

THE INNOCENT OWNER DEFENSE TO REAL PROPERTY FORFEITURE UNDER THE COMPREHENSIVE CRIME CONTROL ACT: DOES KNOWLEDGE EQUAL CONSENT?

I. THE PROBLEM

A. Introduction

In 1984, the Comprehensive Drug Abuse Prevention and Control Act of 1970 was amended to provide for real property forfeiture in the event that the property is found to be used or intended to be used in the furtherance of narcotics transactions.¹ This potent provision, however, carves out an exception to its broad reach, stating that:

no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.²

The phrase "knowledge or consent" has proven unclear. In the process of interpreting this phrase the circuits have split. Some courts have held that an owner must prove *both* lack of knowledge and lack of consent to establish his "innocent" status, while other courts have held that a lack of consent, despite knowledge, can prevent forfeiture under the statute.

The majority view, favored in the Second and Third Circuits, is that knowledge and consent deserve independent consideration in determining an owner's status. The Ninth Circuit, on the other hand, supports the minority view and argues strongly that an owner with knowledge of his property's connection to illegal activity cannot be deemed "innocent."

This article analyzes each side of the debate and determines, in accord with the majority view, that an owner with knowledge should be able to prevent forfeiture by demonstrating a lack of consent. This article also proposes a statutory revision which would clarify that knowledge and consent deserve independent consideration.

B. The Split

Although the innocent owner defense is less than ten years old, it appears that most circuits have either firmly decided the issue or have avoided the question altogether. The split is not likely to simply disappear, and, therefore, needs to be addressed and resolved.

Speaking through the retired Justice Powell, last year the Fourth Circuit set forth a standard for determining consent as it relates to the innocent owner defense.³ This

1. 21 U.S.C. §§ 881-904 (1988 & Supp. IV 1992).

2. 21 U.S.C. § 881(a)(7) (1988).

3. *United States v. 31 Endless St.*, No. 92-1609, 1993 WL 441804 (4th Cir. Nov. 2, 1993) (Reported in Table Case Format at 8 F.3d 321 (4th Cir. 1993)).

standard considers consent separately from knowledge: "Consent, for the purposes of § 881(a)(7), is 'the failure to take all reasonable steps to prevent illicit use of the premises once one acquires knowledge of that use . . .'"⁴ In the Fourth Circuit, not only are the two elements considered distinct, but it is obvious that one who possesses knowledge will not necessarily be found to have consented.

Recently, the Ninth Circuit implicitly affirmed its support of the opposite view. In *United States v. 10936 Oak Run Circle*,⁵ the Ninth Circuit acknowledged that the word "consent" is included in the relevant statute, but, nonetheless, proceeded to base its entire analysis on the owners' knowledge. The court reasoned that "innocence is incompatible with knowledge that puts the owner on notice that he should inquire further."⁶

Still other circuits — the Fifth and Seventh, for example — perhaps feeling unsure where to stand, have refused to take a stance at all.⁷ To make matters worse, even the United States Supreme Court does not appear willing to decide the issue. Just this year it heard a case directly involving the innocent owner defense; yet, it managed to dodge the "knowledge or consent" question.⁸

As long as the split persists, it will promote unfair outcomes and uncertainty. Two identically situated landowners, one in the Third Circuit and one in the Ninth, stand to receive drastically different treatment. Even though it is certainly possible for a landowner to have knowledge of, but not consent to, drug use on her property,⁹ one such landowner might lose all her real property while another is permitted to keep it.

Furthermore, it is also feasible that a Third Circuit landowner who has tried less than diligently (but sufficiently to satisfy the factfinder) to stop narcotics use on his property will receive the benefit of the defense, while a Ninth Circuit owner, who has done everything in his power to remedy the illegalities, will not. Both of these unjust outcomes are accentuated when considered in relation to another problematic question — whether a full parcel, or just that portion of it which was connected to the drug use, can be forfeited. Although this and other controversies surrounding the innocent owner

4. *Id.* at 3.

5. 9 F.3d 74 (9th Cir. 1993).

6. *Id.* at 76.

7. See, e.g., *United States v. Lot 9, Block 2 of Donnybrook Place*, 919 F.2d 994 (5th Cir. 1990); *United States v. 7326 Highway 45 North*, 965 F.2d 311 (7th Cir. 1992).

8. See *United States v. 92 Buena Vista Ave.*, 113 S.Ct. 1126 (1993). In *Buena Vista*, the Court held, *inter alia*, that the innocent owner defense is not limited to bona fide purchasers. Justice Stevens, speaking for the majority, determined that "(t)his Court need not resolve, *inter alia*, the parties' dispute as to the point at which guilty knowledge of the tainted character of property will deprive a party of an innocent owner defense, because respondent has assumed the burden of convincing the trier of fact that she had no knowledge . . ." *Id.* at 1129.

9. Lalit K. Loomba provides two compelling examples:

Consider the example of a landlord who owns property in a city. He knows that drug trafficking is taking place in his building. He does his best to stop the activity: he bolts the doors and calls the police. It would be unfair to disallow such a landlord innocent owner status merely because he knew about the drug dealing. Likewise consider a person whose spouse is selling drugs from their jointly-owned home.[Citation omitted.] The person knows about the drug dealing and tries to convince his or her spouse to discontinue the practice, and perhaps threatens to call the authorities. It would be unfair to deny such a person the chance to attain innocent owner status simply based on their [sic] knowledge of the illegal activity.

Lalit K. Loomba, Note, *The Innocent Owner Defense to Real Property Forfeiture Under the Comprehensive Crime Control Act of 1984*, 58 *FORDHAM L. REV.* 471, 486 (1989).

defense are outside the scope of this article, it is clear enough that the circuit split does not promote the ends of justice.

The split is also pernicious because it creates a general air of uncertainty. In the absence of more definitive authority, residents of the "majority" circuits cannot rest assured that they will have the continuing benefit of the current standard. This might encourage people who are aware of narcotics violations on their property to ignore them in an effort to establish lack of knowledge, rather than admitting that they know about the problem and making a bona fide effort to remedy it. The uncertainty also encourages those circuits which have not committed to one side to remain neutral. Although their position is understandable in the absence of directives from Congress or the Supreme Court, their indecisiveness, when the "knowledge or consent" question is a vital part of a case, does not best serve the interests of the parties before it. Some degree of certainty must be established as to the innocent owner defense to ameliorate such potential problems.

What all of this suggests is that Congress should provide the judiciary with a directive so that the courts may align themselves with the Act's true intent and increase certainty and fair outcomes.

II. THE ARGUMENTS

A. "Consent and Knowledge are Separate Considerations:" The Third Circuit's Approach

The case most often cited as typifying the majority approach is *United States v. 6109 Grubb Rd.*¹⁰ In this case, the defendant's wife sought to demonstrate innocent ownership. The district court found that her failure to prove lack of knowledge precluded her from showing her "innocence" by demonstrating a lack of consent. After an extensive discussion reviewing legislative history, forfeiture law in general, and canons of statutory construction, the Third Circuit adopted the approach used by a New York federal district court.¹¹ Namely, that knowledge and consent are two separate issues. This outcome rested primarily on the "canons" argument by which the *Liberty Avenue* court had reached its decision.

Most courts which have decided whether knowledge and consent should receive separate consideration agree with the result reached in *Grubb Rd.*¹² The *Grubb Rd.* analysis has also garnered a great deal of scholarly support. Several commentators feel that construing knowledge and consent separately is the only sound conclusion as a matter of policy. One commentator has found the "canons" rationale of the *Liberty Avenue* court essentially flawed, feeling that policy alone justifies the outcome.¹³ Oth-

10. 886 F.2d 618 (3rd Cir. 1989).

11. *United States v. 171-02 Liberty Avenue*, 710 F.Supp. 46 (E.D.N.Y. 1989).

12. *See, e.g., United States v. 710 Main Street*, 744 F.Supp. 510 (S.D.N.Y. 1990); *United States v. 755 Forest Road*, 985 F.2d 70 (2d Cir. 1993); *United States v. 14307 Four Lakes Drive*, 1 F.3d 1242 (6th Cir. 1993); *United States v. 60 Acres*, 727 F.Supp. 1414 (N.D. Ala. 1990) ("This court sees no reason why the Eleventh Circuit should not follow the Third Circuit, which, in turn, followed the Eastern District of New York in *171-02 Liberty Avenue* and gave the disjunctive word, 'or,' its ordinary meaning." *Id.* at 1419.).

13. Essentially, Loomba's dispute with the *Liberty Avenue* analysis centers on two points. For one, he opines that "[a] strict logical interpretation of the innocent owner language in § 881(a)(7) requires a different result from that obtained in *Liberty Avenue*." Loomba, *supra* note 9 at 480. Secondly, he feels that the court perhaps erred in its reliance on certain standards of statutory construction. *Id.* at

ers have explored the relation of the problem to the tenancy-by-the-entirety conflict, essentially supporting a separate construction of "knowledge" and "consent."¹⁴ One has concentrated on the special effect the problem poses for indigents.¹⁵ Yet others, in criticizing the real property forfeiture scheme more generally, implicitly support any approach which would minimize unjust forfeitures.¹⁶

B. "Knowledge Equals Consent": The Ninth Circuit's Approach

In *United States v. Lot 111-B Tax Map Key*, 4-4-03-71(4),¹⁷ a landowner who knew of illegal activities occurring on his property attempted to establish his innocent owner defense by showing lack of consent. The Ninth Circuit considered as its primary source the legislative history of the statute, finding that the congressional policy behind it was an "intent . . . to seize all property that has a 'substantial connection' to the illegal drug activity."¹⁸ The court felt that "[t]his policy would be substantially undercut if persons who were fully aware of the illegal connection or source of their property were permitted to reclaim the property as 'innocent' owners."¹⁹ Thus, the court reasoned that "[b]ecause [landowner] Stage knew of the illegal activities, his assertion of lack of consent was of no consequence."²⁰

Commentators have observed that *Tax Map Key's* analysis of the legislative history has merit. For example, Mr. Zajac²¹ has noted that "[a]n examination of § 881(a)(7)'s legislative history finds some support for the posture assumed by the court of appeals."²² Zajac examined quotes from the sparse legislative history, and determined that it is certainly possible to interpret them as leading to the *Tax Map Key* court's outcome. Another commentator agrees that Congress' most direct statement concerning the innocent owner defense²³ "[o]n its face . . . indicates that either

481. He nevertheless concludes that "While property rights must be respected, so must society's right to combat the drug trade. The proposed approach [including, inter alia, the separate consideration of knowledge and consent] balances the interests of property owners with society's interests, which ensures that real property forfeiture will continue to be an effective weapon in the war against drugs. *Id.* at 492.

14. See, e.g., Zajac, *infra* note 22. See also Diana Vondra Carrig, *Criminal Law - Forfeiture - Third Circuit Holds Government is Entitled to Forfeiture of Property Despite One Spouse's Innocent Owner Defense*, 37 VILL. L. REV. 996 (1992). This article does not directly deal with the knowledge-consent dispute, but does arrive at what it considers a "workable solution" between the government's war on drugs and the "innocent owner's" interest in spousal situations. As noted by Zajac and Loomba, the spouse of a drug dealer may be hard put to plead lack of knowledge, but she may indeed not have consented. By advocating protection of such spouses' interest in property, this article appears to indirectly support the establishment of the innocent owner defense by lack of consent alone.

15. See, e.g., Jack Yoskowitz, *The War on the Poor: Civil Forfeiture of Public Housing*, 25 COLUM. J.L. & SOC. PROBS. 567 (1992).

16. See, e.g., Steffanie Stracke, *The Criminal Activity Forfeiture Act: Replete With Constitutional Violations*, 57 MO. L. REV. 909 (1992) and Ron Champoux, *Real Property Forfeiture Under Federal Drug Laws: Does the Punishment Outweigh the Crime?*, 20 HASTINGS CONST. L. QUART. 247 (1992).

17. 902 F.2d 1443 (9th Cir. 1990).

18. *Id.* at 1445 (citing Joint Explanatory Statement of Titles II and III, 95th Cong., 2nd Sess., reprinted in 1978 U.S.C.C.A.N. 9510, 9522-23).

19. *Id.*

20. *Id.*

21. Mr. Eric Zajac is an associate at the Philadelphia law firm of Kosseff & Chaiken.

22. Eric G. Zajac, *Tenancies by the Entirety and Federal Civil Forfeiture Under the Crime Abuse Prevention and Control Act: A Clash of Titans*, 54 U. PITT. L. REV. 553, 569 (1993).

23. Congress stated that "property would not be subject to forfeiture unless the owner of such property knew or consented to the fact" that the property was connected with narcotics activity. Joint Explanatory Statement of Titles II and III to the Psychotropic Substances Act of 1978, 124 Cong. Rec.

knowledge of or consent to the proscribed act would result in forfeiture."²⁴ Significantly, however, a number of legal commentators have concluded that *Tax Map Key* as a policy matter was wrongly decided. In support, they offer several examples of how equating knowledge with consent can result in unconscionable outcomes.²⁵

The vast majority of courts agree, for various reasons, that knowledge and consent should be considered separately. In fact, it appears that only two opinions, one of which is a dissent, support the outcome arrived at by the *Tax Map Key* court.²⁶

III. THE NECESSARY STATUTORY REVISIONS

Since the legislative history is sparse and indefinite, the *Tax Map Key* approach does not rest on a solid foundation. Moreover, as several commentators have cogently demonstrated, it is unsound as a policy matter primarily because it is quite capable of producing unconscionable results. Aside from this consideration, there is the concern, mentioned earlier, that landowners under the *Tax Map Key* approach will try to deny knowledge in order to avoid liability, rather than admitting knowledge and attempting to rectify the situation. Congress could not have meant for the anomalous results that derive from the "knowledge equals consent" rationale.

The majority approach, on the other hand, has not only been accepted by several judges and scholars, but comports better with the ends of justice and fairness. Owners who acquire knowledge before they have a reasonable opportunity to act upon it will not be penalized.²⁷ Likewise, the sensitive situation in which one spouse seeks to persuade another to cease narcotics transactions²⁸ will be treated more fairly and more realistically. It strains the concept of marriage, both as a matter of fairness and of reality, to think that one will immediately "turn in" her spouse before attempting less drastic ways of dealing with the spouse's criminal activity. More generally, it simply seems inimical to one's sense of fairness to penalize a person in such a draconian manner for mere *knowledge* of crime. In short, the majority approach is the superior one, and Congress should amend the statute clearly indicating that knowledge and consent must receive independent consideration.

S17647 (1978).

24. *Loomba*, *supra* note 9 at 484.

25. *See, e.g., Loomba*, *supra* note 9. Zajac offers similar scenarios for consideration:

Forfeiture upon knowledge alone can lead to an unconscionable result if the owner acquires knowledge of illegal use but has no reasonable opportunity to act on it prior to governmental seizure. If, for example, a landlord is informed by a tenant in a multi-unit apartment building that another tenant is selling crack cocaine out of his apartment, and the landlord quickly begins to investigate the allegation, he could see his interest in the building immediately forfeitable upon seizure whether he has had any chance to contact the authorities. A similar result would occur with a wife who finds out for the first time that her husband is selling drugs from the marital home but who has had no real opportunity to act on that knowledge before seizure. The Court of Appeals for the Ninth Circuit did not have to answer these tougher questions when it decided *Tax Map Key*.

Zajac, *supra* note 22 at 571.

26. *See United States v. 6109 Grubb Rd.*, 890 F.2d 659 (3d Cir. 1989) (Greenberg, J., dissenting) and *United States v. Keeton Heights Subdivision*, 869 F.2d 942 (6th Cir. 1989). Judge Greenberg in *Grubb Rd.* based his conclusion not only on the legislative history, but also on canons of statutory construction (which he viewed differently from the majority) and the *in rem* nature of a civil property forfeiture. The *Keeton Heights* court found that a spouse who knew of illegal drug uses of her husband's jointly owned property need not have "specific knowledge of the particular acts" at issue to lose her potential innocent owner status.

27. *See, e.g., Zajac*, *supra* note 25.

28. *Id.*

Zajac has suggested "simply . . . expunging the word 'knowledge' from the statute."²⁹ As he cogently explains, doing so would preclude courts from considering knowledge as an independent basis of forfeiture. He points out that, since one cannot consent to something one does not know about, removing the word "knowledge" would not preclude all consideration of the element. It would simply preclude its consideration on an individual basis, thereby eliminating the problem which has divided the circuits.

The courts, however, have already managed to create confusion out of one seemingly simple phrase - "knowledge or consent". Perhaps the courts need a clearer directive than the simple removal of the word "knowledge" - for example, the insertion of a sentence such as, "Knowledge alone shall not preclude an owner from attempting to establish an innocent owner defense by demonstrating his lack of consent." While not as simple, this revision is perhaps more forceful; it also states on its face that knowledge alone does not nullify the defense. The revision suggested by Zajac might suffice to clarify the question. Considering the current state of affairs, however, one cannot be too sure. The longer revision, although it lacks conciseness, would state the congressional intent more clearly, and it is this revision which should probably be adopted.

Of course either of these two possibilities would result in more certainty than currently exists and would also better serve the ends of justice and equity. It might be next to impossible for a landowner to deny knowledge, but, as one attorney put it, "that's a far different cry from saying that you approve of it, and that you consented with [sic] it, and that you agreed with it, and that you joined it. There's a big difference."³⁰ The attorney was right, and Congress could not have meant to encourage the results that flow from the opposite contention. Congress should, therefore, revise the statute to clarify its intent and enable *all* courts to apply it as it was intended to be applied.

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29. Zajac, *supra* note 22 at 571.

30. *United States v. Sonny Mitchell Center*, 934 F.2d 77, 78-79 (5th Cir. 1991). Incidentally, although the Fifth Circuit claims to have no opinion on the question, it found for the landowners on the issue of consent, and was even willing to apply their lack of consent as to one tract of land to seven *other* tracts. This appears to evince a willingness to allow lack of consent, regardless of knowledge, to establish an owner as "innocent" under the relevant statute.

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