

## Money Judgments in Criminal Forfeiture

By Gary Stein  
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The Second Circuit has just become the latest Court of Appeals to uphold the imposition of money judgments in criminal forfeiture orders. The court sustained forfeiture money judgments of \$10 million and \$4.6 million against two indigent defendants, holding that the criminal forfeiture statutes permit “imposition of a money judgment on a defendant who possesses no assets at the time of sentencing.” *United States v. Awad*, 598 F.3d 76, 78 (2d Cir. 2010). While *Awad* was a drug case, white-collar sentences also commonly include forfeiture money judgments, as shown by the giant judgments against Bernie Madoff (\$170 billion) and Marc Dreier (\$746 million).

The ruling in *Awad* quelled a mini-rebellion in the making. Last Summer, Judge John Gleeson of the Eastern District of New York held that the criminal forfeiture statutes do not authorize courts to issue money judgments. *United States v. Surgent*, No. 04-CR-364 (JG) (SMG), 2009 WL 2525137 (E.D.N.Y. Aug. 17, 2009). The government did not appeal in *Surgent*, and defense lawyers in the Second Circuit began pressing other judges to follow Judge Gleeson’s lead. Faced with a similar is-

sue in *Awad*, the Second Circuit ordered supplemental briefing, citing *Surgent*, and then, in a footnote in its opinion, rejected Judge Gleeson’s analysis as “thorough” but ultimately “unpersuasive.”

### A MISSED OPPORTUNITY

*Awad* represents a missed opportunity. The true import of the forfeiture money judgment is to allow the government to seize and forfeit assets legitimately earned or acquired by the defendant after the criminal case is over and the defendant has been released from prison. Application of the forfeiture statutes to after-acquired assets — which are themselves not tainted and bear no relationship to the defendant’s wrongdoing — is deeply problematic from several standpoints: the statutory text, legislative history and purpose, sound penology, and simple fairness. Neither *Awad* nor the decisions of other circuits that preceded it have seriously grappled with these issues.

### THE RULING IN *SURGENT*

In *Surgent*, Judge Gleeson relied primarily on a textual argument that the main criminal forfeiture statutes — 18 U.S.C. § 982 and 21 U.S.C. § 853 — “do not mention money judgments at all.” In particular, he relied on the contrast between them and 31 U.S.C. § 5332(b), which explicitly authorizes imposition of a “personal money judgment” in cash smuggling cases.

But equally important in considering whether 18 U.S.C. § 982 and 21 U.S.C. § 853 can be applied to a defendant’s future assets is the fact that the statutory language unambiguously looks only to the defendant’s previously acquired as-

sets. The sections speak of forfeiting property “involved in” the defendant’s offense, property that constitutes “the proceeds of” the offense, and property “used to commit” or “facilitate the commission of” the offense — what has been called “offense property.” Offense property obviously does not include a defendant’s assets acquired after the commission of the offense.

The statutes also authorize forfeiture of so-called “substitute property” where the offense property is no longer available as a result of an act or omission of the defendant. In such cases, the court must, at sentencing, order forfeiture of “any other property of the defendant,” up to the value of the offense property. 21 U.S.C. § 853(p). The plain meaning of the phrase “property of the defendant” is the defendant’s property owned at the time of sentencing. To describe future assets, which the defendant does not yet own or possess, as property “of” the defendant strains the statutory text beyond recognition.

### THE PURPOSE OF FORFEITURE

The legislative history of § 853(p) confirms this reading. It is bereft of any suggestion that Congress anticipated that after-acquired assets could be substituted for offense property. Instead, it shows that Congress had only the defendant’s current assets in mind. As the legislation’s chief sponsor in the House explained, the purpose of the substitute assets provision was to enable the government to “go after a similar amount of *other assets they might have* in which they have hidden their previous ones . . . . Why should we allow them to *keep* these

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assets merely because they were smart enough to hire some good attorneys and some good accountants?" 132 Cong. Rec. H6679-02 (statement of Rep. Lungren) (emphasis added).

Indeed, the very concept of "forfeiture" sits uneasily astride property legitimately earned or acquired after the defendant's criminal case is over. "The purpose of forfeiture is to remove property facilitating crime or property produced by crime — all of which is tainted by the illegal activity." *United States v. Keeling*, 235 F.3d 533, 537 (10th Cir. 2000); *United States v. McHan*, 101 F.3d 1027, 1042 (4th Cir. 1996). After-acquired assets are by definition not "tainted." Nor — unlike substitute assets — do they bear any factual, logical or temporal connection to the tainted property.

Forfeiture thus stands in stark contrast to other criminal financial penalties. In the case of both fines and restitution, the statutory text as well as the settled understanding make clear that these are financial obligations that the defendant may be required to satisfy with after-acquired assets. Indeed, federal law expressly requires the court, when imposing a fine or an award of restitution, to consider the defendant's future earning capacity, obligations to dependents, and a range of other factors. *See* 18 U.S.C. §§ 3572(a), 3664(f)(2). When a defendant's existing assets are insufficient to meet the obligation, courts typically impose a payment schedule limited to a fixed percentage of future income. Specific statutory provisions govern and limit the government's ability to enforce a fine or restitution order. *See* 18 U.S.C. §§ 3611-3615, 3664.

No similar statutory apparatus exists for a forfeiture money judgment. The court has no discretion to award anything but the full forfeiture amount. There is no authority for the court to order a payment schedule or to take into account the defendant's family or other factors. In theory, virtually all of a defendant's future income could be immediately seized by the government as it is earned and applied to the judgment. A criminal forfeiture order, moreover, is not dischargeable in bank-

ruptcy. *See* 11 U.S.C. § 523(a)(7); *United States v. Rashid*, 2000 WL 1622761 (E.D. Pa. Oct. 30, 2000). Thus, when a court issues a forfeiture money judgment, it is — without any discernible congressional authorization — inflicting a financial penalty that can "haunt the defendants for the rest of their lives," in the words of *United States v. Croce*, 334 F. Supp. 2d 781, 795 (E.D. Pa. 2004), *rev'd*, 209 Fed. Appx. 208 (3d Cir. 2006).

### UNSOOUND POLICY

Such a result is not only legally problematic, but unsound as a matter of policy. When a defendant is released from prison, he or she should be encouraged to earn a good living and become a productive member of society. A mammoth forfeiture money judgment creates the opposite incentive. When the *Awad* defendants get out of jail, what will they gain by getting legitimate on-the-books jobs, if they'll simply be working for Uncle Sam? What incentive do white-collar defendants have to realize their full earning potential after serving their sentences? Forfeiture seeks to deprive convicts of the benefits and the instrumentalities of their criminal activities, even if that means wiping them out financially. But once that objective has been achieved, courts should be loath — absent an explicit congressional directive — to interpret forfeiture law in such a way as to consign the convict to a lifetime of financial ruin.

The chief argument for forfeiture money judgments was repeated in *Awad*: otherwise, courts have said, an individual involved in a criminal enterprise would rid himself of his ill-gotten gains to avoid the forfeiture sanction. But a forfeiture money judgment is not necessary to address this concern. Under the Alternative Fines Act, the court is already empowered to impose a fine in an amount up to "twice the gross gain." 18 U.S.C. § 3571(d); *see also* 21 U.S.C. § 853(a) (drug sentences); U.S. Sentencing Guidelines § 5E1.2, comment (n.4) (authorizing upward departure on this basis). Further, among the factors the court is required to consider in determining a fine is "the need

to deprive the defendant of illegally obtained gains from the offense." 18 U.S.C. § 3572(a)(5). Such a fine, calibrated in accordance with the relevant factors that are excluded from the forfeiture analysis, would better serve the interests of justice than the blunt instrument of a mandatory forfeiture judgment.

This is especially true because, in many cases, forfeiture has little to do with the defendant's actual "gain" from the offense. In *Awad*, for example, the \$10-million and \$4.6-million judgments represented the defendants' "gross proceeds" from their drug sales, *i.e.*, their total revenues without deducting for the cost of the drugs. The defendants' profits from these sales were likely only a tiny fraction of these sums. In such cases, a forfeiture money judgment will be vastly disproportionate to the objective of ensuring that the defendants return their "ill-gotten gains."

### CONCLUSION

In sum, various circuit courts have created a criminal penalty that was not enacted or intended by Congress, losing sight of the bedrock principle that "the power ... to prescribe the punishments to be imposed upon those found guilty ... resides wholly with the Congress." *Whalen v. United States*, 445 U.S. 684, 689 (1980). The remaining circuits that have not yet definitively addressed this issue (which appear to include the Fourth, Fifth, Sixth, Eighth and Tenth Circuits) — and ultimately the Supreme Court — should rectify this mistake and refuse to recognize the "forfeiture money judgment."

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