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Recent Developments

***Republic National Bank of Miami v. United States*: REMOVAL OF THE RES FROM THE DISTRICT DOES NOT DIVEST THE COURT OF APPEALS OF JURISDICTION IN AN *IN REM* FORFEITURE ACTION.**

In *Republic National Bank of Miami v. United States*, 113 S. Ct. 554 (1992), the United States Supreme Court held that in a civil forfeiture proceeding, a transfer of the res outside of the district by the prevailing party does not preclude the court of appeals from exercising jurisdiction over the action. Supplementing its prior decisions with the policy rationale of common sense and fairness, the Court rejected the United States Government's argument that maintaining jurisdiction over an *in rem* forfeiture claim requires continuous control over the res.

In February 1988, the Government instituted civil forfeiture proceedings in the United States District Court for the Southern District of Florida against a single-family home in Coral Gables. The Government alleged that the owner had purchased the house with proceeds from narcotics trafficking, thereby subjecting the property to forfeiture under the Comprehensive Drug Abuse Prevention and Control Act of 1970, 92 Stat. 3777, (1970)(current version at 21 U.S.C. § 881(a)(6)). The Republic National Bank of Miami filed an action asserting a lien interest in the property under a mortgage it had secured. At the Government's request, the Bank agreed

to sell the home and to permit the Marshal to retain the earnings pending determination of the action.

The district court denied the bank's claim and forfeited the proceeds to the United States pursuant to 21 U.S.C. § 881(a)(6). Thereafter the bank filed a notice of appeal, but it neglected to seek a stay of the judgment's execution to freeze the assets. The Government transferred its award to the Forfeiture Fund of the United States Treasury, and then filed a motion to dismiss the appeal for lack of jurisdiction. The United States Court of Appeals for the Eleventh Circuit granted the Government's motion and concluded that the removal from the district of the proceeds from the sale of the property defeated its *in rem* jurisdiction over the action. The Supreme Court granted certiorari, citing an inconsistency among the circuits as to the disposition on appeal of property awarded to the Government in civil forfeiture proceedings.

In reaching its decision, the Court, citing *United States v. One Assortment of 89 Firearms*, 465 U.S. 354 (1984), recognized that a valid seizure of the res is required prior to the initiation of an *in rem* forfeiture proceeding. *Republic National Bank of Miami*, 113 S. Ct. at 557. The Court reasoned that the seizure of the disputed property and the publication of the fact that proceedings have been instituted constitutes the functional equivalent of service of process. *Id.* at 557-58. The Justices, however, declined to extend beyond the initial determination of jurisdiction the re-

quirement that the res be seized and maintained within the district.

The Court rejected the Government's proposition that maintaining *in rem* jurisdiction requires continued control of the res. Referring to its decision in *The Rio Grande*, 90 U.S. (23 Wall.) 458 (1875), the Court stated that, with certain narrow exceptions, once the power to hear a case *in rem* attaches, any circumstances that arise following the proper exercise of original jurisdiction will not operate to divest a court of its capacity to decide the matter. *Republic National Bank of Miami*, 113 S. Ct. at 558. Reasoning that the concept of *in rem* jurisdiction was developed primarily to augment the court's ability to hear certain cases rather than to provide a means of defeating an adversary's claim, the majority concluded that the rule asserted by the Government did not exist. *Id.* at 559. Accordingly, maintaining control over the res is not a prerequisite to the continued exercise of *in rem* jurisdiction.

The Court, however, did recognize limited circumstances where the treatment of property after the institution of an action would preclude a court from deciding a case. In situations where the plaintiff abandons the res or where the property in dispute is otherwise unobtainable, a court will not adjudicate the matter because of the inability to enforce its decision. *Id.* The Court noted that these exceptions relate exclusively to the policies of rendering only enforceable judgments and of giving fair notice to the parties. *Id.* Nonethe-

less, such considerations did not operate to dissolve the court's power to hear the case at bar.

The Court also rejected the Government's contention that, because funds deposited in the United States Treasury may be released only by a congressional appropriation under Art. I, § 9, Cl. 7 of the United States Constitution, any judgment handed down would necessarily be "useless" within the meaning of the exception to appellate jurisdiction discussed above. *Id.* at 560. The Court reasoned that in 31 U.S.C. § 1322(b)(2) Congress has provided for the refund of funds that are erroneously received. *Id.* In addition, 28 U.S.C. § 2465 states that property seized under any act of Congress shall be returned following the disposition of judgment in the defendant's favor. Under the Court's interpretation of these statutes, a formal appropriation would not be required under these circumstances. *Id.* at 561. Because the funds would be returned to their rightful owner following a favorable judgment, the Court concluded that a decision in the bank's favor would thus be enforceable. *Id.*

Justice Thomas, in a concurring opinion, stated that he would have applied § 1521 of the Housing and Community Development Act of 1992, 106 Stat. 3672, which amended 28 U.S.C. § 1355. Section 1521, which the President signed on October 28, 1992, provides that the removal of property by a prevailing party in a civil forfeiture action does not deprive the appellate court of jurisdiction in the matter. The majority expressly declined to interpret the statute or to determine its retroactive effect. *Republic National Bank of Miami*, 113 S. Ct. at 560 n.5. Justice Thomas, however, believed the Court should have applied the principle recognized in *United States v. Alabama*, 362 U.S. 602 (1960), that new laws which enlarge jurisdiction apply to cases currently pending before a court.

Republic National Bank of Miami v. United States represents a refusal by the Court to curtail the right of property

owners to appeal an adverse decision in civil forfeiture proceedings brought by the Government. In declining to interpret the retroactive effect of § 1521 of the Housing and Community Development Act of 1992, the Court indicated that, even absent such a statute, it would not permit the Government to escape a full adjudication of a civil forfeiture claim on technical procedural grounds. Based on this decision, owners of property seized by the Government pursuant to 21 U.S.C. § 881(a)(6) will be guaranteed the right to appeal a district court ruling forfeiting title to their property to the United States.

-Scott N. Alperin

Crosby v. United States: CRIMINAL TRIAL MAY NOT PROCEED IF DEFENDANT IS NOT PRESENT AT COMMENCEMENT OF TRIAL.

In *Crosby v. United States*, 113 S. Ct. 748 (1993), the United States Supreme Court held that Federal Rule of Criminal Procedure 43 prohibits a trial *in absentia* of a defendant who is not present at the commencement of trial. In arriving at this holding, the Court examined the express language, the history, and the logic of the Rule.

Michael Crosby and others were indicted on several counts of mail fraud by a federal grand jury in the District of Minnesota. He and his codefendants were accused of devising a scheme to fraudulently sell military-veteran commemorative medallions. Crosby appeared before a federal magistrate and pleaded not guilty. He was conditionally released from detention upon agreeing to post a bond and remain in the state. He attended pretrial conferences and hearings with his attorney and was advised of the trial date.

Crosby, however, did not appear for his trial in the United States District Court for the District of Minnesota. Deputy marshals attempted to locate him but were unsuccessful. The court expressed concern over the delay because the pool of potential jurors was waiting and the delay could have interfered with the court's calendar. The prosecutor noted that Crosby's attorney and codefendants were present and that it would be difficult for her to reschedule the case due to the age and health problems of some of the witnesses.

The district court suggested that the trial begin despite Crosby's absence, and Crosby's attorney objected. The Government formally requested that the trial commence because Crosby was still not located after several days of search, and Crosby's bond was forfeited.

The court stated for the record its findings that Crosby had adequate no-