Introduction

This guidebook is the product of an interdisciplinary and interagency working group that was organized under the auspices of the American Bar Association (ABA). Since 2010, the group has been studying and seeking solutions for recurring tensions between governmental enforcement proceedings involving the forfeiture of a wrongdoer's assets, on the one hand, and insolvency proceedings that assert jurisdiction over the disposition of the same assets, on the other hand. As a result of the working group's report and recommendations, the ABA adopted a resolution in February 2014 encouraging all of the entities, agencies, and courts involved in overlapping forfeiture proceedings and insolvency proceedings to develop protocols and work toward enactment of appropriate legislative and rules changes to address these complex intersections. (The ABA Resolution appears as Appendix A.)

The challenges addressed here have arisen largely as the result of the rapid evolution of forfeiture law and its perceived encroachment on traditional insolvency law. Neither substantive nor procedural law has kept pace with this evolution. This guidebook identifies the regulatory schemes, parties, interests, competing considerations, and policies that are at stake, with the objective of assisting the courts in making fully informed decisions. The purpose of this guidebook is to identify the differences between the forfeiture and insolvency processes, for the courts' and parties' understanding. The descriptions of the different processes and of the potential consequences of those differences are not intended to suggest that one process may be favored over the other, nor to suggest how the courts should rule on any substantive tensions that courts might perceive in those differences, nor to alter in any way current protections for crime victims. It is not the guidebook's purpose to determine whether inequities exist, to recommend how the courts should resolve any perceived inequities, or to consider what congressional action, if any, might be taken. Rather, the guidebook is designed to identify the underlying statutes and rules, articulate the positions and arguments the courts are likely to encounter, and provide courts with resources for managing these cases. These resources include links and references to governmental agency websites and materials, as well as summaries of positions trustees generally assert. A robust understanding of these complexities and competing positions, and access to these resources, will aid the courts in administering these cases and ruling on any settlements, including coordination and cooperation agreements, the parties might propose.

Governmental agencies have the power (indeed, often the duty) to apply forfeiture and disgorgement laws to seize assets involved in a criminal enterprise or garnered by violation of securities or other laws. The forfeiture laws permit seized assets to be distributed to innocent owners or to victims harmed by the underlying wrongful activity, or to be retained by law enforcement agencies under equitable sharing programs. DOJ and SEC policy guidelines elaborate procedures and priorities governing the use and application of seized assets.

Seizure of assets by forfeiture often strips the targeted person or enterprise of essential funds necessary for daily existence. The targeted entity or its creditors may seek the
protection of the bankruptcy courts (or, more rarely, other insolvency regimes) either as a proactive measure before the seizure or as a reactive measure after seizure. The entitlement and distributional principles that insolvency law applies to the assets typically differ significantly from the principles forfeiture law applies because insolvency proceedings account for not only innocent owners and victims, but also potentially senior or equal rights of the targeted entity’s trade and other creditors.

When these two legal schemes intersect, the government and bankruptcy estate typically both seek control and distribution of the same assets. Unless the government and bankruptcy estate can reach an agreement about how to proceed, a battle may erupt. Such battles involve far more than a mere procedural turf war. The divergent rules and policies governing forfeiture and insolvency may result in the exact same claimants receiving profoundly different distributions, depending on which scheme is applied. Moreover, because there may be only partial, rather than complete, overlap between the claimants and assets subject to each proceeding, some claimants may receive distributions if forfeiture law is applied, but none if insolvency law is applied, and vice versa.

Ultimately, statutory amendments or determinative judicial rulings may be necessary to resolve the substantive conflicts between forfeiture law and insolvency law. Even when (if) substantive legal changes do occur, the judges managing these cases will continue to face complicated procedural coordination issues. The courts overseeing these proceedings today and in the future have significant opportunities to manage these complex intersections in ways that reduce litigation and conflict, and expedite and enhance recoveries to injured persons. As elaborated herein, these judicial management strategies include:

- early and carefully targeted status conferences;
- awareness of the players in the parallel proceedings and of means of encouraging communication among those players, where appropriate;
- case management orders;
- intercourt communication;
- in appropriate cases, joint hearings between bankruptcy court judges and district court judges or other judges overseeing different proceedings in different courts; and
- in appropriate cases, hearing and approval of coordination agreements that settle procedural, evidentiary, and substantive disputes, including with respect to asset allocation and distribution.

Most of the reported cases involve interactions between federal forfeiture law and federal bankruptcy law. The principles addressed, however, are generally applicable to interactions between all types of insolvency proceedings and both forfeiture and disgorgement proceedings, whether they involve multiple federal courts, multiple state courts, federal and state courts, or cross-border implications. This guidebook notes any significant divergences where appropriate.

### Additional Background Resources

A general overview of these tensions is available in a Federal Judicial Center (FJC) video titled *Asset Forfeiture and Bankruptcy Case Coordination*, available at Federal Judiciary Channel (Jan. 16, 2014), https://www.youtube.com/watch?v=kQlPZLpg6HE&feature=c4-overview&list=UUIcgGfaeUGYJSo7bLeUr1hw.
Citations and links to governmental agency websites and materials are collected in the appendices to this guidebook.

Other useful background resources include: Symposium, A *Cross-Disciplinary Dialogue: White Collar Fraud, Asset Forfeiture, and Bankruptcy*, 42 Golden Gate L. Rev. 525 (2012) (eight articles); a Business Law Today July 2012 mini-theme series titled *Fraud and the Intersection Between Crime, Bankruptcy and Asset Forfeiture* (five articles); and the Report and Recommendation supporting ABA Resolution 102A (February 2014). Portions of this guidebook are adaptations or excerpts (without line-by-line citation) from the materials cited in this paragraph. They are used with permission of the co-authors of this guidebook who authored the cited materials. Prior versions of a portion of this guidebook appeared in Materials, National Conference of Bankruptcy Judges Annual Meeting 2015 (used with permission).


The reader is cautioned that this is a rapidly developing area of law. In late 2015, for example, the DOJ began reviewing its forfeiture practices. Bills concerning forfeiture have been introduced in several recent Congresses. In April 2017, the United States Supreme Court determined that disgorgement is not merely compensatory but constitutes a penalty for statute of limitations purposes. *Kokesh v. SEC*, 137 S. Ct. 1635, 1643 (2017). Other cases continue to wind through the courts.

NOTE TO READER regarding defined terms: Key terms and abbreviations are italicized and defined in the text and are capitalized thereafter. These definitions are also collected in Glossary I.