

## **NEW YORK COURT OF APPEALS STRIKES DOWN NASSAU COUNTY'S FORFEITURE LAW**

In a recent opinion written by the Chief Judge of New York's Court of Appeals, the state's highest court, Chief Judge Judith Kaye ruled that Nassau County's civil forfeiture statute, Administrative Code §8-7.0(g)(3), does not satisfy constitutional requirements, and thus is invalid.

Obviously, the implementation of this type of statute, when carefully drafted, can be an extremely effective tool in the battle against drunk driving. However, because the statute suffers from a variety of constitutional defects, including the permitted forfeiture of vehicles not owned by the individual perpetrating the crime, it is unconstitutional. Leasing companies and financial institutions should breathe a sigh of relief that the vehicle that they own or have a lien interest in will not be lost in a forfeiture action.

The facts of the underlying case, County of Nassau v. Michaele K. Canavan are straight forward; on September 6, 2000, defendant was arrested and charged with driving while intoxicated, speeding, and failure to signal. The 1995 Saturn automobile she had been driving, valued at \$6,500.00 was seized incident to her arrest, and defendant was given notice of the possibility that the car might be forfeited to the County of Nassau. The car was impounded, where it remained throughout the pendency of the criminal case.

In November 2000, defendant pleaded guilty to the traffic infractions of speeding and driving while impaired by alcohol and was sentenced to a \$400 fine, completion of a drunk driver program and suspension of her license. The following month, after defendant demanded the return of her vehicle, the County of Nassau commenced a civil forfeiture action under Nassau County Administrative Code §8-7.0(g)(3).

Administrative Code §8-7.0(g)(3) provides:

The County of Nassau may commence a civil action for forfeiture to the County of Nassau of the proceeds of a crime, substituted proceeds of a crime or instrumentality of a crime seized incident to an arrest for a misdemeanor crime or petty offense or upon a conviction for such misdemeanor crime or petty offense against any person having an interest in such property.

In the Canavan decision, the Court of Appeals stated that the forfeiture statute suffers from a number of defects which make it unconstitutional. First, the Court stated that because the statute allows the County to subject vehicles to punitive forfeiture for violations of petty offenses, i.e., traffic infractions and violations (which are defined as offenses other than traffic infractions for which a sentence to a term of imprisonment in excess of fifteen days cannot be imposed), as well as misdemeanors, the statute violates the Excessive Fines Clause of the Federal and New York State Constitutions.

The Court also stated that because the statute allows every conceivable offense -- however minor -- to be subject to forfeiture, limited only by the discretion of County officials in determining whether to invoke it, "the potential for disproportionality is great." The Court used as an example of the statute's disproportionality, the ability of the County under the statute to subject a vehicle to forfeiture for a minor traffic infraction such as driving with a broken taillight or failing to signal. The Court went on to state that although the County has, as a matter of policy, decided to focus its enforcement efforts on drunk driving arrests, the statute by its terms permits forfeiture for any offense, no matter how small. As such, the Court ruled that by encompassing many minor and technical violations that could not justify forfeiture, the statute, as enacted, risks violation of the Excessive Fines Clause.

The Court also had serious concerns about the lack of requirement for Nassau County to hold a prompt post-seizure hearing. The Court stated that as a general rule, individuals must receive notice and an opportunity to be heard before the Government deprives them of property. However, in limited circumstances, the Court stated, immediate seizure of a property interest, without an opportunity for prior hearing, is constitutionally permissible. Such circumstances are those in which the seizure has been necessary to secure an important governmental or general public interest. When the forfeited property consists of a vehicle, the property's mobility creates a special need for very prompt action that justifies the postponement of notice and hearing until after seizure. However, the Court also noted that due process requires that a prompt retention hearing be provided subsequent to the seizure in order to evaluate the adequacy of process offered in post-seizure, pre-judgment deprivations of property in civil forfeiture proceedings and minimize the risk of erroneous deprivation. Accordingly, the Court held that because the existing statute does not contain a requirement that the County hold a prompt retention hearing after seizure, the statute is unconstitutional, and thus, invalid.

In addition, the Court expressed great concern over the fact that although Nassau County has adopted procedures whereby it attempted to limit forfeiture to vehicles not subject to a defense of innocent ownership, e.g., vehicle lessors, the statute itself contains no such limitation. This issue obviously has caused great concern in the vehicle leasing industry as innocent owners have lost vehicles to civil forfeiture.

The Court stated that a statute that authorizes the police to seize property to which the government has not established a legal right or claim, and that on its face contains no limitation of forfeiture liability for innocent owners, raises substantial constitutional concerns. Ultimately, the Court held that the absence of such a limitation in the statute renders it, as written, unconstitutional. Furthermore, the Court stated that even if the statute were to limit forfeiture liability to seizures of vehicles not involving innocent owners, a prompt hearing would be required to ensure that such innocent owners are not deprived for months or years of vehicles ultimately proved not to be subject to forfeiture.

## CONCLUSION

The Court's decision makes it clear that although the attempt by the County of Nassau to deter drunk driving is admirable, the statute as written to further that cause by the seizure and forfeiture of vehicles pursuant to Administrative Code §8-7.0(g)(3), is unconstitutional as it violates the Excessive Fine Clause of the Federal and State Constitutions and fails to limit forfeiture liability of innocent owners of vehicles. Nassau County and other municipalities endeavoring to stem the tide of drunk driving should create a law which furthers that important goal without infringing on the rights of innocent parties.

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