

Who Will Recover Jeffrey Epstein's Assets?

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News

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With the death of American financier Jeffrey Epstein on 10 August 2019, who faced federal charges for sex trafficking, the Government's criminal case against him comes to an end and so does the effort to recover his assets and distribute them to the victims as part of his sentence. This process – which is called criminal forfeiture – requires a criminal conviction, and there can be no criminal conviction of a person who is deceased.

There may be other criminal cases against co-conspirators, who assisted Epstein in his alleged sex-trafficking scheme, and if such persons are ultimately convicted, the Government may succeed in forfeiting *their* assets, if they were derived from or used to commit the offense. But the Government cannot use a criminal case against another party to recover Epstein's assets.

This does not mean, however, that Epstein's fortune – including the mansions and hideaways (where the alleged offenses may have taken place) or any luxury items (like private jets that may have been used to further the offense) – will go to his heirs untouched. Some of the victims, represented by counsel, have already made known their intent to file actions for damages against his estate, and they have every right to do so. But there is another way to proceed.

When the Government is unable to recover property involved in a criminal case by means of criminal forfeiture – because the defendant has died, is a fugitive, is unknown, or is otherwise beyond the reach of law enforcement in the United States – it may nevertheless recover the property in a civil proceeding; and if the Government is successful, it may distribute the property to the victims of the underlying crime.

The process requires identifying the property in a complaint filed in federal court, laying out the reasons it is believed that the property was derived from or used to commit a crime, and establishing the Government's right to the property in a judicial proceeding if anyone contests the Government's complaint. This is called civil, or non-conviction-based, forfeiture. It is the method the Government commonly uses to recover criminally-involved property if no criminal case is possible.

In a civil forfeiture case, the Government must prove the same things that it has to prove in a criminal case: that someone committed a criminal offense and that the property in a question was derived from or used to commit that offense. A person contesting the forfeiture has the right to force the Government to prove its case to a jury and to assert what is called the "innocent owner defense" if he or she did not know that the property was being used for an illicit purpose. Moreover, the court will limit any forfeiture to property that is directly traceable to the offense, and it will ensure that the forfeiture is proportional to the gravity of the crime. But at the end of the day, if the Government prevails, the title to the property will pass to the Government – and thence to the victims – even though there was no criminal conviction.

Why is this a better option than letting the individual victims launch a series of private lawsuits against Epstein's estate? In some ways it is not: private parties may be able to recover damages from aspects of Epstein's purported wealth that are unconnected to his alleged sex-trafficking offenses – assets that the Government cannot reach through civil forfeiture. But in other ways, allowing the Government to take the lead has many benefits for the victims.

First, the Government has superior resources and can employ them to prove its case without the cost to the victims that retaining private counsel would entail. In short, the money the Government recovers – from forfeiting a mansion in New York or Palm Beach or even on a Caribbean Island and converting it to cash – would go directly to the victims without a huge chunk being siphoned off by the victims' attorneys.

More importantly, if a victim or small group of victims were to prevail in a private lawsuit, the money recovered – minus the attorney's fees – would go only to these victims, leaving little or nothing for other victims who did not have the resources to retain private counsel and bring their own lawsuits. In contrast, the Government's goal in bringing a civil forfeiture action in a case of this nature would be to distribute whatever it recovered to *all* the victims on a *pro rata* basis. The more well-healed victims who were able to retain private counsel may not like this result, but it is certainly fairer.

There is ample precedent for this: the Government has used civil forfeiture many times to recover property when there was no criminal case, e.g., when Russian organized crime invested in real estate in Manhattan; when a corrupt Nigerian dictator laundered money through U.S. bank accounts; and when money destined to fund the nuclear weapons program in North Korea was found in the New York bank accounts of Chinese banks. But most importantly, it has done so to recover money for victims when the perpetrator of the offense died by his own hand, or otherwise.

A federal appellate court said it best a few years ago in a case from Virginia called *United States v. Blackman*: "The Government's ability to collect on a [forfeiture] judgment often far surpasses that of an untutored or impecunious victim of crime. (...) Realistically, a victim's hope of getting paid may rest on the Government's superior ability to collect and liquidate a defendant's assets" under the forfeiture laws." (*United States v. Blackman*, 746 F.3d 137, 143 (4th Cir. 2014)).

The Government now has the opportunity to use these laws to recover what it can of Jeffrey Epstein's estate for the benefit of his victims. Whether it does so remains to be seen.

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