

No. 07-_____

**In The
Supreme Court of the United States**

—◆—
AURORA LOAN SERVICES, L.L.C.,

Petitioner,

v.

UNITED STATES,

Respondent.

—◆—
**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit**

—◆—
PETITION FOR A WRIT OF CERTIORARI
—◆—

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QUESTIONS PRESENTED

This is a criminal forfeiture proceeding, ancillary to a federal criminal action, in which Petitioner Aurora Loan Services claims a superior mortgage interest in property seized by the federal government. The Seventh Circuit held that Petitioner's interest could be forfeited based solely on the criminal defendant's plea agreement, without giving Petitioner the opportunity for a hearing, and without even a basic determination of whether 100% of the forfeited property was in fact tainted by criminal conduct or the proceeds of criminal conduct. The Seventh Circuit's decision creates a circuit split on two issues of jurisprudential significance:

1. Whether partial forfeiture is allowed under the criminal forfeiture statute, 21 U.S.C. § 853.

2. Whether a district court may rely solely on a criminal defendant's plea agreement or must instead hold a hearing when an innocent third party asserts an interest in property subject to a federal criminal forfeiture.

PARTIES TO THE PROCEEDING

The parties to this proceeding are Petitioner Aurora Loan Services, L.L.C., and Respondent the United States of America. This proceeding also concerns the interests of third parties who have filed claims in the underlying forfeiture.

CORPORATE DISCLOSURE STATEMENT

Aurora Loan Services, L.L.C. is a subsidiary of Lehman Brother's Bank FSB, which is owned by Lehman Bankcorp, which is owned by Lehman Brother's Holding, Inc. Lehman Brother's Holding, Inc. owns 100% of Aurora Loan Services, L.L.C.'s stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Aurora Loan Services, L.L.C., respectfully petitions for a writ of certiorari in this case to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.



OPINIONS BELOW

The Seventh Circuit's published opinion (Pet. App. 1) is reported at 501 F.3d 846 (2007). The decision of the District Court for the Northern District of Illinois granting the United States of America's Motion to Dismiss is unreported. (Pet. App. 12.)



JURISDICTION

The Seventh Circuit filed its Opinion on September 10, 2007. This Court has jurisdiction to review the Seventh Circuit's decision on a writ of certiorari under 28 U.S.C. § 1254(1).



CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth Amendment to the Constitution of the United States:

No person shall . . . be deprived of life, liberty, or property, without due process of law;

nor shall private property be taken for public use, without just compensation.

This case also involves the federal criminal forfeiture statute, 21 U.S.C. § 853. A third party may assert an interest in forfeited property under this Section, and may petition for a hearing to adjudicate that interest, 21 U.S.C. § 853(n)(2):

Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

Section 853(n)(6)(B) of that statute then provides:

If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that . . . (B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section; the court shall amend the order of forfeiture in accordance with its determination.



INTRODUCTION

This case involves two, mature circuit splits involving an issue of substantial and recurring importance – whether the federal government may effect a criminal forfeiture of an innocent party’s interest in property without first holding a hearing to adjudicate the innocent party’s rights.

In the underlying criminal proceeding, the Government sought to forfeit the interest of Defendant Jeffrey Grossman, “if any,” in a house in South Haven, Michigan, a house in which his wife was the lone record title holder. Subsequently, Jeffrey Grossman stated that monies from his illegal activities partially funded construction of the house owned by his wife, a house that was burdened with a mortgage in favor of Petitioner. No hearing was ever held to determine Jeffrey Grossman’s interest, if any, in the South Haven house, nor was a hearing ever held to determine the extent that criminal proceeds contributed to the construction of the South Haven house. The Seventh Circuit, citing 21 U.S.C. § 853(c), first held that the interests subject to forfeiture encompass “all” the fruits of the defendant’s crimes, including assets held in the name of third parties. The Seventh Circuit then held that the entire house was subject to criminal forfeiture based solely on the fact that Jeffrey Grossman stated that monies from his illegal activities funded part of the construction of the house, and further agreed the house was subject to forfeiture. The Seventh Circuit denied Petitioner even the

opportunity to prove that untainted money paid for the vast majority of the house.

The Seventh Circuit's decision grants the federal government *carte blanche* authority to forfeit property rights without due process and in violation of federal statutory law. The decision also creates two, mature circuit splits.

The decision first conflicts with the Second Circuit's decision in *Pacheco v. Serendensky*, 393 F.3d 348, at 355 (2d Cir. 2004), which unequivocally held that partial forfeiture is allowed under 21 U.S.C. § 853. As the Second Circuit observed:

[R]eading the criminal forfeiture statute to prohibit partial forfeitures raises serious constitutional concerns. If partial forfeitures are forbidden, then a criminal's activity may result in the forfeiture of an innocent third party's interest in property. The government's acquisition of an entire tract of real property in forfeiture proceedings may thus constitute an unconstitutional taking of a third party's interest or a deprivation of that party's property without due process.

Id. at 354 (citations omitted). Based on this serious constitutional concern and the parallel construction of the federal criminal and civil forfeiture statutes, the Second Circuit expressed its agreement with the Circuits "that have suggested that the criminal forfeiture statute, 21 U.S.C. § 853, permits partial forfeitures of real property." *Id.* at 355, citing *United States v. Totaro*, 345 F.3d 989, 999 (8th Cir. 2003);

United States v. O'Dell, 247 F.3d 655, 680 (6th Cir. 2001); *United States v. Kennedy*, 201 F.3d 1324, 1329 (11th Cir. 2000); and *United States v. Lavin*, 942 F.2d 177, 185 (3d Cir. 1991).

The Seventh Circuit's opinion further conflicts with circuit decisions, including a previous decision of the Seventh Circuit itself, holding that a criminal defendant's plea agreement is an insufficient basis to establish the defendant's ownership of property the government seeks to forfeit. *See, e.g., United States v. Roberts*, 749 F.2d 404, 409 (7th Cir. 1984) ("The mere fact that the defendant has agreed that an item is forfeitable in a plea agreement does not make it so. . . ."); *United States v. Nava*, 404 F.3d 1119, 1133 (9th Cir. 2005) ("A defendant's consent to forfeit property does not expand the Court's power over that property, if the property is not the defendant's own, for the obvious reason that he cannot agree to forfeit property that belongs to someone else.") (citing *United States v. Schwimmer*, 968 F.2d 1570, 1580-81 (2d Cir. 1992). This long-standing line of circuit authority is in accord with the statute requiring federal courts to provide innocent third parties with the opportunity to present evidence at a hearing before effecting a criminal forfeiture of their interests. 21 U.S.C. § 853(n)(2) ("Any person . . . asserting a legal interest in property which has been forfeited to the United States pursuant to this section may . . . petition the court for a hearing to adjudicate the validity of his alleged interest in the property.").

The importance of the recurring questions presented and the uncertainty caused by the split of authority counsel in favor of this Court's grant of the petition.



STATEMENT

Defendant Jeffrey Grossman pleaded guilty to bank fraud, wire and mail fraud, money laundering, and obstruction of justice, all related to real estate developments. According to his plea, and without Petitioner having the opportunity to cross-examine him on the issue, Jeffrey Grossman stated that "some" of the proceeds from this criminal activity partially funded the construction of a residence in South Haven, Michigan. (Pet. App. 2) Jeffrey's wife, Bette Grossman, was the record title holder of the property. The government sought to forfeit Jeffrey Grossman's interest in the property, if any, as part of the criminal proceedings and recorded a *lis pendens* on May 8, 2003. The government recorded the *lis pendens* in the book of levies, but incorrectly named Jeffrey Grossman on the instrument and not Bette Grossman, the record title owner.

After the government recorded the notice of *lis pendens*, Bette Grossman granted a mortgage to Resource Mortgage Company. Petitioner Aurora acquired its interest in the property when Resource Mortgage Company assigned the mortgage to Aurora. Aurora recorded the mortgage on June 24, 2003. In

proceedings before the Magistrate Judge, the Government acknowledged that Aurora's mortgage refinanced an existing loan that burdened the property.

Jeffrey Grossman stated that the property was subject to forfeiture and agreed to entry of a forfeiture judgment in the amount of \$4,000,000. Bette Grossman executed a quit claim deed to the government, and the district court entered a preliminary order of forfeiture against the property.

Aurora timely filed its petition seeking a declaration that its mortgage from Bette Grossman was superior to any interest the government could take in the forfeiture action. The district court granted the government's motion to dismiss without granting Aurora a hearing.

On appeal, the Seventh Circuit first addressed Aurora's argument that it was improper for the district court to order forfeiture of the entire property without conducting a hearing to determine Aurora's interest in the property. (Pet. App. 6). The Seventh Circuit (1) rejected the concept of a partial forfeiture, holding that the "interests subject to forfeiture encompass *all* of the fruits of a defendant's crimes, including assets held in the name of third parties" (Pet. App. 6), and (2) held that the South Haven house was subject to forfeiture because "Jeffrey Grossman admitted [in his plea agreement] that funds from his illegal activity funded the construction of the house and agreed that it was subject to forfeiture" (Pet. App. 6).

The Seventh Circuit went on to address Aurora's argument that the government's *lis pendens* was ineffective constructive notice to Aurora, because the government filed the *lis pendens* under Jeffrey Grossman's name, outside the chain of title. On this issue, the Seventh Circuit agreed with Aurora, and it remanded for further proceedings. (Pet. App. 6-11.) Given the significant and recurring issues of criminal forfeiture law and procedure presented by the Seventh Circuit's opinion, Aurora now seeks interlocutory review.



REASONS FOR GRANTING THE PETITION

- I. This Court should grant the petition to resolve the inter-circuit conflict regarding whether a partial forfeiture is allowed under the criminal forfeiture statute, 21 U.S.C. § 853.**

The Seventh Circuit held that the entire South Haven house must be forfeited because “some” of the construction of the house was paid out of monies related to Jeffrey Grossman's criminal activity. (Pet. App. 6.) That holding is irreconcilable with the Second Circuit's decision in *Pacheco*, which followed the lead of the Third, Sixth, Eighth, and Eleventh Circuits in holding that 21 U.S.C. § 853 allows partial forfeitures of real property. *Pacheco*, 393 F.3d at 355, citing *Totaro*, 345 F.3d at 999; *O'Dell*, 247 F.3d at 680; *Kennedy*, 201 F.3d at 1329; and *Lavin*, 942 F.2d at 185.

Pacheco involved a husband convicted of money laundering, and the residence the government sought to forfeit, which the husband jointly owned with his wife.¹ The couple refinanced their mortgage on the subject premises; the government then recorded its *notice of pendency*;² and the new mortgage bank recorded its mortgage approximately one month later. The couple defaulted and the bank initiated foreclosure proceedings, which ultimately resulted in Pacheco purchasing the property with notice of the *notice of pendency* and the ongoing forfeiture proceedings. 393 F.3d at 349-51.

Pacheco filed a third-party petition in the district court, claiming an interest in the residence, and the district court granted the government's motion to dismiss. 393 F.3d at 351. The Second Circuit began by noting that 21 U.S.C. § 853 "does not expressly preclude partial forfeitures." *Id.* at 354. The statute provides only that anyone convicted of certain offenses "shall forfeit to the United States . . . any property constituting, or derived from, any proceeds the person

¹ The situation in the current case is more egregious because the South Haven house is owned entirely by Jeffrey Grossman's wife. The *Pacheco* court determined that only the husband's one-half interest was tainted with criminal proceeds and the government was only entitled to forfeit his one-half interest. 393 F.3d at 355-56.

² Different states use different nomenclature for a document recorded with the register of deeds intended to give notice to subsequent purchasers that the property is the subject of litigation. A *notice of pendency* is the substantive equivalent of a *lis pendens*.

obtained, directly or indirectly, as the result of such violation.” 21 U.S.C. § 853(a) & (1). The Second Circuit rejected an interpretation of the statute that prohibited partial forfeitures, concluding that the forfeiture of an innocent third-party’s interest in the property may constitute “an unconstitutional taking” or “a deprivation of that party’s property without due process, in violation of the Fifth Amendment.” *Id.* at 354 (citations omitted). The Second Circuit also noted that federal courts “have consistently construed the civil forfeiture statute to permit partial takings,” *id.* at 355 (citations omitted), and it joined the Sixth and Ninth Circuits in recognizing that Congress intended “to vest in the government the same substantive rights under the [civil and criminal forfeiture] statutes, notwithstanding their technical differences.” *Id.*, citing *United States v. Littlefield*, 821 F.2d 1365, 1367 (9th Cir. 1989), and *United States v. Smith*, 966 F.2d 1045, 1053-54 (6th Cir. 1992).

To the Second Circuit, “[n]o other result seems reasonable.” 393 F.3d at 355. Although partial forfeitures have the potential to result in the government co-owning real property with the spouse of a convicted criminal, “the alternative would give the government an undeserved windfall and deny an innocent third party her valid property interest. . . . Indeed, we fail to see either how *any* legitimate interest could be furthered by reading the statute to forbid partial forfeitures or how Congress could have

intended to forbid them.” *Id.*³ That is why the Federal Circuit has recognized compensable takings when interests of mortgagees, like those of Petitioner, are extinguished under criminal forfeiture statutes. *Shelden v. United States*, 7 F.3d 1022, 1026 (Fed. Cir. 1993).

The court rules implicitly endorse the *Pacheco* view of criminal forfeitures. In response to what was viewed as inadequate protection of third-party rights in property the government sought to forfeit in ancillary criminal proceedings, the Federal Rules of Criminal Procedure were amended to direct district courts to hold proceedings to adjudicate third-party rights. Fed. R. Crim. P. 32.2. The absence of such proceedings under the former Rule 31(e) “was an inadequate safeguard against the inadvertent forfeiture of property belonging to third parties, as a defendant who had no interest in the property had no incentive, at the criminal trial, to dispute the government’s forfeiture allegation.”³ Charles Alan Wright, Nancy J. King & Susan R. Klein, *Federal Practice and Procedure* § 547 (3d ed. 2004).

Ironically, the Seventh Circuit’s decision below is also contrary to an analogous Seventh Circuit opinion

³ The Second Circuit’s conclusion is buttressed by the fact that criminal forfeitures are *in personam* actions, not *in rem* actions, as are civil forfeitures. *Alexander v. United States*, 509 U.S. 544, 558-59 (1993). Under a criminal forfeiture proceeding, the government can forfeit only the property interests of the criminal defendant. *Totaro*, 345 F.3d at 996-97.

issued only a few years ago. In *United States v. Genova*, 333 F.3d 750 (7th Cir. 2003), the Seventh Circuit affirmed that partial forfeitures are allowed under 18 U.S.C. § 1963, a sister criminal forfeiture statute to 21 U.S.C. § 853. *Id.* at 762. Once a defendant has contended, with some evidentiary support, that at least some of the value in a given asset came from lawful, nonforfeitable sources, then the prosecution must demonstrate how much is forfeitable. *Id.* at 763. The court in *Genova* remanded the case to the district court for a determination as to how much of the value in the defendant's home came from forfeitable and non-forfeitable means. *Id.* at 763. While the decision in *Genova* involved a criminal defendant contesting total forfeiture, it would defy logic to allow a defendant to achieve partial forfeiture of an asset by showing that at least some of the value came from lawful means and deny an innocent third party the same right. This Court should grant the petition to resolve the circuit split.

II. This Court should also grant the petition to resolve the inter-circuit conflict regarding whether a district court may rely solely on a criminal defendant's plea agreement or must instead hold a hearing when an innocent third party asserts an interest in property subject to a federal criminal forfeiture.

The Seventh Circuit created a second significant and recurring split when it relied solely on Jeffrey

Grossman's statements in his plea agreement as the basis for the forfeiture, rather than remanding for a hearing. (Pet. App. 6 ("Jeffrey Grossman admitted that funds from his illegal activity funded the construction of the house and agreed that it was subject to forfeiture.")) That decision is likewise irreconcilable with decisions of the other circuits, *see, e.g., United States v. Nava*, 404 F.3d 1119, 1133 (9th Cir. 2005) ("A defendant's consent to forfeit property does not expand the Court's power over that property, if the property is not the defendant's own, for the obvious reason that he cannot agree to forfeit property that belongs to someone else.") (citing *United States v. Schwimmer*, 968 F.2d 1570, 1580-81 (2d Cir. 1992), and with the Seventh Circuit itself, *United States v. Roberts*, 749 F.2d 404, 409 (7th Cir. 1984) ("The mere fact that the defendant has agreed that an item is forfeitable in a plea agreement does not make it so. . . ."); *see also Libretti v. United States*, 516 U.S. 29, 55 (1995) (Stevens, J., dissenting) ("It is not unthinkable that a wealthy defendant might bargain for a light sentence by voluntarily 'forfeiting' property to which the government had no statutory entitlement. . . . No matter what a defendant may be willing to pay for a favorable sentence, the law defines the outer boundaries of permissible forfeiture. A court is not free to exceed those boundaries solely because a defendant agreed to permit it to do so.").

An innocent third-party's ability to proffer evidence at a post-conviction hearing is ensconced in the criminal forfeiture statute, 21 U.S.C. § 853(n)(2)

(“Any person . . . asserting a legal interest in property which has been forfeited to the United States pursuant to this section may . . . petition the court for a hearing to adjudicate the validity of his alleged interest in the property.”). As noted above, it is also recognized by Federal Rule of Criminal Procedure 32.2 (a determination of the extent of a defendant’s ownership interest in forfeited property as it relates to third parties is deferred to the post-trial ancillary hearing). Once it is understood that 21 U.S.C. § 853 permits partial forfeitures, it follows that an innocent third party claiming an interest in the property is entitled to a hearing to determine the extent of the “taint” caused by the criminal activity.

It is for this very reason that the Eighth Circuit in *Totaro* remanded a criminal forfeiture proceeding to determine what portion of the forfeited property was actually purchased with criminal proceeds. 345 F.3d at 997. “If this court were to deem forfeited the entire estate despite a valid claim of partial ownership by a third party, the result would be in the nature of an *in rem* forfeiture, not one *in personam*.” *Id.*, citing *United States v. Gilbert*, 244 F.3d 888, 919 (11th Cir. 2001). “It would also punish the third party, against whom no jury has returned a verdict of guilt, and may therefore raise constitutional questions of a whole different order. *The trial court must therefore engage in a factual analysis to determine the precise boundaries of the legal right, title or interest asserted by the third party and save it from forfeiture.*” *Id.* (emphasis added).

Here, Bette Grossman was the title holder of the forfeited premises, subject to the valid mortgage that Aurora held. Wholly aside from Aurora's right to prove that it was a *bona fide* purchaser and had no notice of the government's *lis pendens* (the subject of the present remand), Aurora should also have the right to prove at a hearing the extent to which Jeffrey Grossman's criminal proceeds funded the construction of the house, so that the district court can order forfeiture of an interest commensurate with the criminal proceeds used to pay for the construction of the house.

III. The importance of the questions presented and the thousands of criminal forfeiture actions that will be affected counsel strongly in favor of this Court's interlocutory review.

Criminal forfeiture has proven to be a high-volume business for the federal government. At the end of 2006 there were 6,204 criminal forfeiture cases pending, an 11 percent increase from 2005, and a 10 percent increase from 2004. In 2006, the federal government recovered an estimated \$703,280,200 in both criminal and civil forfeiture cases, a 53 percent increase from 2005.⁴ It is likely that many of these

⁴ See *United States Attorneys' Annual Statistical Report, Fiscal Year 2006*, at http://www.usdoj.gov/usao/reading_room/reports/asr2006/06statrpt.pdf; *United States Attorneys' Annual*
(Continued on following page)

cases and recovered assets involve an innocent third-party's claim that something less than 100 percent of the property sought to be forfeited is actually tainted by criminal conduct or the proceeds of criminal conduct. The issues presented in this petition thus require immediate review, not only to provide guidance to innocent parties, the government, and the courts, but to ensure that other innocent litigants are not similarly deprived of their Fifth Amendment due process and property rights. The questions presented are sufficiently important to warrant resolution on an interlocutory basis, just as this Court has done in other cases presenting questions of jurisprudential significance. *See, e.g., United States v. Grubbs*, 126 S. Ct. 1494 (2006) (certiorari granted on an interlocutory basis to determine whether anticipatory search warrants violate the Fourth Amendment); *Cooper Industries, Inc. v. Aviall Services, Inc.*, 125 S. Ct. 577 (2004) (certiorari granted on an interlocutory basis to determine whether a private party not sued in a CERCLA action could obtain contribution from other liable parties); *Portuondo v. Agard*, 120 S. Ct. 1119 (2000) (certiorari granted on an interlocutory basis to determine whether a prosecutor's comments to a jury denied a criminal defendant his due process rights); *United States v. Lopez*, 115 S. Ct. 1624 (1995) (certiorari granted on an interlocutory basis to determine whether Congress acted outside its power under the

Statistical Report, Fiscal Year 2005, at http://www.usdoj.gov/usaao/reading_room/reports/asr2005/05statrpt.pdf.

Commerce Clause when it enacted the Gun-Free School Zones Act).

Significantly, this Court's interlocutory review will not cause any undue delay in determining ultimate justice. *See Gillespie v. U.S. Steel Corp.*, 379 U.S. 148, 152-53 (1964). The South Haven house has already been sold and the proceeds are being held in escrow pending the outcome of this litigation. Petitioner does not object to a modest delay in receiving those proceeds if it results in nationwide clarity of an innocent lender's ability to petition a district court and assert rights in a property sought to be forfeited on account of criminal conduct.

This Court should exercise its power of interlocutory review to examine immediately the two, clear-cut issues of law presented, both of which are instrumental to the conduct of criminal forfeiture proceedings across the country.



CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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DECEMBER 2007

501 F.3d 846

United States Court of Appeals, Seventh Circuit.
UNITED STATES of America, Plaintiff-Appellee,

v.

Jeffrey **GROSSMAN**, Defendant,
Appeals of Wells Fargo Bank and Aurora Loan
Services, LLC, Third Party-Petitioners.

Nos. 06-2586, 06-2587.

Argued May 29, 2007.

Decided Sept. 10, 2007.

Carolyn F. McNiven (argued), Office of the
United States Attorney, Chicago, IL, for Plaintiff-
Appellee.

Robert K. Villa, Dykema Gossett, Chicago, IL, for
Third Party-Petitioner Wells Fargo Bank.

John G. Cameron, Jr., Dickinson Wright PLLC,
Grand Rapids, MI, Joseph M. Infante, Warner Nor-
cross & Judd LLP, Grand Rapids, MI, for Third Party-
Petitioner Aurora Loan Services, LLC.

Before BAUER, WOOD, and WILLIAMS, Circuit
Judges.

BAUER, Circuit Judge.

This is a criminal forfeiture proceeding, ancillary
to a federal criminal action, in which Wells Fargo
Bank and Aurora Loan Services claim a superior
interest in property seized by the government. The
district court granted the government's motion to
dismiss. On appeal, Wells Fargo and Aurora claim
that the property is not subject to forfeiture and that

they did not have notice of the government's interest. We affirm the dismissal of Wells Fargo's petition for untimeliness, but we vacate the dismissal of Aurora's petition and remand for further proceedings.

I. Background

Jeffrey Grossman pleaded guilty to bank fraud, wire and mail fraud, money laundering, and obstruction of justice, all relating to real estate developments in the Chicago area and elsewhere. Using some of the proceeds from this criminal activity, Jeffrey Grossman had funded the construction of a residence in South Haven, Michigan ("the property"). His wife, Bette Grossman, was the record title holder of the property. The government sought to forfeit the property as part of the criminal proceedings and recorded a *lis pendens* with the Van Buren County, Michigan Register of Deeds on May 8, 2003. The *lis pendens* was recorded in the book of levies but did not name Bette Grossman.

After the government recorded the notice of *lis pendens*, Aurora and Wells Fargo acquired interests in the property by granting mortgages to Bette Grossman. Aurora took a mortgage assignment on the property, recorded on June 24, 2003 with the Van Buren County Register of Deeds; Wells Fargo extended a mortgage on the property, recorded on March 2, 2004 with the Van Buren County Register of Deeds.

Jeffrey Grossman admitted that the property was subject to forfeiture and agreed to entry of a forfeiture judgment in the amount of \$4,000,000. Bette Grossman executed a quit claim deed to the government for the property, and the district court entered a preliminary order of forfeiture against the property on December 14, 2004. The government served both Wells Fargo and Aurora with notice of the forfeiture order on March 7, 2005.

Wells Fargo and Aurora filed petitions seeking a declaration that their mortgages from Bette Grossman were superior to any interest the government could take in its forfeiture action. On April 5, 2005, Aurora filed its petition, and on August 2, 2005, Wells Fargo filed its petition. The government moved to dismiss both petitions, which the district court granted. Wells Fargo and Aurora timely filed this appeal.

II. Discussion

Under the criminal forfeiture statute, a third party may petition for a hearing to adjudicate its interest in a property to be forfeited. 21 U.S.C. § 853(n)(2). Federal Rule of Criminal Procedure 32.2 governs the procedure of this proceeding. Under this rule, when a third party files a petition asserting an interest in property to be forfeited, the court must conduct an “ancillary proceeding,” Fed.R.Crim.P. 32.2(c)(1), which closely resembles a civil action. “In the ancillary proceeding, the court may, on motion,

dismiss the petition for . . . failure to state a claim. . . .” Fed.R.Crim.P. 32.2(c)(1)(A). This procedure is treated like a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b). Fed.R.Crim.P. 32.2 advisory committee’s note. Dismissal of a claim is appropriate only where “it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.” *Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984) (citing *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)). In ruling on a motion to dismiss, we construe all well-pleaded allegations of the petition as true and draw all reasonable inferences in favor of the plaintiff. *Christensen v. County of Boone*, 483 F.3d 454, 466 (7th Cir.2007). We review the grant of the motion to dismiss *de novo*. *Licari v. City of Chicago*, 298 F.3d 664, 666 (7th Cir.2002).

To obtain relief, each petitioner must establish by a preponderance of the evidence either (a) that its interest is superior to that of the defendant because it arose before he committed the criminal acts giving rise to the forfeiture, or (b) that it was a bona fide purchaser for value without actual or constructive knowledge of the government’s interest in the property. 21 U.S.C. § 853(n)(6)(A-B). Wells Fargo and Aurora obtained their interest in the property after the conduct giving rise to forfeiture so the first condition does not apply. We are therefore only concerned with whether Wells Fargo and Aurora could show that they were bona fide purchasers for value without

notice. We look to Michigan property law to determine what constitutes notice. *See United States v. 5 S 351 Tuthill Rd.*, 233 F.3d 1017, 1021 (7th Cir.2000) (“State law defines and classifies property interests for purposes of the forfeiture statutes, while federal law determines the effect of the property interest on the claimant’s standing.”).

A. Wells Fargo

The government claims that Wells Fargo was untimely in filing its petition. We agree. Under the criminal forfeiture statute, a third party must file its petition within thirty days of the earlier of its receipt of (1) actual notice of the order of intent to dispose or (2) the final publication of the notice. 21 U.S.C. § 853(n)(2). If the third party does not file its claim within the thirty days, “the United States shall have clear title to property that is subject to the order of forfeiture.” 21 U.S.C. § 853(n)(7). We construe this provision “liberally . . . to effectuate its remedial purposes.” 21 U.S.C. § 853(o).

Wells Fargo admits that its petition was not filed within thirty days after its agent received notice. The government served its notice to Wells Fargo on March 7, 2005, and Wells Fargo filed its petition five months later: on August 2, 2005. Wells Fargo claims it failed to file its petition within thirty days because the government failed to provide it with adequate notice. We find this argument meritless. The notice provided by the government included the preliminary order of

forfeiture, which identified the property by legal description, PIN number, and street address. It also warned that “the foregoing funds and real property are subject to forfeiture based on the defendant’s conviction for the above reference violations.” We find that the notice was adequate, and the district court properly dismissed Wells Fargo’s petition.

B. Aurora

Aurora first challenges the district court’s ruling that the property was subject to forfeiture. Aurora claims that the *lis pendens* notice, which referred only to Jeffrey Grossman’s interest in the property, could not affect the interest of Bette Grossman, the record owner. Alternatively, Aurora claims that because Jeffrey Grossman had no recorded interest, he had no interest in the house that could be forfeited. We disagree.

The interests subject to forfeiture encompass all the fruits of a defendant’s crimes, including assets held in the name of third parties. 21 U.S.C. § 853(c). Jeffrey Grossman admitted that funds from his illegal activity funded the construction of the house and agreed that it was subject to forfeiture.

Lastly, Aurora asserts that the government’s *lis pendens* was ineffective constructive notice because it was filed under Jeffrey Grossman’s name, outside the chain of title. Further, Aurora claims that because Van Buren County has no tract index, the government’s *lis pendens* could not be discovered by

a prudent title search. The government counters that a recorded interest is sufficient constructive notice. Because it filed its *lis pendens* in the book of levies first, the government claims that it has priority to the property regardless of how the filing was indexed. We must determine whether the government's *lis pendens* served as constructive notice under Michigan law.

A *lis pendens* is a public notification that “warn[s] all persons that certain property is the subject matter of litigation, and that any interests acquired during the pendency of the suit are subject to its outcome.” Black’s Law Dictionary (8th ed.). The effect of a *lis pendens* is to give notice to interested parties that the property is subject to a lawsuit. *See Continental Paper & Supply Co. v. City of Detroit*, 451 Mich. 162, 545 N.W.2d 657, 662 (Mich.1996). However, to give notice to interested parties, a *lis pendens* must be recorded in accordance with Michigan law. Mich. Comp. Laws. § 565.25 sets forth Michigan’s race-notice statute, which establishes that recorded instruments generally serve as constructive notice:

(1) In the entry book of deeds, the register shall enter all deeds of conveyance absolute in their terms, and not intended as mortgages or securities, and all copies left as cautions. In the entry book of mortgages the register shall enter all mortgages and other deeds intended as securities, and all assignments of any mortgages or securities. In the entry book of levies the register shall enter all levies, attachments, liens, notices of lis

pendens, sheriffs' certificates of sale, United States marshals' certificates of sale, other instruments of encumbrances, and documentation required under subsection (2), noting in the books, the day, hour, and minute of receipt, and other particulars, in the appropriate columns in the order in which the instruments are respectively received.

...

(4) The instrument shall be considered as recorded at the time so noted and shall be notice to all persons except the recorded landowner subject to subsection (2), of the liens, rights, and interests acquired by or involved in the proceedings. All subsequent owners or encumbrances shall take subject to the perfected liens, rights, or interests.

Mich. Comp. Laws. § 565.28 requires each party named in an instrument accepted for recording to also be entered into an alphabetical grantor-grantee index: Each register of deeds shall keep a proper general index to each set of books in which he or she shall enter alphabetically the name of each party to each instrument recorded by the register of deeds, with reference to the book and page where the instrument is recorded. . . .

Finally, Mich. Comp. Laws. § 565.29 summarizes the effect of these Michigan recording statutes by stating that recordings not performed in accord with the provisions of Chapter 565 are ineffective against subsequent purchasers in good faith and for

a valuable consideration: Every conveyance of real estate within the state hereafter made, which shall not be recorded as provided in this chapter, shall be void as against any subsequent purchaser in good faith and for a valuable consideration, of the same real estate or any portion thereof, whose conveyance shall be first duly recorded. The fact that such first recorded conveyance is in the form or contains the terms of a deed of quit-claim and release shall not affect the question of good faith of such subsequent purchaser, or be of itself notice to him of any unrecorded conveyance of the same real estate or any part thereof.

The government argues that the chain of title is irrelevant, relying heavily on a negative inference created in *Graves v. Am. Acceptance Mortg. Corp.*, 469 Mich. 608, 677 N.W.2d 829 (2004). In *Graves*, amicus and one of the parties advanced arguments that a property interest must be recorded in the grantor-grantee index. The court declined to review this argument and there is no discussion of it in its opinion. The government also relies on *Cipriano v. Tocco*, 772 F.Supp. 344 (E.D.Mich.1991), *Schepke v. Dept. of Nat. Resources*, 186 Mich.App. 532, 464 N.W.2d 713 (1990), and *Thomas v. Bd. of Supervisors*, 214 Mich. 72, 182 N.W. 417 (1921). In each of these cases, a tract index was available as an additional method of title searching. In Van Buren County, however, the grantor-grantee index is the only searchable method.

We construe the Michigan statutes together to mean that an interest must be recorded within the

chain of title, in the grantor-grantee index, to have priority over a bona fide purchaser. The register of deeds is required to keep a grantor-grantee index, and under M.C.L. 565.29, it is only effective against a bona fide purchaser if it is in the grantor-grantee index. This position is also supported by Michigan case law. See *Bristol v. Braidwood*, 28 Mich. 191, 193 (Mich.1873) (“prior mortgage might describe the same land, yet, if executed by some one having no connection with the real title, but outside of the chain of title, it could in no way defeat or affect the [later filed] mortgage or impair its security”); *Meacham v. Blaess*, 141 Mich. 258, 104 N.W. 579, 580 (1905) (“the record of deeds not in [the] chain of title [of a party] is no notice [to that party]”); *Schweiss v. Woodruff*, 73 Mich. 473, 41 N.W. 511, 513 (1889) (“The question . . . is whether the record contains sufficient [information] to apprise a party that some right or title is claimed or attempted to be conveyed in the premises, and, if it does, the purchaser is bound to use reasonable diligence to ascertain what it is that is so claimed or attempted to be conveyed.”). Because the government’s *lis pendens* was recorded outside the chain of title and because Van Buren County has no tract index, there was no way for Aurora to learn of the government’s interest. The idea that the government’s filing could be constructive notice defies logic. We find that the district court erred by dismissing Aurora’s case.

III. Conclusion

For the aforementioned reasons, the judgment of the district court as to Wells Fargo is AFFIRMED, and the judgment of the district court as to Aurora is VACATED and REMANDED for further proceedings.

**United States District Court,
Northern District of Illinois**

Name of Assigned Judge or Magistrate Judge		Elaine E. Bucklo	
Sitting Judge if Other than Assigned Judge			
CASE NUMBER	02 CR 678-1	DATE	4/10/2006
CASE TITLE	USA vs. Grossman (Filed Apr. 10,2006)		

DOCKET ENTRY TEXT

By April 28, 2006, the government shall provide a written explanation as to how each of these people or entities referred to in the order below is a victim as that term is defined in the statute. Anyone else may (but need not) file a short (not to exceed five pages) argument on this issue as well. I will deal with the issue of priorities after a determination is made as to the statutory victims. Ruling will be by mail on or before May 12, 2006. Status hearing regarding various objections to the Report and Recommendation with respect to restitution held on 3/31/06. **Government's motion to dismiss (267) is granted.**

■ [For further details see text below]

Docketing to mail notices.

STATEMENT

Various persons have filed objections to the magistrate judge's Report and Recommendation concerning restitution in this case. The government argues that the objectors do not have standing to object. Although an argument can be made otherwise (especially, where if the recommendation made by the magistrate judge in this case is accepted, practically, some victims of the charged crime are unlikely ever to receive even a pro rata share of restitution from the defendant's assets), I agree that the MVRA does not give any victim standing to object to a judge's order of restitution. *U.S. v. United Security Savings Bank*, 394 F.3d 564 (8th Cir. 2004). Standing in *U.S. v. Perry*, 360 F.3d 519 (6th Cir. 2004), can be justified on the independent basis that the district court order extinguished a civil lien obtained in a separate case. This case, like the cases cited, is a criminal case. The only parties to the case are the government and the defendant. At least so long as the court does not attempt to limit the civil remedies available to a victim of crime the victim may not interfere in a criminal proceeding because, theoretically at least, a victim is not deprived of rights against the defendant. Despite this, I have an independent duty to make a de novo determination of the appropriate restitution victims, amounts, and priorities. 18 U.S.C. sec. 3664(d)(6). Victims of

the charged conduct in this case who were “directly and proximately harmed as a result of the commission of an offense. . . .” are to receive an order of full restitution. 18 U.S.C. sec. 3663(a)(2). Defendant Jeffrey Grossman plead guilty to fraud against Bradford Kelly, Steven Upchurch, Calvin Eisenberg, the Oak Brook Bank and 5th/3d Bank. Magistrate Judge Denlow’s Report and Recommendation, apparently with the concurrence of the government and the defendant, concluded that victims under this language include, as well, American Environmental Consultants, Paul and Tracy Berger, Brickyard Bank, Tony Jovanov (d/b/a Excel Cleaning Service), and Louis Keith. Neither the Report and Recommendation, the transcript of the hearing before the magistrate judge, nor any filings that I have seen by the government, makes clear on what legal basis any of these additional persons can be held to be statutory victims of the charged offense. In any case of fraud in which the criminal enterprise ends with the arrest of the wrongdoer there are likely to be many persons who are not paid money owed by the defendant. I would like to see some law that supports inclusion of such persons in an order of restitution. By April 28, 2006, the government shall provide a written explanation as to how each of these people or entities is a victim as that term is defined in the statute. Anyone else may (but need not) file a short (not to exceed five pages) argument on this issue as well. I will deal with the issue of priorities after a determination is

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made as to the statutory victims. Ruling will be by mail on or before May 12, 2006.
