

## HITTING THEM WHERE IT HURTS: STRATEGIES FOR SEIZING ASSETS IN HUMAN TRAFFICKING CASES

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### INTRODUCTION

Human trafficking is a lucrative business that is extremely difficult to identify, investigate, and prosecute. Globally, trafficking activity nets over \$32 billion in profits annually.<sup>2</sup> In the United States alone, one trafficker can bring in more than \$500,000 annually from the sexual exploitation of just three victims.<sup>3</sup> Unlike drug trafficking, where the commodity is contraband and must be hidden, sexually exploited women and girls are not easily identified and can be sold over and over again, exposing traffickers to lower risks and yielding high profits for their exploiters.<sup>4</sup> As of March 2013, every state prohibits human trafficking, with some having entire chapters of the criminal code dedicated to trafficking crimes that provide a comprehensive legislative response.<sup>5</sup> Despite the increase in legislation, there are still significant barriers to a successful outcome in these cases, including, among other things, limited resources. Even where offenders are prosecuted and convicted, victims are often left shattered physically, emotionally, and financially by their experiences. Asset forfeiture laws provide for the seizure of property that is a fruit of – or was used to further – the criminal enterprise. Utilizing these laws is one effective way to deter and disrupt traffickers while providing trafficking victims with the monetary means to rebuild their lives.

Asset forfeiture primarily appears in one of two forms – civil or criminal. Civil asset forfeiture is *not* dependent on a conviction, and oftentimes can be pursued even where there is no criminal case pending. The standard of proof is lower in civil asset forfeiture as well, and, in a majority of states, requires proof by a preponderance of the evidence, with a few jurisdictions requiring proof by clear and convincing evidence.<sup>6</sup> Criminal asset forfeiture, on the other hand, can only be obtained following a conviction, and is sought during sentencing or a separate forfeiture hearing and requires a showing that the property to be forfeited was part of the specific criminal offense.<sup>7</sup> This *STRATEGIES In Brief* will discuss civil and criminal asset forfeiture as a tool in prosecuting cases of human trafficking and related crimes.<sup>8</sup>

### WHAT TO CONSIDER

When pursuing asset forfeiture, there are four key points to keep in mind that will help prosecutors obtain assets. First, determine which theory of forfeiture will fit best with the facts of the case. Civil and criminal asset forfeiture are different legal tools, both with pros and cons to weigh. It is important to know what information is available, what the laws are in the applicable jurisdiction, and what the case goals are before making that decision.<sup>9</sup>

Second, as soon as prosecutors are aware that seizable property or assets are involved, they should immediately take custody of the property and file a petition for forfeiture and/or include a notice of forfeiture in the criminal indictment or information.<sup>10</sup> It is critical to seize a trafficker's assets early before he/she has time to move or dispose of property or before any criminal partners can use the assets to further perpetrate human trafficking or any other crimes.<sup>11</sup> Prosecutors should collaborate with their offices' financial crimes investigators and prosecutors to adopt solid procedures for identifying and seizing property. Some offices have a specific prosecutor assigned to asset forfeiture cases, and that prosecutor usually has received training on gangs, organized crime, or drug cases. It is important to build off of that prosecutor's knowledge of and experience with asset forfeiture to more easily pursue assets in human trafficking cases.

Third, the selection of criminal charges – especially in jurisdictions that do not provide for forfeiture under the human trafficking crimes – may impact a prosecutor’s ability to pursue asset forfeiture. Human trafficking often co-occurs with other crimes, such as sexual assault, intimate partner violence, and stalking, in a single case or with cross over into multiple seemingly unrelated cases. Prosecutors should, therefore, pursue traffickers under every theory possible and understand that one positive collateral consequence of this strategy may be more authority to pursue assets.

Fourth, where appropriate, state and local authorities, especially those that have Bureau of Justice Assistance Task Forces, should consider collaborating with federal investigators on human trafficking cases.<sup>12</sup> Including federal agents on the investigation may allow for the application of federal asset forfeiture laws, even where the case is not prosecuted federally.<sup>13</sup> This is especially helpful for those states<sup>13</sup> that do not have laws permitting asset forfeiture in human trafficking or co-occurring crimes.<sup>14</sup> Further, prosecutors and investigators should work collaboratively on every level to ensure they are using every law available to seize assets.<sup>15</sup>

## PETITIONING FOR CIVIL ASSET FORFEITURE

The petition for forfeiture is *civil in form* and *quasi-criminal in nature*. This means that the petition is initiated by criminal activity and pursued by the prosecuting agency, but filed as a civil motion with a much lower standard of proof, either a preponderance, or clear and convincing evidence, as mentioned above. There are 12 jurisdictions that specifically provide for civil asset forfeiture in human trafficking cases and 17 additional jurisdictions with general civil asset forfeiture statutes that could apply in these cases.<sup>16</sup> The specific procedures for civil asset forfeiture vary from jurisdiction to jurisdiction and depend on the criminal and civil statutory authority. Generally, civil forfeiture requires a petition by the prosecuting agency, notice to the property owner, an opportunity for the respondent to answer, and a disposition hearing.<sup>17</sup>

The property, funds, and other assets that are seized and forfeited under these laws are most often distributed to criminal justice offices and victim services programs.<sup>18</sup> The funds usually go to the reimbursement of law enforcement, prosecution, and the courts for their time and resources spent on the case.<sup>19</sup> In some states, the legislature designates the funds go toward victim restitution, a civil award, or to a general victim services or human trafficking program.<sup>20</sup> Asset forfeiture can provide much needed resources to victims and victim services programs and support law enforcement and prosecutors’ offices that are committed to investigating and prosecuting human trafficking cases.

Asset forfeiture laws provide for the seizure and forfeiture of many different kinds of property, usually including proceeds from – and any property acquired or maintained in pursuit of – the trafficking violation. This can include money from forced prostitution, profits from selling a product that is the fruit of forced labor, proceeds from drugs<sup>21</sup> (*e.g.*, used to control trafficking victims or obtained/sold through trafficking activity), computers, cell phones, cars, homes, businesses (*e.g.*, massage parlors, hair/nail salons, restaurants, construction companies), and any other involved money, item, or entity associated with the trafficking.<sup>22</sup> It is important to note, especially for human trafficking cases, that domestic and often foreign assets are subject to forfeiture.<sup>23</sup>

The motion for forfeiture should include a description of the property seized or to be seized, the time and place of seizure, the owner, the possessor (if different than owner), and facts that support the property’s subjection to forfeiture under the law. Prosecutors should carefully review their jurisdiction’s laws to identify the particular requirements, including those involving policies, timelines, and procedures regarding whether the prosecuting agency or law enforcement bear the responsibility of maintaining the property.<sup>24</sup> Prosecutors who do not regularly handle cases of asset forfeiture should talk with local prosecutors who do frequently handle these cases. Ask about specific challenges or issues encountered throughout the state and whether other prosecutors or allied professionals have tips to support the forfeiture petition and related hearings.

Remember that civil forfeiture statutes do not necessarily require a pending criminal case in order for asset forfeiture to apply; however, pending or completed cases may be helpful (*e.g.*, a defendant's guilty plea in an underlying criminal case may be used as an admission). No matter what, an action for forfeiture will actively disrupt the criminal enterprise, maybe even more so than other criminal proceedings.

## SECURING CRIMINAL ASSET FORFEITURE AT SENTENCING

Prosecutors can also obtain assets through criminal forfeiture. "The key to understanding criminal forfeiture is to recognize that it is part of the sentence imposed on a person who has been convicted of a criminal offense for which forfeiture is specifically authorized as a form of punishment."<sup>25</sup> There are only a handful of states that provide for criminal forfeiture upon conviction of a human trafficking offense.<sup>26</sup> As with civil petitions, however, there are also related crimes that would result in forfeiture upon sentencing. Consider multiple theories of forfeiture, both civil and criminal, and think strategically about which pursuit will yield the desired result. In many jurisdictions, the initial choice to pursue criminal forfeiture does not exclude a simultaneous or later civil action.

Notice of intent to seek criminal forfeiture must be included in the indictment or information against the defendant for specific forfeitable crimes.<sup>27</sup> The assets to be forfeited do not need to be itemized; only the crime(s) pursuant to which the prosecutor is seeking forfeiture must be specified. As with civil forfeiture, seize the assets immediately (if they are not already in custody as evidence) through a seizure warrant, injunction, restraining order, or other procedural mechanism. Some defendants may challenge the validity and authority of these orders.

Seizable assets in human trafficking cases are mostly the same for civil and criminal forfeiture with one distinction – that, where appropriate, substitute assets can be seized following conviction in criminal cases.<sup>28</sup> Most of the time, however, the forfeitable property will already be in custody pursuant to a thorough investigation. Prosecutors should work with law enforcement to make sure they are aware of forfeitable offenses and seizable property in human trafficking and related offenses. It is also a good idea for prosecutors to work with the office's forfeiture unit, if there is one, or to speak with other prosecutors and investigators who have pursued criminal asset forfeiture. Collaboration is critical to the successful prosecution of human trafficking and related offenses.

Criminal asset forfeiture is determined at sentencing or during a separate forfeiture hearing, depending on circumstances and the jurisdiction's law.<sup>29</sup> Remember that the primary legislative purpose of criminal asset forfeiture is to punish the defendant for the convicted crime. As a result, the amount of assets must be related to the specific offense for which the defendant was found guilty.<sup>30</sup> When forfeiture is ordered following a conviction, the law dictates *where* those assets will be distributed. As with civil forfeiture, assets or proceeds from their sale may go toward victim restitution, into a state-established victim fund, or to the government agencies involved in the investigation and prosecution.

## OVERCOMING COMMON DEFENSES

Common defenses to a petition for asset forfeiture include that the respondent did not commit the crime that makes the property forfeitable or that he/she did not have knowledge of the criminal activity. When a third party owner's property is subject to forfeiture, he/she may argue that he/she took steps to curtail the criminal behavior of the possessors/lessees, but was unsuccessful. Another common argument is that the assets in question were not part of the criminal enterprise. Where the asset to be seized is money, there will often also be a genuine issue about whether it can be linked to the criminal activity.

When preparing to counter these defenses, prosecutors should employ similar preparation methods used for trial, but keep in mind that asset forfeiture, whether decided in a civil action or sentencing hearing, does not require proof beyond a reasonable doubt.<sup>31</sup> To connect assets to the crime (as fruits or used in furtherance of), working with your financial

crimes unit can help to connect money, property, and other assets to the criminal activity and negate the lack of knowledge argument. Consider calling an expert on the dynamics of human trafficking and the methods of traffickers to show that seemingly innocuous behavior is actually part of the criminal activity.<sup>32</sup>

To prove that the offenders and/or third parties had knowledge that trafficking was occurring, ask questions about the offenders' income. Are they employed? How do they live? Do they have an income? Do they have an explanation for cash? These questions can help to uncover the criminal source of the money or how it may have been used to perpetuate trafficking. Where real property or cars are involved, ask a third party whether the offender paid rent or a monthly payment equal to or in excess of market value. Did they pay in cash? Does the owner have records of the transactions? If there are no records, consider that the payment may have been in illegal services or proceeds from the crime.<sup>33</sup>

A thorough investigation and comprehensive understanding of the dynamics of human trafficking and co-occurring crimes are critical to overcoming common defenses to pursuing asset forfeiture.

## **CONCLUSION**

Human trafficking is a particularly heinous crime because it involves the direct profit off of the indignity suffered by human beings. It may be challenging for prosecutors to obtain justice in human trafficking cases, but there are tools available to ensure that traffickers are held accountable for their crimes and that victims receive the best and most comprehensive support, services, and efforts to promote their healing. Asset forfeiture – even where it might take a separate action or more in-depth preparation for sentencing – gives criminal justice professionals the opportunity to hit the traffickers where it will hurt them the most. It takes the profit out of the crime, and returns it to the individuals whose lives were most impacted – the victim as well as the jurisdiction whose resources supported the victim.

## ENDNOTES

- 1 Charlene Whitman is an Associate Attorney Advisor with AEQuitas: The Prosecutors' Resource on Violence Against Women. The author would like to thank Jennifer Long, Director of, and Viktoria Kristiansson and John Wilkinson, Attorney Advisors with, AEQuitas, for their contributions to this article. The author would also like to thank Prianka Sharma-Iacobucci and Amanda Shapiro, Legal Interns, for their contributions.
- 2 See *Human Trafficking: organized crime and the multibillion dollar sale of people*, UNITED NATIONS OFFICE ON DRUG AND CRIME, [http://www.unodc.org/unodc/en/frontpage/2012/July/human-trafficking\\_organized-crime-and-the-multibillion-dollar-sale-of-people.html](http://www.unodc.org/unodc/en/frontpage/2012/July/human-trafficking_organized-crime-and-the-multibillion-dollar-sale-of-people.html) (last visited Aug. 14, 2013).
- 3 POLARIS PROJECT, HUMAN TRAFFICKING LEGISLATIVE ISSUE BRIEF: ASSET FORFEITURE (2012), [http://www.polarisproject.org/storage/documents/policy\\_documents/Issue\\_Briefs/issue\\_brief\\_asset\\_forfeiture\\_september\\_2012.pdf](http://www.polarisproject.org/storage/documents/policy_documents/Issue_Briefs/issue_brief_asset_forfeiture_september_2012.pdf).
- 4 Please contact AEQuitas for strategies and resources on identifying forfeitable assets in trafficking cases, <http://www.aequitasresource.org/taRegister.cfm>. See also forthcoming in 2013, monograph and Prosecutors' Resource on prosecuting human trafficking.
- 5 See, e.g., *2012 State Ratings Map*, POLARIS PROJECT, <http://www.polarisproject.org/what-we-do/policy-advocacy/current-laws> (last visited May 6, 2013); *Policy Development*, SHARED HOPE INTERNATIONAL, <http://sharedhope.org/what-we-do/bring-justice/reportcards/> (last visited May 6, 2013).
- 6 See, e.g., CONN. GEN. STAT. ANN. § 54-36p (West 2010); FLA. STAT. ANN. § 932.704(8) (West 2010); N.Y. C.P.L.R. 1311 (McKinney 2010) (clear and convincing standard applies to pre-conviction forfeiture crime).
- 7 See, e.g., ALA. CODE § 13A-6-156 (West 2013).
- 8 Note that asset forfeiture laws and procedures are complex and vary from jurisdiction to jurisdiction. Prosecutors should contact an asset forfeiture attorney in their office or their financial crimes division for more information. See also STEFAN D. CASSELLA, *ASSET FORFEITURE LAW IN THE UNITED STATES* (2d ed. 2013).
- 9 Contact AEQuitas for more information and to discuss strategies on pursuing asset forfeiture. See also CASSELLA, *supra* note 7, at 17-25 (for in-depth discussion on advantages and disadvantages of civil and criminal asset forfeiture).
- 10 Refer to your specific jurisdiction's procedure because some laws require a warrant to be issued before any physical removal of property. See, e.g., IOWA CODE ANN. § 809A.4 (West 2013).
- 11 Where property must be seized immediately, prior to a petition being filed by the prosecution, law enforcement bears the responsibility of notifying the prosecution that the property has been seized and then the prosecutor must file for forfeiture. Otherwise, when pursuing forfeiture, service of the motion must be made on the owner of the property or person in possession who will have anywhere between 30 and 90 days to respond with an answer, depending on the jurisdiction. See, e.g., 18 PA. CONS. STAT. ANN. § 3004 (property owner or possessor has 30 days to respond). If there is no response, most jurisdictions will allow for default forfeiture and the property will automatically become the custody of law enforcement or the prosecution.
- 12 For more information, see ANTI-HUMAN TRAFFICKING TASK FORCE INITIATIVE, BJA, [https://www.bja.gov/ProgramDetails.aspx?Program\\_ID=51](https://www.bja.gov/ProgramDetails.aspx?Program_ID=51) (last visited May 23, 2013).
- 13 18 U.S.C. § 1594 (2008).
- 14 See, e.g., New Mexico, Montana, South Dakota, West Virginia, and Wyoming.
- 15 For example, in some jurisdictions, state and local authorities have already put in place agreements on division of assets, between state and federal agencies, when the court orders forfeiture.
- 16 For nationwide legislation on asset forfeiture, see AEQuitas statutory compilation, *Restitution and Civil Asset Forfeiture: A Focus on Human Trafficking*, available upon request.
- 17 Check your state's specific law regarding process and timing to avoid prohibitions from filing.
- 18 See, e.g., 725 ILL. COMP. STAT. ANN. § 5/124B-300 (West 2010); MASS. GEN. LAWS ANN. CH. 265, § 55, 56 (West 2012).
- 19 See, e.g., CONN. GEN. STAT. ANN. § 54-36p (West 2010); HAWAII REV. STAT. § 712A-5 (West 2012); 18 PA. CONS. STAT. ANN. § 3004 (West 2007).
- 20 See, e.g., 725 ILL. COMP. STAT. ANN. § 5/124B-300 (West 2010); MASS. GEN. LAWS ANN. CH. 265, § 55, 56 (West 2012); N.H. REV. STAT. ANN. § 633:8 (2012).
- 21 Any drugs seized are contraband and relevant to criminal charge of human trafficking, i.e., force, fraud, or coercion, and could also be relevant to additional charges.
- 22 See, e.g., Tania Broughton, 'Brothel' claim lodge faces seizure, IOL NEWS (Apr. 12, 2013), <http://www.iol.co.za/news/crime-courts/brothel-claim-lodge-faces-seizure-1.1499524#.UYz3sJWTSVm>; Mary Spicuzza, *As domestic sex trafficking rises more pimps face asset forfeiture*, ASSOC. OF CERTIFIED FINANCIAL CRIME SPECIALISTS, <http://www.acfcs.org/as-domestic-sex-trafficking-rises-more-pimps-face-asset-forfeiture/> (last visited May 10, 2013).
- 23 See, e.g., 18 PA. CONS. STAT. ANN. § 3004(a)(1)(West 2007).
- 24 For example, Virginia law requires that the state bear the responsibility of any upkeep for real property seized for being a product of or part of criminal activity. VA. CODE ANN. § 19.2-3864. (2012).

25 CASSELLA, *supra* note 7, at 562.

26 See Alabama: ALA. CODE § 13A-6-156 (2013); California: CAL. PENAL CODE § 236.7 (West 2013)(Property used to facilitate human trafficking of victims less than 18 years of age); District of Columbia: D.C. CODE § 22-1838 (2010); Illinois: 725 ILL. COMP. STAT. ANN. 5/124B-300 (West 2013); Maine: ME. REV. STAT. ANN. § 5826 (2012); and Rhode Island: R.I. GEN. LAWS ANN. § 11-67-5 (West 2012).

27 See, e.g., CAL. PENAL CODE § 236.7 (West 2013); N.Y. C.P.L.R. 1311 (McKinney 2010).

28 This means that if property that was originally part of the criminal activity or profits is gone or unavailable, the defendant can be ordered to forfeit different assets of equal value.

29 Where there is third party interest in the property to be forfeited, the court must hold an ancillary proceeding where the third party can assert its claim and defend against the forfeiture. In criminal proceedings, any third party interest can only be dealt with at this point; there is no standing between the indictment and conviction to object to seizure of property or assert ownership. See CASSELLA, *supra* note 7, at 777-871.

30 If the defendant was found not guilty of the crime allowing for forfeiture, consider filing a civil asset forfeiture petition, remembering that the burden – a preponderance of the evidence – is lower.

31 See, e.g., R.I. GEN. LAWS ANN. §11-67-5 (West 2007) (requiring that the prosecutor show probable cause that the respondent committed the crime).

32 For example, an indicator of human trafficking may be an individual with a dealer fold of cash cards, not linked to any bank.

33 Consider that property owners may be skimming off the top of illegal business or even sexually exploiting victims of human trafficking in exchange for decreasing their debts.

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