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QUO VADIS? ASSESSING NEW YORK'S CIVIL FORFEITURE LAW

Steven L. Kessler*

It is 3:45 a.m. on March 17. Two police officers from New York City's Narcotics Unit observe Henry Stone¹ stop his 1982 Buick at the intersection of Bruckner Boulevard and Hunts Point Avenue in the Bronx. Stone gets out of his car and approaches an undercover officer waiting at the corner. The officer takes \$200 in marked bills out of his pants pocket and gives it to Stone. Stone takes twenty "dime" bags of cocaine from his jacket and hands them to the officer. Stone returns to his car. The undercover officer radios backup that the buy is complete. A marked police car pulls up along side Stone. The officers ask Stone to alight from the car and he is placed under arrest. A search of the vehicle incident to the arrest reveals a small kitchen scale, a knife, a spoon, two Bunsen burners, a pocket calculator, six rounds of ammunition, \$200 in marked bills and a brown paper bag containing two kilograms of cocaine and \$60,000 in small denominations. When asked about the money, Stone says that he is just now returning from the contract closing on his mother's house and that the money is a deposit on the sale of the

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1. The names used in the hypothetical fact patterns in this article are fictitious. Any resemblance to actual people is strictly coincidental.

house. Investigation reveals that his mother's house was sold fifteen years earlier for \$46,500. Stone is charged with sale of a controlled substance and related crimes. He pleads guilty to a lesser count of sale of a controlled substance as a felony and receives a five year probationary sentence as a first time offender.

Had this scenario taken place in 1983, Henry Stone probably would have received a property release from the District Attorney's office for the \$60,000. The money is not contraband and the District Attorney would have had no legal basis upon which to retain possession following the plea. But the year is 1988. Under a four-year-old statute found in the Civil Practice Law and Rules (CPLR), the District Attorney's civil litigation unit has a right to seek the forfeiture of that money. The statute is Article 13-A, New York's powerful and comprehensive civil forfeiture law.

Article 13-A is just coming into its own as a regular part of the state's arsenal in its continuing fight against crime. From Brooklyn to Buffalo, prosecutors have cautiously implemented this new weapon and the courts are beginning to look upon and deal with the new statute as a law that is here to stay. This article will present a brief overview of the statute and its legislative history.² It will then discuss some of the compromises made during the drafting of the statute, focusing on the legislative concerns over prosecutorial abuse. Finally, following a review of Article 13-A and the cases interpreting its provisions, this article will examine whether the compromises and exceptions have undercut the basic goals of the legislature and will discuss some changes that might better effectuate the use of Article 13-A in a manner consistent with the original legislative objectives.

I. OVERVIEW OF ARTICLE 13-A

Enacted by the 1984 state legislature, Article 13-A of the CPLR is New York's comprehensive forfeiture statute. Complex and lengthy, the statute greatly expands the scope of forfeiture in New

2. For a more detailed discussion of the provisions of the statute, see 2A J. WEINSTEIN, H. KORN & A. MILLER, *NEW YORK CIVIL PRACTICE*, Art. 13-A (Bender 1987 & Supp. 1988). For a general discussion and background information regarding the statute, see A. GIRESE, *FORFEITURE HANDBOOK: LITIGATION UNDER CPLR ARTICLE 13-A* (New York State District Attorneys Association, Feb. 1985) [hereinafter *FORFEITURE HANDBOOK*]; Kessler, *Taking the Profit Out of Crime: Asset Forfeiture*, 59 N.Y. ST. B.J. 48 (July 1987) [hereinafter *Kessler*]; Kessler, *State's Civil Forfeiture Law: Is it Working After 2 Years?*, N.Y.L.J., Dec. 18, 1986, at 1, col. 3 [hereinafter *Civil Forfeiture Law*]; Girese, *Forfeiture: A New Comprehensive Legislative Tool in War Against Crime*, N.Y.L.J., Apr. 25, 1985, at 17, col. 1.

York, supplementing several narrow and seldom used provisions scattered throughout New York's statutes.³

Article 13-A, however, differs significantly from other state and federal forfeiture statutes. It is not an *in rem* statute, authorizing actions to be brought against the property. Nor is it, like the federal Racketeer Influenced and Corrupt Organizations Act (RICO),⁴ a criminal forfeiture proceeding brought against the person of the criminal defendant as an integral part of the criminal action. It is instead an *in personam* statute, authorizing the "claiming authority,"⁵ usually a prosecutor, to bring a civil lawsuit against certain classes of people for the forfeiture of specific property or its value equivalent. This civil lawsuit is totally separate and apart from the criminal prosecution and must not be handled by the same individual prosecuting the defendant in the criminal case. Moreover, since the statute is exclusively civil in nature, there are no double jeopardy implications in conducting two separate judicial actions arising from what is essentially one incident.⁶

3. Other sections of the New York statutes require forfeiture in given situations. See, e.g., N.Y. PENAL LAW § 410.00 (McKinney 1980 & Supp. 1988) (equipment used for the promotion of pornography); N.Y. PENAL LAW § 415.00 (McKinney 1980 & Supp. 1988) (vehicles, vessels and aircraft used to transport or conceal gambling records); N.Y. PENAL LAW § 420.05 (McKinney 1980 & Supp. 1988) (equipment used in the production of unauthorized sound recordings); N.Y. PUB. HEALTH LAW § 3388 (McKinney 1985 & Supp. 1988) (vehicles, vessels and aircraft used to conceal, convey or transport controlled substances); N.Y. TAX LAW § 1847 (McKinney 1987) (vehicles used to transport contraband). Sections dealing with forfeiture of stolen property include N.Y. ABAND. PROP. LAW § 1310 (McKinney 1976 & Supp. 1988); N.Y. PENAL LAW § 450.10 (McKinney 1980 & Supp. 1988); N.Y. PERS. PROP. LAW §§ 254, 258 (McKinney 1976 & Supp. 1988); see also N.Y. CIV. PRAC. L. & R. 1300(B) (McKinney Supp. 1988); N.Y. PENAL LAW § 460.30 (McKinney Supp. 1988) (Organized Crime Control Act of 1986).

4. 18 U.S.C. §§ 1961-1968 (1981).

5. N.Y. CIV. PRAC. L. & R. 1310(11) (McKinney Supp. 1988).

6. The legislature's desire that Article 13-A be regarded as a civil statute rather than one imposing criminal sanctions is illustrated by language throughout the statute. Representative are clauses in New York's Civil Practice Law and Rules 1311(1) stating that the statute is civil and remedial in nature and is not a criminal proceeding. Also, under CPLR 1311(8), a defendant's liability is limited to a sum certain — the amount he obtained from criminal activity — plus the value of any forfeited instrumentality of the crime. Thus, there is no sweeping punitive provision authorizing penalties financially disproportionate to the profits secured as a result of the underlying crimes. In addition, the statute is in the CPLR, not any of the criminal codes, and all of the remedies provided for in the CPLR, except those specifically limited or excluded by Article 13-A, may be used in forfeiture actions. See N.Y. CIV. PRAC. L. & R. 1352 (McKinney Supp. 1988). Further, the defenses to criminal liability included in Criminal Procedure Law Article 40 have been specifically excluded from application in Article 13-A actions. *Id.* 1311(1) (McKinney Supp. 1988). Finally, the victims of crime are given priority in the distribution of funds collected through forfeiture proceedings. See *id.* 1349; O. CHASE, CPLR MANUAL, ch. 36 (Bender 1986 & Supp. 1987), J. WEINSTEIN, H. KORN & A.

The essence of the statute is contained in its first two sections. CPLR 1310 defines the basic terms used in the statute. The forfeiture action itself is outlined in CPLR 1311. These provisions authorize a District Attorney or the Attorney General⁷ to institute a civil *in personam* action against any individual who is criminally responsible for the underlying crime to which the property is related or who maintains an interest in the property subject to forfeiture. Since the principal objective of Article 13-A was to provide state and local law enforcement authorities with a powerful weapon against large scale narcotics traffickers,⁸ the legislators broadened the prosecutor's powers in situations involving drug-related crimes. Consequently, where a defendant profits from the commission of a drug-related felony, a forfeiture action may proceed even in the absence of a criminal prosecution.⁹ The burden upon the prosecutor to prove the commission of the crime in such situations, however, is elevated to the "clear and convincing" standard, significantly lower than the criminal "reasonable doubt" standard but slightly greater than the "preponderance of the evidence" standard required in most civil suits and in other actions under this statute.

Most of the remaining sections of the statute deal with the four provisional remedies available to the prosecution to ensure that the property sought to be forfeited is not removed, destroyed or disposed of prior to a forfeiture judgment. These remedies are largely the same as those available in other civil actions. They include attachment,¹⁰ preliminary injunction and temporary restraining order,¹¹ temporary receivership,¹² and notice of pendency.¹³ However, there are some differences between these provisions and their CPLR counterparts in Articles 62 through 65. These differences make Article 13-A remedies somewhat easier for the prosecutor to secure, and take into account the particular attributes of civil forfeiture.¹⁴

MILLER, *supra* note 2, § 1311.01-.02; *see also infra* notes 178-206 and accompanying text for a discussion of some of the constitutional issues relating to Article 13-A.

7. The Corporation Counsel and County Attorney are also authorized "claiming authorities" in certain situations. *See* N.Y. CIV. PRAC. L. & R. 1311(1) (McKinney Supp. 1988).

8. *See* Letter from Senator Frank Padavan and Assemblyman Melvin H. Miller to Governor Mario Cuomo (July 12, 1983) [hereinafter Padavan Letter]. The goals of the sponsors in drafting Article 13-A are discussed more thoroughly *infra* notes 20-95 and accompanying text.

9. N.Y. CIV. PRAC. L. & R. 1311(1)(b) (McKinney Supp. 1988).

10. *Id.* 1313-1332.

11. *Id.* 1333-1337.

12. *Id.* 1338-1342.

13. *Id.* 1343-1348.

14. *See* FORFEITURE HANDBOOK, *supra* note 2; J. WEINSTEIN, H. KORN & A. MILLER, *supra* note 2, § 1311.01-.02; *see also* *infra* notes 178-206 and accompanying text.

The statute also includes a complex series of burdens of proof and presumptions,¹⁵ an “interests of justice” relief mechanism, unique among forfeiture statutes, by which a defendant may defeat a forfeiture action,¹⁶ damage provisions permitting recovery against a claiming authority under certain circumstances,¹⁷ a value cap limiting what a prosecutor is allowed to recover from all sources in any given case,¹⁸ and a section detailing the schedule of priorities for the disposition of the forfeited assets.¹⁹

II. THE LEGISLATIVE HISTORY OF ARTICLE 13-A²⁰

Prior to the enactment of Article 13-A, several scattered New York statutes provided for the *in rem* forfeiture²¹ of certain properties used in connection with various illegal activities.²² The Public Health Law, for example, permitted the forfeiture of vehicles, vessels and aircraft used to conceal, convey or transport controlled substances.²³ Penal Law Article 415 provided for the forfeiture of modes of transportation used to conceal or transport gambling records.²⁴ Yet, these sections limited the types of activity and property affected by forfeiture.²⁵ No section of the New York statutes, for example, provided for the forfeiture of the \$60,000 found by the police in the fact pattern presented at the beginning of this article. Only “equitable” doctrines, such as laches, clean hands, or public policy, kept the defendants from receiving the property in return or from winning a replevin action against the party possessing the goods.²⁶

15. N.Y. CIV. PRAC. L. & R. 1310(a), 1311(1)(b)-(3) (McKinney Supp. 1988).

16. *Id.* 1311(4).

17. *Id.* 1318(4), 1337, 1347.

18. *Id.* 1311(8).

19. *Id.* 1349.

20. See FORFEITURE HANDBOOK, *supra* note 2 (detailed discussion of the historical background of forfeiture actions in general); DAVID SMITH, PROSECUTION AND DEFENSE OF FORFEITURE CASES, chs. 2 & 3 (1st ed. 1985 & Supp. 1986, 1987) (same); see also Holtzman v. Samuel, 130 Misc. 2d 976, 495 N.Y.S.2d 583 (Sup. Ct. Kings County 1985) (scholarly discussion of forfeiture actions by the court); Dillon v. Niera, 130 Misc. 2d 434, 495 N.Y.S.2d 622 (Nassau County Ct. 1985) (same).

21. See DAVID SMITH, *supra* note 20 (discussion of the differences between *in rem* and *in personam* forfeiture proceedings); J. WEINSTEIN, H. KORN & A. MILLER, *supra* note 2, § 1311.02 (same).

22. Note that none of the existing *in rem* statutes were repealed by the enactment of Article 13-A.

23. N.Y. PUB. HEALTH LAW § 3388 (McKinney 1985 & Supp. 1988).

24. N.Y. PENAL LAW § 415 (McKinney 1980 & Supp. 1988).

25. *Id.* § 415.00(1)&(2) (McKinney 1980 & Supp. 1988).

26. See, e.g., Baker v. Kallash, 63 N.Y.2d 19, 24-25, 29, 468 N.E.2d 39, 41, 43-44, 479 N.Y.S.2d 201, 203, 206 (1984); Carr v. Hoy, 2 N.Y.2d 185, 187-88, 139 N.E.2d 531, 532-33,

While most states were talking about forfeiture,²⁷ the federal government was busy enacting numerous statutes providing for the forfeiture of property used in connection with illegal activities. Areas affected by the statutes included firearms,²⁸ alcohol,²⁹ gambling,³⁰ counterfeiting³¹ and, of course, narcotics.³² The theory behind these statutes was simple: profit is the driving force behind certain types of crime. Take the profit out of the activity and the activity itself will diminish. Put into practice, the theory apparently worked well,³³ and states such as New York began playing with the idea of enacting similar statutes for use at the state and local levels.

In early 1983, several proposals were drafted for consideration by the state legislature. One was a comprehensive forfeiture bill, patterned after the statutes of other states, which attempted to include broad protections against possible prosecutorial abuse. The Padavan-Miller Asset Forfeiture Bill,³⁴ named for its sponsors, Senator Frank Padavan and Assemblyman Melvin H. Miller, was passed by both houses of the state legislature in June, 1983. Considerable criticism of the bill, however, led to the passage of a second version³⁵ three months later. This new bill created an entirely new article of the CPLR to deal with the subject of forfeiture. It also included amendments which had been proposed at earlier sessions of the legislature but had not been included in the first version of the bill. It appeared that an effective forfeiture statute, when signed into law by the Governor, would be in use by the new year.

But with a subject matter as important as forfeiture, potentially affecting a major cross-section of the law enforcement communities throughout the state, and carrying with it political overtones, as any law affecting criminal activity invariably does, the battle had just

158 N.Y.S.2d 572, 574-75 (1957); *Hofferman v. Simmons*, 290 N.Y. 449, 49 N.E.2d 523 (1943); *Riggs v. Palmer*, 115 N.Y. 506, 22 N.E.2d 188 (1889); *Dwyer v. County of Nassau*, 66 Misc. 2d 1039, 322 N.Y.S.2d 811 (Nassau County Ct. 1971).

27. Most states had some forfeiture provisions, usually geared to vehicles, vessels or aircraft used to transport or conceal narcotics. See DAVID SMITH, *supra* note 20, at 4-76.1-4-78; L. STELLWAGEN, *USE OF FORFEITURE SANCTIONS IN DRUG CASES* (National Institute of Justice, July 1985); Annotation, *Forfeiture of Money to State or Local Authorities Based on Its Association With or Proximity to Other Contraband*, 38 A.L.R. 4th 496 (1985).

28. 18 U.S.C. § 924(d) (1976); 26 U.S.C. § 5872 (1976).

29. 18 U.S.C. § 3615 (1976).

30. 18 U.S.C. §§ 1082, 1955(d) (1976); 26 U.S.C. § 4412 (1976).

31. 49 U.S.C. § 781 (1980).

32. 21 U.S.C. § 881 (1976); 49 U.S.C. §§ 781-782 (1939).

33. See generally DAVID SMITH, *supra* note 20; L. STELLWAGEN, *supra* note 27.

34. Bill number S.3308B/A4545A, amended as Bill number S.6950/A8190.

35. Bill number S.6950A/A8223 (signed on Oct. 31, 1983 as 1983 N.Y. Laws 1017).

begun. Representatives of the Attorney General, the District Attorneys Association, the Association of Chiefs of Police, the Sheriff's Association, the Organized Crime Task Force, various citizens groups, and factions within the state legislature itself wrote to the Governor's office and the bill's sponsors voicing disapproval of many sections of the proposed bill and requesting that the Governor veto it.³⁶

Responding to these criticisms, the sponsors of the bill agreed to try to formulate a bill incorporating many of the concerns expressed by the coalition representatives. In the meantime, the Governor signed the bill into law, to take effect on January 1, 1984. It took until June, 1984, however, following extensive negotiations, for the sponsors, the law enforcement council, and the Governor's office to agree upon the revisions for the new bill.³⁷ The newly created statute, signed into law on August 1, 1984, and applicable to crimes committed on or after that same day,³⁸ repealed all prior legislation and replaced them with what we now know as Article 13-A of the CPLR.

A. The Purposes of the New York Forfeiture Statute

What were the major concerns of the drafters of Article 13-A? The bill's sponsors wanted to create a statute that would provide prosecutors with a potent weapon against large scale drug traffickers. In a letter to Governor Cuomo following the legislature's unanimous approval of the first version of Article 13-A, the sponsors of the statute touched upon some of these concerns:

As you are no doubt aware, drug abuse is becoming more and more prevalent. The importation, distribution and sale of controlled substances in the New York area has been estimated as a \$45 billion a year business. The dealers themselves escape the punishment that they deserve even under strict criminal statutes.

Asset Forfeiture is the procedure that federal enforcement officers are utilizing to combat crime under the U.S. Racketeer and Corrupt

36. See FORFEITURE HANDBOOK, *supra* note 2 (discussion of the statute's history and copies of many of the letters and documents written during the drafting of Article 13-A). Of course, the jackets for both the former and current versions of the statute supply a complete record of the statute's background.

37. During negotiations with the law enforcement community, the legislature pushed back to March 1, 1984 the date on which the statute would become law. It appears that no forfeiture actions were filed during the five months between March 1, 1984 and August 1, 1984, the effective date of the current statute.

38. Bill number S.10039/A11143 (signed on Aug. 1, 1984 as 1984 N.Y. Laws 669). There is one exception to this rule. See *infra* notes 101-08 and accompanying text.

Organizations Act (RICO), as well as under the Controlled Substances Act. It has proven an effective tool to fight crime. Other states, for example, Florida and California, have enacted their own statutes so that they may increase drug control efforts and themselves benefit from seizures and forfeitures.

Our bill improves upon those statutes by incorporating New York Civil Practice rights without weakening the end result. We believe the Asset Forfeiture bill, that has been unanimously passed by both Senate and Assembly, will open a new front in the war on crime and provide law enforcement as well as drug treatment, education and prevention programs needed financial support.³⁹

Governor Cuomo himself, in approving the legislation the first time around, cited the statute's effectiveness in fighting a constant battle against illicit drug trafficking, and other forms of organized crime and "encourag[ed] the law enforcement community to use it vigorously."⁴⁰

It is equally clear, however, that drug trafficking was not the only criminal activity on the minds of the legislators while drafting the statute. In a memorandum to the Governor, Attorney General Robert Abrams described the statute as one which would enable prosecutors to recover proceeds of "felony crimes."⁴¹ Mr. Abrams expressed "the need for a workable forfeiture statute that could, in fact, be used by law enforcement to recover ill-gotten fruits of crime without entanglement in stifling proceedings and procedures" as one of the motivating factors guiding the development of the statute.⁴² Moreover, sections of the statute permitted forfeiture of assets in cases unrelated to narcotics.⁴³ Manhattan District Attorney Robert Morgenthau commended the legislature for broadening the scope of the original drafts to allow for greater forfeitures in cases not stemming from drug convictions.⁴⁴ Examples cited in other correspondence cov-

39. Padavan Letter, *supra* note 8.

40. Executive Memorandum from Governor Mario Cuomo to the State Legislature (Oct. 31, 1983) [hereinafter Executive Memorandum] (approving ch. 1017 of the laws of 1983); *see also* Dillon v. Neira, 130 Misc. 2d 434, 495 N.Y.S.2d 622 (Nassau County Ct. 1985) (held temporary restraining order, which prevented defendant charged with possession and sale of a controlled substance from disposing of money in bank account, was to remain in effect pending reapplication).

41. Memorandum from Attorney General Robert Abrams to Governor Mario Cuomo (Oct. 1983) [hereinafter Memorandum from Attorney General] (regarding Senate 6950-A).

42. *Id.*

43. *See, e.g.*, Act of March 1, 1983, ch. 1017, § 1311(1)(a), 1983 N.Y. Laws 2148, 2149 (repealed 1984).

44. Letter from District Attorney Robert Morgenthau to Senator Frank Padavan and Assemblyman Melvin H. Miller (Oct. 25, 1983) [hereinafter Morgenthau Letter].

ered non-drug related themes.⁴⁵ Certainly the legislature's desire to "take the profit out of crime"⁴⁶ was not limited to drug dealing.⁴⁷

The legislature, however, had to wrestle with a greater concern: safeguarding the public — innocent third parties — from the wrath and power of an overzealous prosecutor.⁴⁸ It was this problem that underscored the history of New York's current asset forfeiture law.

B. Article 13-A: The First Time Around

The first version⁴⁹ of Article 13-A was signed into law by Governor Cuomo in the fall of 1983. In it were several provisions which prosecutors found troublesome. First, the new statute limited forfeiture proceedings to proceeds of a crime.⁵⁰ Substituted proceeds or instrumentalities of any criminal activity were not subject to forfeiture, nor was any appreciation in value of the property obtained through the commission of a crime. Further, there was no provision for the forfeiture of property obtained by a defendant through a

45. See, e.g., Letter from the New York State Law Enforcement Council to Senator Frank Padavan (July 12, 1983) [hereinafter Law Enforcement Council Letter].

46. Executive Memorandum, *supra* note 40.

47. See *Holtzman v. Bailey*, 132 Misc. 2d 25, 503 N.Y.S.2d 473 (Sup. Ct. Kings County 1986). In *Bailey*, the defendant stood criminally convicted of driving while under the influence of alcohol as a felony (DWI). The District Attorney filed a civil action against the defendant, seeking forfeiture of the defendant's automobile as an instrumentality of the crime. The court, in granting the claiming authority's motion, offered a thorough discussion of the intent of the legislature in enacting Article 13-A. The court then presented a brief analysis of similar cases decided under the Florida and Virginia state forfeiture statutes, and compared them with Article 13-A. Finally, the court held that the defendant's vehicle contributed "directly and materially" to the commission of the crime and, therefore, fit squarely within the statutory definition of an instrumentality of the crime. The court granted the state's application to confirm the order of attachment, finding the taking of the car consistent with the legislative intent behind Article 13-A. *Id.*

Forfeiture actions against drivers convicted of DWI are clearly the trend. See, e.g., *Bailey*, 132 Misc. 2d 25, 503 N.Y.S.2d 473 (Sup. Ct. Kings County 1986); *Merola v. Gaither*, No. 560/86 (Sup. Ct. Bronx County Apr. 27, 1987); *Dillon v. Castelli*, 132 Misc. 2d 1077, 506 N.Y.S.2d 418 (Nassau County Ct. 1986). Equally as clear, such actions are within the scope of Article 13-A and within the purview of the legislative draftmanship.

48. One concern raised by virtually all of those involved in the drafting of Article 13-A was the issue of constitutionality, particularly relating to the question of double jeopardy. For a brief discussion of the cases which have so far addressed these issues relative to Article 13-A, see *infra* notes 178-226 and accompanying text.

49. References to the "first," "former" or "original" statute are to the bill signed into law by Governor Cuomo, effective January 1, 1984, a date which was ultimately extended to March 1, 1984, by the legislature. The present Article 13-A was signed into law on August 1, 1984, effective the same date.

50. Act of March 1, 1983, ch. 1017, § 1310, 1983 N.Y. Laws 2148, 2149 (repealed 1984).

common scheme or plan.⁵¹ Thus, traceability was the true measure of the forfeiture action: whatever proceeds could be found were subject to a civil action. This made for several awkward situations, typical of which was the arrest of the drug dealer following a fifty dollar "buy and bust" operation in a "drug factory." The defendant's liability was fifty dollars, despite the fact that ten kilograms of cocaine and heroin and more than one million dollars in cash were found in his apartment.

Second, a prosecutor could only file a forfeiture action against a criminal defendant.⁵² In an attempt to protect innocent individuals

51. See *People v. Molineux*, 168 N.Y. 264, 305-06, 61 N.E. 286, 299 (1901). In this landmark Court of Appeals decision, the phrase "common scheme or plan" was defined:

It sometimes happens that two or more crimes are committed by the same person in pursuance of a single design, or under circumstances which render it impossible to prove one without proving all. To bring a case within this exception to the general rule which excludes proof of extraneous crimes, there must be evidence of system between the offense on trial and the one sought to be introduced. They must be connected as parts of a general and composite plan or scheme, or they must be so related to each other as to show a common motive or intent running through both. Underhill, in his work on Criminal Evidence (section 88), thus states this exception to the general rule: "No separate and isolated crime can be given in evidence. In order that one crime may be relevant as evidence of another, the two must be connected as parts of a general and composite scheme or plan. Thus the movements of the accused prior to the instant of the crime are always relevant to show that he was making preparations to commit it. Hence, on a trial for homicide it is permissible to prove that the accused killed another person during the time he was preparing for or was in the act of committing the homicide for which he is on trial. And, generally, when several similar crimes occur near each other, either in time or locality, — as, for example, several burglaries or incendiary fires upon the same night, — it is relevant to show that the accused, being present at one of them, was present at the other *if the crimes seem to be connected*. Some connection between the crimes must be shown to have existed in fact and in the mind of the actor, uniting them for the accomplishment of a common purpose, before such evidence can be received. . . ."

Id. (emphasis added).

Mere similarity, of course, is insufficient. There must be "such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations." J. WIGMORE, EVIDENCE § 304 (Chadburn rev. 1979) (emphasis omitted); see, e.g., *People v. Santarelli*, 49 N.Y.2d 241, 247-53, 401 N.E.2d 199, 203-06, 425 N.Y.S.2d 77, 81-84 (1980); *People v. Allweiss*, 48 N.Y.2d 40, 46-49, 396 N.E.2d 735, 737-39, 421 N.Y.S.2d 341, 344-46 (1979); *People v. Vails*, 43 N.Y.2d 364, 368, 372 N.E.2d 320, 322-23, 401 N.Y.S.2d 479, 481-82 (1979); *People v. Grutz*, 212 N.Y. 72, 78-79, 105 N.E. 843, 845 (1914).

It is of note here that, although *Molineux* arose in the criminal context, the same standard applies in civil trials. See, e.g., *Matter of Brandon*, 55 N.Y.2d 206, 433 N.E.2d 501, 448 N.Y.S.2d 436 (1982); *Davis v. Solondz*, 122 A.D.2d 401, 504 N.Y.S.2d 804 (3d Dep't 1986); *People v. Aulet*, 111 A.D.2d 822, 490 N.Y.S.2d 567 (2d Dep't 1985); *Mangiaracina v. New York Tel. Co.*, 105 A.D.2d 695, 481 N.Y.S.2d 567 (2d Dep't 1984); W. RICHARDSON, EVIDENCE § 170, 184 (10th ed. 1973).

52. Act of March 1, 1983, ch. 1017, §§ 1310(7), 1311(1), 1983 N.Y. Laws 2148, 2149-50 (repealed 1984).

from being sued by the state, the legislature precluded any action against a third party not named in the criminal indictment. A keen-witted defendant could thus give the stolen diamond cufflinks to her boyfriend and thereby remove them from the grasp of the claiming authority.

The legislature further required the prosecuting authority to prove every issue of fact relevant to the forfeiture action by clear and convincing evidence.⁵³ Effectively, the statute did away with the CPLR's traditional "preponderance of the evidence" standard and forced the prosecutor to both prove the elements of the action and disprove any defenses the defendant might have, a standard virtually impossible to meet.

The standard of obtaining a provisional remedy under Article 13-A was also egregiously high. Adopting the same criteria required under Articles 62 through 65 of the CPLR, the statute provided that no provisional remedy could be granted unless the state established a "significant probability" of ultimate success on the merits and that unless the remedy was granted, the assets subject to the forfeiture *would* be transferred or secreted.⁵⁴ Necessitating proof of the probability of the transfer, as opposed to the possibility of its occurrence, made it virtually impossible to successfully pursue a forfeiture action, especially in light of the type of defendant against whom the statute was designed to be used.

If the provisions discussed above were not enough to make law enforcement personnel think twice before using the statute, the statute's damages provision overloaded the circuit. It provided that a defendant's success in a forfeiture action automatically created liability in the claiming authority for damages resulting from an attachment or any other provisional remedy.⁵⁵ Furthermore, the vacatur of a provisional remedy arising from even the slightest technical defect in the paperwork would result in an award of damages to the defendant. Consequently, given the misgivings and hesitations on the part of those who would ultimately be implementing the statute, the prospects of a workable forfeiture law without extensive revisions seemed dim indeed.

53. *Id.* § 1311(3) at 2150.

54. *Id.* § 1312.

55. *Id.* § 1318(4) at 2152.

The sponsors were deluged with correspondence from law enforcement personnel critical of the statute.⁵⁶ This placed the legislators in a predicament. Article 13-A is atypical of civil statutes in one major respect: it was designed to be used exclusively by prosecutors. Unlike the federal RICO statute, which permits a private citizen to bring a RICO action, an Article 13-A forfeiture action could be initiated only by a "claiming authority," an authorized agency of the government.⁵⁷ If prosecutors refused to implement the statute, it would not be used. Accordingly, if, as here, the correspondence indicated an unwillingness to use the statute on the part of those for whom the statute was designed, then the law was for all practical purposes worthless. Therefore, responding to the criticisms of the law enforcement community was essential to the life of the statute.⁵⁸

One aside here. Most drafters of legislation use compromise as a means of securing passage of a bill into law. Here, the compromises were required to ensure the statute's use once it became law. The consequences of leaving the statute in its original form, therefore, might have appeared greater in a case such as this, putting more

56. See generally FORFEITURE HANDBOOK, *supra* note 2, at 214-51. For a more complete compilation of correspondence and legislative materials, see the documents included in the jackets of the former and current bills.

57. N.Y. CIV. PRAC. L. & R. 1310(11), 1311(1) (McKinney Supp. 1988).

58. One of the major problems the law enforcement community had was dealing with the *in personam* nature of the statute. Apparently, because most actions authorized by other state or federal forfeiture statutes are *in rem*, providing for civil actions directed against the "defendant" property rather than its owner, the prosecutors felt uncomfortable with an *in personam* statute. Their criticisms also included issues of constitutionality, particularly state and federal prohibitions against double jeopardy.

Ironically, it is the *in personam* structure of Article 13-A that permits the claiming authority to dispense with the need to establish a separate trial to tie the property in question to a specific crime. More importantly, this type of action "permits the substitution of a defendant's assets in order to satisfy a forfeiture judgment, thereby allowing the state to collect even though the defendant may no longer possess the property actually derived" from the crime. O. CHASE, *supra* note 6, at 36-43. In short, it permits substantial flexibility in locating assets which could be subject to forfeiture.

It has been held that, due to the *in personam* nature of Article 13-A, a prosecutor may seek forfeiture of any assets of a criminal defendant which are proceeds or substituted proceeds of a crime, regardless of the location of those assets. *District Attorney v. McAuliffe*, 129 Misc. 2d 416, 493 N.Y.S.2d 406 (Sup. Ct. Queens County 1985). The court in *McAuliffe* held that, due to the *in personam* nature of Article 13-A, the court retained the authority to issue a decree affecting property outside of the state when concerning a provisional remedy such as a preliminary injunction. *Id.* at 425, 493 N.Y.S.2d at 412; see J. WEINSTEIN, H. KORN & A. MILLER, *supra* note 2, §§ 1310.03, 1311.02-.03, 1311.09, 1312.03 and 1333.04 (discussion of *McAuliffe* and *in personam* actions in general); see also *Dillon v. Neira*, 130 Misc. 2d 434, 495 N.Y.S.2d 622 (Nassau County Ct. 1985); *Holtzman v. Samuel*, 130 Misc. 2d 976, 495 N.Y.S.2d 583 (Sup. Ct. Kings County 1985); *Dillon v. Smith*, *supra* note 20.

pressure on the legislators to secure a *workable* statute rather than one which might look formidable but would not be used at all.

C. Compromises: Making the Horse Drink

Following extensive negotiation, ending in June of 1984, nearly six months after the initial effective date of the statute, a bill acceptable to all parties was drafted. But in designing the new law, compromises had to be made.⁵⁹

The primary goal of the drafters of the revisions was to maintain the safeguards and protections for innocent parties while easing some of the restrictions on law enforcement officials and giving prosecutors incentive to implement the statute.⁶⁰ With this in mind, legislators changed several of the existing sections of the statute and added a few new provisions to the bill.

To appease the law enforcement community, the legislature increased the scope of the bill to permit recovery against a criminal defendant of property, substituted proceeds or a money judgment in the amount of the value of the property.⁶¹ The recoverable property included instrumentalities of the criminal activity which were not recoverable under the former statute. The statute also authorized the use of any or all of the provisional remedies, including attachments and preliminary injunctions, in an action for a money judgment.⁶²

The definition of proceeds of a crime was broadened to include appreciation in value of the property obtained as a result of the criminal activity.⁶³ Thus, the defendant who fraudulently acquired land in Westchester County valued at \$50,000 and watched the property appreciate to triple that amount before the forfeiture action was completed, could no longer request a refund of \$100,000 following a successful action by the state.

For post-conviction cases, the legislature inserted a provision permitting the claiming authority to commence a forfeiture action and secure provisional remedies prior to the criminal conviction.⁶⁴ The

59. The discussion that follows deals with the primary concessions made during the revision of the former statute. For a full comparison of the differences between the statutes, see the documents and correspondence comprising the jackets of the two bills; see also FORFEITURE HANDBOOK, *supra* note 2.

60. Memorandum from Attorney General, *supra* note 41; Letter from Senator Frank Padavan and Assemblyman Melvin H. Miller to First Assistant Attorney General Dennis H. Allee (Oct. 13, 1983) [hereinafter Letter to Allee].

61. N.Y. CIV. PRAC. L. & R. 1311(1) (McKinney Supp. 1988).

62. *Id.* 1312(1).

63. *Id.* 1310(2).

64. *Id.* 1311(1)(a).

new legislation also authorized filing a forfeiture action based upon criminal activity committed as part of a common scheme or plan to be the basis of a forfeiture action, so long as the criminal activity leading to the underlying criminal conviction was a part of the overall scheme or plan.⁶⁵

One major legislative concession concerned burdens of proof. The legislature lowered the burden of proof in post-conviction cases filed against criminal defendants to the traditional civil standard of the preponderance of the evidence.⁶⁶ In pre-conviction actions against a criminal defendant, the claiming authority was still required to show by clear and convincing evidence that a crime was committed and that the criminal defendant committed the crime.⁶⁷

Certain procedural changes were also made. The first version of the statute required the claiming authority to make service upon the owner of the property subject to forfeiture, the person from whom the property was seized *and* any other person known to the claiming authority to have an interest in the property. The revised statute eliminated this requirement, necessitating only ordinary service upon the defendant.⁶⁸

The legislators inserted a remission provision into the statute, limiting the time permitted for a person to move to open a forfeiture judgment to one year after the entry of a final judgment.⁶⁹ The moving party must now show that he had no actual knowledge of the forfeiture proceeding or any other related proceeding and that he did not know or should not have known that the forfeited property was connected to a crime or subject to a fraudulent conveyance.⁷⁰ Further, the court must determine whether the restoration of the property to the movant is in the interests of justice.⁷¹ This section only applies in cases where forfeiture has been ordered, in contrast to actions pursuant to CPLR 1311(4) permitting the dismissal or modifi-

65. *Id.*; see *Kuriansky v. Natural Mold Shoe Corp.*, 133 Misc. 2d 489, 506 N.Y.S.2d 940 (Sup. Ct. Westchester County 1986), *modified on other grounds*, 136 Misc. 2d 684, 519 N.Y.S.2d 88 (Sup. Ct. Westchester County 1987) (*infra* notes 101-07 and accompanying text discuss *Kuriansky* more thoroughly); see also *supra* note 51 (definition of common scheme or plan).

66. N.Y. CIV. PRAC. L. & R. 1311(3) (McKinney Supp. 1988).

67. *Id.* 1311(1)(b), 1311(3).

68. *Id.* 1311(5), 1319, 1320, 1335, 1345.

69. *Id.* 1311(7).

70. *Id.*

71. *Id.*

cation of orders in the interests of justice during the pendency of the forfeiture action.⁷²

The new law also restricted to a non-party in the original action the right to commence a proceeding to establish an adverse claim to the property subject to forfeiture.⁷³ This is in sharp contrast to the former statute which permitted any "interested person," including the forfeiture defendant, to commence such an action.

One of the most hotly contested topics during the revision process was the issue of the claiming authority's liability for damages.⁷⁴ The former statute provided that the claiming authority

shall be liable for all damages, including reasonable attorney's fees, which may be sustained by reason of the attachment if the defendant recovers judgment, or if it is finally decided that the claiming authority was not entitled to an attachment of the defendant's property. It is a defense to any claim for damages under this section that the claiming authority acted reasonably and in good faith.⁷⁵

Under the new statute, applicable to all of the statute's damages provisions,⁷⁶ the burden of proof was placed on the defendant to show, by a preponderance of the evidence, that the claiming authority acted "without reasonable cause *and* not in good faith."⁷⁷ This is a high standard. The legislature apparently was concerned that the initial statute might inhibit prosecutors from bringing forfeiture actions. This new standard creates a balance by encouraging wronged individuals with credible claims to seek damages against errant prosecutors rather than fostering a continuous flow of frivolous litigation following virtually every unsuccessful forfeiture action.

The legislature also changed the stay provisions of the statute. Previously, a defendant could obtain a stay of the forfeiture proceed-

72. For further discussion, see *infra* notes 151-75 and accompanying text.

73. N.Y. CIV. PRAC. L. & R. 1327 (McKinney Supp. 1988).

74. Among the many letters and memoranda dealing with this issue, see Memorandum from Attorney General, *supra* note 41; Memorandum from First Assistant Attorney General Dennis H. Allee to Scott Fein, Assistant Counsel to the Governor (June 22, 1983) [hereinafter Memorandum from First Assistant Attorney General]; Memorandum from First Assistant Attorney General Dennis H. Allee to James Yates (Apr. 25, 1984); Law Enforcement Council Letter, *supra* note 45; Memoranda from Jerry Neugarten to Matt Crosson (Apr. 30, 1984 and June 4, 1984).

75. Act of March 1, 1983, ch. 1017, § 1318(4), 1983 N.Y. Laws 2148, 2152 (repealed 1984).

76. N.Y. CIV. PRAC. L. & R. 1318(4), 1320(2), 1321, 1327, 1337, 1347 (McKinney Supp. 1988).

77. *Id.* 1318(4) (emphasis added).

ing during the pendency of *any* criminal case against him.⁷⁸ Law enforcement authorities argued that this would permit some criminals, especially career felons, to insulate themselves entirely from forfeiture.⁷⁹ The revised law provides for an automatic stay of both pre-conviction and post-conviction forfeiture actions, but only during the pendency of the related criminal case.⁸⁰ The statute, however, does permit a pre-conviction forfeiture to proceed, despite a pending criminal proceeding, if all of the parties consent and if the court determines that lifting the stay is "in the interest of justice and for good cause."⁸¹

Finally, the legislature authorized the appropriation to the state or county, as appropriate, of twenty-five percent of the proceeds of forfeiture judgments in all cases, to be used for law enforcement purposes.⁸² This was a financial incentive of sorts for law enforcement personnel.⁸³ Concerns arose that this would turn police and prosecutors into bounty hunters with shields,⁸⁴ but the legislature apparently felt that this compromise, down from the asking price of fifty percent, would do no more than encourage claiming agents and authorities — all government agencies — to implement the statute to the best of their abilities. After all, the money was not going directly to the bank account of the police officer or prosecutor in charge of the case. This decision seems to have paid off.⁸⁵ The legislature also ap-

78. Act of March 1, 1983, ch. 1017, § 1311(1)(b), 1983 N.Y. Laws 2148, 2150 (repealed 1984).

79. Morgenthau Letter, *supra* note 44.

80. N.Y. CIV. PRAC. L. & R. 1311(1)(a), (b) (McKinney Supp. 1988). Note that the legislature specifically provided that a stay "shall not prevent the granting or continuance of any provisional remedy." *Id.* This may raise some issues with constitutional overtones. See O. CHASE, *supra* note 6; FORFEITURE HANDBOOK, *supra* note 2, at 171-74.

81. N.Y. CIV. PRAC. L. & R. 1311(1)(b) (McKinney Supp. 1988). The practicality of this provision is questionable as it is unclear in what situations a prosecutor or a defense attorney would consent to trying the forfeiture action before the criminal case. If the District Attorney's criminal case were weak, the defense would want to expedite the criminal matter to gain an acquittal. Counsel might then file a motion under Article 13-A's "interests of justice" provision, seeking dismissal of the civil action on equitable grounds. If, on the other hand, the state's criminal case were strong, the District Attorney would want it tried first. If a conviction resulted, issue preclusion might put the prosecutor in an advantageous position in the civil action and probably secure for him a settlement or summary judgment on the liability issues.

82. *Id.* 1349(2)(d)(ii), 1349(e).

83. Letter to Allee, *supra* note 60.

84. Law Enforcement Council Letter, *supra* note 45; Letter to Allee, *supra* note 60.

85. In the first two and one half years of operation — the most recent figures available — nearly five million dollars in assets were forfeited, with somewhere between nine and fifteen million dollars worth of cash and assets still at the provisional remedy stage of the proceedings or pending in court. See generally, Kessler, *supra* note 2.

propriated one million dollars to assist in the implementation of the bill.

D. Safeguarding the Public

The benefits of compromise did not all fall in favor of law enforcement. A package of provisions included in the new statute demonstrated the legislature's fervent attempt to protect innocent bystanders from getting caught in the web of prosecutorial wrath and rancor.

First among the safeguards were the provisions dealing with non-criminal defendants, those individuals with an interest in the property subject to forfeiture who had not been proven to have committed the underlying felony.⁸⁶ The new statute authorized forfeiture suits against non-criminal defendants, but limited them to actions seeking the proceeds or substituted proceeds of a crime.⁸⁷ Actions seeking the instrumentality of a crime were permitted, but only in instances where the instrumentality did not exceed the value of the proceeds. Also, bringing a forfeiture action for a money judgment against a non-criminal defendant was expressly prohibited.⁸⁸

The new statute also changed the burden of proof required to secure a judgment against a non-criminal defendant. In general, the state was required to prove its case against this type of defendant by a preponderance of the evidence.⁸⁹ Unlike actions against criminal defendants, however, in drug-related cases brought against a non-criminal defendant, the state was required to show by clear and convincing evidence that a crime was committed by a person, but need not prove the identity of that person.⁹⁰

86. For a detailed discussion of the provisions relating to non-criminal defendants, see *infra* notes 115-24 and accompanying text.

Note, of course, that, from a prosecutor's standpoint, the fact that an individual is not prosecuted for a crime does not make him free of guilt for the underlying criminal activity. For purposes of the statute, however, only the named defendant in the criminal proceeding is considered a criminal defendant. All other parties with an interest in the property are dealt with as non-criminal defendants.

There is one exception to this rule. In a pre-conviction action, the civil suit may proceed without a concurrent criminal proceeding. In these cases, the criminal defendant is the individual who the claiming authority will attempt to show actually committed the crime. The standard for proving the commission of the crime and the identity of the defendant as the actual criminal is by clear and convincing evidence. See *infra* notes 98-113 and accompanying text.

87. N.Y. CIV. PRAC. L. & R. 1311(1) (McKinney Supp. 1988).

88. *Id.*

89. *Id.* 1311(3)(b)(ii)-(iv).

90. *Id.* 1311(3)(b)(i).

The statute also expressly prohibited double recovery by a claiming authority in the same action.⁹¹ Theoretically, the state probably could have sought to recover both the proceeds and the substituted proceeds of the same crime from different individuals. The statute limited recovery to the greater of the two plus any instrumentality, exclusive of real property, used in the commission of the crime. The real property exemption merited great discussion by the legislature and is discussed more thoroughly below.⁹²

Another provision in the new law provides that any party can make a motion to seal all papers relating to the forfeiture action, or any provisional remedy, for good cause shown, until the property which is the subject matter of the forfeiture action has been levied upon.⁹³ A prosecutor might use this provision when surprise is required for an effective attachment. A defendant who could be adversely affected by the publicity might also move under this section. Since the sealing terminates upon levy, however, the practicality of a defendant implementing the provision is questionable at best as the time period that the seal is in effect is usually short.

Finally, as a last resort to prevent abuse of the statute by the law enforcement community, the legislature added an "interests of justice" provision.⁹⁴ Unique among forfeiture statutes, this section permits a court to dismiss a forfeiture action in the interests of justice upon the motion of either party. In addition, when an action relates to the instrumentality of a crime, a court may limit the forfeiture to the value of the proceeds of the crime if the value of the instrumentality substantially exceeds the value of the proceeds.⁹⁵ A powerful provision indeed. Given the importance of this section and the interpretation it has been given by the courts, it, too, is discussed below in greater detail.

III. ARTICLE 13-A: A STATUTORY ANALYSIS

So what was the final product of the legislators' arduous endeavors? What follows is a practitioner's guide to Article 13-A: a detailed analysis of the main provisions of the current statute and the cases which have interpreted it.

91. *Id.* 1311(8).

92. *See infra* text accompanying notes 135-49.

93. N.Y. CIV. PRAC. L. & R. 1311(6) (McKinney Supp. 1988).

94. *Id.* 1311(4).

95. *Id.* 1311(4)(a).

The statute makes three primary distinctions in each forfeiture action. First, each action is categorized as either a "pre-conviction" or "post-conviction" forfeiture.⁹⁶ Second, forfeiture actions may be brought against "criminal" and "non-criminal" defendants.⁹⁷ Finally, the action may seek forfeiture of the "proceeds," "substituted proceeds" or an "instrumentality of a crime," or, in some instances, may seek a "money judgment" for the value equivalent.⁹⁸

A. The Forfeiture Crime: Pre-conviction or Post-conviction

The name given the pre-conviction action is misleading. Applicable only where the underlying felony involves narcotics or marijuana, a pre-conviction forfeiture does not require a criminal conviction at all. Instead, the prosecutor may prove the occurrence of a drug-related criminal act, not necessarily by the defendant, in the forfeiture case itself. The proof of the crime, however, must meet the higher civil standard of clear and convincing evidence. All other elements of the forfeiture action require the standard proof by a preponderance of the evidence.⁹⁹

An actual order of forfeiture may be granted to a prosecutor, as "claiming authority," in a post-conviction action only after someone has been convicted of "any felony defined in the penal law or any other chapter of the consolidated laws of the state."¹⁰⁰ Note that this definition includes narcotics and marijuana felonies. Accordingly, where the underlying crime is drug-related, a prosecutor has the option of filing a post-conviction action or a pre-conviction action. Where the underlying crime is not drug-related, however, the prosecutor may file only a post-conviction action.

In either instance, the underlying felony must have been committed on or after August 1, 1984, the effective date of the statute, and the forfeiture action must be commenced within five years of the commission of the crime.¹⁰¹ There is, however, an important exception to this rule. Where the series of criminal acts underlying the forfeiture action may have begun prior to August 1, 1984 but terminated after that date, the acts will be considered as part of a continuous crime and the plaintiff will be entitled to recover the proceeds

96. *Id.* 1311(1).

97. *Id.*

98. *Id.*

99. *Id.* 1310(6), 1311(1)(b).

100. *Id.* 1310(5), 1311(1)(a).

101. *Id.* 1311(1).

dating back to the beginning of the criminal activity.¹⁰² This exception was carved out by the court in *Kuriansky v. Natural Mold Shoe Corp.*¹⁰³

In *Natural Mold*, the Deputy Attorney General for Medicaid Fraud Control brought a post-conviction forfeiture action against four defendants who were indicted for grand larceny and related charges in connection with an alleged scheme of overbilling Medicaid to the tune of some \$1.4 million for orthopedic shoes and molds. One of the claims raised by the defense was that the money sought by the state included sums alleged to have been collected prior to August 1, 1984, the effective date of the statute, and were, therefore, not recoverable under the statute.¹⁰⁴

The court rejected this argument. Citing as support a rule enunciated by the court of appeals in *People v. Cox*¹⁰⁵ many years earlier, the court held that since the underlying criminal acts were committed against a single individual, pursuant to a single intent and design and in execution of a single scheme, the acts constituted a single crime.¹⁰⁶ Accordingly, since that "single crime" terminated after August 1, 1984, the crime had been committed during the effective period of the statute and the claiming authority was thereby entitled to recover all of the proceeds of the criminal act.¹⁰⁷

This is the proper reading of the statute. A contrary interpretation would permit a defendant to retain the proceeds of acts committed prior to August 1, 1984, while permitting forfeiture of proceeds obtained after that date, even though all of the proceeds resulted from a single continuous scheme. The legislature surely could not have intended such a result.¹⁰⁸

In post-conviction actions, as mentioned above, the prosecutor must prove his case by a preponderance of the evidence. The prosecutor need not, however, wait until verdict to file the forfeiture ac-

102. See *Kuriansky v. Natural Mold Shoe Corp.*, 133 Misc. 2d 489, 506 N.Y.S.2d 940 (Sup. Ct. Westchester County 1986), *modified on other grounds*, 136 Misc. 2d 684, 519 N.Y.S.2d 88 (Sup. Ct. Westchester County 1987).

103. *Id.*

104. *Id.* at 495-96, 506 N.Y.S.2d at 946.

105. 286 N.Y. 137, 142-43, 36 N.E.2d 84, 86 (1941).

106. *Natural Mold*, 133 Misc. 2d at 495, 506 N.Y.S.2d at 946.

107. *Id.*

108. Note that the forfeiture of proceeds obtained prior to August 1, 1984 is not a question of retroactivity. A distinction must be made between the application of the statute to criminal activity completed prior to August 1, 1984, the effective date of the statute, and the *Natural Mold* situation where a continuing act began prior to the effective date but was completed after that date. Application of the statute to the first situation would require the use of the doctrine of retroactivity. Such is not the case, however, in the *Natural Mold* fact pattern.

tion. Nor, for that matter, must the prosecutor wait for charges to be filed in a pre-conviction action. Rather, in both instances, the action may be commenced, up to sixty days prior to the filing of an indictment,¹⁰⁹ with a motion for temporary relief through provisional remedies, including preliminary injunctions, orders of attachment, temporary restraining orders, receiverships or notices of pendency.¹¹⁰ These are especially important where the property sought is liquid or moveable, or is in danger of being sold, assigned or destroyed prior to the disposition of the criminal action. The provisional remedies provided for under Article 13-A are similar to those under Articles 62 through 65 of the CPLR. Unlike proceedings in non-forfeiture cases, however, all provisional remedies are available in all types of actions under Article 13-A, including actions for a money judgment.¹¹¹

Confirmation hearings must be conducted within five days of levy upon the property by the claiming authority pursuant to *ex parte* orders of attachments.¹¹² This is another requirement that protects a defendant's due process rights against overzealous prosecutors.¹¹³

B. *The Forfeiture Defendant: Criminal or Non-criminal*

The subject of the forfeiture action may be a "criminal" or "non-criminal" defendant. Formulating this distinction was one of the leg-

109. N.Y. CIV. PRAC. L. & R. 1311(1)(a) (McKinney Supp. 1988).

110. *Id.* 1312-1348; *see also* *Morgenthau v. Citisource, Inc.*, 68 N.Y.2d 211, 500 N.E.2d 850, 508 N.Y.S.2d 152 (1986); *Dillon v. Schiavo*, 114 A.D.2d 924, 495 N.Y.S.2d 197 (2d Dep't 1985), *appeal dismissed*, 67 N.Y.2d 918, 492 N.E.2d 794, 501 N.Y.S.2d 1023 (1986); *Dillon v. Bialostok*, 136 Misc. 2d 695, 519 N.Y.S.2d 186 (Nassau County Ct. 1987); *Holtzman v. Samuel*, 130 Misc. 2d 976, 495 N.Y.S.2d 583 (Sup. Ct. Kings County 1985); *District Attorney v. McAuliffe*, 129 Misc. 2d 416, 493 N.Y.S.2d 406 (Sup. Ct. Queens County 1985).

111. N.Y. CIV. PRAC. L. & R. 1312(1) (McKinney Supp. 1988). Note, however, that actions for a money judgment may not be brought against non-criminal defendants. *See infra* note 120 and accompanying text; *see also* J. WEINSTEIN, H. KORN & A. MILLER, *supra* note 2, § 1310.02-.03.

112. N.Y. CIV. PRAC. L. & R. 1317 (McKinney Supp. 1988).

113. CPLR 1317 has been upheld against constitutional attack. *See Morgenthau v. Citisource, Inc.*, 68 N.Y.2d 211, 500 N.E.2d 850, 508 N.Y.S.2d 152 (1986); *Dillon v. Schiavo*, 114 A.D.2d 924, 495 N.Y.S.2d 197 (2d Dep't 1985), *appeal dismissed*, 67 N.Y.2d 918, 492 N.E.2d 794, 501 N.Y.S.2d 1023 (1986); *Dillon v. Bialostok*, 136 Misc. 2d 695, 519 N.Y.S.2d 186 (Nassau County Ct. 1987); *Holtzman v. Samuel*, 130 Misc. 2d 976, 495 N.Y.S.2d 583 (Sup. Ct. Kings County 1985); *District Attorney v. McAuliffe*, 129 Misc. 2d 416, 493 N.Y.S.2d 406 (Sup. Ct. Queens County 1985). For a discussion of the cases decided under Article 13-A dealing with constitutional issues, *see infra* notes 178-205 and accompanying text.

Confirmation hearings are not unique to Article 13-A. *See* N.Y. CIV. PRAC. L. & R. 6211(b) (McKinney Supp. 1988).

islature's most important acts in attempting to protect the rights of innocent third parties in forfeiture actions.¹¹⁴

Defining the criminal defendant is simple. In the post-conviction scenario, the criminal defendant is the individual who has been criminally convicted of a felony. In the pre-conviction case, involving narcotics or marijuana felonies, he is the person who the prosecutor proves has committed a pre-conviction forfeiture crime.¹¹⁵ Thus, the prosecutor may elect, in pre-conviction cases, to litigate the issue of guilt in the forfeiture action itself under a "clear and convincing" standard, rather than seek a criminal conviction based upon the higher standard of reasonable doubt.

The non-criminal defendant is "a person, other than a criminal defendant, who possesses an interest in the proceeds of a crime, the substituted proceeds of a crime, or [in] an instrumentality of a crime."¹¹⁶ Falling into this category may be the spouse, girlfriend or "business" partner of the criminal defendant. To succeed in an action against this type of defendant, the prosecutor must prove, by a preponderance of the evidence, one of two specific elements: (1) the non-criminal defendant "knew or should have known that the proceeds were obtained through the commission of a crime," or (2) the non-criminal defendant "fraudulently obtained his or her interest in the proceeds to avoid forfeiture."¹¹⁷ Thus, the bank robber's girlfriend can be sued for the ruby and sapphire bracelet that the bank robber gave her after the crime. Similarly, the criminal's associate who agreed to hold the ten million dollars until the "heat" died down would be an easy target for this type of action.

The statute also affords a rebuttable presumption in cases involving non-criminal defendants. It is presumed that the non-criminal defendant knew that the property subject to forfeiture was the proceeds, substituted proceeds or instrumentality of a crime where the non-criminal defendant (1) did not pay "fair consideration"¹¹⁸ for the asset or (2) obtained an interest in the asset with knowledge of an order for a provisional remedy relating to that asset or (3) in a

114. See *supra* notes 48-51, 86-94 and accompanying text.

115. N.Y. CIV. PRAC. L. & R. 1310(9) (McKinney Supp. 1988).

116. *Id.* 1310(10).

117. *Id.* 1311(3)(b)(ii).

118. "Fair consideration" is defined in CPLR 1310(13). The concept and its application to Article 13-A actions are discussed in J. WEINSTEIN, H. KORN & A. MILLER, *supra* note 2, § 1310.05.

The term is not unique to forfeiture proceedings. For an extensive body of law dealing with this concept, see N.Y. DEBT. & CRED. LAW § 272 (Consol. 1979 & Supp. 1987); UNIF. FRAUDULENT CONVEYANCE ACT § 3, 7A N.L.A. 448 (1985) and cases cited therein.

post-conviction forfeiture action, has criminal liability for the crime for which the criminal defendant has been convicted and possesses an interest in the asset or (4) participated in or was aware of a scheme to conceal or disguise the manner in which the interest in the asset was obtained.¹¹⁹

The non-criminal defendant, as discussed above, represents the innocent third party whom the legislature sought to protect with its built-in statutory safeguards. A major difference between the statute's treatment of criminal defendants and non-criminal defendants is that the prosecutor may not seek a money judgment against a non-criminal defendant.¹²⁰ By so limiting the use of the statute, the legislature prevented the claiming authority from using its full power and investigative means to pursue the assets of an individual who, although aware of the criminal activity, was probably not one of the prime actors in the criminal scheme. Traceability is the key to a non-criminal defendant; anything more than direct or substituted proceeds must be secured from the actual defendants.

The liability of the non-criminal defendant, therefore, is limited to the asset itself or its value. If, for example, a non-criminal defendant lent his station wagon, valued at \$10,000, to a criminal defendant friend who used the wagon as a transport and getaway car in a \$475,000 heist of Tiffany's, the non-criminal defendant's loss, regarding the station wagon, would be limited to the value of the proceeds or any substituted proceeds. Since, in this instance, the value of the jewelry exceeded that of the station wagon, the vehicle would be forfeitable. If, however, the value of the stolen jewels was only \$7,500, the wagon would be safe from forfeiture. Only if the value of the proceeds exceeds the value of the instrumentality would the forfeiture of the non-criminal defendant's property be authorized.

One final point concerning non-criminal defendants is worthy of mention. In any type of forfeiture action, regardless of the nature of the property sought, a claiming authority may prove his case by either of two methods. For proceeds, a claiming authority must prove by a preponderance of the evidence that the non-criminal defendant either (1) knew or should have known that the proceeds were obtained through the commission of a crime or (2) fraudulently obtained his interest in the proceeds to avoid forfeiture.¹²¹ As the prop-

119. N.Y. CIV. PRAC. L. & R. 1311(3)(c) (McKinney Supp. 1988).

120. *Id.* 1311(1), (8); see *Kuriansky v. Natural Mold Shoe Corp.*, 133 Misc. 2d 489, 495-96, 506 N.Y.S.2d 940, 946 (Sup. Ct. Westchester County 1986), *modified on other grounds*, 136 Misc. 2d 684, 519 N.Y.S.2d 88 (Sup. Ct. Westchester County 1987).

121. N.Y. CIV. PRAC. L. & R. 1311(3)(b)(ii) (McKinney Supp. 1988).

erty gets further removed from the crime, however, the prosecutor's burden becomes greater. For forfeiture of substituted proceeds, a claiming authority must show that the non-criminal defendant either (1) "knew that the property sold or exchanged to obtain an interest in the substituted proceeds was obtained through the commission of a crime," or (2) "fraudulently obtained his or her interest in the substituted proceeds to avoid forfeiture."¹²² Thus, actual knowledge of the nature of the substituted proceeds is required under the first theory of proof. Regarding the forfeiture of an instrumentality, a claiming authority must prove that the non-criminal defendant either (1) "knew that the instrumentality was or would be used in the commission of a crime" or (2) "knowingly obtained his or her interest in the instrumentality to avoid forfeiture."¹²³ It should be remembered, however, that since recovery against a non-criminal defendant is limited to the amount of the proceeds of the crime, the non-criminal defendant will only lose his or her instrumentality if the value of the proceeds meets or exceeds that of the instrumentality. A comparison of these standards with those involving criminal defendants illustrates the protections the legislature afforded the non-criminal defendant while drafting this statute.

Note that a forfeiture defendant, whether criminal or non-criminal, may be a corporate entity.¹²⁴ Judging from the tenor of the statute as a whole, it seems that the legislature did not wish to discourage forfeiture actions against defendants merely because the individual defendant chose to hide behind the corporate veil.

C. *The Forfeited Property*

Once the type of crime and class of defendant are determined, the focus turns to the class of property that is subject to forfeiture. The statute provides for three categories: (1) proceeds of a crime, (2) substituted proceeds of a crime, and (3) the instrumentality of a crime.¹²⁵ The first two classifications are easily defined. Proceeds of a crime is property obtained through the commission of a crime, including any appreciation in value.¹²⁶ Substituted proceeds is "any

122. *Id.* 1311(3)(b)(iii).

123. *Id.* 1311(3)(b)(iv).

124. *Morgenthau v. Citisource, Inc.*, 68 N.Y.2d 211, 215 n.2, 500 N.E.2d 850, 851 n.2, 508 N.Y.S.2d 152, 153 n.2 (1986); *Dillon v. Morgan Oil Terminals Corp.*, 138 Misc. 2d 135, 138, 523 N.Y.S.2d 719, 722 (Nassau County Ct. 1987); *see also* N.Y. GEN. CONSTR. LAW § 37 (McKinney 1980).

125. N.Y. CIV. PRAC. L. & R. 1310(2), (3), (4) (McKinney Supp. 1988).

126. *Id.* 1310(2).

property obtained by the sale or exchange of proceeds of a crime, and any gain realized by such sale or exchange.”¹²⁷ Thus, if a bank robber steals \$20,000 from Chemical Bank, deposits the money in a money market account at ten percent interest and earns \$2,000 in interest, the entire \$22,000 is subject to forfeiture. If that same thief, instead, uses the stolen money to buy a plot of land in Washington County and the property appreciates in value, the defendant's entire interest in the land may be subject to forfeiture as the substituted proceeds of the crime. There is no requirement, however, that a particular criminal defendant actually receive the proceeds or receive the benefit of those proceeds.¹²⁸

An instrumentality of a crime is “any property, other than real property and any buildings, fixtures, appurtenances, and improvements thereon, whose use contributes directly and materially to the commission of a crime”¹²⁹ Inclusion of this type of property within the scope of Article 13-A was one of the unwavering demands the law enforcement community sought from the legislative sponsors.¹³⁰ Virtually all forfeiture statutes authorize to some degree the attachment and forfeiture of instrumentalities.¹³¹ Exclusion from Article 13-A would have severely limited the statute's effectiveness.

This category has been interpreted to include everything from machines used to dismantle automobiles in an illegal “chop shop” operation¹³² and the automobile driven by a driver arrested for driving while intoxicated¹³³ to a corporation used as a front for illegal drug

127. *Id.* 1310(3).

128. See *Morgenthau v. Citisource, Inc.*, 68 N.Y.2d 211, 500 N.E.2d 850, 508 N.Y.S.2d 152 (1986); *Holtzman v. Ciro*, No. 8948/85 (Sup. Ct. Kings County Mar. 31, 1987) (In *Ciro*, the court deemed it irrelevant, for purposes of the forfeiture action, which of the two defendants actually received the money from the illegal drug transactions which were the basis of the criminal proceeding. The court held each defendant jointly and severally liable for the \$262,000, the full amount sought by the claiming authority.); *Kuriansky v. Natural Mold Shoe Corp.*, 133 Misc. 2d 489, 506 N.Y.S.2d 940 (Sup. Ct. Westchester County 1986), *modified on other grounds*, 136 Misc. 2d 684, 519 N.Y.S.2d 88 (Sup. Ct. Westchester County 1987).

129. N.Y. CIV. PRAC. L. & R. 1310(4) (McKinney Supp. 1988).

130. See Memorandum from First Assistant Attorney General, *supra* note 74; Law Enforcement Council Letter, *supra* note 45; Memorandum from Attorney General, *supra* note 41; Letter from Ronald Goldstock, Deputy Attorney General, New York State Organized Crime Task Force, to Attorney General Robert Abrams (Oct. 21, 1983) [hereinafter Task Force Letter]; Memorandum from Jerry Neugarten to Matt Crosson (June 4, 1984) [hereinafter Memorandum from Neugarten].

131. See generally, DAVID SMITH, *supra* note 20; L. STELLWAGEN, *supra* note 27.

132. *Merola v. Ferranti*, No. 1168/85 (Sup. Ct. Bronx County Apr. 4, 1986).

133. See *Merola v. Gaither*, No. 560/86 (Sup. Ct. Bronx County Apr. 27, 1987); *Dillon v. Gaslin*, No. 102 @ Misc. 2d 1077, 506 N.Y.S.2d 418 (Nassau County Ct. 1986); *Holtzman v.*

sales.¹³⁴ Its broad reach, compared with that of the proceeds or substituted proceeds categories, makes it ideal for use by prosecutors seeking to attach items not directly traceable to the crime. Its potential for abuse is also great. Accordingly, the legislature saw fit to exclude real property from the definition of an instrumentality.

The real property exemption is specifically written into the statute's definition of an instrumentality.¹³⁵ It reflects the legislature's concern over an attachment or forfeiture of a five story building because of a ten dollar "buy and bust" in the building's vestibule. Note, however, that this exception is limited to actions which seek the forfeiture of real property as an instrumentality of a crime. Real property is forfeitable when it is the proceeds or substituted proceeds of criminal activity.¹³⁶

Much is made, in the statute's legislative history, of the real property exemption.¹³⁷ Such an exemption is not new to New York civil practice. Analogous is the homestead exemption provided to judgment debtors under Article 52.¹³⁸ Here, however, the sponsors were particularly concerned with drafting a bill that would sustain judgments similar to that in the landmark case of *Calero-Toledo v. Pearson Yacht Leasing Co.*,¹³⁹ best remembered for affirming the doctrine that the innocence of a property owner is not a defense in an *in rem* forfeiture action.

In *Pearson Yacht*, a case decided under one of the Puerto Rican forfeiture statutes,¹⁴⁰ two Puerto Rican residents leased a \$20,000

Bailey, 132 Misc. 2d 25, 503 N.Y.S.2d 473 (Sup. Ct. Kings County 1986). For a discussion of *Bailey*, see *supra* note 47.

134. *Dillon v. Ferrandino*, 132 Misc. 2d 334, 503 N.Y.S.2d 675 (Nassau County Ct. 1986). In *Ferrandino*, the defendant, a pharmacist, procured and paid for drugs in the name of his pharmacy, a legitimate corporation. He then placed some drugs, still in manufacturers' containers, in a bag which was placed in his Mercedes in preparation for a later illegal drug sale. The court held that the corporation was a front or subterfuge for the illegally sold drugs. The fact that the pharmacy did legitimate business did not bar the court from finding that the corporation was an instrumentality of the crime and that its assets were subject to forfeiture as a result of the pharmacist's illegal drug-related activities. *Id.* at 335, 503 N.Y.S.2d at 676; see also *Borzuko v. City of New York Police Dep't Property Clerk*, 136 Misc. 2d 758, 519 N.Y.S.2d 491 (Sup. Ct. N.Y. County 1987).

135. N.Y. CIV. PRAC. L. & R. 1310(4) (McKinney Supp. 1988).

136. Examples of this include situations where a defendant bought a plot of land with counterfeit money (proceeds) or where a defendant used money taken in a Brinks armored truck robbery to purchase a home in Onondaga County (substituted proceeds).

137. See, e.g., Letter to Allee, *supra* note 60; Morgenthau Letter, *supra* note 44.

138. N.Y. CIV. PRAC. L. & R. 5206 (McKinney 1978).

139. 416 U.S. 663 (1974).

140. P.R. LAWS ANN. tit. 24, § 2512(a)(4),(b)(Supp. 1973); tit. 34, § 1722 (1971). In *Pearson Yacht*, the court held that for the purposes of the Three Judge Court Act, Puerto Rican Statutes are considered state statutes. 416 U.S. at 675.

yacht from the defendant, a large leasing company. Under the terms of the lease, the leasing company retained title to the yacht. The lease, however, had a buy-out clause which permitted the lessees to purchase the yacht for one dollar upon the termination of the agreement. The lease also included a provision protecting the leasing company from loss resulting from the forfeiture of the yacht.

Fourteen months into the lease, authorities discovered a "joint" aboard the yacht. Pursuant to the Puerto Rican forfeiture statute dealing with narcotics, the government seized the yacht and its contents. The yacht was subsequently forfeited by default.

Pearson had not been notified during any of the proceedings. Upon learning of the forfeiture, Pearson filed suit challenging the constitutionality of the forfeiture statute and seeking recovery of the yacht or due compensation from the government.

A unanimous district court found the statute unconstitutional.¹⁴¹ The United States Supreme Court, however, by a 7-2 vote, reversed the lower court and upheld the seizure and the constitutionality of the statute.¹⁴²

In drafting Article 13-A, the legislators took pains to create a statute that would not sanction forfeiture of a yacht "because one marijuana cigarette was found aboard."¹⁴³ Legislation permitting such "disproportionate penalties through the rubric of civil forfeiture" was deemed unacceptable.¹⁴⁴ The drafters extended their concerns to situations where a stolen item is sold in a "mom and pop" grocery store or a marijuana plant is grown in a farmer's field.¹⁴⁵ Would the grocery store be subject to forfeiture as an instrumentality of a crime? Would the farmer lose his farm because of one plant? The legislature wanted to insure negative responses to these questions.

Law enforcement agencies also condemned the outcome of cases such as *Pearson Yacht* and expressed regret if an isolated minor criminal incident were to destroy a person's business or take a family's home.¹⁴⁶ But the prosecutors drew the line in cases where mom

141. *Pearson Yacht Leasing Co. v. Massa*, 363 F. Supp. 1337, 1342 (D. P.R. 1973).

142. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. at 679-80. More problematic than the result in *Pearson Yacht* was the high court's failure to give any guidance to lower courts on how to deal with forfeitures of this nature. This confusion has led to wide ranging variations on and interpretations of *Pearson Yacht* in the lower courts. See DAVID SMITH, *supra* note 20 (analyzing *Pearson Yacht* and its legacy).

143. Letter to Allee, *supra* note 60.

144. *Id.*

145. *Id.*

146. Morgenthau Letter, *supra* note 44.

and pop sold little but cocaine from their store or the farmer's field was used almost exclusively to cultivate opium poppies.¹⁴⁷ Other targeted real estate included the backyard garage used primarily as a "chop shop," the warehouse used as a storage facility for "fenced" or stolen merchandise, the liquor store used to hide the "numbers" operation in the back, or the motel used predominantly for the purchase and sale of heroin. The final draft, however, retained the real property exemption in its entirety.

Finally, concerning instrumentalities, it should be noted that the instrumentality of a crime can be recovered separate and apart from the value of the proceeds of the underlying crime.¹⁴⁸

Where the value of the instrumentality sought to be forfeited is clearly and substantially in excess of the proceeds of the crime of which the defendant was convicted, a defendant's recourse may be to move for an "interests of justice" dismissal of the complaint pursuant to CPLR 1311(4)(d).¹⁴⁹

D. "Interests of Justice" Dismissal

For the attorney defending his client against this display of state power, the statute provides a mechanism, ostensibly unique among forfeiture statutes, which may be used to defeat a forfeiture action regardless of its procedural or substantive legality. Made a part of the statute during its final revision, CPLR 1311(4)(a)(ii) is even more powerful than its criminal counterpart. Patterned after *People v. Clayton*,¹⁵⁰ it permits the court to dismiss a pending forfeiture action "in the interests of justice" on its own motion or upon an application by the defendant. It also allows the forfeiture court to effect a "compromise" by reducing the amount of the forfeiture without dismissing the case in its entirety. Among the factors the court may¹⁵¹ use to decide this issue are the seriousness and circum-

147. *Id.*

148. N.Y. CIV. PRAC. L. & R. 1311 (McKinney Supp. 1988); see *Dillon v. Morgan Oil Terminals Corp.*, 138 Misc. 2d 135, 138, 523 N.Y.S.2d 719, 722 (Nassau County Ct. 1987); *Holtzman v. Bailey*, 132 Misc. 2d 25, 503 N.Y.S.2d 473 (Sup. Ct. Kings County 1986). Cf. *Dillon v. Castelli*, 132 Misc. 2d 1077, 506 N.Y.S.2d 418 (Nassau County Ct. 1986).

149. *Morgan Oil*, 138 Misc. 2d at 138, 523 N.Y.S.2d at 722; see *infra* notes 151-75 and accompanying text (discussion of the statute's "interests of justice" provision and its application to *Morgan Oil*).

150. 41 A.D.2d 204, 342 N.Y.S.2d 106 (2d Dep't 1973).

151. Note that the language of the statute is permissive. Thus, a court seems to have the option of using all, some, or none of the factors enumerated in the statute. A court may also give different weight to the various factors in its determination. See *Morgan Oil*, 138 Misc. 2d at 138, 523 N.Y.S.2d at 722 (discussed *infra* notes 157-62 and accompanying text).

stances of the crime, the impact of the property forfeitures on the defendant, the adverse impact of a successful forfeiture on innocent people, the value of an instrumentality in contrast with that of the proceeds or substituted proceeds of the crime, and the propriety of a pre-conviction forfeiture action in light of an acquittal in the underlying criminal case.¹⁵²

Furthermore, the statute requires the forfeiture court to issue a written decision when reducing the amount or dismissing the action brought under Article 13-A. Criminal Procedure Law section 210.40(3), the criminal counterpart, requires the court only to "set forth its reasons for the record,"¹⁵³ a requirement which is usually met by the court through a brief, oral statement for the record. One additional noteworthy comparison relates to the appealability of the decisions. The forfeiture court's written opinion is appealable;¹⁵⁴ the criminal court's decision is not. The appealability of the forfeiture court's opinion might encourage well-reasoned opinions, to be used as precedent in future cases.

Another distinguishing characteristic of forfeiture statutes is that, unlike their criminal counterparts, they do not allow a court any discretion over the remedy imposed for their violation.¹⁵⁵ This is the very nature of forfeiture. The property is either subject to forfeiture or it is not. Consequently, the resulting forfeiture may be entirely inappropriate when compared with the underlying criminal activity.

One application, then, of this "interests of justice" portion of the statute may arise where the value of the instrumentality sought by the claiming authority is disproportionately greater than the value of the proceeds of the criminal activity. Such was the case in *Dillon v. Morgan Oil Terminals Corp.*¹⁵⁶ There, the claiming authority moved to confirm an order of attachment against a tractor trailer owned by the defendant. The defendant, a corporation, opposed the claiming authority's application and moved to vacate the attachment of the tractor trailer, an instrumentality of grand larceny in the third degree, the crime to which the defendant had already pled guilty.

152. N.Y. CIV. PRAC. L. & R. 1311(4)(d) (McKinney 1976 & Supp. 1988); see *Morgan Oil*, 138 Misc. 2d at 138, 523 N.Y.S.2d at 722 (discussed *infra* notes 157-62 and accompanying text).

153. N.Y. CRIM. PROC. LAW § 210.40(3) (McKinney Supp. 1988).

154. Compare N.Y. CIV. PRAC. L. & R. 5701 (McKinney 1976 & Supp. 1988) with N.Y. CRIM. PROC. LAW art. 450 (McKinney Supp. 1988).

155. See generally D. SMITH, *supra* note 20.

156. 138 Misc. 2d 135, 523 N.Y.S.2d 719 (Nassau County Ct. 1987).

The forfeiture action stemmed from charges that the oil company had rigged the meters on their oil trucks. The meters recorded that oil was being supplied to the Massapequa School District when, in fact, a large portion of what the customer was being charged for was air.

The defendant, in opposing the attachment, argued that the "unfortunate episode" had already cost the defendant \$125,000 in restitution exclusive of the \$45,000 tractor trailer and in addition to the criminal conviction.

In a well-reasoned opinion, the court set forth the factors that may be used in determining such an application.¹⁵⁷ Noting the voluntary and nonexhaustive¹⁵⁸ nature of this list, the court conceded that the value of the tractor trailer was "clearly and substantially" in excess of the proceeds of the crime.¹⁵⁹ Yet, calling the defendant's criminal activity "despicable," the court granted the claiming authority's application to confirm the attachment and denied the defendant's motion for vacatur. The court held that the seriousness of the crime and the lack of any indication that the forfeiture would have an adverse impact on innocent individuals far outweighed the value discrepancy. The court also noted that there was no indication that the ultimate impact of the forfeiture would pose any hardship on the business entity.¹⁶⁰

Morgan Oil is a true "interests of justice" decision. The court balanced the concerns of both sides, coming down on the side of the public interest. Such an outcome is uncommon, especially when the underlying criminal activity is of the "white collar" nature. Taking the profit out of crime should include an element of deterrence. Here, a fine alone probably would not have had any lasting effect on the defendant. Permitting the forfeiture action to proceed effectuated both the legal guidelines of the law and the spirit of the statute. It is hoped that an "interests of justice" analysis factoring in a defendant's wrongdoing would not make an otherwise remedial statute punitive in nature.¹⁶¹

157. The statute uses the word "may" rather than "shall." N.Y. CIV. PRAC. L. & R. 1311(4)(d) (McKinney 1976 & Supp. 1988).

158. The section of the statute preceding the laundry list of factors reads as follows: "Among the factors, considerations and circumstances the court may consider, among others, are. . . ." N.Y. CIV. PRAC. L. & R. 1311(4)(d)(i-iv) (McKinney 1976 & Supp. 1988).

159. *Dillon v. Morgan Oil Terminals Corp.*, 138 Misc. 2d 135, 523 N.Y.S.2d 719, 722 (Nassau County Ct. 1987).

160. *Id.*

161. See *supra* note 6 for a discussion of the remedial nature of the statute.

Another recent case exhibits the use of this provision as a compromise. In *People v. Roman*,¹⁶² the Brooklyn District Attorney moved to confirm the order of attachment secured against the defendant's automobile as an instrumentality of the crime of robbery in the second degree and against sixty dollars in cash as proceeds of the crime. The forfeiture case was sent for disposition to the same judge in Supreme Court, Criminal Term, who had taken the plea in the underlying criminal action. The court denied the District Attorney's motion concerning the defendant's automobile but granted the motion insofar as it related to the sixty dollars.¹⁶³

The *Roman* court based its decision on equitable grounds. Citing the "interests of justice" provision and the federal due process clause, the court said that the District Attorney should be "estopped from now — subsequent to defendant's plea — demanding the forfeiture of defendant's automobile since the defendant demonstrably relied on the District Attorney's promise regarding the extent of his liability that it would be seeking for this crime's commission and detrimentally and materially altered his position accordingly."¹⁶⁴ Key among the factors used by the court was that the District Attorney was the plaintiff in both the civil and criminal actions and that she did not inform the defendant at the criminal plea of the forthcoming civil action against defendant's car as an instrumentality of the crime. The defendant, therefore, was unable to make an informed decision regarding the criminal plea. "[F]orfeiture under these circumstances would contravene the interests of justice in its penalizing the defendant for his good-faith reliance on the District Attorney's express and implied plea conference representations which induced him to change his position and instead plead guilty to [attempted robbery in the second degree]."¹⁶⁵ The court said the defendant could have otherwise reasonably expected to retain the car, although it was an instrumentality of the crime, since it was "not in itself contraband or the fruit of a crime."¹⁶⁶ The sixty dollars, on the other hand, was direct proceeds of a crime and "no convicted criminal defendant can legitimately expect the retention of direct proceeds of a felony to [sic] which he or she has committed."¹⁶⁷

162. 136 Misc. 2d 876, 519 N.Y.S.2d 463 (Sup. Ct. Kings County 1987).

163. *Id.* at 878, 519 N.Y.S.2d at 465.

164. *Id.* at 877, 519 N.Y.S.2d at 464-65.

165. *Id.* at 878, 519 N.Y.S.2d at 465.

166. *Id.* at 878-79, 519 N.Y.S.2d at 465.

167. *Id.* at 879, 519 N.Y.S.2d at 465.

The court's decision is troubling not so much in its result as in its theory. The court expressly did not find the statute unconstitutional on double jeopardy grounds.¹⁶⁸ Nor did the court expressly reject the civil nature of the statute¹⁶⁹ as pronounced by the court of appeals in *Morgenthau v. Citisource, Inc.*¹⁷⁰ Rather, the court held that, in a situation where a defendant *pleads* guilty to a crime and the District Attorney acquiesces in the sentence, the prosecutor may not later file a forfeiture action for an *instrumentality* of the crime unless the District Attorney forewarns the defendant of the impending civil action during the criminal plea negotiations.¹⁷¹

The emphasis the court placed on the plea seems to relate to the concept of settlement. If the parties are the same and the underlying action is the same, the results should bind the parties in that action and in all related actions. But the court did not negate the fact that the actions were separate and distinct, as stated in the statute by the legislature and affirmed by the state's highest court in *Citisource*. The court merely stated that the defendant here "suffers no less a hardship" by the civil action than he might in a criminal case.¹⁷² Further, other than briefly stating that its decision was based "as well . . . pursuant to the Due Process Clause as contained in the United States Constitution," the court did not discuss any procedural or substantive constitutional issues.¹⁷³ It seems clear, therefore, that the court was limiting any constitutional problem it might have had to the general "fairness of a decision in an individual case."¹⁷⁴

But the court went further and distinguished between a defendant's expectation of retaining the instrumentality of a crime and that same expectation of retaining the proceeds and, by implication, the substituted proceeds of the same crime. Suppose, however, the instrumentality were a kitchen knife in an armed robbery. Would the defendant expect to keep the knife after pleading guilty to a lesser included offense? What expectation of retention would a defendant have in the equipment used in a "chop shop" operation? And what if the defendant had been convicted following a jury trial? Would he still be able to raise these same expectations to defeat a subsequent

168. *Id.* at 878, 519 N.Y.S.2d at 465.

169. *Id.* at 877, 519 N.Y.S.2d at 465.

170. 68 N.Y.2d 211, 500 N.E.2d 850, 508 N.Y.S.2d 152 (1986).

171. *Roman*, 136 Misc. 2d at 877-78, 519 N.Y.S.2d at 464-65 (emphasis added).

172. *Id.* at 878, 519 N.Y.S.2d at 465.

173. *Id.*

174. J. NOWAK, B. ROTUNDA & J. NELSON YOUNG, CONSTITUTIONAL LAW 381 (1st ed. 1978).

forfeiture action? Is an instrumentality of a crime property which the defendant expects to retain after a criminal conviction? The elements of the corresponding statutes include both the proceeds and the instrumentality. The distinction, therefore, is flawed if the court hopes to draw a bright line for future forfeiture cases. If, on the other hand, the facts of this particular case — of which we are told little — and the equities of the situation merited the return of the vehicle to the defendant, the court's decision is well within the guidelines of CPLR 1311(4)(d) and should find affirmance on appeal. The court's emphasis on the "interests of justice" and equitable doctrines leads one to believe that the decision was unique in its fact pattern. Accordingly, the decision should be limited in its scope.

E. Prosecutorial Liability

Under Article 13-A, a prosecutor may be liable for damages resulting from the loss or destruction of an asset after the defendant recovers judgment or when a final determination is made that the claiming authority was not entitled to attach or enjoin the defendant's property.¹⁷⁵ The burden of proof upon the defendant, however, is high. He must show, by a preponderance of the evidence, that the prosecutor acted both without reasonable cause and not in good faith.

The difficulty in meeting this standard was demonstrated in the one case which has so far addressed this issue. In *Dillon v. Bialostok*,¹⁷⁶ the court found insufficient the factual allegations submitted by the defendant in support of his application for damages. The court denied all of the defendant's monetary requests, including those for reasonable attorney's fees, stating that the defendant had not proven by the requisite standard that the claiming authority had acted without reasonable cause and not in good faith in obtaining the order of attachment against the defendant's property.¹⁷⁷

The two-pronged standard is difficult to establish. That the provision is in the statute at all, however, indicates the desire of the legislature to give prosecutors pause before deciding to proceed against a particular individual based upon emotion rather than evidence.

175. N.Y. CIV. PRAC. L. & R. 1318(4), 1320(2), 1337, 1347(3) (McKinney 1976 & Supp. 1988).

176. 136 Misc. 2d 695, 519 N.Y.S.2d 186 (Nassau County Ct. 1987).

IV. THE CONSTITUTION AND ARTICLE 13-A

The issue of constitutionality, particularly the question of double jeopardy, was the concern of virtually all those involved in drafting Article 13-A. The analysis of the constitutional questions underlying Article 13-A will be left for a future time. Certain cases, however, should be commented upon.

As of this writing, several courts have addressed the constitutionality of various provisions of the statute. In *Morgenthau v. Citisource, Inc.*,¹⁷⁸ the only court of appeals case as yet to address any of the provisions of Article 13-A, the court held that a court may grant a provisional remedy in a forfeiture action prior to a criminal conviction, although it may not grant a final forfeiture order until after conviction in the criminal case. "[T]he availability of provisional remedies serves the substantial governmental need of preventing the judicial process from being frustrated by the dissipation of assets that will potentially satisfy a civil judgment."¹⁷⁹ Were this otherwise, the court found, the provisions of the statute dealing with provisional remedies would be "meaningless."¹⁸⁰ The court held:

[T]here would be no plausible reason for requiring the forfeiture action to be stayed pending the prosecution of the underlying criminal action or for the specific provision authorizing the commencement of the forfeiture action prior to [the criminal] conviction or to require dismissal of the action within 60 days unless there had been a conviction or an indictment had been returned.¹⁸¹

Holding that Article 13-A satisfies federal due process requirements,¹⁸² the court cited the elaborate safeguards in the statute designed to protect defendants from deprivation of their property without due process through the imposition of a provisional remedy.¹⁸³ The court stressed that the statute adequately addressed the sixth amendment issue of right to counsel by "requiring the claiming authority to prove that the need for the provisional remedy out-

178. 68 N.Y.2d 211, 500 N.E.2d 850, 508 N.Y.S.2d 152 (1986).

179. *Id.* at 221, 500 N.E.2d at 855, 508 N.Y.S.2d at 157.

180. *Id.* at 219-20, 500 N.E.2d at 854, 508 N.Y.S.2d at 156; *see also* *Dillon v. Secular*, 132 Misc. 2d 279, 503 N.Y.S.2d 939 (Nassau County Ct. 1986) (pre-conviction attachment order necessary to preserve property until judgment); *District Attorney v. McAuliffe*, 129 Misc. 2d 416, 493 N.Y.S.2d 406 (Sup. Ct. Queens County 1985) (court granted injunction prohibiting defendant's sale of out-of-state property while Article 13-A action was pending to preserve the property for a forfeiture judgment).

181. *Morgenthau*, 68 N.Y.2d at 219-20, 500 N.E.2d at 854, 508 N.Y.S.2d at 156.

182. *Id.* at 220-23, 500 N.E.2d at 854-56, 508 N.Y.S.2d at 156-58.

183. *Id.* at 222, 500 N.E.2d at 855-56, 508 N.Y.S.2d at 157-58.

weighs the hardship on any party against whom the order may operate."¹⁸⁴ Other statutory protections designed to permit vacatur, modification or dismissal of the order were cited by the court in support of its decision that the statute did not violate the defendant's right to counsel.¹⁸⁵

In *Dillon v. Schiavo*,¹⁸⁶ the Appellate Division, Second Department, upheld the constitutionality of the *ex parte* provisions of CPLR 1317 dealing with orders of attachment. The court found sufficient safeguards within the statute to protect the rights of the defendant.¹⁸⁷

In *Holtzman v. Samuel*,¹⁸⁸ the court, in a scholarly opinion, upheld the legality and due process procedures of the provisional remedies authorized under Article 13-A, including *ex parte* orders of attachment. The court held that the requirement of the confirmation hearing, on notice to the defendant and within five days of the levy upon the subject property, satisfied due process.¹⁸⁹

The court in *People v. Roman*¹⁹⁰ mentioned the question of double jeopardy but did not answer the challenge. The court found that the forfeiture action fell short of double jeopardy problems, but did not reach the substantive issue in its decision.¹⁹¹ However, the court did deny, in part, based upon federal due process grounds, the claiming authority's application to confirm an order of attachment. The decision, however, appears to fall within Article 13-A's "interests of justice" provision.¹⁹²

In *Dillon v. Bialostok*,¹⁹³ the defendant attacked Article 13-A on the grounds that it violated his sixth amendment right to counsel, fifth amendment right to remain silent, and right of due process. The court denied all of the challenges. The court found no factual basis advanced by the defendant to support his claim that the seizure of his property effectively deprived him of an attorney. It recognized that the claiming authority, when advised that the defendant had drawn drafts on certain bank accounts before he was notified of the

184. *Id.* at 223, 500 N.E.2d at 856, 508 N.Y.S.2d at 158 (citation omitted).

185. *Id.* (citing N.Y. CIV. PRAC. L. & R. 1311(4)(d)(i), 1329 (McKinney Supp. 1988)).

186. 114 A.D.2d 924, 495 N.Y.S.2d 197 (2d Dep't 1985), *appeal dismissed*, 67 N.Y.2d 605, 492 N.E.2d 794, 501 N.Y.S.2d 1023 (1986).

187. *Id.* at 925, 495 N.Y.S.2d at 198.

188. 130 Misc. 2d 976, 495 N.Y.S.2d 583 (Sup. Ct. Kings County 1985).

189. *Id.* at 980-81, 495 N.Y.S.2d at 587-88.

190. 136 Misc. 2d 876, 519 N.Y.S.2d 463 (Sup. Ct. Kings County 1987).

191. *Id.* at 878, 519 N.Y.S.2d at 465.

192. *Id.*; see *supra* notes 150-74 and accompanying text.

193. 136 Misc. 2d 695, 519 N.Y.S.2d 186 (Nassau County Ct. 1987).

attachment, released more than \$44,000 to the defendant. Further, the court suggested that the defendant may apply, as his needs warrant, for release of his funds.¹⁹⁴

The defendant also claimed "that he must give up his Fifth Amendment right to silence in order to exercise his due process right to be heard."¹⁹⁵ The court found that under CPLR 1328, the defendant has the right to provide an undertaking in the amount equal to the value of his property in exchange for the discharge of the attachment. Since the civil action is automatically stayed pending the outcome of the criminal case¹⁹⁶ and there can be no final order of forfeiture in a post-conviction case until the defendant is convicted of a related felony,¹⁹⁷ the court dismissed defendant's claims.

In a case emanating from Albany County, a court vacated a temporary restraining order on fifth and sixth amendment grounds. In *Kuriansky v. Professional Care, Inc.*,¹⁹⁸ the claiming authority sought a preliminary injunction preventing the defendants from distributing and paying out monies from their financial accounts. The state also moved to compel disclosure¹⁹⁹ of defendants' financial records and related documents.

In a concise opinion, the court held that the claiming authority failed to satisfy the statutory requirements to secure a preliminary injunction and, further, that under the circumstances, freezing \$85,000 of the defendants' money would deprive the defendants of their constitutional right to counsel.²⁰⁰ "Such unconscionable and unconstitutionalized hardship," the court said, "clearly outweighs any imagined threat to" the claiming authority.²⁰¹

The court rebuked the claiming authority for attempting to use Article 13-A's disclosure provision "to gather evidence in anticipation of [the] criminal trial" and attempting to "circumvent the defendants' constitutional protections by using this civil proceeding."²⁰² Disclosure of personal assets by the defendants "would have the adverse affect of requiring them to put forward defenses for possible incriminating evidence before trial," thereby violating their fifth

194. *Id.* at 697, 519 N.Y.S.2d at 188.

195. *Id.* at 699, 519 N.Y.S.2d at 189.

196. N.Y. CIV. PRAC. L. & R. 1311(a)(1) (McKinney Supp. 1988).

197. *Id.*; see also *Morgenthau v. Citisource, Inc.*, 68 N.Y.2d 211, 500 N.E.2d 850, 508 N.Y.S.2d 152 (1986).

198. No. 7088/87 (Sup. Ct. Albany County Aug. 5, 1987).

199. N.Y. CIV. PRAC. L. & R. 1326 (McKinney Supp. 1988).

200. *Professional Care, Inc.*, No. 7088/87, slip op. at 3.

201. *Id.*

202. *Id.*

amendment rights.²⁰³ Accordingly, the court stayed any disclosure by the defendants until the completion of the criminal action.

Probably the most thorough and scholarly discussion of constitutional issues as they relate to Article 13-A came in *Kuriansky v. Bed-Stuy Health Care Corp.*²⁰⁴ The Deputy Attorney General for Medicaid Fraud Control brought suit against the defendant, a diagnostic and treatment center in Brooklyn, and its principals, to recover damages arising from a scheme whereby, during a seven year period, the defendants submitted reimbursement claims totalling more than thirteen million dollars to the state Medicaid program for thousands of patient visits that never occurred. The claiming authority sought forfeiture of the proceeds of the crimes enumerated in a sixty-five count indictment under Article 13-A and treble damages under the Social Services law.²⁰⁵ The defendants attacked the validity of the attachment and the preliminary injunction granted by the lower court, arguing that Article 13-A was unconstitutional both on its face and as applied to the case.

The Appellate Division, Second Department, rejected the defendants' claims. In a twenty-three page decision, Justice Arthur Spatt, writing for a unanimous bench,²⁰⁶ first emphasized the balancing factor concerning the potential hardship to the defendants by virtue of the provisional remedies. The court found that the claiming authority sustained its burden of proof, calling the provisional remedy relief "particularly appropriate in this case where the profits of the criminal defendants' alleged crimes are misappropriated public funds which can potentially be restored to the taxpayers."²⁰⁷

The heart of the opinion dealt with the constitutional issues. The court found that the attachment proceedings before the lower court did not violate the defendants' due process rights, despite the absence of an evidentiary hearing.²⁰⁸ The lower court heard extensive argument and the defendants were given the opportunity to submit affidavits and legal memoranda prior to the issuance of the attach-

203. *Id.*

204. 135 A.D.2d 160, 525 N.Y.S.2d 225 (2d Dep't 1988). A discussion of *Bed-Stuy* may be found in N.Y.L.J., Feb. 19, 1988, at 1, col. 3.

205. N.Y. SOC. SERV. LAW § 145-b(2) (McKinney 1983) (The state may obtain civil damages "equal to three times the amount by which any figure [submitted to obtain payment for services rendered] is falsely overstated.").

206. Although there was a partial dissent in *Bed-Stuy* by Justice Weinstein, the decision, as it related to the constitutional issues, was unanimous. *Kuriansky v. Bed-Stuy Health Care Corp.*, 135 A.D.2d 160, 163, 181, 525 N.Y.S.2d 225, 227, 238 (2d Dep't 1988).

207. *Id.* at 169, 525 N.Y.S.2d at 230.

208. *Id.* at 170-71, 525 N.Y.S.2d at 231-32.

ment order by the court. Since the factual contents of the state's submissions were not disputed by the defendants, the Appellate Division held that Special Term did not abuse its discretion by not conducting a post-attachment adversarial hearing.²⁰⁹

The court next wrestled with defendants' claim that the attachment of their assets deprived them of their right to retain counsel of their choice. The court compared Article 13-A to the Federal Comprehensive Forfeiture Act²¹⁰ and discussed the treatment by federal courts of sixth amendment claims under the federal statute. The Appellate Division cited *United States v. Caplin & Drysdale*²¹¹ and *United States v. Monsanto*,²¹² two recent federal cases decided under the federal statute. In *Caplin & Drysdale*, the Fourth Circuit held that the right to counsel of choice "simply does not apply at all in the fee forfeiture context."²¹³ "The very point of the inclusion of forfeiture in an indictment is the government's assertion that the assets possessed by a defendant are not legally his own, but the fruits of crime in which the law recognizes no ownership rights of the defendant," the circuit court held. "Forfeiture is not an attempt to punish those with legal assets by denying them an attorney; it is an assertion that the defendant does not have the legal assets that entitle him to a right of counsel of choice in the first place."²¹⁴

Under the statute's "relation-back" theory, forfeiture occurs at the time an offense is committed. As such, the court found, ill-gotten assets may not secure a right such as that to legal representation. "The right to counsel of choice belongs only to those with legitimate assets. [It] does not guarantee that every defendant will have the lawyer he desires."²¹⁵

The defendants in *Caplin & Drysdale* argued that appointed counsel are not qualified to handle such complex cases. The court dismissed this assertion, stating that acceptance of such a theory "would lead to the absurd result that the government could not

209. *Id.* (citing *Dillon v. Schiavo*, 114 A.D.2d 924, 925-26, 495 N.Y.S.2d 197, 198 (2d Dep't 1985), *appeal dismissed*, 67 N.Y.2d 605, 492 N.E.2d 794, 501 N.Y.S.2d 1023 (1986)).

210. 21 U.S.C. § 853(e)(1)(A)(1985).

211. 837 F.2d 637 (4th Cir. 1988)(en banc).

212. 836 F.2d 74 (2d Cir. 1987), *modified*, No. 436, 87-1397, 1988 WL 68784 (2d Cir. July 1, 1988) (remand to permit Monsanto access to restrained assets to pay legitimate attorney's fees for criminal charges, such fees are exempt from subsequent forfeiture).

213. *Caplin & Drysdale*, 837 F.2d at 644.

214. *Id.*

215. *Id.* at 645.

prosecute . . . defendants apprehended with no funds in their possession.”²¹⁶

The Fourth Circuit acknowledged that “[e]quality of representation has been thought a goal beyond constitutional attainment.”²¹⁷ Since the forfeiture defendant has no “uncontested assets” available to hire the attorney of choice, however, the court found no constitutional requirement compelling the release of the assets to the defendant’s chosen counsel. Thus, while under the circumstances of the instant case the defendants’ choice of counsel was limited, the court held that the sixth amendment right of choice had not been denied.²¹⁸

The Second Circuit in *Monsanto* also permitted the government to freeze the defendant’s assets and to later sue to recover monies already paid by the defendant to an attorney. The court used the result-oriented analysis, finding the fees forfeitable as funds resulting from criminal activity. The court, however, tempered its decision by directing an adversarial hearing, similar to that required under CPLR 1317, in situations involving forfeiture-related restraining orders. The prosecution would have the burden of demonstrating a probability that the government would prevail at trial on the issues of criminal liability and forfeiture. Such a proceeding would “provide a procedural check against the government’s discretion to limit [continuing criminal enterprise] and RICO defendants’ choice of counsel simply by obtaining a forfeiture charge in the indictment.”²¹⁹

While citing these cases as persuasive authority in the *Bed-Stuy* decision, the Appellate Division found substantial differences between the federal statute and Article 13-A. Under the court of appeals decision in *Morgenthau v. Citisource, Inc.*²²⁰ and the facts in the instant case, the court held that it was unable to ascertain and balance any hardship suffered by the appellants resulting from the attachments due to the defendants’ “intentional failure” to present sufficient financial disclosure to the lower court. The court remanded to the lower court for further fact-finding regarding this issue.²²¹

216. *Id.* at 647.

217. *Id.* at 648.

218. *Id.*

219. 836 F.2d 74, 84 (2d Cir. 1987). For an excellent discussion of *Caplin & Drysdale* and *Monsanto*, see Obermaier, *White Collar Crime: The Second Circuit’s Year*, N.Y.L.J., Mar. 1, 1988, at 1, col. 1.

220. -68 N.Y.2d 211, 500 N.E.2d 850, 508 N.Y.S.2d 152 (1986).

221. *Kuriansky v. Bed-Stuy Health Care Corp.*, 135 A.D.2d 160, 174-76, 525 N.Y.S.2d

Finally, the court found no merit to the defendants' contention that the lower court's disclosure order imposed an unconstitutional sanction by compelling them to incriminate themselves in order to obtain a release of their assets. Calling financial disclosure "an integral part of the statutory forfeiture plan,"²²² the court deemed "pure speculation" defendants' claim that by complying with the disclosure order, the defendants would "necessarily incriminate themselves" in the pending criminal prosecution.²²³ The court refused to equate forfeiture of assets with freezing of assets, holding that there is no automatic forfeiture of the defendants' property resulting from their failure to disclose information concerning their assets. The defendants' "choice of whether to disclose in connection with the provisional remedies deals with an attachment rather than loss of their property [T]he circumstances in this case . . . do not subject the defendants to the 'potent sanctions' held to violate the privilege against self-incrimination."²²⁴ The court, therefore, upheld the lower court's disclosure order as not violating the fifth amendment.

In light of *Citisource* and *Bed-Stuy*, and the two federal cases upholding the federal forfeiture statute against sixth amendment attacks, it appears that, at least for now, the forfeiture statutes *per se* are not violative of a defendant's right to counsel.²²⁵ As the court of appeals held, and as even the court in *Professional Care, Inc.* implied, Article 13-A itself appears sound. The courts will decide whether the application of the statute to a particular defendant is fair and will balance the claiming authority's interest in securing the forfeiture or provisional remedy against the rights of the individual defendant. This balancing act, as in most constitutional dilemmas, is to be applied on a case by case basis.²²⁶

222. *Id.* at 177, 525 N.Y.S.2d at 235.

223. *Id.*, 525 N.Y.S.2d at 235-36.

224. *Id.* at 180, 525 N.Y.S.2d at 237. *See also* *People v. Jackson*, N.Y.L.J., Mar. 22, 1988, at 16, col. 2 (Nassau County Ct.) (no sixth amendment right to counsel involved; right to counsel is qualified and can be outweighed by countervailing governmental interests).

225. For further analysis of the double jeopardy issue, see FORFEITURE HANDBOOK, *supra* note 2, at 138-47, 182-273; J. WEINSTEIN, H. KORN, & A. MILLER, *supra* note 2, §§ 1311.01-.02, 1311.04, 1317.01; Clark, *Civil and Criminal Penalties and Forfeiture: A Framework for Constitutional Analysis*, 60 MINN. L. REV. 379 (1976); *see also* the jackets of both the former and present Article 13-A.

226. *See generally* J. NOWAK, B. ROTUNDA & J. NELSON, *supra* note 174; J. WEINSTEIN, H. KORN & A. MILLER, *supra* note 2, at §§ 1311.01-.02, 1311.04, 1317.01.

V. RUMINATIONS

Now that we have the feel of this powerful, complex statute, the question remains: Are the goals of its drafters being met in the statute's use and interpretation, or have the compromises made along the way made second best the best we can hope for?

Admittedly, no one is fully satisfied with the statute: the defense bar is wincing at the "awesome power" which has been placed in the hands of "overly zealous state prosecutors,"²²⁷ the courts are showing apprehension in what they perceive as unjust results from applying many of the statute's "obscure provisions,"²²⁸ and the prosecutors are grudgingly implementing the statute in ways probably not measuring up to the legislators' expectations.

From a strictly statistical point of view, the prosecutors are having a heyday. At last estimate, close to twenty million dollars worth of cash and assets have been forfeited to claiming authorities throughout the state.²²⁹ Suffolk County prosecutors alone collected three quarters of a million dollars in forfeited cash and goods in 1987, and that figure was *down* more than \$250,000 from the more than one million dollars collected the previous year. The Bronx District Attorney's office recently presented the state with a check for \$125,000 representing fifty percent of just the drug monies recovered in that borough.²³⁰ And forfeiture has not been restricted to the state's urban counties. The Greene County District Attorney, for example, earned his spurs last year by recovering monies resulting from a narcotics case.²³¹

But statistics, as everyone knows, can be misleading. These figures do not reflect the type of property being confiscated or how these forfeiture actions are developing.

It appears from the statute itself and its legislative documentation that the legislature envisioned prosecutors, city police, county sheriffs, and state troopers combining forces to investigate and prosecute felons who profit from their criminal activity and to use Article 13-A

227. Letter to the Editor, N.Y.L.J., Jan. 21, 1987, at 2, col. 5.

228. See *People v. Roman*, 136 Misc. 2d 876, 519 N.Y.S.2d 463 (Sup. Ct. Kings County 1987); *Dillon v. Bialostok*, 136 Misc. 2d 695, 699, 519 N.Y.S.2d 186, 189 (Nassau County Ct. 1987). The more frequent use of the "interests of justice" provision of the statute by the courts in recent opinions seems to show a desire to find a way around some of the more difficult situations created by "all or nothing" statutes like forfeiture statutes in general and Article 13-A in particular. See DAVID SMITH, *supra* note 20.

229. See Kessler, *supra* note 2.

230. N.Y.L.J., Jan. 28, 1988, at 2, col. 6.

231. *People v. Sanders*, No. 86/136 (Greene County Ct. June 19, 1987).

as a means of relieving these criminals of their undue rewards. The shadow side of the statute's implementation, however, is that most of the forfeiture actions come not from affirmative, creative, cooperative ventures by law enforcement personnel but instead as the result of *reactions* by the prosecutors to files landing on their desks during the course of criminal court or supreme court arraignments.

Further, an unduly high percentage of forfeiture actions are being settled in connection with concurrent criminal cases rather than tried civilly to their conclusion. Granted, the statute's stay provisions²³² make the prospect of a full civil trial remote, but certain counties have essentially resigned themselves to limiting their forfeitures to those cases disposed of by criminal plea.

The result of this is twofold. First, it makes the civil action virtually one and the same with the criminal case, lending strength to the double jeopardy concerns raised by law enforcement personnel during the drafting of the statute and highlighted in some of the more recent lower court opinions.²³³ Second, it seems to take from the statute its *raison d'être*. If all that is happening is that the judge presiding over the criminal case is making the civil forfeiture a part of the felony plea, why not just include forfeiture within the sanctions available under the Penal Law and dispense with the civil action? Together with the *in rem* forfeiture provisions already part of the New York codes,²³⁴ the same result could be achieved with little practical change in the law. Unless the law enforcement community steps up its activity under Article 13-A, the statute's power will dissipate on its own.

The cases affected by the forfeiture statute also appear slightly different from those which the drafters had in mind. Although drug

232. N.Y. CIV. PRAC. L. & R. 1311(a),(b) (McKinney Supp. 1988).

233. See Memorandum from Attorney General, *supra* note 41; Morgenthau Letter, *supra* note 44; Task Force Letter, *supra* note 130; Law Enforcement Council Letter, *supra* note 45; Memorandum from First Attorney General, *supra* 74; Memorandum from Neugarten, *supra* note 130; see also *People v. Roman*, 136 Misc. 2d 876, 519 N.Y.S.2d 463 (Sup. Ct. Kings County 1987); FORFEITURE HANDBOOK, *supra* note 2; *supra* notes 149-58, 177-205 and accompanying text.

The United States Supreme Court has treated several federal civil forfeiture statutes as "quasi-criminal." See DAVID SMITH, *supra* note 20, 4-52.5-4-76.

234. See N.Y. ABAND. PROP. LAW § 1310 (McKinney Supp. 1988) (forfeiture of stolen property); N.Y. PENAL LAW § 410 (McKinney 1980 & Supp. 1988) (equipment used for the promotion of pornography); *id.* § 415 (vehicles, vessels and aircraft used to transport or conceal gambling records); *id.* § 420.05 (equipment used in the production of unauthorized sound recordings); *id.* § 450.10 (McKinney Supp. 1988) (forfeiture of stolen property); N.Y. PERS. PROP. LAW §§ 254, 258 (McKinney 1976) (forfeiture of stolen property); N.Y. PUB. HEALTH LAW § 3388 (McKinney 1985) (vehicles, vessels and aircraft used to conceal, convey or transport controlled substances).

forfeitures, as a group, tend to bring in the greatest amount of cash, the number of actual drug-related actions brought under the statute has been relatively small.²³⁵ Two factors appear to be responsible for this. First, most drug arrests tend to result from one, isolated transaction, whether it is a "buy and bust" operation or a raid on a drug "factory." The proceeds of those transactions tend to be small, especially when compared to the large quantities of money, drugs and illegal property usually found in the defendant's apartment or place of business following the arrest. Within the design of "common scheme or plan" of Article 13-A, these goods would appear to be easily forfeitable. But, surprisingly, the legislature did not authorize an action based on a common scheme or plan in the pre-conviction setting. Although nothing prevents a claiming authority from following the procedures in post-conviction cases where the underlying criminal activity is drug related,²³⁶ such action would seem to defeat the purpose of the distinction between the two types of crimes. Certainly, it removes from the prosecutor the desire to initiate a full-scale investigation, since the recovery from the one or two transactions would be minimal at best. Bringing the pre-conviction and post-conviction actions into alignment on this issue might encourage greater use of the pre-conviction action and thereby increase activity in drug-related forfeiture actions to figures more in keeping with the statute's intent.²³⁷

Second is the problem of forfeited money and, more precisely, who keeps it. Under the federal Comprehensive Crime Control Act of 1984,²³⁸ when a state or local law enforcement agency assists the federal government in an investigation that leads to the seizure or forfeiture of property, that state or local agency is entitled to a percentage of the assets that reflects its contribution to the seizure or forfeiture of the property.²³⁹ In November of 1986, the Manhattan District Attorney's office made news when it received more than 1.2 million dollars from the U.S. Department of Justice for its assistance in fraud prosecutions culminating in successful forfeiture proceed-

235. An informal survey of prosecutors around the state estimated at about twenty-five percent the number of forfeiture actions stemming from drug-related cases.

236. See N.Y. CIV. PRAC. L. & R. 1310(5) (McKinney Supp. 1988).

237. See *supra* notes 39-48 and accompanying text. Changing the name of the pre-conviction action also might take away some of the confusion surrounding this type of action, especially since no conviction at all is required for a successful forfeiture action under this section. See N.Y. CIV. PRAC. L. & R. 1311(1)(b), (3) (McKinney Supp. 1988).

238. Pub. L. No. 98-473, 98 Stat. 1976-2040, Title II (1984) (scattered sections appear throughout Pub. L. No. 98-473).

239. Tariff Act of 1930, 19 U.S.C. § 1616 (1984).

ings.²⁴⁰ Many of these combined efforts also occur in drug-related cases.²⁴¹

The monies distributed pursuant to the state statute²⁴² generally do not even cover the actual costs of the forfeiture action. "Costs" are limited by statute²⁴³ to no more than \$300 in New York City and \$150 in all other counties.²⁴⁴ Practically all of the "disbursements," also defined by statute,²⁴⁵ are inapplicable to prosecutors and filing fees are waived for governmental agencies.²⁴⁶ Presented with a choice of which statute to use, many state prosecutors are opting to assist federal authorities with their investigations and get a percentage of that pie rather than put their own effort into an investigation that will net them only a modest amount.

The legislative compromise of giving twenty-five percent of the recovery to the law enforcement fund of the county represented by the claiming authority *after* the payment of all outstanding property liens and restitution, reparations, and damages to those victimized by the defendant in this *or any other crime*, was grounded in the fear of bounty hunters if the rewards were higher.²⁴⁷ Such abuse, however, has not been a problem on the federal level.²⁴⁸ There are at least two possible explanations. First, there is too much "real" work for law enforcement to do without worrying about collecting some spare change from another forfeiture action. Second, there is honesty. That is, although there may be one bad apple in a barrel, most of those given authority rise to the level of responsibility necessary to exercise that confidence and trust. If, however, the legislature desires to further safeguard the public, it might appoint a panel or trustee to govern the financial distributions to law enforcement authorities. Alternatively, the legislature might want to compensate the claiming authority for the "real costs" of the civil action. At present, however, it often does not pay, in money or manpower, for the claiming authorities to file forfeiture actions against defendants.

240. N.Y.L.J., Nov. 17, 1986, at 1, col. 3. As of January 1, 1987, state and local law enforcement offices have received more than \$33 million under this equitable sharing program.

241. In January, 1986, New York City Special Narcotics Prosecutor Sterling Johnson, Jr. accepted nearly \$245,000 on behalf of his office for its role in a narcotics prosecution.

242. N.Y. CIV. PRAC. L. & R. 1349 (McKinney Supp. 1988).

243. N.Y. CIV. PRAC. L. & R. 8201 (McKinney 1981).

244. *Id.*

245. *Id.* 8301.

246. *Id.* 8017.

247. See *supra* notes 82-85 and accompanying text.

248. See generally, Dwyer & Smith, *supra* note 20.

Further, federal authorities are permitted to keep, for official use, items such as vehicles which are confiscated pursuant to forfeiture.²⁴⁹ Article 13-A, on the other hand, requires that state authorities sell these items at public auction.²⁵⁰ The sale is of little benefit, either monetarily or otherwise, since most of the property has a low book value and brings a mere pittance on the auction block. It also makes no practical sense, especially in light of statutes such as New York Public Health Law section 3388, pursuant to which a prosecutor may move, in an *in rem* proceeding, against vehicles, vessels or aircraft used to transport or conceal narcotics and retain the results of the forfeiture.²⁵¹ Thus, as the law now stands, a claiming authority could keep drug vehicles but only after filing two separate civil proceedings in addition to the criminal action.

Furthermore, there is nothing in Article 13-A preventing the defendants themselves from bidding in the auction and buying back their own property for a few cents on the dollar. It makes a prosecutor wonder whether his actions are at all worthwhile. A simple change in the statute might solve this problem.

Another reason for the paucity of actions under Article 13-A is the shortage of investigative personnel assigned to the units handling forfeiture cases. Whether it is a lack of money in the respective budgets or just indifference on the part of policy makers, forfeiture actions are usually conducted by assistant prosecutors assigned to rackets or narcotics bureaus who, because of the nature of their criminal caseloads, are privy to the types of cases best suited for a forfeiture action.

Getting the prosecutors to use the statute, however, is only part of the problem. Many of the difficulties lie with the statute itself. In addition to the issues discussed above, a few other problems, which also were products of legislative compromise, dilute the strength of the statute to such a degree that its implementation suffers.

Foremost among these problems is the real property exemption in the definition of an instrumentality.²⁵² In their zeal to protect innocent third parties from losing their homes or livelihoods because of

249. See 21 U.S.C. § 881 (1970); UNIF. CONTROLLED SUBSTANCE ACT § 505, 9 U.L.A. 611 (1979); Raspberry, *Can They Get Their Cars Back?*, Washington Post, Aug. 8, 1986, at A15. Indeed, the federal government's right to the property vests at the time the property is used illegally. See DAVID SMITH, *supra* note 20. In contrast, a state claiming authority under Article 13-A must wait until the time of the forfeiture judgment before claiming his right to the property.

250. See N.Y. CIV. PRAC. L. & R. 1350, 5233 (McKinney 1978 & Supp. 1988).

251. N.Y. PUB. HEALTH LAW § 3388 (McKinney 1985 & Supp. 1988).

252. See *supra* notes 135-47 and accompanying text.

an isolated minor criminal incident, the legislators decided to exclude real property as an instrumentality. The result of this exclusion has already appeared in a Bronx "chop shop" forfeiture.²⁵³ In *Ferranti*, the District Attorney secured, through liens and attachments, all of the equipment and parts used by the defendants in the dismantling process. Yet, two large buildings and their accompanying property, used exclusively to house the illegal operation, were beyond the reach of the claiming authority. Indeed, the defendants sold those properties during the pendency of the action. The money judgment obtained by the District Attorney was paid in part from the proceeds of those sales. However, the defendants were able to retain a substantial amount from the sales, thereby benefitting from their criminal activity.

Changing the statute to permit forfeiture of real property "exclusively used" in the commission of a crime would be totally unworkable, since virtually every criminal enterprise works under some legitimate cover. Revising the exclusion to permit forfeiture of real property used "substantially" in the commission of the crime, however, would avoid inequities such as those that resulted in *Ferranti*, while the mom and pop store used merely as a backdrop for a single drug deal would remain clear of governmental action.

As a means of limiting the liability of third parties in forfeiture actions, the portions of the statute relating to non-criminal defendants are, on the whole, excellent. However, in actions against non-criminal defendants for an instrumentality of the crime, the legislature limited the recovery to an amount not to exceed that of the proceeds of the crime.²⁵⁴ Apparently, the drafters did not foresee a clever defendant. This provision encourages a criminal defendant to use a friend's expensive boat in the commission of a crime where the monetary benefits are small. The friend — the potential non-criminal defendant — is in no danger of losing the boat as long as its value exceeds that of the proceeds of the criminal activity, and all the defendant has to lose is his profit. The legislature should create uniformity in the provisions dealing with the instrumentalities of criminal defendants. Once the applicable proof has been presented,²⁵⁵ the instrumentality should be subject to forfeiture regardless of its value. A court always has the option of curing any inequity by dismissing the action or reducing the claim pursuant to

253. *Merola v. Ferranti*, No. 1168/85 (Sup. Ct. Bronx County Apr. 4, 1986).

254. N.Y. CIV. PRAC. L. & R. 1311(1) (McKinney Supp. 1988).

255. *Id.* 1311(3)(c).

the “interests of justice” provision. Drafting the statute for the worst scenario by precluding the initial action seems to be an inappropriate and extreme reaction to *Pearson Yacht*.²⁵⁶

Finally, one important presumption concerning narcotics cases is conspicuously absent from Article 13-A. New York Penal Law section 220.25 allows that the presence of a controlled substance in an automobile or in open view in a private area under certain circumstances is “presumptive evidence of knowing possession” of each person in close proximity to the drugs.²⁵⁷ The inclusion of such a presumption into Article 13-A is crucial. Otherwise, the claiming authority must show that the one million dollars in small bills found in a defendant’s apartment after a fifty dollar “buy and bust” is directly traceable to criminal activity. The prospect of successfully tracing the money directly to criminal activity is virtually non-existent, especially without a “common scheme or plan” provision for pre-conviction actions.²⁵⁸

CONCLUSION

The drafters of Article 13-A produced an exceptional statute in many respects. The fine balance of powerful prosecutorial tools with protections for the public at large can serve as a model from which other states may learn. This article has examined the statute and its judicial gloss from the perspectives of those who utilize, and are affected by, the statute, as well as those who drafted it. It is, of course, a statute designed to be used by prosecutors in a cautious and conscientious manner in order to implement one specific purpose: taking the profit out of crime.

In an effort to effectuate this goal, the legislature authorized state officials to strike the criminal where it hurts most: in the pocketbook. One may debate the propriety of this pursuit; this article has not. Instead, it has presented some suggestions for furthering the legislative goal without jeopardizing the rights of innocent individuals.

It may be argued that the courts, by way of CPLR 1311(4), can remedy many of the problems raised and discussed in this article. But, as the label placed on CPLR 1311(4) should suggest, an “interests of justice” provision should be used to correct an unjust situation, not to rewrite a defective statute. The courts have already begun calling upon the legislature to redraft certain “obscure”

256. See *supra* notes 135-47 and accompanying text.

257. N.Y. PENAL LAW § 220.25(1), (2) (McKinney 1980 & Supp. 1988).

258. See *supra* notes 51, 234-36 and accompanying text.

provisions and present the courts with guidelines for their interpretation and application.²⁵⁹ The compromises made in Albany were designed with good intentions. These same good intentions may, however, eventually lead to the statute's self-demise. Revision is a legislative task, and one that should be expeditiously attended to.

259. See *Dillon v. Bialostok*, 136 Misc. 2d 695, 699, 519 N.Y.S.2d 186, 189 (Nassau County Ct. 1987).