UNDERSTANDING CALIFORNIA CIVIL ASSET FORFEITURE- THE CLAIMANTS' POINT OF VIEW

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PROCEDURE IN CIVIL FORFEITURE PROCEEDINGS

". . . the provisions of the Code of Civil Procedure are applicable to the proceedings in chapter 8 regarding the seizure and disposition of property subject to forfeiture unless otherwise inconsistent with the provisions or procedures in that chapter." H&S §11488.5, subd. (c)(3); see also Jauregi v. Superior Court (1999) 72 CA4th 931, 938. A forfeiture proceeding is a civil action or proceeding. Jauregi, supra. Further, "Except as otherwise provided in this title, the provisions of part two of this code are applicable to and constitute the rules of practice in the proceedings mentioned in this title (Special Proceedings, including Petitions). CCP §1109.

See for instance, People v. $241,600 United States Currency (1998) 67 CA4th 1100, 79 CR2d 588; People v. $48,715 United States Currency (1997) 58 CA4th 1507, 68 CR2d 829; People v. $28,500 United States Currency (1996) 51 CA4th 447, 59 CR2d 239; People v. $4,503 United States Currency (1996) 49 CA4th 1743, 57 CR2d 467.

STATUTORY BACKDROP

First and foremost, in construing forfeiture laws, it must be remembered that "[s]tatutes imposing forfeitures are not favored and are to be strictly construed in favor of the persons against whom they are sought to be imposed." Baca v. Minier (1991) 229 CA3d 1253, 1265, 280 CR 810, 817, citing People v. One 1937 Lincoln etc. Sedan (1945) 26 C2d 736, 738, 160 P.2d 769, and People v. $6,500 U.S. Currency, supra, at 1547; accord, People v. One 1986 Toyota Pickup (1995) 31 CA4th 254, 261-262, 37 CR2d 29;

People v. $28,500 U.S. Currency, supra, at 463-464.

Property/Money Subject to Forfeiture

With certain exceptions, *Health and Safety Code §11740(f)* provides that the following are subject to forfeiture:

> [1)] All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance, [and] all proceeds traceable to such an exchange[;]
> [2)] all moneys, negotiable instruments, or securities used or intended to be used to facilitate any violation of Section 11351, 11351.5, 11352, 11355, 11359, 11360, 11378, 11378.5, 11379, 11379.5, 11379.6, 11380, 11382, or 11383 of [the Health and Safety Code], or Section 182 of the Penal Code, or a felony violation of [Health and Safety Code] Section 11366.8 . . ., insofar as the offense involves manufacture, sale, possession for sale, offer for sale, or offer to manufacture, or conspiracy to commit at least one of those offenses[;]

With certain exceptions, *Health and Safety Code §11740(e)* provides that the following is subject to forfeiture:

> The interest of any registered owner of a boat, airplane, or any vehicle . . . which has been used as an instrument to facilitate the manufacture of, or possession for sale or sale of . . . [varied minimum amounts of:] heroin or cocaine base[;] . . . a substance containing . . . heroin or cocaine base[;] . . . Schedule I controlled substances[;] . . . cocaine . . . or methamphetamine[;] a substance containing cocaine . . . or methamphetamine; or Schedule II controlled substances.

With certain exceptions, *Health and Safety Code §11470(g)* provides that the following is subject to forfeiture: "The real property of any property owner who is convicted of violating [Health and Safety Code] Section 11366, 11366.5, or 11366.6 with respect to that property."

Finally, contraband is subject to forfeiture.

The People are generally set to the task of also proving up the underling predicate acts or facts, such as the existence of the controlled substance, and each element of the

predicate violations. See United States v. Dollar Bank Money Market Account (1992) 980 P2d 233.

Property/money is forfeitable if it falls within *mutually exclusive* specified categories of use or connection: That the seized property/moneys at issue were furnished in exchange for a controlled substance; or, That the seized property/moneys at issue were intended to be furnished by any person in exchange for a controlled substance, or that the seized property/moneys at issue were are proceeds traceable to an exchange for a controlled substance; or, that the seized property/moneys at issue were used to facilitate any violation of Section 11351, 11351.5, 11352, 11355, 11359, 11360, 11378, 11378.5, 11379, 11379.5, 11379.6, 11380, 11382, or 11383 of this code, or Section 182 of the Penal Code, or a felony violation of Section 11366.8 of this code, insofar as the offense involves manufacture, sale, possession for sale, offer for sale, or offer to manufacture, or conspiracy to commit at least one of those offenses; or That the seized property/moneys at issue were used to facilitate any violation of Section 11351, 11351.5, 11352, 11355, 11359, 11360, 11378, 11378.5, 11379, 11379.5, 11379.6, 11380, 11382, or 11383 of this code, or Section 182 of the Penal Code, or a felony violation of Section 11366.8 of this code, insofar as the offense involves manufacture, sale, possession for sale, offer for sale, or offer to manufacture, or conspiracy to commit at least one of those offenses.

The property/money can not be both, for instance, used in the exchange and traceable to an exchange. It is one or the other. As discussed below, the fact the People can not specify which is telling as to the inability to meet their burden of proof.

LIMITATIONS OF FORFEITURE

Statute of Limitations

The statute of limitations to file the petition for forfeiture is one year from the date of

seizure. See Health and Safety Code §11488.4(a) and Code of Civil Procedure §340(b). See also the people v. The Superior Court (Drummer) (1988) 200 CA3d 105; 245 CR 825; People v. Property Listed in Exhibit One (1991) 227 Cal.App.3d 1, 4.

In addition to the one year limit in all cases, it appears that in summary forfeiture cases (optional process by the People in cases involving personal property not exceeding twenty-five thousand dollars ($25,000) in value), a Petition must be filed within 30 days of service of a claim. H&S §11488.4(j). Also in addition, except in cases of cash or negotiable instruments of a value of $25,000 or more, the forfeitable the exchange, violation, or other conduct which is the basis for the forfeiture must have occurred within five years of the seizure of the property, or the filing of a petition under this chapter, or the issuance of an order of forfeiture of the property, whichever comes first. H&S §11488.4(h)(i)(3).

Requirement of Conviction/Joint Proceeding Required for Most Claims

In either case of a (1) Boat, (2) Plane, (3) Vehicle, (4) Real Property, or (5) Cash of less than $25,000, a judgment of forfeiture requires as a condition precedent thereto that (1) a defendant be convicted in an underlying or related criminal action of an offense specified in *Health and Safety Code §11470(f) or (g)*, and (2) that the offense of which the defendant is convicted occurred within five years of the seizure of the property subject to forfeiture or within five years of the notification of intention to seek forfeiture. H&S Code §11488.4(i)(3), supra.

If the defendant is found guilty of the underlying or related criminal offense, the issue of forfeiture is to be tried before the same jury, if the trial was by jury, or tried before the same Court, if trial was by Court, unless waived by all parties. The issue of forfeiture is required to be bifurcated from the criminal trial and tried after conviction, unless waived by

all the parties. Health & Safety Code §11488.4(i)(3), supra; see also Health & Safety Code §11488.4(i)(5).[1]

A plaintiff is barred from splitting a claim into separate action or proceeding. Craig v. County of Los Angeles (1990) 221 C___d 1294, 271 CR 82; Witkin, Cal Procedure 4th, Vol. 4, Section 35, "Rule Against Splitting Causes of Action." "A single cause of action cannot be split, i.e., an entire claim cannot be divided into several suits." Id. Courts have recognized that the barr on splitting is based upon not only res judicata principles, but goes much "further" and is based upon multiple theories and procedural concerns. 1 Cal Jur3d, Actions, Section 96. Those grounds and possible procedures include public policy, possible conflict between Courts, jurisdiction, waiver, and abatement.

> . . . it is against public policy to permit litigants to consume the time of the courts by relitigating matters already judicially determined, or by asserting claims which properly should have been settled in some prior action . . . . Neither will the law allow the parties to trifle with the courts by piecemeal litigation . . . If plaintiff, through negligence in not properly presenting her claim in the first instance, has lost her right to recover money which she allegedly advanced in reliance upon fraudulent representations of said individual defendants, it is a hardship but one from which the courts cannot relieve if the general and well-established rule against the splitting of a single cause of action is to be followed for the benefit of all. To adopt any other view of this case would open a 'Pandora's box' of evils that would upset all legal principles for avoiding multiple litigation in settlement of but one

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[1] With respect to moneys, negotiable instruments, securities, or other things of value, as described in Health and Safety Code Section 11470(f), discussed above, when cash or negotiable instruments of a value of $25,000 or more, there is no requirement that a criminal conviction be obtained in an underlying or related criminal offense. Health & Safety Code §11488.4(i)(4).

Where required if the defendant wilfully fails to appear as required, however, there is not requirement of a criminal conviction as a prerequisite to forfeiture. In this event, forfeiture will be ordered as against the defendant and judgment entered on default, on application of the state or local governmental entity. In its application for default, the state or local government entity is required to give notice to the defendant's attorney of record, if any, in the underlying or related criminal action, and to make a showing of due diligence to locate the defendant. In moving for the default judgment, the state or local government entity is required to establish a prima facie case in support of its petition for forfeiture. Health & Safety Code §11488.4(k).

fundamental claim for appropriate redress. Wulfien v. Dolton (Cal. 1944) 24 Cal.2d 891, 151 P.2d 846.

. . . under what circumstances is a matter to be deemed decided by the prior judgment. Obviously, if it is actually raised by proper pleadings and treated as an issue in the cause, it is conclusively determined by the first judgment. But the rule goes further. If the matter was within the scope of the action, related to the subject matter and relevant to the issues, so that it could have been raised, the judgment is conclusive on it despite the fact that it was not in fact expressly pleaded or otherwise urged. The reason for this is manifest. A party cannot by negligence or design withhold issues and litigate them in consecutive actions. Hence the rule is that the prior judgment is res judicata on matters which were raised or could have been raised, on matters litigated or litigable. In Price v. Sixth District, 201 Cal. 502, 511, 258 P. 387, 390, this court said: 'But an issue may not be thus split into pieces. If it has been determined in a former action, it is binding notwithstanding the parties litigant may have omitted to urge for or against it matters which, if urged, would have produced an opposite result. Sutphin v. Speik (Cal. 1940) 15 Cal.2d 195, 99 P.2d 652.

General principles applicable to controversies in which the same parties and the same subject matter are involved are these: When two ro more tribunals in this state have concurrent jurisdiction, the tribunal first assuming jurisdiction retains it to the exclusion of all other tribunals in which the action might have been initiated. Thereafter another tribunal, although it might originally have taken jurisdiction, may be restrained by prohibition, if it attempts to proceed. Greene v. Superior Court, 1951, 37 Cal.2d 307, 310-311, 231 P.2d 821; Browne v. Superior Court, 1940, 16 Cal.2d 593, 597, 602, 107 P.2d 1, 131 A.L.R. 276; Slinack v. Superior Court, 1932, 216 Cal. 99, 105, 107, 13 P.2d 670; Lee v. Superior Court, 1923, 191 Cal. 46, 53, 214 P. 972; M.H. Golden, etc., Co. v. Superior Court, 1950, 98 Cal.App.2d 811, 221 P.2d 218; Myers v. Superior Court, 1946, 75 Cal. App.2d 925, 929-930, 172 P.2d 84; Milani v. Superior Court, 1943, 61 Cal.App.2d 463, 469, 143 P.2d 402, 935; Rilcoff v. Superior Court, 1942, 50 Cal.App.2d 503, 507, 123 P.2d 540; Wright v. Superior Court, 1941, 43 Cal.App.2d 181, 183-184, 110 P.2d 529; Gorman v. Superior Court, 1937, 23 Cal.App.2d 173, 178, 72 P.2d 774. One reason for the rule is to avoid unseemly conflict between courts that might arise if they were free to make contradictory decisions or awards at the same time or relating to the same controversy; another reason is to protect litigants from the expense and harassment of multiple action. Greene v. Superior Court, 1951, supra, 37 Cal.2d 307, 311, 312, 231 P.2d 821; Simmons v. Superior Court, 1950, 96 Cal.App.2d 119, 130, 214 Pl2d 844, 19 A.L.R.2d 288; Gorman v. Superior Court, 1937, supra, 23 Cal.App.2d 173, 178, 72 P.2d 774. Scott v. Industrial Ace. Commission (Cal. 1956) 46 Cal.2d 76, 293 P2d 18, 293 P.2d 18.

Because the numerous grounds disfavoring the practice of splitting a cause of

action, ordinary res judicata rules do not apply.

Numerous cases and treatises hold that any judgment on the prior split cause of action barrs the second action.

The only exception to this well settled rule is where the plaintiff specifically withdraws the particular issue from the prior litigation. 40 Cal.Jur3d, Judgments, Section 141, 1 Cal Jur3d, Actions, Section 95. In fact, the Court applies the prohibition even if the second Court cannot determine what the prior judgment actually determined. City of LA v. Sup. Ct. (1978) 85 CA3d 143, 149 CR 320.

Indeed, contrary to the general rule of res judicata, numerous cases hold that a final judgment on the split cause of action is not required to assert a barr in the second action. Wulfien v. Dolton (1944) 24 C2d 891, 151 P2d 840 and progeny.

The law pertaining to criminal procedure is in accord. See Kellett v. Sup. Ct. (1966) 63 C2d 822.

REQUISITE INTENT

"the owner of any interest in the seized property consented to the use of the property with knowledge that it would be or was used for a purpose for which forfeiture is permitted." HSC §11488.5(d)(1). Absent such proof, "[n]o interest [of that owner] in the seized property shall be affected by a forfeiture decree." §11488.5(d)(2). "At the hearing, the state or local governmental entity shall have the burden of establishing, pursuant to subdivision (i) of Section 11488.4, that the owner of any interest in the seized property consented to the use of the property with knowledge that it would be or was used for a purpose for which forfeiture is permitted, in accordance with the burden of proof set forth in subdivision (l) of Section 11488.4." §11488.5(d)(1) (see discussion below regarding standard of proof).

RELEASE OF PROPERTY

Unless the Court or jury finds that the seized property was used for a purpose for which forfeiture is permitted, the Court shall order the seized property released to the person it determines is entitled thereto. If the Court or jury finds that the seized property was used for a purpose for which forfeiture is permitted, but does not find that a person claiming an interest therein, to which the Court has determined he or she is entitled, had actual knowledge that the seized property would be or was used for a purpose for which forfeiture is permitted and consented to that use, the Court shall order the seized property released to the claimant. H&S §11488.5. See also People v. 6344 Skyway, Paradise, California, 71 Cal.App.4th 1026.

HIGH BURDEN OF PROOF UPON THE PEOPLE

As discussed more fully below, the burden upon the People is either "beyond a reasonable doubt" or "clear and convincing", depending upon the circumstances.

The Court needs to be aware that most published California cases are based upon a lower standard, either probable cause or preponderance of the evidence due to the earlier versions of the Code. The current standard of proof provisions of forfeiture law became effective August 19, 1994. The current standard is far beyond mere "probable cause", a standard often formerly applicable to this type of proceedings. See People v. Superior Court (Plascencia) (2002) 103 Cal.App.4th 409, 432. Prior law at one time permitted forfeiture upon the People making a "minimum prima facie showing of probable cause to believe the property is subject to forfeiture" by a preponderance of evidence. Accordingly, Court decisions interpreting prior versions are to be considered only to the extent the Court notes a considerably lesser showing was required on the part of the People. Thus, if evidence in an older case was found insufficient to support a threshold finding, it, a fortiori, is persuasive authority that similar evidence in this case is insufficient

to support the conclusion that the People have carried their ultimate burden of proof under the Present statutory scheme. See People v. $47,050 (1993) 17 Cal.App.4th 1319, 1325. The opposite is not true, however.

Nor can this Court, unlike in the past, look to Federal decisions as to sufficiency of evidence for guidance (but can for most other issues, as the overall scheme is based upon Federal scheme). "The burden of proof in a federal action is different from that in California. The United States needs to show only that there is probable cause to believe property is subject to forfeiture. The burden then shifts to the claimant to show the property is not forfeitable. (U.S. v. One Single Family Residence (11th Cir. 1991) 933 F.2d 976, 982 (One Single Family Residence).) In California, the state bears the burden of proving the property is forfeitable. Depending upon the asset involved, the burden may be to prove forfeitability by clear and convincing evidence, or, as in this case, beyond a reasonable doubt. (§11488.4, subd. (i)(2).)" People v. $9,632.50 United States Currency (1998) 64 Cal.App.4th 163, 169.

People v. $9,632.50 United States Currency is a California post Code revision case directly addressing sufficiency of proof upon a claim of forfeiture.

In *People v. $9,632.50*, the defendant worked and lived rent-free on a ranch. Officers executed a search warrant at the ranch upon which they found a methamphetamine laboratory operating in and next to a barn. Both defendant and his brother were arrested and later pled guilty to manufacturing methamphetamine. Officers issued a warrant for all proceeds in defendant's bank account. Defendant filed a petition contending he was entitled to return of the funds. The trial Court denied defendants petition. On appeal, the Court found that nothing in the forfeiture scheme or the cases interpreting it suggested untainted assets whether belonging to a third person or person

involved in drug activity to be subject to forfeiture simply because they were in proximity with forfeitable assets. Further Court Found that only the amounts directly traceable to drug transactions were subject to forfeiture. The Court held that the remainder of the account, as legitimate funds not directly traceable to drug transactions, must be returned to defendant. The Court remanded the case to the trial Court to modify the judgment and return the balance to defendant.

People v. $9,632.50 United States Currency makes clear that the applicable burden must be met in proving the "actual" money or property at issue is furnished or, in this case, "directly" . . . "traceable" to the predicate illicit conduct. People v. $9,632.50 United States Currency, supra at 127, 128.

The legislature's choice of the phrase "any interest" in *HSC §11488.5(d)(1)* is not without import as well. In regard to moneys or deposits the burden upon the People is as to each part of the moneys sought to be forfeited. "Forfeitability" is "not something that spreads like a disease." Such a rule "would deprive persons accused of dealing drugs of the right to own any property." People v. Superior Court (Moraza) (1989) 210 CA3d 592, 599 n.5, 258 CR 499 (quoting with approval United States v. Pole No. 3172, Hopkinton, 852 F.2d 636, 639 (1st Cir. 1988)). Thus, *Health and Safety Code Section 11470(f)* does not authorize forfeiture of an entire bank account into which drug proceeds have been commingled. Rather, only the portion of the bank account that the People can prove reflects the actual drug proceeds is subject to forfeiture. People v. $9,632.50 U.S. Currency (1998) 64 CA4th 163, 173-74, 75 CR2d 125.

> . . . nothing in the California forfeiture scheme or the cases interpreting it suggests the Legislature intended untainted assets (whether belonging to a third person or person involved in drug activity) to be subject to forfeiture simply because they were in proximity with forfeitable assets.
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> Respondent urges this court to interpret the statute broadly in order

> to further the Legislature's intent of "removing the tools and profits from those engaged in the illicit drug trade . . . (§11469, subd. (J), italics added.) Respondent reasons: Appellant evidently spent his drug money on routine living expenses and banked his payroll, bonus, and tax refund checks. Thus, the legitimate money in this bank account actually represents profits from illicit drug transactions because, without the drug money, the bank account could not have increased. Respondent, in effect, asks us to hold that proceeds traceable to an exchange for a controlled substance include any assets the claimant would not possess had he not been able to use drug money for routine financial needs.
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> Carried to its logical extreme, respondent's theory would eliminate the need for tracing, despite the statute's clear language requiring it. We illustrate our point. Without a doubt, an asset purchased with drug proceeds can be forfeited because the asset is directly traceable to drug money. Hence, if evidence showed claimant took his $8,000 and purchased a car for $8,000, that car could be seized; it would be the product of drug proceeds. In contrast, under respondent's theory, the direct link between the car and drug money could be eliminated. Thus, if the claimant had spent his $8,000 drug money for food and lodging and used $8,000 in salary to buy that same car, the car could still be seized. Such a result would effectively repeal the statutory requirement of tracing. People v. $9,635.20 United States Currency, at 173.

People v. $9,635.20 United States Currency points to an example of sufficient proof where "one identifiable sum of money simple moved through different bank accounts, eventually finding its way back to claimant, having earned him some interest on its journey. The principal sum originally seized was traceable drug money; the interest was direct profits from that principal sum." The Court held "The statute authorizes forfeiture only of proceeds traceable to an exchange for a controlled substance. It does not authorize forfeiture of the increase in net worth that would not have occurred but for the person having acquired drug money. Such an expansion of the forfeiture law should be left to the Legislature." People v. $9,635.20 United States Currency, at 173-174.

Of further note cases often refer to the burden upon the People as a need to establish a "nexus or link" between the money or property and illicit activity. However, the "nexus or link" language was originally based upon the ***former*** "probable cause" standard.

Under the *former* probable cause rule, "The court explained the People's burden as follows: 'To obtain a judgment of forfeiture, the People need not offer evidence of the discovery of significant quantities of narcotics, or even direct evidence of a specific narcotics transaction. Nevertheless, they must offer some evidentiary basis for inferring a link between the seized cash and past or future narcotics activity." (17 Cal.App.4th at pp. 1325-1326; accord, United States v. Banco Cafetero Panama (2d Cir. 1986) 797 F.2d 1154, 1160 [government must have probable cause to connect the property with narcotics activity, but need not link the property to a particular transaction); U.S. v. Four Million, Two Hundred Fifty-Five Thous. (11th Cir. 1985) 762 F.2d 895, 904 [nothing in the statute requires evidence of a particular narcotics transaction]; United States v. Brock (D.C. Cir. 1984) 747 F.2d 761, 762-763 [241 App.D.C. 324] [while "[t]here was no direct evidence to connect the jewelry with the claimant's alleged narcotics activities," the Court affirmed the judgment of forfeiture because "[c]ircumstantial evidence and inferences therefrom are good grounds for a finding of probable cause in a forfeiture proceeding"]. People v. $497,590 United States Currency (1997) 58 Cal.App.4th 145, 154.

> People v. Superior Court (Moraza), supra, 210 Cal.App.3d 592 is the only published California case discussing the nature of the probable cause that must be shown, and that case, by its own terms, dealt with the government's burden of proof at the trial of a forfeiture petition. (See id. At p. 598; see also U.S. v. U.S. Currency, $30,060.00 (9th Cir. 1994) 39 F.3d 1039, 1041.) HN6Probable cause, according to Moraza, "is often defined as a reasonable ground for belief of guilt, less than prima facie proof but more than mere suspicion." (210 Cal.App.3d at pp. 598, 601-602; see 39 F.3d at p. 1041.) n7
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> - - - - - - - - - - Footnotes - - - - - - - - - -
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> n7 In passing, the Moraza court stated the following: "The use of the phrase 'probable cause' may cause some confusion in this respect since it is also the phrase of art to test the constitutional validity of assets and searches. But under the forfeiture laws, again, the probable cause test is not the yardstick of the initial seizure but is simply the government's prima facie case of nexus justifying forfeiture, which the claimant may rebut." (210 Cal.App.3d at p. 602.)

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> CA(5a)(5a) As articulated in Moraza and in the federal cases, the concept of probable cause in the forfeiture context seems no different to us than the "probable cause" defined in Illinois v. Gates (1983) 462 U.S. 213, 230-232 [103 S. Ct. 2317, 2328-2329, 76 L. Ed. 527]. (See U.S. v. $191,910.00 in U.S. Currency (9th Cir. 1994) 16 F.3d 1051, 1071 ["The standard of probable cause to support a forfeiture is similar to that required for a search warrant."].) According to Gates, probable cause is a "'practical, nontechnical conception.' . . . 'In dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.' . . . [P] [P]robable cause is a fluid concept–turning on the assessment of probabilities in particular factual contexts . . ." (Illinois v. Gates, supra, at pp. 231-232 [103 S. Ct. at pp. 2328-2329].) Thus, the Gates standard helps us determine whether a particular showing is more than a mere suspicion, though less than prima facie proof of forfeitability. People v. $48,715 United States Currency, 58 Cal.App.4th 1507, 1517 (Cal. Ct. App. 1997)

It is no longer sufficient to establish merely a "link" to form the required nexus. The required nexus under the revised code is "traceable to" or "having a connection with" the seized funds and a narcotics transaction. People v. $20,110 United States Currency (2007) 151 Cal.App.4th 1022, 1025.

Beyond a Reasonable Doubt Standard for Most Claims

The People must establish their case *beyond a reasonable doubt* in all cases, excepting qualifying cash or negotiable instruments of a value of at least $25,000.

Health and Safety Code Section 11488.4(l)(1)-(3) provides (emphasis added),

> (1) With respect to property described in subdivisions (e) and (g) of [Health and Safety Code] Section 11470 for which forfeiture is sought and as to which forfeiture is contested, the state or local governmental entity shall have the burden of proving *beyond a reasonable doubt* that the property for which forfeiture is sought was used, or intended to be used, to facilitate a violation of one of the offenses enumerated in subdivision (f) or (g) of Section 11470.
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> (2) In the case of property described in subdivision (f) of Section 11470, except cash, negotiable instruments, or other cash equivalents of a value of not less than twenty-five thousand dollars ($25,000), for which forfeiture is sought and as to which forfeiture is contested, the state or local

> governmental entity shall have the burden of proving *beyond a reasonable doubt* that the property for which forfeiture is sought meets the criteria for forfeiture described in subdivision (f) of Section 11470.

Clear and Convincing Evidence Standard for Forfeiture of Qualifying Cash or Negotiable Instruments of a Value Exceeding $25,000

Health and Safety Code §11488.4(l)(4) provides in pertinent part (emphasis added):

> In the case of property described in subdivision (f) of [Health and Safety Code] Section 11470 that is cash or negotiable instruments of a value of not less than twenty-five thousand dollars ($25,000), the state or local governmental entity shall have the burden of proving *by clear and convincing evidence* that the property for which forfeiture is sought is such as is described in subdivision (f) of Section 11470.

Notably, even in regard to certain cash or negotiable instruments worth *more than* $25,000, or "equivalents" the "reasonable doubt" standard still applies. *Section 11488.4(l)(4)* refers back to "property described" in *Section 11470(f)* "that is cash or negotiable instruments." *Section 11470(f)* in turn refers to "all moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, or securities used or intended to be used to facilitate any violation of (the applicable) Section. *Section 11488.4(l)(4)* does not use the clear and convincing standard for "proceeds traceable to such an exchange" nor for "securities, or other things of value." Thus in addition to excluding proceeds, it would appear that most deposit accounts are also subject to the beyond a reasonable doubt standard. The relationship of a bank with its depositor arising out of a general deposit is that of debtor and creditor, respectively. The deposit creates a debt payable by the bank on demand. Union Tool Co. v. Farmers etc. Nat. Bk. (1923) 192 C. 40 53, 218 P 424; Lee v. Bank of America (1990) 218 CA3d 914, 919-920, 267 CR 387. Title to deposited funds passes immediately to the bank, which may use them for its own purpose and does not

become trustee. Lee v. Bank of America (1990) 218 CA3d 914, 919-920, 267 CR 387. The claim of the depositor is a choose in action, it is not ordinarily upon a negotiable instrument. See Ornbaun v. First Nat'l Bank, 215 C 72. An exception is a "certificate of deposit." See Com Code §9-105(1)(e).[2]

IN SEEKING TO FORFEIT MONEY OR EQUIVALENT, THE PEOPLE MUST MEET THEIR BURDEN AS TO EACH AND EVERY DOLLAR

The legislature's choice of the phrase "any interest" in *HSC §11488.5(d)(1)* is not without import. In regard to moneys or deposits the burden upon the People is as to each part of the moneys sought to be forfeited. "Forfeitability" is "not something that spreads like a disease." Such a rule "would deprive persons accused of dealing drugs of the right to own any property." People v. Superior Court (Moraza) (1989) 210 CA3d 592, 599 n. 5, 258 CR 499 (quoting with approval United States v. Pole No. 3172, Hopkinton, 852 F.2d 636, 639 (1st Cir. 1988)). Thus, *Health and Safety Cod Section 11470(f)* does not authorize forfeiture of an entire bank account into which drug proceeds have been commingled. Rather, only the portion of the bank account that reflects the actual drug proceeds is subject to forfeiture. People v. $9,632.50 (1998) 64 CA4th 163, 173-74, 75 CR2d 125.

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[2] Bank deposits, both savings and checking, are classified as "general" or "special." In the case of a general deposit, the funds become a part of the bank's assets and may be used in conducting its banking business. Bank of America Assn. v. California Bk. (1933) 218 Cal. 261, 273-274, 22 P.2d 704. A special deposit is one that the bank has no right to use in its banking business. A special deposit is created when the financial institution acts as escrow or agent or trustee. Bank of America Assn. v. California Bk. (1933) 218 Cal. 261, 274, 22 P.2d 704; cf. Com. Code §4201.