) ("[N]o man shall have a larger amercement imposed upon him, than his circumstances or personal estate will bear . . . .")).

241 *Id.*

242 *Id.*

243 *Id.*

244 *See generally Eagle Pass Forfeiture*, INST. FOR JUSTICE (2017), https://ij.org/case/eagle-pass-civil-forfeiture/ (discussing case where Kentucky resident drove his nearly brand-new truck across the border into Mexico to visit his cousin, but he forgot he had five bullets from a registered and lawful gun in the center console. Agents kept his truck through civil forfeiture because it was used to transport "munitions of war"); *Iowa Forfeiture*, INST. FOR JUSTICE (2014), https://ij.org/case/iowa-forfeiture/ (discussing case where restaurant

There is hardly, if any, a level of culpability or harm to society from these types of civil forfeitures. Yet, the people in these situations, especially if they are debtors who have declared bankruptcy, may not be able to afford bringing suit against the government to get their property. Civil forfeiture also punishes creditors who were dependent upon these debtors and have done nothing wrong to deserve the punishment. Therefore, the creditors or the trustee may want to bring the suit using their own interest in the property as standing to assert the excessive fine defense. However, unsecured creditors will not have a way to bring the suit to recover the property in order to be paid. Therefore, it is important that parties are able to assert the defense in the bankruptcy forum when determining whether the automatic stay applies.

c. The Creditor Is the Proper Focus in the Excessiveness Inquiry

When thinking about "ability to pay" as a factor in the excessive fine analysis, it is helpful that the debtor has filed for bankruptcy. However, when considering culpability, a secured creditor is technically an owner of the property, but most likely has no culpability in the crime committed. The question then becomes, who is the proper focus of the excessiveness inquiry? This inquiry is furthered by the Constitution's requirement to consider the people who the fine is meant to punish.[245]

In *United States v. Ferro*, the Court of Appeals for the Ninth Circuit corrected the district court's excessive fines analysis.[246] The Court considered both an innocent owner defense and an excessiveness inquiry. In 1992, Robert Ferro transferred ownership of "all of his property and possessions" to his wife Maria Ferro.[247] After the transfer, Robert was convicted of a felony for possessing explosives.[248] Robert was informed that he would not be able to legally possess firearms after his conviction was final, but he lied and told his wife that it was perfectly legal for him to still possess the firearms after his conviction.[249] In 2006, over a decade later, agents searched the Ferro's home and seized over 700 firearms, a vast majority of which, Maria did not know about.[250] The government then filed civil forfeiture action over all of the firearms seized

owner only accepted cash, meaning she made frequent trips to the bank to keep the money safe, government seized her entire bank account claiming she was "structuring" her deposits to be less than $10,000).

245 *See* United States v. Ferro, 681 F.3d 1105, 1117 (9th Cir. 2012).

246 *Id.* at 1114–15.

247 *Id.* at 1107.

248 *Id.*

249 *Id.* at 1108.

250 *Id.*

because they were illegally in the possession of a convicted felon.[251] The firearms seized were very valuable and rare: "Some of the firearms are gold-plated; others are early twentieth-century rarities; several are valued at $10,000 or more."[252]

Ferro's wife, Maria, asserted an innocent owner defense and excessive fine argument. The court denied her innocent owner defense explaining that she was not innocent simply because she did not know it was illegal for her husband to be in possession of the firearms. However, in its excessiveness inquiry, the Ninth Circuit made it clear that the district court erred when it focused solely on Robert's conduct.[253] The Court explained that the excessiveness test is not simply whether the punishment is proportional to the crime that led to the forfeiture since "nothing in *Bajakajian* directs a court to ignore the culpability of the owner and focus solely on whether the fine is excessive given the conduct that subjected the property to forfeiture . . . ."[254]

Maria was the owner of the firearms and was not charged with any crime, so the court stated that her culpability must be considered in the excessiveness analysis.[255] *Bajakajian* was silent on the proper focus of the excessiveness inquiry, but courts following the Supreme Court decision held that individual culpability of the claimant, or the person actually punished by the fine, must be considered when determining whether the forfeiture was an excessive fine.[256] The government argued that 18 U.S.C. § 983(g)(3) requires the court to "compare the forfeiture to the gravity of the offense giving rise to the forfeiture,"[257] but the court denied the statutory argument and stated that the Eighth Amendment requires consideration of the culpability of the property's owner.[258]

Combining the definition of "owner" in the statutory innocent owner defense, which includes the trustee and secured creditors, with the reasoning in *Ferro*, supports the conclusion that a trustee or creditor's culpability should be

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[251] *Id.*

[252] *Id.*

[253] *Id.* at 1115 ("the caselaw in our circuit was clear that the excessiveness inquiry must focus, at least in part, on the culpability of the owner.") (internal quotations omitted).

[254] *Id.*

[255] *Id.*

[256] *Id.* at 1116 (citing von Hofe v. United States, 492 F.3d 175, 178–79 (2d Cir. 2007) (holding that the extent of the forfeiture bears no correlation either with Mrs. von Hofe's minimal culpability or any harm she purportedly caused because the Excessive Fines Clause precludes forfeiture of her entire one-half interest in 32 Medley Lane)).

[257] *Id.* at 1116–17 (citing 18 U.S.C. § 983(g)(3) (2018)).

[258] *Id.* at 1117.

assessed when conducting the Eighth Amendment Excessive Fine analysis. The creditors in the bankruptcy proceeding are the claimants actually punished by the fine when property is taken from the estate through forfeiture, so their lack of culpability should be considered.

If the culpability of creditors is considered when determining whether the forfeiture is excessive, then the forfeiture will likely be found to be excessive as to the creditors. Therefore, the forfeiture cannot pass the pecuniary purpose and public policy tests. Thus, the police power exception to the automatic stay should not apply and the creditors should be protected from the debtor's wrongdoings as Congress originally intended.[259]

CONCLUSION

Government entities increasingly have begun to seek forfeiture more pervasively and broadly. The forfeitures can be a significant amount of money, highly valuable personal items, or even an entire business. Arguably, the government has not seized property as a punishment or to recover costs, but to profit and pay off debt.[260] Viewing civil forfeitures as a "gold mine" or "pennies from heaven" should not go unchecked.[261] Public policy favors the creditors and innocent parties with interests in the property that deserve to be paid their share of the debtor's assets.

Additionally, the Code also favors creditors, both secured and unsecured, as Section 726 provides that forfeiture claims are relegated to fourth priority.[262] "[Forfeiture claims] are to be treated as inferior and subordinate to the claims of the unsecured creditors . . . The intent of Congress was that unsecured creditors should be protected from 'the debtor's wrongdoing.'"[263]

In the cases where the forfeiture is excessive, as it often is, the bankruptcy forum has a strong interest in its jurisdiction over the property. Therefore, creditors and trustees should assert the possible constitutional defenses to the

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[259] 11 U.S.C. § 726(a)(4) (2019) ("fourth, in payment of any allowed claim, whether secured or unsecured, for any fine, penalty, or forfeiture, or for multiple, exemplary, or punitive damages, arising before the earlier of the order for relief or the appointment of a trustee, to the extent that such fine, penalty, forfeiture, or damages are not compensation for actual pecuniary loss suffered by the holder of such claim."); *see* Sachs v. Ryan (*In re* Ryan), 15 B.R. 514, 520 (Bankr. D. Md. 1981).

[260] Carpenter, *supra* note 27 (surveying state laws).

[261] *Id.* (quoting former Las Cruces, N.M., city attorney Harry S. "Pete" Connelly, Jr. and Columbia, Mo., police chief Kenneth M. Burton).

[262] § 726(a)(4).

[263] *In re Ryan*, 15 B.R. at 520.

civil forfeiture in bankruptcy court to determine if the forfeiture is legitimate and if it should be exempt from the automatic stay. The innocent owner defense can defeat the relation-back doctrine, which would mean that the property was in fact part of the property of the estate. Also, the excessive fine argument can determine that the forfeiture is punitive, and that the police power exception does not apply. This means that the forfeiture action is stayed and proceeds are distributed according to the order of distribution defined in the Code.

Despite all of the support for limiting civil forfeiture, its power in the courts remains mostly unrestrained. Congress should provide clear direction to protect innocent owners, or third parties such as trustees and creditors. The bankruptcy court should retain jurisdiction over the property at issue to determine if the forfeiture is even legitimate, and thus whether the property should be taken from the property of estate at all. If the forfeiture is excessive and does not pass the pecuniary purpose or public policy test, then it is not a police power exception to the automatic stay.

Further, if the civil forfeiture is determined to be legitimate and the creditor's lack of culpability is not considered, the government still should not have the ability to disregard innocent creditors' ownership rights in the property without just compensation. Therefore, the Attorney General should at least be held accountable with the bankruptcy court and forced to work with the trustee when distributing the proceeds of the forfeiture. Since the Supreme Court recently recognized the need to limit civil forfeiture's power generally, its power should also be limited to protect innocent creditors.

BRITTANY TEMPLE*

* Notes and Comments Editor, *Emory Bankruptcy Developments Journal*; J.D. Candidate, Emory University School of Law (2020); B.A., *magna cum laude*, Coastal Carolina University (2016). Recipient of the 2019 Keith J. Shapiro Award for Excellence in Consumer Bankruptcy Writing. First, I would like to thank my faculty advisor, Professor Morgan Cloud, for his invaluable assistance in developing my Comment. I would also like to thank the staff members and editors of the *Emory Bankruptcy Developments Journal* for their work in preparing my Comment for publication. Finally, I would like to thank my parents, Robert and Michele Temple, for their love, support, and encouragement throughout all of my endeavors.