

REMEDIES FOR A CLAIMANT IN AN IN REM FORFEITURE PROCEEDING: COUNTERCLAIMING A TERRIBLE, HORRIBLE, NO GOOD, VERY BAD REMEDY

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INTRODUCTION

The United States Courts of Appeals are currently split over whether a claimant can succeed in filing a counterclaim against the United States, for the violation of a constitutional right, in an in rem civil forfeiture proceeding.¹ The First and Sixth Circuit Courts of Appeals take the majority perspective that claimants are prohibited from filing counterclaims.² In contrast, the Fifth Circuit Court of Appeals offers the minority perspective that allows counterclaims to be filed in these proceedings.³

1. See Nicholas Hallock, *Removing Interpretative Barnacles: Counterclaims and Civil Forfeiture*, 88 U. CHI. L. REV. 938, 951 (2021).

2. See *United States v. One Lot of U.S. Currency (\$68,000)*, 927 F.2d 30, 34–35 (1st Cir. 1991); *Zappone v. United States*, 870 F.3d 551, 561 (6th Cir. 2017).

3. See *United States v. \$4,480,466.16 in funds seized from Bank of Am. account ending in 2653*, 942 F.3d 655, 663 (5th Cir. 2019).

This split is significant because it exposes how in rem claimants are afforded vastly different rights based on the federal circuit in which they live. This inconsistent treatment of in rem claimants is not only problematic for claimants, but also the federal government. For example, in the Fifth Circuit, a claimant could file a counterclaim against the United States. Hence, in this circuit, the ability to file a counterclaim allows claimants to seek additional damages against the federal government outside of the return of their confiscated property. Whereas, in rem claimants in the First and Sixth Circuits are not given this same right and are only allowed to seek recovery for their confiscated property. Thus, in these circuits, the government does not have to be concerned with exposing itself to suit by filing an in rem forfeiture action.

This Article examines all relevant case law, federal rules of civil procedure, federal rules of criminal procedure, federal statutes, and constitutional amendments that could help resolve the current circuit split. After analyzing these tools, this Article endorses the majority perspective: that a claimant does not have the ability to file a counterclaim, for the violation of a constitutional right, in these proceedings. In arriving at this position, this Article will discuss several key aspects of in rem forfeitures.

First, Part I examines the history of in rem forfeitures in the United States and abroad. In addition, this section describes the in rem forfeiture process, how the government initiates an in rem proceeding, and the burdens of proof at those proceedings. Second, Part II identifies the importance of this circuit split and thoroughly reviews the decisions from the three federal courts of appeals composing the split.

Third, Part III analyzes this issue, adopts the majority approach, and explains why counterclaims, for the violation of a constitutional right, cannot be filed against the United States in these proceedings. Fourth, Part IV provides a solution for claimants facing this problem. More specifically, this portion of the Article provides several ways, other than filing a counterclaim, claimants can seek remedies for the government's unlawful seizure of property.

I. IN REM CIVIL FORFEITURE

A. History

Forfeiture laws have an extensive history that dates back to biblical times.⁴ Historically, a king could forfeit property to God as a reparation for a wrong committed by the property.⁵ This first type of forfeiture was called a deodand.⁶ The use of forfeiture laws expanded when the laws were

4. See *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680–81 (1974) (quoting the book of *Exodus* 21:28).

5. See *id.* at 681.

6. See *id.* at 680–81.

implemented by the Crown in England.⁷ In fact, the Crown's most obvious expansion of forfeiture laws was in spreading the reach of those laws.⁸ For instance, in addition to using deodands, the Crown also enacted and enforced new forfeiture laws to punish individuals charged with committing either a felony or treason.⁹ This second type of forfeiture could be called felony forfeiture or forfeiture of estate.¹⁰ Also, the Crown instituted forfeiture proceedings for people charged with "violat[ing] customs and revenue laws."¹¹ Customs and revenue forfeitures were considered statutory forfeitures because those forfeitures were derived from statutes or laws passed by the British government.¹²

1. *Deodand*

Deodands date back to "[b]iblical and pre-Judeo-Christian" times.¹³ Deodands' primary purpose was to serve as an atonement to God for a crime or wrong committed by the property.¹⁴ Indeed, the word "deodand," which "derives from the Latin *Deo dandum*," has been translated to mean "to be given to God."¹⁵ The Bible even makes reference to the use of deodands.¹⁶ For example, in the book of Exodus 21:28, the Bible reads, "[i]f an ox gore a man or a woman, and they die, he shall be stoned, and his flesh shall not be eaten."¹⁷ In this biblical verse, the ox would be the deodand because the ox's death served as the atonement to God for its act of goring.¹⁸ In other situations, "the value of the instrument [or deodand could be] forfeited to the King in the belief that the King would provide the money for Masses . . . or insure that the deodand was put to charitable uses."¹⁹

After the use of deodands began in England, the Crown transitioned from using them to enforce religious laws to using them as means of obtaining extra sources of revenue.²⁰ Moreover, it was during this transition that forfeiture laws were delineated into the three (3) aforementioned

7. *See id.* at 681–82.

8. *See id.*

9. *See id.*

10. *See id.*

11. *Id.* at 682.

12. *See Austin v. United States*, 509 U.S. 602, 612 (1993).

13. *Calero-Toledo*, 416 U.S. at 681.

14. *See id.*

15. *Id.* at n.16.

16. *See id.* at n.17.

17. *Id.*

18. *See id.*

19. *Id.* at 681. When the Crown sought possession of a deodand, the proceeding "was [i]n rem in nature with the property itself considered [to be] the offender." *Commonwealth v. Irland*, 153 A.3d 469, 473 (Pa. Commw. Ct. 2017) (quoting *Commonwealth v. 2010 Buick Enclave*, 99 A.3d 163, 166–67 (Pa. Commw. Ct. 2014)). Hence, the property was treated as an individual. *See id.* That is, if the property was found guilty it was "held guilty and condemned as though it was conscious instead of inanimate." *Id.*

20. *See Calero-Toledo*, 416 U.S. at 681.

categories: (1) deodands; (2) felony forfeiture or forfeiture of estate; and (3) statutory forfeiture.²¹

2. *Felony Forfeiture or Forfeiture of Estate*

The second type of forfeiture, which is often called felony forfeiture or forfeiture of estate, resulted in the forfeiture of an individual's property upon the individual's conviction for committing either a felony or treason.²² For instance, if a person was convicted of committing a felony, that person would have to "forfeit[] his chattels to the Crown."²³ A conviction for treason resulted in a much more severe forfeiture because it would require the traitor to "forfeit[] *all* of his property, real and personal, to the Crown."²⁴ The severity of this type of forfeiture reflected the Crown's severe disdain for those committing a felony or treason.²⁵ Indeed, "[u]pon conviction of a felony or treason" an individual "was considered to have suffered a 'legal death'" that resulted in the loss of that individual's civil rights.²⁶ The Crown felt justified enforcing these stiff penalties because, in its view, "property was a right derived from society which one lost by violating society's laws."²⁷

Interestingly, felony forfeiture and forfeiture of estate were not solely limited to property relinquishment.²⁸ As a matter of fact, a conviction for either a felony or treason could result in an individual being unable to either inherit property or leave property to his or her heirs.²⁹ Some individuals were legally prohibited from inheriting from relatives or leaving property to their heirs if convicted of a felony or treason.

3. *Statutory Forfeiture*

The third type of forfeiture, which is known as statutory forfeiture, is forfeiture derived from the violation of specific laws.³⁰ Typically, statutory forfeiture arose from violations of "customs and revenue laws."³¹ In addition, statutory violations sometimes led to draconian forfeitures.³² For example, a person convicted of violating a customs law not only had to forfeit the illegal goods but sometimes also the vessel responsible for transporting those illegal

21. *See Austin v. United States*, 509 U.S. 602, 611 (1993).

22. *See id.* at 611–12.

23. *Calero-Toledo*, 416 U.S. at 682.

24. *Id.* (emphasis added).

25. *See Commonwealth v. Irland*, 153 A.3d 469, 486 (Pa. Commw. Ct. 2017).

26. *See id.* at 474.

27. *Id.*

28. *See id.*

29. *See id.*

30. *See id.* at 475.

31. *Id.*

32. *See id.*

goods.³³ As the United States Supreme Court (“Supreme Court”) once explained, “the act of an individual seaman, undertaken without the knowledge of the master or owner, could result in forfeiture of the entire ship.”³⁴

B. Forfeiture in the United States

Deodands were unpopular in colonial America.³⁵ In fact, there is not even a record of their use in our nation’s common law.³⁶ It is believed that the colonists’ animosity towards deodands was due to the belief that deodands were “repugnant to our ideas of justice.”³⁷ Although deodands were disfavored in the colonies, their existence and wide usage in Europe still impacted America’s forfeiture laws.³⁸ As one court recognized, “[t]he United States Supreme Court itself has made the connection between this ancient form of forfeiture and current legislation” by acknowledging that “[t]he modern forfeiture statutes are the direct descendants of this (English deodand) heritage.”³⁹

Forfeiture of estate was also rejected by the colonists.⁴⁰ Forfeiture of estate was so disfavored that most states explicitly barred its usage through either constitutional or statutory provisions.⁴¹ Congress even limited the forfeiture of a traitor’s property under the Constitution to “the Life of the Person attainted.”⁴² Similarly, “the First Congress also abolished forfeiture of estate as a punishment for felons.”⁴³

In contrast, colonists embraced statutory forfeiture “[l]ong before the adoption of the Constitution.”⁴⁴ Quite interestingly, “the common law courts in the Colonies—and later in the states during the period of Confederation—were exercising jurisdiction in rem in the enforcement of [English and local] forfeiture statutes.”⁴⁵ After obtaining independence, the colonies continued to use statutory forfeiture.⁴⁶ For instance, the First Congress that blatantly prohibited forfeitures of estate was the same First Congress that enacted the nation’s first set of statutory forfeiture laws.⁴⁷ Like in England, the First

33. *See id.*

34. *Austin v. United States*, 509 U.S. 602, 612 (1993).

35. *See Irland*, 153 A.3d at 474.

36. *See id.* at 473–74 (quoting *Parker-Harris Co. v. Tate*, 188 S.W. 54, 55 (1916)).

37. *Id.*

38. *See id.* at 474.

39. *Id.*

40. *See id.* at 475.

41. *See id.*

42. *United States v. Austin*, 509 U.S. 602, 613 (1993) (citing U.S. CONST. art. III, § 3, cl. 2).

43. *Id.* (citing Act of Apr. 30, 1790, ch. 9 § 24, 1 Stat. 117).

44. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 683 (1974).

45. *Id.*

46. *See id.*

47. *See Austin*, 509 U.S. at 613.

Congress aimed these laws at “the forfeiture of commodities and vessels used in violations of customs and revenue laws.”⁴⁸ The Act of July 31, 1789 was one such law.⁴⁹ This act required an individual forfeit both the goods and their carrying vessel if crew members were discovered unloading goods at an inappropriate time.⁵⁰ Additionally, “almost immediately after adoption of the Constitution, ships and cargoes involved in customs offenses became subject to forfeiture under federal law, as were vessels used to deliver slaves to foreign countries, and, somewhat later, those used to deliver slaves to this country.”⁵¹

C. What is an In Rem Forfeiture?

In rem, which is derived from the Latin language, literally means “against the thing.”⁵² In the context of forfeiture law, in rem forfeiture is essentially a government-initiated forfeiture proceeding filed against property instead of a person.⁵³ Consider the following scenario. The government could initiate a forfeiture action against John Doe (“Doe”) if it suspected Doe of selling narcotics from his suburban home.⁵⁴ When filing this forfeiture action, the government would list itself as the plaintiff and Doe’s home address as the defendant.⁵⁵ Likewise, the government could file a forfeiture action if the government searched Doe’s home and found \$50,000 that it believed was the product of illegal drug sales.⁵⁶ In this instance, if the government filed a forfeiture action, it would again list itself as the plaintiff.⁵⁷ However, instead of the home or Doe being the defendant, the defendant would be the confiscated \$50,000.⁵⁸ Hence, in in rem proceedings, the defendant is always the property subject to forfeiture and not any specific individual or individuals with an interest in the property.⁵⁹

Modern forfeiture laws are generally aimed at particular crimes such as the violation of child exploitation laws, drug laws, the Racketeer Influenced and Corrupt Organizations (“RICO”) statute, or federal fishing laws.⁶⁰ Generally, these statutes identify the types of property that could be

48. *Calero-Toledo*, 416 U.S. at 683.

49. *See Austin*, 509 U.S. at 613.

50. *See id.*

51. *Calero-Toledo*, 416 U.S. at 683.

52. *In Rem*, Black’s Law Dictionary (4th ed. 1968).

53. *See id.*

54. *See United States v. 28 Emery St.*, 914 F.2d 1, 2–3 (1st Cir. 1990).

55. *See id.* at 1.

56. *See, e.g., United States v. One Hundred Forty-Nine Thousand Four Hundred Forty-Two & 43/100 Dollars*, 965 F.2d 868 (10th Cir. 1992) (ruling that forfeiture was proper where the government showed that the currency and two vehicles found at the defendant’s home were likely proceeds of or used to facilitate drug trafficking of narcotics from the home).

57. *See id.* at 868.

58. *See id.*

59. *See Hallock, supra* note 1, at 939.

60. *See* 21 U.S.C. § 881; 18 U.S.C. § 2254; 18 U.S.C. § 1963; 16 U.S.C. § 1860.

subject to forfeiture.⁶¹ For example, federal drug laws identify several items that could be subject to forfeiture by the government.⁶² These items include any narcotics “manufactured, distributed, [or] dispensed” in violation of the law, any “aircraft, vehicles, or vessels” used to transport illegal narcotics, and any money obtained from manufacturing, distributing, or dispensing illegal narcotics.⁶³ Similarly, federal fishing laws allow for the forfeiture of any vessel found violating federal fishing law, as well as the forfeiture of any fish obtained in violation of the law.⁶⁴ Similarly, federal fishing laws allow the government to possess any vessel and the fish obtained using said vessel if any of its crew violates the statute.

D. How the Government Initiates In Rem Forfeiture Proceedings

A common way the federal government forfeits property is by filing a forfeiture complaint in district court.⁶⁵ In order for the district court to accept the complaint, the complaint must satisfy six (6) prerequisites.⁶⁶ First, the complaint must be verified.⁶⁷ Second, the government must clearly state the grounds for district court jurisdiction.⁶⁸ Third, the government must “describe the [forfeited] property with reasonable particularity” in the complaint.⁶⁹ Fourth, “if the property is tangible,” the government must also identify the location of the property at the time the government seized it in the complaint.⁷⁰ Also, if the property has moved from its original location, the government must disclose the tangible property’s new location at the time the government files its forfeiture action.⁷¹ Fifth, the government must identify in its forfeiture complaint the law that allows the government to file a forfeiture action in district court.⁷² Lastly, the government should “state sufficiently detailed facts to support a reasonable belief that the government will be able to meet its burden of proof at trial” in its complaint.⁷³

Once the complaint is filed, the government usually has to publish notice of the forfeiture action.⁷⁴ Under Supplemental Rule G(4)(a), the government must publish notice “within a reasonable time after filing the

61. See 21 U.S.C. § 881; 18 U.S.C. § 2254; 18 U.S.C. § 1963; 16 U.S.C. § 1860.

62. See 21 U.S.C. § 881.

63. 21 U.S.C. § 881(a)(1); 21 U.S.C. § 881(a)(4).

64. See 16 U.S.C. § 1860.

65. See FED. R. CIV. P. SUPP. G(2).

66. *Id.*

67. FED. R. CIV. P. SUPP. G(2)(a).

68. See FED. R. CIV. P. SUPP. G(2)(b).

69. FED. R. CIV. P. SUPP. G(2)(c).

70. FED. R. CIV. P. SUPP. G(2)(d).

71. See *id.*

72. FED. R. CIV. P. SUPP. G(2)(e).

73. FED. R. CIV. P. SUPP. G(2)(f).

74. See FED. R. CIV. P. SUPP. G(4).

complaint or at a time the court orders.”⁷⁵ Additionally, the government’s notice must: (1) describe the forfeited property; (2) identify the time period any interested party has to file a claim for the property and to answer the complaint; and (3) provide the name of “the government attorney [who should] be served with the claim and answer.”⁷⁶ If the government identifies an interested party, the government “must send notice of the action and a copy of the complaint” directly to that person.⁷⁷

After notice of the forfeiture is either published or sent to a claimant, the claimant can then file three types of pleadings.⁷⁸ First, the claimant can file a claim objecting to the forfeiture proceeding.⁷⁹ The claim, like the government’s notice of the forfeiture, must also meet certain prerequisites in order to be accepted by the district court.⁸⁰ Supplemental Rule G(5)(a) requires the claimant: (1) identify the property the claimant believes he or she has an interest in; (2) identify the claimant’s interest in the forfeited property; (3) “be signed by the claimant under penalty of perjury” and (4) be served on the proper government attorney.⁸¹ Moreover, the timeframe for filing the claim is dependent on how the government provided notice.⁸² For example, if notice is done through a newspaper publication, the claimant can file a claim up to “30 days after final publication of [the] newspaper notice.”⁸³ However, if the government sends a direct notice of the forfeiture action to the claimant, the claimant can “fil[e] a claim, at least 35 days after the notice is sent.”⁸⁴ A claimant can have up to 60 days to file a claim if the government’s notice was published through “an official internet government forfeiture site.”⁸⁵

The second type of responsive pleading a claimant can file is an answer to the forfeiture complaint.⁸⁶ The answer must be served and filed “within 21 days after filing the claim.”⁸⁷ Third, a claimant can file a Federal Rules of Civil Procedure Rule 12 motion to dismiss the forfeiture action.⁸⁸ Like the answer, the Rule 12 motion must also be filed “within 21 days after

75. FED. R. CIV. P. SUPP. G(4)(a)(i). *But see* FED. R. CIV. P. SUPP. G(4)(a)(i)(A)–(B). Publication is not required if the forfeited property is worth less than \$1,000 and direct notice is sent under Rule G(4)(b) to every person the government can reasonably identify as a potential claimant, FED. R. CIV. P. SUPP. G(4)(a)(i)(A), or if the cost of publication exceeds the property’s value and that other means of notice would satisfy due process, FED. R. CIV. P. SUPP. G(4)(a)(i)(B).

76. FED. R. CIV. P. SUPP. G(4)(a)(ii).

77. FED. R. CIV. P. SUPP. G(4)(b)(i).

78. *See* FED. R. CIV. P. SUPP. G(5)(a)–(b), G(8).

79. FED. R. CIV. P. SUPP. G(5)(a).

80. *See* FED. R. CIV. P. SUPP. G(5)(a)(i).

81. FED. R. CIV. P. SUPP. G(5)(a)(i)(A)–(D).

82. *See* FED. R. CIV. P. SUPP. G(5)(a)(ii).

83. FED. R. CIV. P. SUPP. G(5)(a)(ii)(B).

84. FED. R. CIV. P. SUPP. G(4)(b)(ii)(B).

85. FED. R. CIV. P. SUPP. Rule G(5)(a)(ii)(B).

86. *See* FED. R. CIV. P. SUPP. G(5)(b).

87. *Id.*

88. *See id.*

filing the claim.”⁸⁹ Furthermore, Rule G requires any objection to in rem jurisdiction or venue to be contained within either the answer to the complaint or the Rule 12 motion.⁹⁰

E. Burden of Proof in In Rem Forfeiture Proceedings

The government’s burden of proof in an in rem forfeiture proceeding is preponderance of the evidence.⁹¹ Hence, in order to succeed at a forfeiture hearing, the government has to prove, by a preponderance of the evidence, that the seized property was subject to forfeiture.⁹² The government can satisfy this burden of proof by providing evidence the government obtained prior and subsequent to its filing of the complaint.⁹³ Also, the government must prove the seized property has “a substantial connection” with the underlying crime.⁹⁴

Likewise, any of the claimant’s defenses to a forfeiture action must also meet the preponderance of the evidence standard.⁹⁵ For example, if a claimant raises an innocent owner defense, the claimant has “the burden of proving that the claimant is an innocent owner by a preponderance of the evidence.”⁹⁶

II. CIRCUIT SPLIT

A. Significance of This Circuit Split

This circuit split reveals the United States Courts of Appeals’ growing disagreement about whether in rem forfeiture proceedings are subject to counterclaims.⁹⁷ Currently, the First and Sixth Circuit Courts of Appeals do not allow claimants to file counterclaims in in rem actions.⁹⁸ In contrast, the Fifth Circuit Court of Appeals has rejected that notion and determined counterclaims can be filed in response to the initiation of in rem

89. *Id.*

90. *Id.*

91. 18 U.S.C. § 983(c)(1).

92. *See id.*

93. 18 U.S.C. § 983(c)(2).

94. 18 U.S.C. § 983(c)(3).

95. *See* 18 U.S.C. § 983(d)(1).

96. *Id.* The innocent owner defense is a legal defense available to claimants in in rem forfeiture proceedings. *See id.* More specifically, under this defense, an owner of seized property can keep retain the property if the owner can prove he or she had no knowledge or involvement with the unlawful activity that resulted in the property’s seizure. *See id.*

97. *See* United States v. 8 Luxury Vehicles, 88 F.Supp.3d 1332,1336–37 (M.D. Fla. 2015) (collecting cases).

98. *See* Zappone v. United States, 870 F.3d 551, 561 (6th Cir. 2017); United States v. One Lot of U.S. Currency (\$68,000), 927 F.2d 30, 34 (1st Cir. 1991).

forfeiture proceedings.⁹⁹ This divergence of opinions has afforded in rem forfeiture proceeding claimants different rights depending on the circuit.¹⁰⁰ For instance, the First or Sixth Circuits do not allow claimants to file a counterclaim against the government for damages resulting from an in rem forfeiture; whereas, the Fifth Circuit extends that same right to claimants.¹⁰¹

B. Majority View

1. *United States v. One Lot of U.S. Currency (\$68,000)*, 927 F.2d 30 (1st Cir. 1991)

a. Facts

On November 15, 1988, a confidential informant (“CI”) informed the Drug Enforcement Agency (“DEA”) that the claimant, Giovanni Castiello (“Castiello”), was involved in “large-scale drug trafficking in the Boston area.”¹⁰² In addition, the CI also stated Castiello was looking to buy a huge supply of cocaine.¹⁰³ After receiving this information, DEA agent Joseph Desmond (“Desmond”) went undercover, pretended to be a cocaine supplier, and arranged himself a meeting with Castiello.¹⁰⁴ The meeting was set to occur on November 18, 1988, at a local airport.¹⁰⁵

Desmond met Castiello at the airport as planned on November 18.¹⁰⁶ Desmond got into Castiello’s Lincoln Town Car, and Castiello drove them to a restaurant to discuss the drug sale.¹⁰⁷ While at the restaurant, Castiello made several admissions to Desmond.¹⁰⁸ First, Castiello admitted that he needed to locate a new cocaine supplier.¹⁰⁹ Castiello explained that he “could sell roughly ten kilograms of cocaine per month.”¹¹⁰ He also said he wanted to purchase at least \$68,000 worth of cocaine from Desmond.¹¹¹

99. *See United States v. \$4,480,466.16 in funds seized from Bank of Am. account ending in 2653*, 942 F.3d 655, 663 (5th Cir. 2019).

100. *Compare Zappone*, 870 F.3d at 561 (refusing to allow an intervenor to assert a counterclaim), and *One Lot of U.S. Currency (\$68,000)*, 927 F.2d at 34–35 (denying an intervenor the right to assert a counterclaim), with *\$4,480,466.16*, 942 F.3d at 663 (implicitly granting intervenors the right to assert a counterclaim against the government).

101. *See Zappone*, 870 F.3d at 561; *One Lot of U.S. Currency (\$68,000)*, 927 F.2d at 34–35. *But see \$4,480,466.16*, 942 F.3d at 663.

102. *One Lot of U.S. Currency (\$68,000)*, 927 F.2d at 31.

103. *Id.*

104. *Id.* at 31–32.

105. *See id.* at 31–32.

106. *Id.* at 32.

107. *See id.*

108. *See id.*

109. *See id.*

110. *Id.*

111. *See id.*

Four days later, Desmond and Castiello spoke on the telephone several times about the potential drug sale.¹¹² During those calls, Castiello informed Desmond that he would not have the full \$68,000 needed to purchase the cocaine.¹¹³ Instead, Castiello said he had only “about sixty grand.”¹¹⁴ Consequently, Desmond “said he would bring the four kilograms of cocaine the next morning, on Castiello’s assurance that he would obtain the remainder of the funds.”¹¹⁵

The next day, on November 23, Castiello drove his same Lincoln Town Car to the airport to purchase cocaine from Desmond.¹¹⁶ Upon arrival, Desmond asked Castiello to provide the \$68,000 before receiving the cocaine.¹¹⁷ Castiello then “drove away, and returned with a shoe box containing \$68,000 in mixed bills.”¹¹⁸ Once Castiello returned with the money, he completed the drug sale.¹¹⁹ Shortly thereafter, Castiello was arrested.¹²⁰

At some point after Castiello’s arrest, the government filed an in rem forfeiture petition seeking possession of Castiello’s Lincoln Town Car, as well as the \$68,000 Castiello brought to purchase the cocaine.¹²¹ In response to the government’s petition, Castiello “filed a timely claim to the property in the form of an answer to the complaint.”¹²² In his answer, Castiello also “filed what he termed a ‘counterclaim’ for the return of” various items including a portable telephone.¹²³ The government filed a motion for summary judgment, which included an affidavit from Desmond.¹²⁴ Castiello opposed the motion; however, he did not include any “affidavits or statement of disputed fact” with his opposition.¹²⁵ Thus, the district court granted the government’s motion for summary judgment.¹²⁶

b. First Circuit’s Ruling

On appeal, Castiello argued that the district court’s ruling should be remanded because the government and lower court both failed to address his counterclaim concerning his “portable telephone and various other items of

112. *See id.*

113. *See id.*

114. *Id.*

115. *Id.*

116. *See id.*

117. *See id.*

118. *Id.*

119. *Id.*

120. *See id.*

121. *See id.* at 31.

122. *Id.*

123. *Id.* at 34.

124. *See id.* at 31.

125. *Id.*

126. *See id.*

personal property” taken from the Lincoln Town Car.¹²⁷ The First Circuit Court of Appeals disagreed and refused to remand the case.¹²⁸ The court of appeals ruled that Castiello could not assert a counterclaim in the in rem forfeiture proceeding.¹²⁹ It noted that, in these proceedings, the defendant is the property and not the claimant.¹³⁰ Since the claimant was not a party in the proceeding, the court reasoned that the claimant could not file a counterclaim.¹³¹ The court supported its holding by explaining that “[b]y definition, a counterclaim is a turn-the-tables response directed by one party (‘A’) at another party (‘B’) in circumstances where ‘B’ has earlier lodged a claim in the same proceeding against ‘A.’”¹³²

Here, the court concluded that Castiello’s counterclaim was invalid because he was not a party to the in rem action.¹³³ Moreover, it found the district court’s ruling did not even apply to Castiello’s personal property in the Lincoln Town Car since that ruling “did not expressly extend to personal property within the vehicle.”¹³⁴ Although the court refused to remand Castiello’s case, it did suggest some alternative avenues to recovery.¹³⁵ For instance, the court reasoned that Castiello could have sought administrative relief by filing an action under 19 U.S.C. § 1618.¹³⁶ He also could have filed a motion seeking the return of property “in the underlying criminal case.”¹³⁷ Lastly, the court explained that Castiello could have also sought retrieval of the personal property by filing an entirely separate civil action against the government.¹³⁸

2. *Zappone v. United States*, 870 F.3d 551 (6th Cir. 2017)

a. Facts

In 2012, the Internal Revenue Service (“IRS”) began an investigation of the Zappones.¹³⁹ This IRS investigation concerned the Zappones operation of “a scrap-metal recycling business in Delta, Ohio.”¹⁴⁰ The IRS obtained a

127. *Id.* at 34.

128. *See id.* at 34–35.

129. *See id.* at 34.

130. *See id.*

131. *See id.*

132. *Id.*

133. *See id.*

134. *Id.* The First Circuit did not go into the specifics of the motion hearing, but it did note that “the district court . . . eventually allowed the [government’s] motion.” *Id.* at 31. In allowing the motion, the lower court did not make any written findings, although it did issue an order that forfeited the money and vehicle. *See id.*

135. *See id.* at 35.

136. *See id.*

137. *Id.*

138. *See id.*

139. *See Zappone v. United States*, 870 F.3d 551, 553–54 (6th Cir. 2017).

140. *Id.*

search warrant for the Zappones' home and businesses,¹⁴¹ and during that search found \$1,264,000 in a company safe.¹⁴² The Zappones contended the safe held "\$3,150,000 in total—and that the Special Agents pocketed the excess cash."¹⁴³

The government filed a forfeiture action in April of 2013 seeking to retain the \$1,264,000.¹⁴⁴ In response, the Zappones filed a claim seeking the return of their \$1,264,000.¹⁴⁵ Subsequently, in June 2013, the Zappones amended their claim to "alleg[e] that the amount of the defendant currency 'is understated with the true value at approximately Three Million One Hundred Fifty Thousand Dollars (\$3,150,000).'"¹⁴⁶

The forfeiture action was not the only legal avenue the Zappones took in attempt to get their money back.¹⁴⁷ In July 2014, they filed "administrative claims to the IRS seeking \$1,886,000, the difference between the amount of currency allegedly seized and the amount that was then the *res* of the civil-forfeiture action."¹⁴⁸ The IRS denied the Zappones' claim the following year.¹⁴⁹

Consequently, in October 2015, the Zappones filed a civil complaint against the IRS to recover monetary damages arising out of the execution of the November 2012 search warrant.¹⁵⁰ More specifically, the Zappones' lawsuit, which was against several IRS employees and an IRS subcontractor, included claims for the violations of various state laws and federal constitutional provisions.¹⁵¹ The government filed a motion to dismiss the Zappones' lawsuit.¹⁵² After a hearing, the district court judge granted the government's motion to dismiss because he believed "the Zappones had filed their state-law and constitutional claims" outside the statute of limitations.¹⁵³

b. Sixth Circuit's Ruling

The Sixth Circuit Court of Appeals affirmed the dismissal.¹⁵⁴ In affirming the trial court's decision, the Sixth Circuit held that the Zappones could not raise any counterclaims during their *in rem* forfeiture proceeding.¹⁵⁵ The court explained that, "a claim in a civil-forfeiture action

141. *See id.*

142. *See id.* at 553–54.

143. *Id.* at 554.

144. *See id.*

145. *See id.*

146. *Id.*

147. *See id.*

148. *Id.* (emphasis in original).

149. *See id.*

150. *See id.*

151. *See id.*

152. *See id.*

153. *Id.* at 554.

154. *See id.* at 562.

155. *See id.* at 561–62.

is ‘brought against property, not people’” for “the purpose of which is to determine ‘ownership and control’ over that property.”¹⁵⁶ Thus, the Sixth Circuit concluded, “while the purported owner of the property may intervene in the action, he may not assert counterclaims against the United States.”¹⁵⁷ The court did, however, recognize that the Zappones could have asserted these claims in a separate civil action, as long as that separate action was filed within the applicable statute of limitations.¹⁵⁸

C. Minority View

1. *United States v. \$4,480,466.16 in funds seized from Bank of Am. account ending in 2653, 942 F.3d 655 (5th Cir. 2019)*

a. Facts

In 2017, Retail Ready Career Center (“RRCC”) became the subject of a federal investigation when the Department of Veteran Affairs (“VA”) accused the school of not “be[ing] in compliance with the ‘85-15’ rule.”¹⁵⁹ This rule prohibits the VA from approving a student “veteran’s enrollment in a course ‘for any period during which more than 85 percent of the students enrolled in the course [were] having all or part of their tuition, fees or other charges paid for them by the . . . VA[.]’”¹⁶⁰ The Texas-based school had a substantial student population composed of military veterans.¹⁶¹ Thus, RRCC received VA payments to cover much of these veterans’ education costs.¹⁶² Since RRCC received VA money, it was subject to various government regulations meant to ensure that money was being used in accordance with the law.¹⁶³ To further its investigation, the government obtained search warrants for RRCC’s bank accounts.¹⁶⁴ The government executed these warrants in September 2017 and seized over \$4 million dollars that the government believed to be proceeds from RRCC’s violation of “various fraud and conspiracy statutes.”¹⁶⁵

In October 2017, the government filed an in rem forfeiture petition seeking the \$4,000,000.¹⁶⁶ In its petition, the government reiterated its belief that RRCC raised this money through illegal activity.¹⁶⁷ In response to the

156. *Id.* at 561.

157. *Id.*

158. *See id.*

159. *United States v. \$4,480,466.16 in funds seized from Bank of Am. account ending in 2653, 942 F.3d 655, 657 (5th Cir. 2019).*

160. *Id.*

161. *See id.*

162. *See id.*

163. *See id.*

164. *See id.*

165. *Id.*

166. *See id.*

167. *See id.*

forfeiture petition, RRCC filed a verified claim seeking return of the seized money.¹⁶⁸ In addition to seeking the return of its money, RRCC also raised two counterclaims alleging that the government's seizure of the money violated RRCC's Fourth and Fifth amendment rights.¹⁶⁹ RRCC also sought damages for these constitutional violations.¹⁷⁰ In response, "[t]he government moved to dismiss RRCC's counterclaims under Federal Rule of Civil Procedure 12(b)(6)."¹⁷¹

The district court judge granted the government's motion and dismissed RRCC's counterclaims.¹⁷² Since the Fifth Circuit had not yet addressed this specific issue, the judge primarily relied on the First Circuit's analysis in *United States v. One Lot of U.S. Currency ("\$68,000")*.¹⁷³ The judge also observed that this decision "had been followed by several district courts from other circuits."¹⁷⁴ After the court acknowledged the First Circuit's decision as well as its adoption by other courts, it ruled that RRCC "as a claimant in an *in rem* civil forfeiture action . . . cannot bring a counterclaim."¹⁷⁵

b. Fifth Circuit's Ruling

The Fifth Circuit Court of Appeals affirmed the district court's decision, but for partially different reasons.¹⁷⁶ The court noted that while it disagreed with the assertion "that claimants in *in rem* civil forfeiture proceedings are barred, always and everywhere, from filing counterclaims," it believed, in this situation, that "RRCC's constitutional damages claims [were] barred by sovereign immunity."¹⁷⁷ However, the Fifth Circuit did provide several reasons for its conclusion that the district court incorrectly denied claimants in *in rem* forfeiture proceedings a counterclaim.¹⁷⁸

First, the court of appeals took issue with the district court's reliance on the First Circuit's decision in *\$68,000*.¹⁷⁹ Indeed, it referred to the First Circuit's decision as a "citationless half paragraph."¹⁸⁰ Although the court criticized the First Circuit's analysis, it did acknowledge that the decision had been adopted by several district courts and at least one other court of appeals.¹⁸¹ However, the Fifth Circuit chose not to follow these courts and

168. *See id.*

169. *See id.*

170. *See id.*

171. *Id.*

172. *See id.* at 658.

173. *See id.*

174. *Id.*

175. *Id.*

176. *See id.* at 659.

177. *Id.*

178. *See id.* at 660–63.

179. *See id.* at 660.

180. *Id.* at 659.

181. *See id.*

instead “reject[ed] the First Circuit’s broad rationale for barring counterclaims in *in rem* civil forfeiture proceedings.”¹⁸²

Second, the court of appeals did not believe that the government’s choice to proceed in rem instead of in personam should affect a claimant’s rights to file a counterclaim.¹⁸³ In fact, the court identified a litany of ways claimants could challenge the seizure of their property.¹⁸⁴ For example, a claimant could “‘file a claim’ to protect his interests in the property.”¹⁸⁵ Additionally, a claimant could file a motion to dismiss the *in rem* proceeding, a motion to suppress, or a motion alleging the forfeiture was excessive under the Eighth Amendment.¹⁸⁶

Furthermore, the court noted that the federal civil forfeiture statute also afforded claimants with special rights.¹⁸⁷ For example, under 18 U.S.C. § 983(d), a claimant can raise an “‘innocent owner defense.’”¹⁸⁸ 18 U.S.C. § 983(e) also allows a claimant to “move to set aside the forfeiture” if the government did not properly notify the claimant about the petition.¹⁸⁹ Overall, the Fifth Circuit found it hard to fathom why the federal government would afford a claimant all the aforementioned rights and simultaneously prevent a claimant from filing a counterclaim.¹⁹⁰ The court wrote, “if a claimant can do all this in *in rem* forfeiture proceedings, it cannot be that he is barred from filing counterclaims simply because forfeitures are ‘*in rem* and not *in personam*.’”¹⁹¹

Third, the court of appeals believed that Federal Rules of Civil Procedure Rule 24 affords a claimant with the right to file a counterclaim in an *in rem* forfeiture proceeding.¹⁹² The court explained that Rule 24 allows a party to intervene in a civil action if that party “claims an interest relating to the property . . . that is the subject of the action.”¹⁹³ In the court’s view, Rule 24’s language provides intervenors certain rights that strongly parallel claimant rights identified in both 18 U.S.C. § 983(a)(4)(A) and Supplemental Rule G(5)(a)(i).¹⁹⁴ As the court observed, under 18 U.S.C. § 983(a)(4)(A), “‘any person claiming an interest in the seized property’ [can] . . . file a claim.”¹⁹⁵ Similarly, Supplemental Rule G(5)(a)(i) provides claimants with

182. *Id.* at 660.

183. *See id.* In an *in personam* proceeding, the defendant is a specific person instead of property. *See id.*

184. *See id.*

185. *Id.*

186. *See id.*

187. *See id.* (citing 18 U.S.C. § 983).

188. *Id.*

189. *Id.*

190. *See id.*

191. *Id.*

192. *See id.*

193. *Id.*

194. *See id.*

195. *Id.*

the right “to contest the forfeiture” by “assert[ing] an interest in the defendant property.”¹⁹⁶

Additionally, the Fifth Circuit stated that courts, as a whole, have used the terms claimants and intervenors interchangeably.¹⁹⁷ It even recognized that, in *\$68,000*, the First Circuit referred to Castiello as a claimant that “intervened” in the forfeiture hearing.¹⁹⁸ “Likewise here,” the court observed, “the government described RRCC as ‘an intervening party.’”¹⁹⁹ Since the court found these two (2) terms were being used interchangeably, it held that RRCC could file a counterclaim because “[u]nder federal law, an intervenor of right ‘is treated as he were an original party and has equal standing with the original parties.’”²⁰⁰ Thus, RRCC, as an intervenor, could assert any counterclaims it could have raised if it was the direct defendant instead of the property.²⁰¹

Fourth, the court of appeals found that admiralty cases permitted the filing of “counterclaims (or their equivalents) in *in rem* proceedings.”²⁰² These counterclaims could: (1) seek compensation for “damages negligently caused to [a] vessel;” (2) contest the initial seizure of the vessel; or (3) be used to “assert[] a property right in the res.”²⁰³

Fifth, the court also determined that the rules governing “admiralty and maritime claims plainly fores[aw] counterclaims in *in rem* and *quasi in rem* proceedings.”²⁰⁴ In support of this assertion, the court referenced Supplemental Rule E(7), which mentions the use of counterclaims in *in rem* forfeiture proceedings.²⁰⁵ Specifically, Supplemental Rule E(7) allows a claimant in an *in rem* proceeding to file a counterclaim if the claimant “has given security for damages in the original action [and] asserts a counterclaim that arises from the transaction or occurrence that is the subject of the original action.”²⁰⁶

Besides arguing that RRCC could never file a counterclaim in an *in rem* proceeding, the government also argued that RRCC could not file a counterclaim because the government did not waive sovereign immunity.²⁰⁷ The court of appeals agreed and upheld the district court’s ruling on those grounds.²⁰⁸ RRCC’s counterclaims sought damages from the government for alleged violations of the Fourth and Fifth Amendments.²⁰⁹ However, in

196. *Id.*

197. *See id.* at 661.

198. *Id.*

199. *Id.*

200. *Id.*

201. *See id.*

202. *Id.*

203. *Id.*

204. *Id.* at 662.

205. *Id.*

206. *Id.* at 662 n.13.

207. *See id.* at 663.

208. *See id.*

209. *See id.*

asserting these counterclaims, RRCC did not “identif[y] [any] statute unequivocally waiving the United States’ immunity for the damages claims.”²¹⁰ This was necessary since RRCC was required to prove that the government unequivocally expressed a waiver of its immunity from claims filed under these two amendments.²¹¹ The Fifth Circuit Court of Appeals found that this failure to identify any waiver of these claims was fatal to RRCC’s counterclaims since “[i]t is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction.”²¹²

Although the Fifth Circuit affirmed dismissal of RRCC’s counterclaims, it did offer other remedies RRCC could have used to seek monetary damages from the government.²¹³ For one, it noted that “[u]nder certain circumstances, claimants who ‘substantially prevail[]’ in a forfeiture action may recover attorneys’ fees, costs, and interest.”²¹⁴ Also, the court of appeals recognized that the Federal Tort Claims Act permits claimants to sue the government for property damage.²¹⁵

III. RESOLVING THE CIRCUIT SPLIT

The following sections will seek to bring finality to this circuit split by arguing the reasons courts should adopt the holdings of the First and Sixth Circuit Court of Appeals and find that a claimant cannot file a counterclaim against the government for violating a constitutional right during an in rem forfeiture proceeding. However, the reasons for that rule are not solely limited to those articulated by both of those courts of appeals. Thus, this section addresses the five primary reasons why a claimant cannot file a counterclaim against the government, namely: doing so would be an attempt to usurp sovereign immunity; both the Supplemental Rules for Admiralty, Maritime Claims and Asset Forfeiture Actions and the Federal Rules of Civil Procedure do not support allowing claimants to file counterclaims in these proceedings; and the general nature of in rem forfeitures also support this position. Lastly, this section will explain how public policy strongly discourages claimants from being able to file counterclaims in in rem proceedings.

A. Sovereign Immunity

Sovereign immunity is the primary reason a claimant does not have an ability to file a counterclaim against the government for the violation of a

210. *Id.*

211. *See id.*

212. *Id.* (quoting *United States v. Mitchell*, 463 U.S. 206, 212 (1983) (citing *United States v. Sherwood*, 312 U.S. 584, 586 (1941))).

213. *Id.* at 666.

214. *Id.*

215. *Id.*

constitutional right in an in rem forfeiture proceeding.²¹⁶ Under this legal doctrine, the federal government is immune from lawsuits.²¹⁷ However, notwithstanding sovereign immunity, the government can still be sued if it waives its immunity, but that waiver must be unequivocally expressed in a statute.²¹⁸

Congress has addressed the issue of seized property in two (2) situations, but neither supports filing a counterclaim against the government during an in rem forfeiture proceeding.²¹⁹ First, under the Federal Tort Claims Act (“FTCA”), the federal government can be sued for damages if it causes either: (1) injury to seized property; (2) damage to forfeited property; or (3) the loss of forfeited property.²²⁰ Although Congress specifically waived sovereign immunity for these three types of damages when it enacted the FTCA, it did not waive its immunity from constitutional claims brought against the government.²²¹ Thus, it appears Congress expressly decided that the FTCA is not the appropriate vehicle to use to file a counterclaim against the United States for violation of a claimant’s constitutional rights.²²²

Second, federal forfeiture law governing the return of wrongly seized property allows a claimant who substantially prevails in an in rem forfeiture proceeding to obtain three types of monetary awards.²²³ For example, a claimant could recover “reasonable attorney fees and other litigation costs” related to defending against the forfeiture hearing.²²⁴ In addition, the government could also be responsible for any interest accrued on the forfeited property while in the government’s possession.²²⁵ Consequently, this specific law only provides claimants with these limited monetary remedies after the forfeiture hearing has been completed and the claimant substantially prevailed at that hearing.²²⁶ Congress interestingly also intended to limit the federal government’s monetary liability through 28 U.S.C. § 2465.²²⁷ For

216. *See* *United States v. All Right, Title & Int.*, 821 F. Supp. 893, 899 (S.D.N.Y. 1993) (“Initiation of a forfeiture action does not constitute a waiver of sovereign immunity”).

217. *Id.*

218. *See* *United States v. \$4,480,466.16 in funds seized from Bank of Am. account ending in 2653, 942 F.3d 655, 663 (5th Cir. 2019).*

219. *See* 28 U.S.C. §§ 1346(b)(1), 2465(b).

220. *See* 28 U.S.C. § 1346(b)(1).

221. *See* 28 U.S.C. § 2680(c) (“The provisions of this chapter and section 1346(b) of this title shall not apply . . . if— (1) the property was seized for the purpose of forfeiture under any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense; (2) the interest of the claimant was not forfeited; (3) the interest of the claimant was not remitted or mitigated (if the property was subject to forfeiture); and (4) the claimant was not convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal criminal forfeiture law.”).

222. *See id.*

223. 28 U.S.C. § 2465.

224. *Id.*

225. *See id.*

226. *Id.*

227. *See* 28 U.S.C. § 2465(b)(2)(A).

instance, 28 U.S.C. § 2465 provides that, “[t]he United States shall not be required to disgorge the value of any intangible benefits nor make any other payments to the claimant not specifically authorized by this subsection.”²²⁸ This statute should not afford a claimant the right to file a counterclaim for monetary damages occurring from the violation of constitutional rights.²²⁹

B. Supplemental Rules for Admiralty, Maritime Claims and Asset Forfeiture Actions

The following subsections will identify how several specific provisions of the Supplemental Rules for Admiralty, Maritime Claims and Asset Forfeiture Action support courts following the majority perspective. More specifically, this portion of the Article will discuss Supplemental Rule(s) G, C, and E and their effect on claimants’ ability to file counterclaims in in rem proceedings.

For one, in rem forfeiture proceeding counterclaims are not supported by Supplemental Rule G.²³⁰ Rule G addresses in rem forfeiture actions and identifies the primary way a claimant can assert their interest in seized property.²³¹ The rule specifically states that, “[a] person who asserts an interest in the defendant property may contest the forfeiture by filing a claim in the court where the action is pending.”²³² However, the claim must meet specific requirements.²³³ The claimant’s claim must: (1) identify the property sought to be claimed; (2) identify the claimant’s interest in the seized property; (3) be signed under the penalty of perjury; and (4) be served on the appropriate government attorney.²³⁴

Despite this specificity, Rule G does not discuss or even mention counterclaims.²³⁵ In fact, the plain language of the rule only allows claimants to “assert[] an interest in the defendant property.”²³⁶ Hence, Rule G has not provided for a right to assert any type of counterclaim in an in rem action.

Even though Rule G does not mention counterclaims, it does offer other remedies to individuals who contest the lawfulness of a property seizure.²³⁷ Rule G provides the filing of motions to suppress and dismiss as possible remedies.²³⁸ Additionally, a claimant can also file a petition seeking release of the seized property.²³⁹

228. *Id.*

229. *See id.*

230. *See* FED. R. CIV. P. SUPP. G(5).

231. FED. R. CIV. P. SUPP. G(5)(a)(i).

232. *Id.*

233. FED. R. CIV. P. SUPP. G(5)(a)(i)(A)–(D).

234. *Id.*

235. FED. R. CIV. P. SUPP. G.

236. FED. R. CIV. P. SUPP. G(5)(a)(i).

237. FED. R. CIV. P. SUPP. G(8)(a)–(e).

238. FED. R. CIV. P. SUPP. G(8)(a)–(b).

239. FED. R. CIV. P. SUPP. G(8)(d).

Although Rule G does not directly address counterclaims, the rule does acknowledge, “[t]o the extent that this rule does not address an issue, Supplemental Rules C and E and the Federal Rules of Civil Procedure also apply.”²⁴⁰ That said, “Rules C and E are not to be invoked to create conflicts with Rule G. They are to be used only when Rule G, fairly construed, does not address the issue.”²⁴¹ Here, Rule G identifies very specific information that should be included in a verified claim without mentioning counterclaims, which seems to preclude counterclaims altogether.²⁴²

Rule C discusses the initial pleadings required in an in rem forfeiture proceeding, but does not support the filing of counterclaims for violations of constitutional rights against the United States in these proceedings because Rule C, like Rule G, does not mention or discuss counterclaims.²⁴³ However, Rule C does note that a person can file a “statement of right or interest [that] must describe the interest in the property that supports the person’s demand for its restitution or right to defend the action.”²⁴⁴ The plain language of Rule C indicates that the information within the statement of right or interest, similar to a claim, is only limited to: (1) a claimant identifying their right or interest to seized property; (2) a claimant seeking restitution; or (3) a claimant asking to defend the forfeiture petition.²⁴⁵ Hence, Rule C does not provide an avenue for filing a counterclaim in an in rem proceeding.²⁴⁶ Instead, its language supplements Rule G’s requirements by adding the possibility of a request for restitution or a request to defend the petition.²⁴⁷

Similarly, Rule E does not support counterclaims for the violation of a constitutional right against the United States in in rem forfeiture proceedings.²⁴⁸ First, even though Rule E notes that it is applicable to “actions in rem,” Rule E also states it only “supplement[s] Rules B, C, and D.”²⁴⁹ Thus, the plain language of Rule E recognizes that it does not supplement Rule G, which is the primary federal rule governing in rem forfeiture proceedings.²⁵⁰

Although Rule E does not supplant Rule G, Rule E does mention counterclaims.²⁵¹ More specifically, under Rule E(7)(a), “[w]hen a person who has given security for damages in the original action asserts a counterclaim that arises from the transaction or occurrence that is the subject of the original action, a plaintiff for whose benefit the security has been given

240. FED. R. CIV. P. SUPP. G(1).

241. FED. R. CIV. P. SUPP. G advisory committee’s note to 2006 amendment.

242. *See* FED. R. CIV. P. SUPP. G(5)(a)(i)(A)–(D).

243. *See* FED. R. CIV. P. SUPP. C.

244. FED. R. CIV. P. SUPP. C(6)(a)(ii).

245. *See id.*

246. *See id.*

247. *See id.*; FED. R. CIV. P. SUPP. G(5)(a)(i)(A)–(D).

248. *See* FED. R. CIV. P. SUPP. E.

249. FED. R. CIV. P. SUPP. E(1).

250. *See id.*

251. FED. R. CIV. P. SUPP. E(1), (7).

must give security for damages demanded in the counterclaim.”²⁵² Assuming Rule E supplements Rule G, this provision still does not afford individuals a right to assert a counterclaim.²⁵³ The Rules Committee noted in 2006 that, “Rules C and E are not to be invoked to create conflicts with Rule G. They are to be used only when Rule G, fairly construed, does not address the issue.”²⁵⁴ Here, finding that Rule E provides for a right to assert a counterclaim would contravene Rule G’s requirements, both for filing a responsive pleading (i.e. claim) and for the information that should be included in that pleading (i.e. identifying the property claimed, identifying the claimant’s interest in the property).²⁵⁵ To hold otherwise would allow Rule E to expand the types of requests that could be allowed under a Rule G claim, contrary to the drafter’s plain language and intent.²⁵⁶

C. The Federal Rules of Civil Procedure

As the supplemental rules explain, “[t]he Federal Rules of Civil Procedure also apply to [] [in rem] proceedings except to the extent that they are inconsistent with the[] Supplemental Rules.”²⁵⁷ In the context of in rem forfeitures, Federal Rule of Civil Procedure 13, which covers counterclaims and crossclaims, as well as Rule 24, which governs intervention, could apply to this issue.²⁵⁸

1. Rule 13. Counterclaim and Crossclaim

Federal Rule of Civil Procedure Rule 13 identifies: (1) who can file a counterclaim; (2) when a counterclaim can be filed; and (3) the limitations of filing a counterclaim against the United States.²⁵⁹ First, Rule 13(a)(1) outlines when and who can file a counterclaim.²⁶⁰ According to this section, “[a] pleading must state as a counterclaim any claim that—at the time of its service—the pleader has against an opposing party.”²⁶¹ This portion of Rule 13 recognizes an opposing party’s ability to file a counterclaim once the opposing party has received the initial complaint.²⁶²

Here though, a claimant would not be the opposing party. As courts like the First Circuit have explained, a claimant is not a party to an in rem

252. FED. R. CIV. P. SUPP. E(7)(a).

253. See FED. R. CIV. P. SUPP. E(7)(a); FED. R. CIV. P. SUPP. G advisory committee’s note to 2006 amendment.

254. FED. R. CIV. P. SUPP. G advisory committee’s note to 2006 amendment.

255. See FED. R. CIV. P. SUPP. G(5)(a)(i)(A)–(D) (identifying the information required for a valid claim).

256. See *id.*

257. FED. R. CIV. P. SUPP. A(2).

258. See FED. R. CIV. P. 13; FED. R. CIV. P. 24.

259. FED. R. CIV. P. 13.

260. FED. R. CIV. P. 13(a)(1).

261. *Id.*

262. *Id.*

proceeding since the defendant in the proceeding is the property subject to forfeiture.²⁶³ For example, when the government files an in rem petition, its complaint has to establish certain prerequisites—none of which directly relate to the claimant.²⁶⁴ One such prerequisite, found in Supplemental Rule G, is “stat[ing] the grounds for subject-matter jurisdiction, in rem jurisdiction over *the defendant property*, and venue.”²⁶⁵ The supplemental rules’ silence about requiring the government to allege the court’s jurisdiction over a claimant indicates Congress’ intent not to treat claimants and their property equally.²⁶⁶ In fact, the government’s only obligation to the claimant when initially filing the in rem petition is to send notice of the forfeiture.²⁶⁷

Rule 13(d) also poses problems for claimants attempting to file counterclaims in in rem proceedings.²⁶⁸ This section of Rule 13, which directly addresses the filing of counterclaims against the federal government, states “[t]hese rules do not expand the right to assert a counterclaim—or to claim a credit—against the United States or a United States officer or agency.”²⁶⁹ The plain language of Rule 13(d) does not automatically confer a claimant the right to sue the government, even outside of forfeiture proceedings.²⁷⁰ Instead, Rule 13(d) limits a claimant’s ability to file a counterclaim against the United States.²⁷¹

2. Rule 24. Intervention

A claimant can intervene in an in rem forfeiture proceeding in two primary ways.²⁷² First, the party could file a verified claim under Rule G.²⁷³ Second, a party could file a motion to intervene under Federal Rule of Civil Procedure 24.²⁷⁴ If a claimant files a motion to intervene, “[t]he motion must state the grounds for intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought.”²⁷⁵ Thus, the plain language of Rule 24 notes that an intervenor can file pleadings establishing claims to the underlying action.²⁷⁶ Courts have also routinely recognized an

263. *United States v. One Lot of U.S. Currency (\$68,000)*, 927 F.2d 30, 34 (1st Cir. 1991).

264. *See* FED. R. CIV. P. SUPP. G(2)(a)–(f) (identifying the information required for a valid complaint).

265. FED. R. CIV. P. SUPP. G(2)(b) (emphasis added).

266. *See id.*

267. *See* FED. R. CIV. P. SUPP. G(4).

268. *See* FED. R. CIV. P. 13(d).

269. *Id.*

270. *See id.*

271. *Id.*

272. *See* FED. R. CIV. P. SUPP. G(5)(a)(i)(A)–(D); FED. R. CIV. P. 24.

273. FED. R. CIV. P. SUPP. G(5)(a)(i)(A)–(D).

274. FED. R. CIV. P. 24.

275. FED. R. CIV. P. 24(c).

276. *See id.*

intervenor's right to file a counterclaim.²⁷⁷ Indeed, as the Fifth Circuit observed, "[u]nder federal law, an intervenor of right 'is treated as he were an original party and has equal standing with the original parties.'"²⁷⁸

However, even though intervenors can file counterclaims, that right is not limitless and is subject to restrictions.²⁷⁹ For example, a claimant's ability to file a counterclaim is still limited by Rule 13(d).²⁸⁰ Additionally, the right to assert a counterclaim does not automatically overcome sovereign immunity.²⁸¹ Lastly, Rule 24 does not provide the claimants with remedies not found in the supplemental rules.²⁸² As previously noted, the Federal Rules of Civil Procedure apply to in rem proceedings to the extent those rules do not contradict the supplemental rules.²⁸³ Allowing Rule 24 to serve as an avenue for claimants to file counterclaims would not only be inconsistent with the supplemental rules but also contradicts the Rule 13(d)'s limitations on filing counterclaims.

D. In Rem Jurisdiction Versus In Personam Jurisdiction

Courts lack jurisdiction to hear in rem counterclaims for the violation of a constitutional right filed against the United States because, since civil forfeiture proceedings are in rem, any claimant counterclaim would convert the court's jurisdiction to in personam.²⁸⁴ Forfeiture proceedings are in rem because it "is the property that has been seized, rather than the claimant of that property."²⁸⁵ Consequently, in in rem proceedings, the property is the defendant instead of the individual claiming an interest in the property.²⁸⁶ Thus, the court's jurisdiction arises from the government's claim seeking the forfeited property.²⁸⁷

By contrast, a court obtains in personam jurisdiction when the defendant is an actual person or entity.²⁸⁸ Civil forfeiture proceedings are not in personam because the court's jurisdiction only covers the property in dispute.²⁸⁹ If a counterclaim were allowed in an in rem proceeding, that

277. See *United States v. \$4,480,466.16 in funds seized from Bank of Am. account ending in 2653*, 942 F.3d 655, 661 (5th Cir. 2019).

278. *Id.*

279. See FED. R. CIV. P. 13(d).

280. *Id.*

281. See *\$4,480,466.16*, 942 F.3d at 659.

282. FED. R. CIV. P. 24; FED. R. CIV. P. SUPP. A(2).

283. FED. R. CIV. P. SUPP. A(2).

284. See *United States v. 8 Luxury Vehicles*, 88 F. Supp.3d 1332, 1336 (M.D.Fla. 2015) (citing *United States v. One Lot of U.S. Currency (\$68,000)*, 927 F.2d 30, 34 (1st Cir. 1991)).

285. *Id.* at 1337 (quoting *United States v. \$43,725.00*, No. 08-1373, 2009 U.S. Dist. LEXIS 132541, at *3 (D.S.C. Feb. 3, 2009)).

286. See *id.* (quoting *\$43,725.00*, No. 08-1373 at *3).

287. See *id.* (quoting *United States v. Funds from Fifth Third Bank Acct. #0065006695*, No. 13-11728, 2013 U.S. Dist. LEXIS 157447, at *32 (E.D. Mich. Nov. 4, 2013)).

288. *In Rem*, Black's Law Dictionary (11th ed. 2019).

289. See *8 Luxury Vehicles*, 88 F. Supp.3d at 1334.

counterclaim would be directed at the government.²⁹⁰ Since the counterclaim would be directed at the government, it would change the in rem forfeiture proceeding into an in personam proceeding, thereby contradicting the very nature and definition of an in rem proceeding.²⁹¹

E. Public Policy

Similarly, public policy does not support claimant counterclaims.²⁹² Courts widely recognize that “[i]t is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction.”²⁹³ Allowing claimants to usurp this premise by filing a counterclaim in an in rem forfeiture proceeding would lead to the absurd result of forcing the federal government to open itself up to a floodgate of claims merely because it sought to forfeit property it believed was used to facilitate illegal activity.²⁹⁴ For instance, a claimant could use the in rem proceeding to assert constitutional claims the claimant believes arose during the seizure of the contested property.²⁹⁵ This would clearly undermine Congress intent to protect the government from suit unless the government has waived sovereign immunity.²⁹⁶ Moreover, allowing claimants to file counterclaims would unreasonably expand the rights afforded to claimants beyond the limits outlined in Supplemental Rule G(5).

IV. SOLUTIONS

In lieu of filing a counterclaim against the government, claimants still have several options to recover.²⁹⁷ These include, but are not limited to, filing a separate lawsuit, filing a claim for the property at the forfeiture proceeding, and raising various defenses in the answer.

290. See *id.* (quoting \$43,725.00, No. 08-1373 at *1).

291. See *id.* (citing *United States v. Assorted Comput. Equip.*, No. 03-2356V, 2004 U.S. Dist. LEXIS 6334 at *2 (W.D. Tenn. Jan. 9, 2004)).

292. See *United States v. \$4,480,466.16 in funds seized from Bank of Am. account ending in 2653*, 942 F.3d 655, 666 (5th Cir. 2019).

293. *Id.* at 663 (quoting *United States v. Mitchell*, 463 U.S. 206, 212 (1983)).

294. See *id.* at 663–64 (quoting *Doe v. United States*, 853 F.3d 792, 796 (5th Cir. 2017)); *\$4,480,466.16*, 942 F.3d at 664 (quoting *Spotts v. United States*, 613 F.3d 559, 565 n.3 (5th Cir. 2010)).

295. See *id.* at 664 (quoting *Spotts v. United States*, 613 F.3d 559, 565 n.3 (5th Cir. 2010)).

296. See *id.* at 663 (quoting *Mitchell*, 463 U.S. at 212).

297. See FED. R. CIV. P. SUPP. G(5)–(8) (identifying several different ways claimants can file claims and other forms of relief in in rem forfeiture proceedings).

A. Filing a Separate Lawsuit

Claimants can always file an entirely separate action against the government.²⁹⁸ Even though the government is generally immune from suit, it has waived immunity in specific situations related to the seizure of property.²⁹⁹ For example, a claimant could file a separate action seeking damages if the government damaged his or her seized property.³⁰⁰ Also, the government could be liable to a claimant if the government lost the claimant's property while the property was in the government's control.³⁰¹

B. Filing a Claim

A claimant could also file a claim for the property in the court where the government initiated the forfeiture proceeding.³⁰² The right to file a claim can be found in both Supplemental Rule G(5)(a)(i) and 18 U.S.C. § 983(a)(4)(A).³⁰³ A valid claim has to meet certain requirements, which include "identify[ing] the specific property claimed," "identify[ing] the claimant," "stat[ing] the claimant's interest in the property," and "be[ing] signed by the claimant under penalty of perjury."³⁰⁴

C. Answer to the Complaint

Under Supplemental Rule G(5)(b), a claimant can also file an answer to the government's complaint.³⁰⁵ The answer, which must be filed within twenty-one (21) days after the claim is filed, can be used by the claimant to raise objections to both in rem jurisdiction and venue.³⁰⁶

D. Federal Rules of Civil Procedure: Rule 12. Defenses and Objections

Supplemental Rule G(5)(b) allows claimants to file a "motion under [Federal Rules of Civil Procedure] Rule 12 within 21 days after filing the claim."³⁰⁷ Like the answer to the government's complaint, a claimant's Rule 12 motion could also be used to raise objections to in rem jurisdiction and

298. *United States v. One Lot of U.S. Currency* (\$68,000), 927 F.2d 30, 35 (1st Cir. 1991) (citing *United States v. Wilson*, 540 F.2d 1100, 1104 (D.C. Cir. 1976)).

299. *See* 28 U.S.C. § 1346(b); 28 U.S.C. § 2465(b); 28 U.S.C. § 2680(c)(1).

300. *See* 28 U.S.C. § 1346(b)(1).

301. *See id.*

302. FED. R. CIV. P. SUPP. G(5)(a)(i).

303. *See id.*; 18 U.S.C. § 983(a)(4)(A) (providing that "[a]ny person claiming an interest in the seized property may file a claim asserting such person's interest in the property.>").

304. FED. R. CIV. P. SUPP. G(5)(a)(i).

305. FED. R. CIV. P. SUPP. G(5)(b).

306. *See id.*

307. *Id.*

venue.³⁰⁸ In addition, “[a] claimant who establishes standing to contest forfeiture may move to dismiss the action under Rule 12(b).”³⁰⁹

Rule 12(b) gives claimants several bases for filing a motion to dismiss an in rem forfeiture proceeding.³¹⁰ For example, a claimant could file a motion to dismiss because the claimant believes the district court lacks jurisdiction or venue to hear the forfeiture proceeding.³¹¹ Similarly, a motion to dismiss could be filed if a claimant believes the government’s complaint has failed to state a valid forfeiture claim.³¹² Overall, Rule 12(b) gives claimants various options for attempting to get an in rem forfeiture petition dismissed.³¹³

E. Answers or Objections to Special Interrogatories

A claimant can also assert a claim by either answering or objecting to the government’s special interrogatories.³¹⁴ Under Supplemental Rule G(6), the government can “serve special interrogatories” when it wants to determine a “claimant’s identity and relationship to the defendant property.”³¹⁵ In response, a claimant can either answer or object to the interrogatories, as long as those “[a]nswers or objections to these interrogatories [are] served within twenty-one (21) days after the interrogatories are served.”³¹⁶ Also, if the claimant wants to assert a claim to the seized property, the claimant can do so in the answer to the government’s interrogatories.³¹⁷

F. Filing a Petition for Relief

A claimant could also seek recovery of the seized property administratively.³¹⁸ Under 19 C.F.R. § 171.2, once the government has mailed its notice of seizure, a claimant has thirty (30) days to file a petition for relief with the government.³¹⁹ The petition for relief, like a claim, must

308. *See id.*

309. FED. R. CIV. P. SUPP. G(8)(b)(i).

310. FED. R. CIV. P. 12.

311. FED. R. CIV. P. 12(b)(1), (3).

312. FED. R. CIV. P. 12(b)(6).

313. FED. R. CIV. P. 12 (1)–(7) (“(1) lack of subject-matter jurisdiction; (2) lack of personal jurisdiction; (3) improper venue; (4) insufficient process; (5) insufficient service of process; (6) failure to state a claim upon which relief can be granted; and (7) failure to join a party under Rule 19.”).

314. FED. R. CIV. P. SUPP. G(6)(a)–(b).

315. FED. R. CIV. P. SUPP. G(6)(a).

316. FED. R. CIV. P. SUPP. G(6)(b).

317. *See id.*

318. *See United States v. \$4,480,466.16 in funds seized from Bank of Am. account ending in 2653, 942 F.3d 655, 660 (5th Cir. 2019); see also 19 C.F.R. § 171.2 (2021).*

319 19 C.F.R. § 171.2.

meet certain requirements.³²⁰ Specifically, the petition should: (1) describe the property involved in the seizure; (2) identify the date and location of the seizure; (3) state the facts that support “remission or mitigation” of the seized property; and (4) provide “proof of a petitionable interest in the seized property.”³²¹

G. Innocent Owner Defense

The innocent owner defense, which is codified in 18 U.S.C. § 983(d), provides claimants with the right to raise an innocent owner defense in an in rem forfeiture proceeding.³²² In order for the defense to succeed, a claimant must prove by a preponderance of the evidence that: (1) the claimant did not know about the illegal conduct that led to the forfeiture and (2) when the claimant learned about the criminal “conduct giving rise to the forfeiture, [the claimant] did all that reasonably could be expected under the circumstances to terminate such use of the property.”³²³ This statute even provides some ways the claimant can prove he or she is an innocent owner.³²⁴ For example, the claimant could present evidence that he or she notified “an appropriate law enforcement agency” about the conduct that either could or would lead to the property’s seizure.³²⁵ In addition, a claimant could succeed with an innocent owner defense if he or she proves that they attempted to “discourage or prevent the illegal use of the property.”³²⁶

H. Motion to Set Aside Forfeiture

A claimant could also file a motion to set aside the government’s forfeiture where the claimant was “entitled to written notice” but never received it prior to the forfeiture proceeding.³²⁷ A judge must allow a claimant’s motion to set aside the forfeiture if the claimant can satisfy two separate elements.³²⁸ First, the claimant must show “the Government knew, or reasonably should have known, of the moving party’s interest and failed to take reasonable steps to provide such party with notice.”³²⁹ The second element requires the claimant to prove he or she “did not know or have reason to know of the seizure within” the statutory time allowed for filing a claim.³³⁰

320. See 19 C.F.R. § 171.1(c) (2021).

321. *Id.*

322. See 18 U.S.C. § 983(d).

323. 18 U.S.C. § 983(d)(1)–(2)(A).

324. See 18 U.S.C. § 983(d)(2)(B)(i).

325. 18 U.S.C. § 983(d)(2)(B)(i)(I).

326. 18 U.S.C. § 983(d)(2)(B)(i)(II).

327. 18 U.S.C. § 983(e)(1).

328. See 18 U.S.C. § 983(e)(1)(A)–(B).

329. 18 U.S.C. § 983(e)(1)(A).

330. 18 U.S.C. § 983(e)(1)(B).

I. Request for the Immediate Release of Seized Property

18 U.S.C. § 983(f) allows claimants to ask the government for the immediate release of seized property.³³¹ In order for a request for immediate release to be valid, it must identify four specific things.³³² First, the request needs to state the claimant's "possessory interest in the property."³³³ Second, the request must show that "the claimant has sufficient ties to the community [and] provide assurance that the property will be available at the time of the trial."³³⁴ Third, the claimant's request must explain "how the continued possession [of the property] by the Government . . . will cause substantial hardship to the claimant, such as preventing the functioning of a business, preventing an individual from working, or leaving an individual homeless."³³⁵ Lastly, the hardship must be so severe that it "outweighs the risk that the property will be destroyed, damaged, lost, concealed, or transferred if it is returned to the claimant during the pendency of the [forfeiture] proceeding."³³⁶

Once the government receives the request for immediate release, it has fifteen (15) days to release the property.³³⁷ If it chooses not to release the property, a claimant can then "file a petition in the district court in which the complaint has been filed or, if no complaint has been filed, in the district court in which the seizure warrant was issued or in the district court for the district in which the property was seized."³³⁸

J. Motion to Suppress

A claimant, who is also a defendant in a criminal proceeding, can file a motion to suppress the use of the forfeited property in the underlying criminal case.³³⁹ Although "[s]uppression does not affect forfeiture of the property based on independently derived evidence," it would benefit the claimant-defendant since the government would be prohibited from using that forfeited property in the defendant's criminal trial.³⁴⁰ Furthermore, granting the motion to suppress would be the court's recognition that, during seizure of the property, the government violated some constitutional provision and must be deterred from doing so again.³⁴¹

331. 18 U.S.C. § 983(f).

332. *See* 18 U.S.C. § 983(f)(1)(A)–(D).

333. 18 U.S.C. § 983(f)(1)(A).

334. 18 U.S.C. § 983(f)(1)(B).

335. 18 U.S.C. § 983(f)(1)(C).

336. 18 U.S.C. § 983(f)(1)(D).

337. *See* 18 U.S.C. § 983(f)(3)(A).

338. *Id.*

339. FED. R. CIV. P. SUPP. G(8)(a).

340. *Id.*

341. *See* M. Jackson Jones, *The Fourth Amendment and Search Warrant Presentment: Is a Man's House Always His Castle?*, 35 SUPP. AM. J. TRIAL ADVOC. 525, 564 (2012)

K. Federal Rules of Criminal Procedure: Rule 41(g) Motion to Return Property

Federal Rules of Criminal Procedure Rule 41(g) permits “[a] person aggrieved by an unlawful search and seizure of property . . . [to] move for the property’s return” by filing a motion to return property.³⁴² This motion, which “must be filed in the district where the property was seized,” could result in the seized property returning to the claimant.³⁴³ However, in returning the property to the claimant, the motion judge is free to “impose reasonable conditions to protect access to the property and its use in later proceedings” including forfeiture proceedings.³⁴⁴

L. Filing a Motion Under the Eighth Amendment’s Excessive Fines Clause

A claimant can also file a motion “under the Excessive Fines Clause of the Eighth Amendment.”³⁴⁵ This type of motion alleges the government’s forfeiture was excessive to the conduct that led to it.³⁴⁶ Even though this type of motion can be asserted at any time, Rule G(8)(e) requires the motion to either be in the form of a “motion for summary judgment or by motion made after entry of a forfeiture judgment.”³⁴⁷

CONCLUSION

Ideally, all the federal circuits would interpret forfeiture laws in a consistent manner. However, this has not occurred with respect to forfeiture proceeding counterclaims and has resulted in inconsistent application of laws across the nation. Indeed, the courts are currently split. While at least three United States Courts of Appeals have examined this issue, these courts were unable to arrive at a uniform answer. While the First and Sixth Circuits have held claimants cannot file counterclaims in in rem forfeiture proceedings, the Fifth Circuit allows the filing of counterclaims.³⁴⁸

This Article aimed at resolving this circuit split by providing reasons why claimants should be prohibited from filing these counterclaims in in rem forfeiture proceedings. That conclusion is supported not only by federal case

(recognizing that after a motion to suppress is allowed “the government’s case becomes significantly more difficult to prove.”).

342. FED. R. CRIM. P. 41(g).

343. *Id.*

344. *Id.*

345. FED. R. CIV. P. SUPP. G(8)(e).

346. *See id.*

347. *Id.*

348. *Compare Zappone v. United States*, 870 F.3d 551, 561 (6th Cir. 2017), and *United States v. One Lot of U.S. Currency (\$68,000)*, 928 F.2d 30, 34–35 (1st Cir. 1991), with *United States v. \$4,480,466.16 in funds seized from Bank of Am. account ending in 2653, 942 F.2d 655, 663* (5th Cir. 2019).

law, but also by the plain language of the supplemental rules of forfeiture actions and the federal rules of civil procedure. For instance, sovereign immunity has long been recognized as a principle that protects the government for being subject to a vast array of lawsuits.³⁴⁹ Also, the Supplemental Rules of Asset Forfeiture completely omit any discussion about counterclaims while simultaneously identifying a plethora of initial pleadings a claimant can file in in rem forfeiture proceedings.³⁵⁰ In lieu of any Supreme Court intervention in the near future, this article provides courts with a sufficient roadmap towards resolving the longstanding circuit split on civil forfeiture counterclaims.

349. *See* *United States v. All Right, Title & Int.*, 821 F. Supp 893, 899 (S.D.N.Y. 1993).
350 FED. R. CIV. P. SUPP. G(5)–(8).