Calculating Forfeiture Money Judgments After *Honeycutt*

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For years, federal courts imposed joint and several liability, "a creature of tort law,"[1] in criminal forfeiture actions. By 2017, a majority of federal circuits had held that a district court could impose a criminal forfeiture personal money judgment ("money judgment") against a defendant that rendered him jointly and severally liable with his co-conspirators for the entire amount of the conspiracy's illegal proceeds. In other words, a money judgment could require a criminal defendant to disgorge the ill-gotten proceeds of the conspiracy, even those already spent by him and his co-conspirators. However, in *United States v. Honeycutt,* 137 S. Ct. 1626 (2017), the Supreme Court largely brought a halt to joint and several money judgments.

In *Honeycutt*, the Supreme Court held that a plain reading of the drug forfeiture statute, 21 U.S.C. § 853, did not provide for joint and several liability. According to the Supreme Court, "[s]ection 853(a)(1) limits forfeiture to property the defendant 'obtained ... as the result of' the crime." "Neither the dictionary definition nor the common usage of the word 'obtain' supports the conclusion that an individual 'obtains' property that was acquired by someone else." In conclusion, the Supreme Court held that "[f]orfeiture pursuant to § 853(a)(1) is limited to property the defendant himself actually acquired as the result of the crime."[2]

The *Honeycutt* Court's new approach to forfeiture under section 853(a)(1) is akin to "several liability," another creature of tort law. Under several liability, a defendant is only responsible "for his proportionate share of the total liability."[3] Indeed, several liability is the direct opposite of joint and several liability.[4]

Since *Honeycutt*, several courts have held that the Supreme Court's bar against joint and several money judgments is not just applicable to forfeitures under the drug forfeiture statute, 21 U.S.C. § 853. In fact, courts have applied the *Honeycutt* Court's holdings to forfeitures under the general criminal forfeiture statute, 18 U.S.C. § 982,[5] and the RICO criminal forfeiture statute, 18 U.S.C. § 1963.[6] Some courts, but not all, have even applied the *Honeycutt* Court's holdings to criminal forfeiture under 18 U.S.C. § 981(a)(1)(C), a civil forfeiture statute that has been integrated into criminal proceedings via 28 U.S.C. § 2461(c).[7]

Perhaps the most vexing question since *Honeycutt* is how to calculate a money judgement now that it cannot be imposed jointly and severally. This article provides an overview of how some courts have calculated money judgments after *Honeycutt*.

General Principles

Under *Honeycutt*, a district court must first determine how much property the defendant himself "obtained," i.e., "actually acquired as the result of the crime."[8] Although this is an easy concept to understand, it has often been difficult for the government to apply. For instance, the district court in *United States v. Lobo*, No. 15 Cr. 174 (LGS), 2017 WL 2838187 (S.D.N.Y. June 30, 2017), held that simply dividing the proceeds of the conspiracy equally among the conspirators does not "show by a preponderance of the evidence the amount, if any, that [a conspirator] actually received."[9] In other words, the district court apparently expected the government to present some evidence demonstrating how the conspirators allotted the conspiracy proceeds among themselves.

In *United States v. Bradley*, 897 F.3d 779 (6th Cir. 2018), the government similarly fell short of proving the amount of proceeds

that the defendant "obtained" from his crime. In that case, the Sixth Circuit noted that it was unlikely that defendant Bradley kept all proceeds that he collected on behalf of an 18-member conspiracy.[10] Accordingly, the Sixth Circuit vacated the money judgment so that the district court could "figure out 'an amount proportionate with the property [Bradley] actually acquired through the conspiracy.'"[11]

Simply put, *Honeycutt* requires courts to look at each defendant individually when calculating a money judgment. Again, "[f]orfeiture pursuant to § 853(a)(1) is limited to property the defendant himself actually acquired as the result of the crime."[12] Despite this restriction on money judgments, courts have held that "[t]he calculation of [the] forfeiture amount does not demand mathematical exactitude[,] and the district courts are 'permitted to use general points of reference as a starting point ... and may make reasonable extrapolations from the evidence established by a preponderance of the evidence at the sentencing proceeding.'"[13] For example, in a drug forfeiture case, the government may simply multiply the estimated number of sales by the estimated sales price of the drug.[14]

Although these principles are relatively straightforward, calculating forfeiture money judgments can become more complicated when the defendant is a leader in the conspiracy. If the defendant is a leader, he may be liable in a forfeiture action for all proceeds obtained from the activities directly supervised by him.

Masterminds, Middle Managers, and Intermediaries

In *Honeycutt*, the Supreme Court juxtaposed two participants—a "mastermind" and an intermediary—in a marijuana distribution scheme.

> Suppose a farmer masterminds a scheme to grow, harvest, and distribute marijuana on local college campuses. The mastermind recruits a college student to deliver packages and pays the student $300 each month from the distribution proceeds for his services. In one year, the mastermind earns $3 million. The student, meanwhile, earns $3,600.[15]

The Supreme Court concluded that the college student should only be liable for $3,600 under the drug forfeiture statute. After all, the $3,600 is the only "property he 'obtained...as the result of' the crime." The Supreme Court did not specifically identify how much of the scheme's proceeds the mastermind would be liable for under the drug forfeiture statute. However, because the drug forfeiture statute provides for the forfeiture of "any proceeds the person obtained, directly or indirectly, as the result of" the crime, the Supreme Court effectively held that the mastermind would be liable for the entire amount of the scheme's proceeds.

> [T]he marijuana mastermind might receive payments directly from drug purchasers, or he might arrange to have drug purchasers pay an intermediary such as the college student. In all instances, he ultimately "obtains" the property—whether "directly or indirectly."[16]

Since *Honeycutt*, at least a couple of district courts have concluded that the mastermind in the Supreme Court's example would be liable under the drug forfeiture statute for all scheme proceeds. According to these courts, if a defendant is a "mastermind" or a "leader" of a conspiracy, the defendant is liable for all scheme proceeds. For example, in *United States v. Ward*, No. 2:16-cr-6, 2017 WL 4051753 (W.D. Mich. Aug. 24, 2017), the magistrate judge opined as follows: "Although the Government did not establish that [the farmer mastermind] directly obtained the [gross proceeds of the marijuana sales],...the Government proved by the preponderance of the evidence that Defendant indirectly obtained the...gross proceeds."[17] In *United States v. Bradley*, No. 3:15-cr-00037-2, 2019 WL 3934684 (M.D. Tenn. Aug. 20, 2019), the district court likewise found that the leader of a conspiracy that collected and distributed opioid pills was liable for all proceeds "obtained, directly or indirectly" from the conspiracy.[18]

Of course, there are instances where the defendant is neither the mastermind of the conspiracy nor simply a low-level intermediary in the conspiracy. For instance, a defendant may have a middle management position within the conspiracy with the responsibility to supervise others. In that situation, the D.C. Circuit has suggested that the middle manager might only be liable for the "proceeds from activities directly supervised by" him.[19] The D.C. Circuit further supported its conclusion by noting that "property obtained 'indirectly' might include 'property received by persons or entities that are under the defendant's control,' such as 'an employee or other subordinate of the defendant.'"[20]

Furthermore, there are instances where the defendant is merely acting as a middleman or broker for a supplier. In *United States v. Cooper*, No. 15-161-08 (EGS), 2018 WL 6573454 (D.D.C. Dec. 13, 2018), the district court held that when a middleman collects the purchase money for a controlled substance from a customer and remits the purchase money, minus the middleman's commission to the supplier, *Honeycutt* dictates that the middleman must only forfeit his commission.[21] In other words, because the supplier, not the middleman, received most of the purchase money paid by the customer, the supplier alone should be responsible for that portion of the tainted money he acquired indirectly through the middleman. In *Cooper*, the government argued "that applying the *Honeycutt* Court's definition of the word 'obtain' here amounts to a 'backdoor way into the net proceeds versus gross proceeds' argument." The court disagreed by noting as follows: "In *Honeycutt*, the Supreme Court clearly and broadly stated that 'Section 853(a) limit[s] forfeiture to tainted property acquired or used by the defendant.'" In fact, the court did "not address whether the term 'proceeds' means gross proceeds or net profits" because the government had not even "met its burden of proving by a preponderance of the evidence that [the middleman] 'obtained' the amount it seeks in forfeiture." The court ultimately denied the government's motion for final order of forfeiture.[22]

In sum, the government must first prove what proceeds the defendant obtained, directly or indirectly, from the conspiracy. Subsequently, the court can consider whether the gross proceeds or the net proceeds obtained by the defendant should be forfeited.

Gross Proceeds vs. Net Proceeds

Multiple circuits have held that "proceeds," as used in § 853, the criminal drug forfeiture statute, "refers to gross receipts, not net profits."[23] Accordingly, the gross proceeds of the conspiracy "should determine the baseline for calculating the amount of the forfeiture."[24] Although this is the majority rule for § 853 forfeitures, it is important to note that other forfeiture statutes may use net proceeds, or another measure, as the baseline for calculating the amount of the forfeiture.

Further, even if a statute requires that forfeiture be calculated based on gross proceeds, the government may elect to calculate based on net proceeds. For example, in *Honeycutt*, the government sought forfeiture under § 853 based on net profits, even though it was entitled to use gross proceeds as the baseline. Further, a district court has calculated forfeiture based on the "wholesale costs of acquiring" the instrumentalities of the crime, as opposed to gross proceeds, as long as it would be "proportional to the gravity" of the defendant's offense.[25] In short, even if the forfeiture statute at issue provides for a certain measure of forfeiture, the government or the court may use another measure that results in a lower forfeiture award.

Conclusion

It has been almost three years since the Supreme Court largely brought an end to joint and several forfeiture money judgments. During that time, courts have been grappling with how to calculate a money judgment that only includes "property the defendant himself actually acquired as the result of the crime." Perhaps the most challenging aspect of calculating a money judgment is determining how much profit is attributable to the "masterminds," "middle managers," and "intermediaries" in a conspiracy. This area will no doubt be the subject of litigation for years to come. ⊙

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Endnotes

[1]*United States v. Honeycutt*, 137 S. Ct. 1626, 1631 (2017).
[2]*Id.* at 1635.
[3]*Mortg. Contracting Servs., LLC v. J & S Prop. Servs. LLC*, No. 8:17–cv–1566–T–36CPT, 2018 WL 3219386, at *8 (M.D. Fla. 2018) (quoting *Juarez v. Friess*, 2016 WL 406252, at *11 (W.D. Pa. Feb. 3, 2016)).
[4]*Cf. Phillips v. Duro-Last Roofing, Inc.*, 806 P.2d 834, 835 n. 1 (Wyo. 1991) ("An allocation and apportionment statute addresses separate responsibilities and divides up resulting liability among defendants or potential defendants--the direct opposite in result of joint and several liability.").
[5]*United States v. Carlyle*, 776 F. App'x 565, 570 n. 3 (11th Cir. 2019) ("We have . . . concluded that the reasoning of *Honeycutt* applies to criminal forfeitures under 18 U.S.C. § 982(a)(7), pertaining to healthcare offenses."); *United States v. Brown*, 714 F. App'x 117, 118 (3d Cir. 2018) ("[W]e conclude that *Honeycutt* applies with equal force to § 982(a), and that the imposition of joint and several liability in the forfeiture money judgment was an error which requires remand to correct."); *United States v. Chittenden*, 896 F.3d 633, 639 (4th Cir. 2018) ("In light of the Supreme Court's decision in *Honeycutt*, we hold that 18 U.S.C. § 982(a)(2) precludes joint and several forfeiture liability."); *United States v. Elbeblawy*, 899 F.3d 925, 941-42 (11th Cir. 2018) (holding that "[t]he healthcare-fraud statute [18 U.S.C. § 982(a)(7)] does not permit joint and several liability."); *United States v. Sanjar*, 876 F.3d 725, 749 (5th Cir. 2017) ("The forfeiture statute [18 U.S.C. § 982(a)(7)] thus does not allow [defendant] Main to be responsible for any amount beyond the proceeds of the Medicare fraud that he obtained.")
[6]*United States v. Gjeli*, 867 F.3d 418, 427-28 (3d Cir. 2017) ("[W]hile the forfeiture based on other counts of conviction was rooted in a different criminal forfeiture statute, 18 U.S.C. § 1963, and in a civil forfeiture statute, 18 U.S.C. § 981(a)(1)(C), a review of the text and structure of those statutes reveals that they are substantially the same as the one under consideration in *Honeycutt*. We thus see no reason why the holding in *Honeycutt* does not apply with equal force to those statutes. Joint and several liability therefore cannot be imposed in these cases.").
[7]*United States v. Peithman*, 917 F.3d 635, 652-653 (8th Cir. 2019), *cert. denied,* ___U.S.___, 140 S. Ct. 340 (2019) ("We note a circuit split has developed on the question of whether *Honeycutt* applies to criminal forfeitures under § 981(a)(1)(C). *Compare United States v. Sexton*, 894 F.3d 787, 798-99 (6th Cir. 2018) (holding that *Honeycutt* does not apply to forfeiture under 18 U.S.C. § 981(a)(1)(C)) and *United States v. Peithman,* 917 F.3d 635 (8th Cir. 2019) (We join the Sixth Circuit and conclude that the reasoning of *Honeycutt* is not applicable to forfeitures under 18 U.S.C. § 981(a)(1)(C) .... ") with *United States v. Gjeli*, 867 F.3d 418, 427 (3d Cir. 2017) (finding that 18 U.S.C. § 981(a)(1)(C) is substantially the same as the [statute] under consideration in *Honeycutt*"), and *United States v. Carlyle*, 712 F. App'x 862, 864–65 (11th Cir. 2017) (per curiam) (remanding to the district court for a determination on whether *Honeycutt* governed wire fraud forfeiture under § 981(a)(1)(C) and observing it appeared likely to apply).
[8]*Honeycutt*, 137 S. Ct. at 1635.
[9]*United States v. Lobo*, No. 15 Cr. 174 (LGS), 2017 WL 2838187, at *7 (S.D.N.Y. June 30, 2017).
[10]*United States v. Bradley*, 897 F.3d 779, 783 (6th Cir. 2018).
[11]*Id.* at 783-84.
[12]*Honeycutt*, 137 S.Ct. at 1635.
[13]*United States v. Ford*, 296 F. Supp. 3d 1251, 1260 (D. Or. 2017) (quoting *United States v. Treacy*, 639 F.3d 32, 48 (2d Cir. 2011)).
[14]*E.g., United States v. Basciano*, 649 F. App'x 42, 43 (2d Cir. 2016) ("[I]n a narcotics case, the government may sustain its burden by proving the quantity of [narcotics] dealt . . . multiplied by the price it could have commanded." (internal quotation marks and citation omitted)).
[15]*Honeycutt*, 137 S. Ct. at 1631.
[16]*Id.* at 1633.
[17]*United States v. Ward*, No. 2:16-cr-6, 2017 WL 4051753, at *3 (W.D. Mich. Aug. 24, 2017).
[18]*United States v. Bradley*, No. 3:15-cr-00037-2, 2019 WL 3934684, *11 (M.D. Tenn. Aug. 20, 2019).
[19]*United States v. Leyva*, 916 F.3d 14, 31 (D.C. Cir. 2019).
[20]*Id.* at 30 (quoting *United States v. Cano-Flores*, 796 F.3d 83, 92 (D.C. Cir. 2015)).
[21]*United States v. Cooper*, No. 15-161-08 (EGS), 2018 WL 6573454, at *2-4 (D.D.C. Dec. 13, 2018).
[22]*Id.*
[23]*United States v. Carey*, 268 F. Supp. 3d 29, 33 (D.D.C. 2017).
[24]*United States v. Ward,* No. 2:16-cr-6, 2017 WL 4051753, at *3 (W.D. Mich. Aug. 24, 2017) (quoting *United States v. Logan*, 542 F. App'x 484, 498 (6th Cir. 2013)).
[25]*United States v. Peithman*, 917 F.3d 635, 652 (8th Cir. 2019).