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Defining an "Innocent Owner" Under 21 U.S.C. § 881: The Eleventh Circuit's Use of the *Calero-Toledo* Dicta

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COMMENT

Defining an "Innocent Owner" Under 21 U.S.C. § 881: The Eleventh Circuit's Use of the *Calero-Toledo* Dicta

A major new weapon in combatting the drug trade is the civil forfeiture of property that was the instrument or proceeds of the drug trade.[1] Civil forfeiture is an in rem action against the seized property itself and is independent of any criminal proceeding that may be directed at the owner of the property.[2] Because civil (in rem) forfeitures rely on the legal fiction that the property itself is guilty,[3] the government need not indict or convict the property owner.[4]

Because of the nature of a civil forfeiture, innocent owners and third parties such as spouses and commercial lenders who have legitimate ownership interests in forfeited property may find themselves casualties in

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1. *See* 21 U.S.C. § 881 (1988). Criminal forfeiture of property is authorized by 21 U.S.C. § 853 (1988).

2. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 680-89 (1974); U.S. Dept. Of Justice, Drug Agents' Guide to Forfeiture of Assets (1987 revision), 3-9 (1987) [hereinafter *Drug Agents' Guide*].

3. Various Items of Personal Property v. United States, 282 U.S. 577, 581 (1931); U.S. DEPT. OF JUSTICE, VOL. 1, ASSET FORFEITURE: LAW, PRACTICE AND POLICY 3 (1988) [hereinafter ASSET FORFEITURE].

4. *See Drug Agents' Guide*, *supra* note 2, at 30.

the war against drugs.[5] Historically, the innocence of the property owner was no defense to civil forfeiture actions.[6] Likewise, the civil drug forfeiture statute as originally enacted contained only limited statutory protection for innocent owners.[7] In *Calero-Toledo v. Pearson Yacht Leasing Co.*,[8] the Supreme Court, however, recognized that "innocent owners" may have some constitutional protection from civil forfeiture.[9] In amendments to 21 U.S.C. § 881 ("section 881") after the decision in *Calero-Toledo*, Congress, while increasing the scope of property forfeitable, combined this increase in scope with additional statutory "innocent owner" defenses to forfeiture.[10]

This comment will examine the civil forfeiture statute's "innocent owner" provisions and what constitutes "innocence" within the meaning of those provisions. While decisions from all federal courts will be discussed, this comment focuses on the state of the law in the Eleventh Circuit. Part One will present a brief history of the civil forfeiture statute, the decision in *Calero-Toledo*, and section 881's "innocent owner" statutory defenses. Part Two will examine each statutory innocent owner provision, how various courts have interpreted them, and subject those interpretations to a critical analysis to determine the more reasoned approach.

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5. For a general discussion of the effects of forfeiture statutes on "innocent lenders" see Whitney Adams, *The Government's Forfeiture Power: An Unreasonable Threat to Bona Fide Lenders*, 56 BNA's Banking Rep. (BNA) No. 16 at 750 (April 22, 1991).

Lienholders and mortgagees are now recognized as "owners" for purposes of asserting the innocent owner defense. *See* United States v. One Urban Lot Located at 1 St. A-1, Valpariso, Bayamon, P.R., 865 F.2d 427, 430 (1st Cir. 1989); *In re* Metmor Fin. Inc., 819 F.2d 446, 448 (4th Cir. 1987); United States v. One Piece of Real Estate, Described in Part as: 1314 Whiterock & Improvements, San Antonio, Bexar County, Tex., 571 F. Supp. 723, 725 (W.D. Tex. 1983).

6. For a discussion of the historical treatment of "innocent owners" in civil forfeiture actions see Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 683-686 (1974).

7. *See* The Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (codified as amended at 21 U.S.C. §§ 801-971 (1988)). *See infra* text accompanying notes 18-20 for a discussion of the limited protection provided by § 881 as originally enacted.

8. 416 U.S. 663 (1974).

9. *Id.* at 689. *See infra* text accompanying notes 21-29 for a discussion of the case.

10. The innocent owner defenses are codified at 21 U.S.C. § 881(a)(6) and (7) (1988). In addition, in 1988 Congress added 21 U.S.C. § 881(a)(4)(C) which provides "innocent owner" protection similar to that contained in subsections (a)(6) and (7). For a discussion of the expansion of statutory innocent owner protection see Mark A. Jankowski, Note, *Tempering the Relation-Back Doctrine: A More Reasonable Approach to Civil Forfeiture in Drug Cases*, 76 VA. L. REV. 165, 167-71 (1990).

I. THE DEVELOPMENT OF THE STATUTORY "INNOCENT OWNER" DEFENSES

A. *The Original Civil Drug Forfeiture Statute*

The use of civil (in rem) forfeiture in combatting the war on drugs began in 1970 when Congress passed the Comprehensive Drug Abuse Prevention and Control Act ("Drug Act").[11] Its purpose was to fight drug abuse by providing a mix of rehabilitation, prevention, and more effective law enforcement measures.[12] The Drug Act's original civil forfeiture provisions authorized forfeiture of (1) all controlled substances, (2) raw materials used in the manufacture or distribution of controlled substances, (3) containers for controlled substances, (4) conveyances or vehicles used in connection with controlled substances, and (5) any records associated with such activities.[13] For the property to be subject to forfeiture, the government had only to show probable cause to believe the property was violative of the statutory provisions.[14] Once the government established probable cause, the burden then shifted to the claimant[15] to establish by a preponderance of the evidence that the property was not subject to forfeiture.[16] A claimant could meet this burden by either rebutting the government's evidence establishing probable cause or by showing that he was an "innocent owner."[17]

The original statute protected innocent owners of conveyances subject to forfeiture only if the vehicle had been stolen and was no longer in their possession at the time the illegal activity occurred.[18] A second "innocent

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11. Pub. L. No. 91-513, 84 Stat. 1236 (1970). Congress also passed in personam forfeiture statutes that same year. *See* the Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 1961-64, 84 Stat. 922, 941-44 (1970), and Pub. L. No. 91-513, § 408, 84 Stat. 1265 (1970).

12. *See* H.R. 191-1444, 91st Cong., 2d Sess. 1-10 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4566-4574.

13. *See* 21 U.S.C. § 881(a)(1)-(5) (1988).

14. 21 U.S.C. § 881(b)(4) (1988). The standard definition of probable cause is a "reasonable ground for belief of guilt, supported by less than prima facie proof, but more than mere suspicion." United States v. A Single Family Residence and Real Property Located at 900 Rio Vista Blvd., Ft. Lauderdale, Fla., 803 F.2d 625, 628 (11th Cir. 1986) (citing United States v. $364,960,000, 661 F.2d 319, 323 (5th Cir. 1981)).

15. Any person alleging an interest in property subject to forfeiture is designated as a claimant. *See* Edith A. Landman & John Hieronymus, *Civil Forfeiture of Real Property under 21 U.S.C. § 881(a)(7)*, 70 MICH. B.J. 174, 179 (1991).

16. *See, e.g.*, United States v. One Single Family Residence Located at 15603 85th Ave. North, Lake Park, Palm Beach County, Fla., 933 F.2d 976, 979 (11th Cir. 1991).

17. *See* Lalit K. Loomba, Note, *The Innocent Owner Defense to Real Property Forfeiture Under the Comprehensive Crime Control Act of 1984*, 58 FORDHAM L. REV. 471, 475 (1989) (discussing the mechanics of civil forfeiture proceedings).

18. *See* 21 U.S.C. § 881(a)(4)(B) (1988). This provision offered only a limited protection to "innocent owners" because even if an owner lacked any knowledge of the vehicle's illegal use, forfeiture would still occur if the illegally used vehicle had been lawfully obtained from

owner" provision protected common carriers by denying forfeiture of their vehicles if they could establish that they were not consenting parties or privy to the violation giving rise to forfeiture.[19] Innocent owners who did not fall into these categories were unprotected by the statute. For these owners, the only protection available was by way of certain remission and mitigation procedures provided under 19 U.S.C. § 1618.[20] Thus, although the original section 881 offered some protection to "innocent owners," it did not provide total coverage.

B. The Calero-Toledo Decision

Prior to any further Congressional expansion of either civil forfeiture or "innocent owner" protection, the Supreme Court recognized that certain owners may be entitled to constitutional protection from forfeiture of their property.[21] In *Calero-Toledo*,[22] a lessor's yacht was seized under a Puerto Rican statute similar to section 881 when police found marijuana on board.[23] The lessor was neither involved in nor had any knowledge of the lessee's illegal act.[24] The Court held that forfeiture statutes are not rendered unconstitutional merely because of their applicability to the property interests of innocents.[25] Like other forfeiture statutes, the Puerto Rican statute served both preventive and deterrent purposes sufficient to withstand constitutional challenge even though the statute lacked any "innocent owner" defense.[26]

Despite the fact that the "innocence of the owner of property subject to forfeiture ha[d] almost uniformly been rejected as a defense,"[27] the Court, in dicta, noted that an owner may be entitled to a constitutional defense if he "proved not only that he was uninvolved in and unaware of the

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the owner. *See* United States v. One 1982 Datsun 200SX, 627 F. Supp. 62 (W.D. Pa. 1985), *aff'd mem.*, 782 F.2d 1032 (3d Cir. 1986); United States v. One 1978 Chrysler Le Baron Station Wagon, 648 F. Supp. 1048 (E.D.N.Y. 1986).

19. 21 U.S.C. § 881(a)(4)(A) (1988).

20. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 689-90 n.27 (1974). The granting of remission or mitigation is deemed equivalent to an "executive pardon." *Drug Agents' Guide*, *supra* note 2, at 214-15. *See also* 28 C.F.R. §§ 9.1-9.7 (1991) and 21 C.F.R. §§ 1316.71-1316.81 (1991) for the Drug Enforcement Administration and Department of Justice remission and mitigation procedures.

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

22. *Id.*

23. *Id.* at 665, 686-87 n.25.

24. *Id.* at 664.

25. *Id.* at 680.

26. *Id.* at 686-87. The court also noted that as applied to innocent secured lenders, lessors, and bailors, forfeiture statutes may have a "desirable effect of inducing them to exercise greater care in transferring possession of their property." *Id.* at 688.

27. *Id.* at 683.

wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property."[28] The lessor of the yacht, however, was not an "innocent owner" entitled to such protection. Even though the lessor was uninvolved in and unaware of the illegal activity, it failed to offer any proof that it had done "all that it reasonably could to avoid having its property put to an unlawful use."[29] Some courts have incorporated this dicta into the statutory innocent owner defenses.[30]

C. *Expansion of Statutory Innocent Owner Defenses*

In 1978, in recognition that the nation was losing the war on drugs despite the forfeiture laws,[31] Congress added section 881(a)(6) to permit forfeiture of the proceeds of illegal drug transactions.[32] Congress hoped that the new provision would remove the motive for the illegal drug trade by eliminating the profit from it.[33]

At the same time, Congress, in addition to stiffening the civil forfeiture provision, also expanded the protection offered "innocent owners."[34] The new statutory provision stated that "no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner."[35]

The 1978 amendments failed, however, to achieve the results in the drug war that Congress had hoped for,[36] and in 1984 Congress again amended section 881.[37] According to the General Accounting Office, the forfeiture statutes had not been aggressively used by federal law enforcement agencies, partially because of the statutory limitations and ambigui-

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28. *Id.* at 689.

29. *Id.* at 690.

30. *See infra* notes 85-122 and accompanying text.

31. *See* 124 Cong. Rec. 23,055 (1978) (statement of Sen. Sam Nunn).

32. Pub. L. No. 95-633, § 301(a)(1), 92 Stat. 3777 (1978). 21 U.S.C. § 881(a)(6) (1988) provides that the following will be subject to forfeiture:

> [A]ll moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter . . . .

33. *See* 124 Cong. Rec. 23,055 (1978) (statement of Sen. Sam Nunn); 124 Cong. Rec. 23,056 (1978) (statement of Sen. Culver).

34. 21 U.S.C. § 881(a)(6) (1988). For a discussion of the statutory innocent owner protection then offered by section 881 *see supra* notes 18-20 and accompanying text.

35. 21 U.S.C. § 881(a)(6).

36. *See* S. Rep. No. 98-225, 98th Cong. 2nd Sess. 191-97 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3374-80.

37. Pub. L. No. 98-473, §§ 301-23, 98 Stat. 2040-57 (1984).

ties present in the forfeiture laws.[38] At that time, the civil forfeiture statute provided no mechanism for the forfeiture of real property even though it was used to facilitate an illegal drug transaction.[39] To remedy the situation, Congress enacted section 881(a)(7), which authorized forfeiture of any real property used or intended to be used in connection with a felony narcotics violation.[40]

As with the 1978 amendment, Congress also added an "innocent owner" counterpart to its expansion of the forfeiture statute.[41] The provision's language is identical to the "innocent owner" defense contained in section 881(a)(6)'s "proceeds" provision.[42]

While the 1978 and 1984 amendments to the original civil forfeiture statute had dual goals of expanding the range of forfeiture and increasing protection for innocent owners, Congress in 1988 decided to correct the deficiency in the original "innocent owner" defense to the forfeiture of vehicles and conveyances[43] by adding one final statutory defense for "in-

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38. *See* S. Rep. No. 225, *supra* note 36, at 191-92.

39. S. Rep. No. 225, *supra* note 36, at 195 stated:

> Under current law, if a person uses a boat or car to transport narcotics or uses equipment to manufacture dangerous drugs, his use of the property renders it subject to civil forfeiture. But if he uses a secluded barn to store tons of marihuana or uses his house as a manufacturing laboratory for amphetamines, there is no provision to subject his real property to civil forfeiture, even though its use was indispensable to the commission of a major drug offense . . . .

However, two court decisions had held real property forfeitable under section 881(a)(6) if it was traceable to the proceeds of an illegal drug transaction. *See* United States v. 8584 Old Brownsville Rd., 736 F.2d 1129, 1130-31 (6th Cir. 1984); United States v. Route 3, 568 F. Supp. 434, 436 (W.D. Ark. 1983).

Likewise, real property was then forfeitable under the criminal RICO and CCE statutes. *See* S. Rep. No. 225, *supra* note 36, at 193-95.

40. Pub. L. No. 98-473, § 306, 98 Stat. 2050 (1984). 21 U.S.C. § 881(a)(7) (1988) provides that the following will be subject to forfeiture:

> All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment . . . .

At this time, Congress also enacted section 881(h) which codified the "relation back" doctrine. Pub. L. No. 98-473 § 306, 98 Stat. 2050 (1984). The relation back doctrine fixes title to forfeitable property in the government at the time the illegal act giving rise to forfeiture occurred. This has caused immense problems for subsequent bona fide purchasers of forfeitable property. For a thorough treatment of the subject see Jankowski, *supra* note 10, at 171-88.

41. 21 U.S.C. § 881(a)(7) (1988).

42. *See supra* text accompanying note 35.

43. *See supra* note 18 and accompanying text.

nocent owners."[44] In creating this statutory defense, Congress departed from the language it had used with the proceeds and real property provisions. Instead, section 881(a)(4)(C) protected a claimant's vehicle from forfeiture only if the claimant established that the violation giving rise to forfeiture was "committed or omitted without the knowledge, consent, or willful blindness of the owner."[45]

Thus, under the current civil forfeiture statute owners possess three main statutory defenses to forfeiture.[46] Since these provisions cover the forfeiture of vehicles, proceeds, and real property, items in which those owners who are truly innocent are most likely to have an interest, there would seem to be little need for application of the *Calero-Toledo* dicta. Nevertheless, many courts have considered whether *Calero-Toledo* should be incorporated into these provisions. The following section will discuss how courts, especially in the Eleventh Circuit, have defined "innocence" in light of the language of each of the various statutory defenses and the Supreme Court's dicta in *Calero-Toledo*.

II. THE JUDICIAL DEFINITION OF INNOCENCE IN LIGHT OF THE STATUTE

A. 21 U.S.C. § 881(a)(4)(C)

The main innocent owner defense to the vehicle-conveyance portion of the civil forfeiture statute, section 881(a)(4)(C), disallows forfeiture if the owner can prove that the illegal act giving rise to forfeiture occurred "without [his] knowledge, consent or willful blindness."[47] The authoritative case in the Eleventh Circuit interpreting this statutory provision is *United States v. One 1980 Betram 58' Motor Yacht, Known as the M/V Mologa*.[48]

The court in *One 1980 Bertram 58' Motor Yacht* did not directly discuss the meaning of the phrase "without knowledge, consent or willful blindness" found in section 881(a)(4)(C). Instead, it merely cited that section as controlling on the status of the claimant as an innocent owner,[49] and then held that the claimant must meet the literal requirements of

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44. Pub. L. No. 100-690, 102 Stat. 4181 § 6075 (1988) (codified at 21 U.S.C. § 881(a)(4)(C) (1988)).

45. 21 U.S.C. § 881(a)(4)(C) (1988).

46. *See* 21 U.S.C. § 881(a)(4)(C), (a)(6), (a)(7) (1988).

47. 21 U.S.C. § 881(a)(4)(C). *See supra* text accompanying notes 18 and 19 for a discussion of the other two "innocent owner" defenses to the forfeiture of conveyances and vehicles.

48. 876 F.2d 884 (11th Cir. 1989).

49. *Id.* at 887.

Calero-Toledo to prevail on a defense of innocent ownership.[50] Perhaps confusedly, the court cited as authority a decision handed down prior to the enactment of the new statutory innocent owner provision.[51] The failure to discuss the import of this language is surprising because this case was the court of appeal's first opportunity to interpret the newly enacted statutory innocent owner provision of section 881(a)(4), and because the court was setting precedent with its ruling. The court's failure to consider the effects of the new provision on the status of those claiming to be "innocent owners" is indicative of the Eleventh Circuit's present hard line approach to those even peripherally connected to drug dealing.[52]

At least one court outside the Eleventh Circuit has interpreted the innocent owner provision of section 881(a)(4)(C) by defining "willful blindness" in light of its meaning in the criminal context.[53] The court cited a jury instruction that willful blindness is an "[e]lement of knowledge [which] may be satisfied by inferences drawn from proof that a defendant deliberately closed his eyes to what would otherwise have been obvious to him."[54] Willful blindness has also been deemed present when a person "has his suspicion aroused but then deliberately omits to make further inquiries, because he wishes to remain in ignorance."[55]

Because willful blindness requires a "high probability" of awareness of the truth,[56] the use of that term in section 881(a)(4)(C) appears to directly contradict an application of the *Calero-Toledo* dicta as the proper standard under that section. While the statutory "willful blindness" language would seem to require an owner to take affirmative preventive steps only if she has some reason to suspect that her vehicle would be used illegally, the *Calero-Toledo* standard places an affirmative duty on an owner to take "reasonable precautions" to prevent the proscribed use of her property no matter what her state of knowledge. This contradiction would suggest that the use of the *Calero-Toledo* standard as controlling on the status of "innocent owners" under section 881(a)(4)(C) is misplaced.

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50. *Id.* at 888. Calero-Toledo requires that a claimant prove "not only that he was uninvolved in and unaware of the wrongful activity, [upon which forfeiture is sought] but also that he had done all that reasonably could be expected to prevent the [activity] . . . ." 416 U.S. at 663, 689.

51. *Id.* (citing United States v. One 1982 28' International Vessel, 741 F.2d 1319 (11th Cir. 1984)).

52. For those wishing to claim innocent owner status, the requirements of *Calero-Toledo* are most unforgiving. *See infra* text accompanying note 111.

53. United States v. 1977 Porsche Carrera 911 Vin 9117201924, 748 F. Supp. 1180, 1185 (W.D. Tex. 1990).

54. *Id.* at 1185.

55. G. WILLIAMS, CRIMINAL LAW: THE GENERAL PART 157, 159 (2d ed. 1961).

56. Adams, *supra* note 5, at ____ n.36.

If the Eleventh Circuit is going to use the *Calero-Toledo* dicta as the applicable standard governing innocent ownership under section 881(a)(4)(C), it should reinterpret that dicta to require an affirmative duty to investigate only if the owner has reason to suspect that another person has used her vehicle for illegal purposes. Several reasons support this proposition.

First, while the *Calero-Toledo* dicta represents the minimum protection offered to "innocent owners" under the Constitution,[57] Congress has the ability to provide more protection to individuals if it so chooses.[58] As several courts recognize, in enacting the "innocent owner" statutory defenses Congress could have incorporated the *Calero-Toledo* language directly into the statute.[59] The fact that Congress did not use the *Calero-Toledo* language in section 881(a)(4)(C) raises the inference that it sought to provide more protection to "innocent owners" than the Constitutional minimum, especially when the statute uses language that carries its own connotations within the criminal context. Thus, when Congress has chosen to enact statutory "innocent owner" defenses that differ in language from the dicta describing the basic constitutional protection, one must accord such defenses their own independent weight. Otherwise, since courts were already using the dicta to protect owners from forfeiture, the new statutory provision would merely be superfluous.[60]

Second, prior to the enactment of section 881(a)(4)(C), some courts in personal property cases had already interpreted the *Calero-Toledo* dicta, despite its literal language, to require the owner to take affirmative action only when he had reason to suspect the conveyance might be used illegally.[61] Likewise, courts had denied "innocent owner" status to claimants because circumstances had established actual or constructive knowledge of the possibility of illegal use of their conveyance.[62] This interpretation of the *Calero-Toledo* dicta, while not in accord with the absolute affirma-

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57. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 668-690 (1974).

58. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 349-50 (2d ed. 1988).

59. *See* United States v. 4,657 Acres, 730 F. Supp. 423, 427 (S.D. Fla. 1989); United States v. Certain Real Property, 724 F. Supp. 908, 915 n.15 (S.D. Fla. 1989) (relating to the incorporation of dicta into section 881(a)(7)).

60. *See* Alice Marie O'Brien, Note, *"Caught in the Crossfire": Protecting the Innocent Owner of Real Property From Civil Forfeiture Under 21 U.S.C. § 881(a)(7)*, 65 ST. JOHN'S L. REV. 521, 546 (1991).

61. *See* United States v. One Datsun 280ZX, 644 F. Supp. 1280, 1283 (E.D. Pa. 1986); United States v. One Mercury Cougar XR-7, 397 F. Supp. 1325, 1327 (C.D. Cal. 1975).

62. *See* United States v. 1966 Beechcraft Aircraft, 777 F.2d 947, 953 (4th Cir. 1985); United States v. One Mercedes Benz, 604 F. Supp. 1307, 1317 (S.D.N.Y. 1984), *aff'd*, 762 F.2d 991 (2d Cir. 1985). For a fuller discussion, see Patricia M. Canavan, Note, *Civil Forfeiture of Real Property: The Government's Weapon Against Drug Traffickers Injures Innocent Owners*, 10 PACE L. REV. 485, 501-03 (1990).

tive duty required by its literal language, is more in accord with the definition of willful blindness as understood in the context of criminal law. Given Congress' use of the term "willful blindness" in section 881(a)(4)(C), interpreting *Calero-Toledo* to require an owner to take "reasonable precautions" only when he has some reason to suspect an illegal use of his conveyance would more nearly accord with Congress' probable intention in using that term.

Finally, when Congress enacted section 881(a)(4)(C) it broadened the already existing but limited statutory "innocent owner" defense of section 881(a)(4)(B).[63] Certainly, the *Calero-Toledo* standard would have filled the gap in protection given innocent owners by section 881(a)(4)(B), even without the statutory provision of section 881(a)(4)(C). However, interpreting section 881(a)(4)(C) to incorporate the literal requirements of the *Calero-Toledo* standard would not increase the protection offered owners and thereby further the remedial purposes of the statute, but would instead penalize owners by placing on them an affirmative duty to investigate no matter what the circumstances.[64] By reading section 881(a)(4)(C) and the incorporated *Calero-Toledo* dicta to require an owner to take affirmative steps only when he has reason to suspect the conveyance may be used for illegal drug transactions, courts will more effectively balance both the deterrent and remedial purposes contained in the civil forfeiture statute.

B. 21 U.S.C. § 881(a)(6),(7)

Section 881(a)(6), the proceeds provision of the civil forfeiture statute, authorizes forfeiture of anything furnished or intended to be furnished in exchange for controlled substances or the proceeds traceable to such an exchange.[65] Section 881(a)(7), the real property provision of the civil forfeiture statute, authorizes the forfeiture of any interest in all real property and appurtenances used or intended to be used to commit or facilitate a felony narcotics violation.[66] Both sections contain identical "innocent owner provisions" despite being enacted at different times.[67] Under either of these sections, a claimant can succeed on a defense of "innocent ownership" only if he can establish that the act giving rise to forfeiture was committed or omitted "without his knowledge or con-

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63. *See supra* note 18 and accompanying text for a discussion of the limitation of section 881(a)(4)(B).

64. *See* Jankowski, *supra* note 10, at 193 (noting that courts have consistently misapplied the *Calero-Toledo* dicta to make it a punitive rather than a protective measure as was intended by the Supreme Court).

65. 21 U.S.C. § 881(a)(6) (1988).

66. 21 U.S.C. § 881(a)(7) (1988).

67. *See supra* text accompanying notes 31-42.

sent."[68] Courts have interpreted the phrase "without his knowledge or consent" in three distinct ways.[69] Some courts have interpreted the phrase disjunctively.[70] Others have interpreted it conjunctively.[71] A third set of courts has interpreted the phrase by incorporating the *Calero-Toledo* dicta into it.[72]

A disjunctive interpretation of the phrase "without the knowledge or consent of the owner" allows an owner to avoid forfeiture under section 881(a)(6) or (7) if he can establish that he did not consent to the illegal activity giving rise to forfeiture even though he had knowledge of it.[73] Conversely, under a conjunctive interpretation in which the word "or" would be read as the word "and," a claimant can establish his innocence only by establishing both a lack of knowledge and a lack of consent to the illegal activity giving rise to forfeiture.[74] Arguments for and against each interpretation hinge on statutory canons and policy considerations.

Courts adopting the disjunctive approach rely on the canon of construction that the court must give effect, if possible, to every word in the statute.[75] This approach reaches its conclusion through the following reasoning.[76] Under a conjunctive interpretation, a claimant would have to

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68. 21 U.S.C. § 881(a)(6),(7) (1988).

69. *See* O'Brien, *supra* note 60, at 529-48; Brad A. Chapman & Kenneth W. Pearson, Comment, *The Drug War and Real Estate Forfeiture Under 21 U.S.C. § 881: The "Innocent" Lienholder's Rights*, 21 TEX. TECH. L. REV. 2127, 2177 (1990).

70. *See, e.g.*, United States v. 141st Street Corp. By Hersh, 911 F.2d 870, 878 (2d Cir. 1990) *cert. denied*, 111 S. Ct. 1017 (1991); United States v. One 107.9 Acre Parcel, 898 F.2d 396, 398 (3d Cir. 1990); United States v. 6109 Grubb Rd., 886 F.2d 618, 626 (3d Cir. 1989); United States v. Real Property Known As 19026 Oakmont S. Drive, 715 F. Supp. 233, 237 n.3 (N.D. Ind. 1989); United States v. 60 Acres, More or Less With Improvements, Located in Etowah County, Ala., 727 F. Supp. 1414, 1418-19 (N.D. Ala. 1990).

71. *See, e.g.*, United States v. Lot 111-B, 902 F.2d 1443, 1445 (9th Cir. 1990); United States v. 4,657 Acres, 730 F. Supp. 423, 427 (S.D. Fla. 1989); United States v. 124 East N. Ave., 651 F. Supp. 1350, 1357 (N.D. Ill. 1987); United States v. Four Million Two Hundred Fifty-Five Thousand, 762 F.2d 895, 906 (11th Cir. 1985), *cert. denied*, 474 U.S. 1056 (1986); United States v. One Parcel of Real Estate at 5745 N.W. 110th Street, Miami, Fla., 721 F. Supp. 287, 290 (S.D. Fla. 1989).

72. *See, e.g.*, United States v. Premises Described as Route 2, Box 61-C, Crosset, Ark., 727 F. Supp. 1295,.1299 (W.D. Ark. 1990); United States v. Real Property Located at 2011 Calumet, Houston, Tex., 699 F. Supp. 108, 110 (S.D. Tex. 1988); United States v. One Single Family Residence Located at 2901 S.W. 118th Court, Miami, Fla., 683 F. Supp. 783, 788 (S.D. Fla. 1988); United States v. Two Tracts of Real Property Containing 30.80 Acres, 665 F. Supp. 422, 425 (M.D.N.C. 1987), *aff'd sub nom*, 856 F.2d 675 (4th Cir. 1988).

73. *See* O'Brien, *supra* note 60, at 529-30.

74. *Id.*

75. *See, e.g.*, United States v. Real Property & Premises Known As 171-02 Liberty Ave., 710 F. Supp. 46, 50 (E.D.N.Y. 1989) (citing United States v. Menasche, 348 U.S. 528, 538-39 (1955)).

76. *See* United States v. 141st Street Corp., 911 F.2d 870, 878 (2d Cir. 1990); Loomba, *supra* note 17, at 485.

prove both a lack of knowledge and a lack of consent to the illegal activity to prevail as an "innocent owner."[77] Knowledge of an activity, however, is a prerequisite to consent to that activity. One could never prove lack of consent without first having admitted knowledge. A conjunctive interpretation then effectively renders the consent defense illusory. Instead, under a conjunctive interpretation, the phrase "without knowledge or consent" would truly only mean "without knowledge." The word consent would be mere surplusage. Conversely, a disjunctive interpretation of the phrase "without knowledge or consent" would give effect to the word consent, by allowing an owner to establish his innocence by proving that he did not consent to an activity even though he had knowledge of it.[78] Despite this analysis, certain courts that considered the issue refused to accept the disjunctive approach. Some courts have based this decision solely on policy grounds.[79]

Courts and commentators disagree over whether policy considerations favor a conjunctive or a disjunctive approach.[80] Some reject the disjunctive approach because it could allow an owner to know of and tacitly condone illegal drug activity but still claim that he did not consent to the activity.[81] Other courts and commentators feel that owners who know that their property is being used for illegal activity, but have taken af-

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77. Loomba, *supra* note 17, at 485.

78. *See supra* text accompanying note 73. At least one commentator has criticized the reliance on the use of statutory canons to determine the meaning of the "without knowledge or consent" language. *See* O'Brien, *supra* note 60, at 536-37 (noting that use of canons alone may not provide the in-depth thoughtful analysis needed to provide a sound basis for future decisions). Another commentator has noted that the logical principle known as De Morgan's theorem would call for a conjunctive approach. As yet, however, seemingly no court has used De Morgan's theorem to interpret a statute. *See* Loomba, *supra* note 17, at 481 n.68.

79. *See, e.g.*, United States v. Certain Real Property & Premises, Known as 890 Noyac Road, Noyac, N.Y., 739 F. Supp. 111, 114 (E.D.N.Y. 1990), *rev'd*, 945 F.2d 1252 (2d Cir. 1991); United States v. Land Known as Lot 111-B, 902 F.2d 1443, 1445 (9th Cir. 1990).

80. *Compare* United States v. Certain Real Property & Premises, Known as 890 Noyac Road, Noyac, N.Y., 739 F. Supp. 111, 114 (E.D.N.Y. 1990) *rev'd*, 945 F.2d 1252 (2d Cir. 1991); Chapman & Pearson, *supra* note 69, at 192-93 (policy favors conjunctive approach) *with* United States v. 141st Street Corp. By Hersh, 911 F.2d 870, 878 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1017 (1991); Loomba, *supra* note 17, at 486 (policy favors disjunctive approach).

81. *See* United States v. Certain Real Property & Premises, Known as 890 Noyac Road, Noyac, N.Y., 739 F. Supp. 111, 114 (E.D.N.Y. 1990), *rev'd*, 945 F.2d 1252 (2d Cir. 1991) (fearing disjunctive approach would lead to "absurd results"); United States v. One Parcel of Land, Known as Lot 111-B, 902 F.2d 1443, 1445 (9th Cir. 1990) (governmental policy of making forfeiture a powerful weapon against drugs would be "substantially undercut if persons who were fully aware of the illegal connection or source of their property were permitted to reclaim the property as 'innocent' owners").

firmative steps to prevent that use are unfairly denied "innocent owner" status by a conjunctive interpretation of the statute.[82]

All considerations of the applicability of the *Calero-Toledo* standard to the interpretation of section 881(a)(6) and (7)'s "innocent owner" provisions aside, it seems apparent that policy considerations favor courts interpreting the statute disjunctively. A disjunctive interpretation would allow more owners who are truly "innocent" to save their property from forfeiture than a conjunctive interpretation, a result seemingly in accordance with congressional recognition of the need to temper the harsh results of forfeiture. More importantly, the fear that an owner who tacitly condones illegal activity on his property could retain it under a disjunctive interpretation of the statute seems overblown for two reasons. First, the burden is on the claimant to establish his "innocent" status; it is not on the government to disprove such status.[83] Second, a court adopting a disjunctive interpretation will have considerable leeway to determine on a fact sensitive, case-by-case basis what constitutes a lack of consent within the meaning of the statute.[84] Given this judicial leeway, a disjunctive interpretation seems to provide a better balance between both the deterrent and remedial purposes of the forfeiture statute.

A third group of courts outside the Eleventh Circuit, interpreting the "innocent owner" provisions of section 881(a)(6) and (7), have required claimants to meet the *Calero-Toledo* standard in order to establish "innocent owner" status.[85] The courts' opinions, however, usually provide no rationale for the application of the *Calero-Toledo* standard to these statutory provisions.[86] Instead, as authority for this application, the courts,

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82. *See* United States v. 141st Street Corp. By Hersh, 911 F.2d 870, 878 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1017 (1991) (claiming congressional intent was to protect "innocent owners" from harsh result of forfeiture).

83. *See* United States v. One 1980 Bertram 58' Motor Yacht, Known as the M/V Mologa, 876 F.2d 884, 888 (11th Cir. 1989).

84. *See, e.g.*, United States v. 141st Street Corp. By Hersh, 911 F.2d 870, 879 (1990), *cert. denied*, 111 S. Ct. 1017 (1991) (concluding proof of lack of consent requires claimant to prove "that he did all he reasonably could to prevent the illegal activity once he learned of it."); United States v. Sixty Acres, More or Less With Improvements, Located in Etowah County, Ala., 727 F. Supp. 1414, 1420-22 (1990) (noting difficulty of drawing line between doing all that one reasonably could to prevent the illegal activity and at least doing something to prevent it).

85. *See* cases cited *supra* note 72.

86. *See, e.g.*, United States v. Real Property Located at 2011 Calumet, Houston, Tex., 699 F. Supp. 108, 110 (S.D. Tex. 1988); United States v. Premises Described as Route 2, Box 61-C, Crosset, Ark., 727 F. Supp. 1295, 1299 (W.D. Ark. 1990). The court in *Crosset* claimed that the Supreme Court had little sympathy for lessors losing their property. 727 F. Supp. at 1299 (citing Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 687-88 (1974)). *But see* United States v. Two Tracts of Real Property, Containing 30.80 Acres, 655 F. Supp. 422, 425 (M.D.N.C. 1987), *aff'd sub nom*, 856 F.2d 675 (4th Cir. 1988) (holding that innocent

perhaps confusedly, cite cases that were decided when there were no statutory "innocent owner" provisions.[87] Given those citations and the scarcity of courts adhering to such an interpretation of section 881(a)(6) and (7)'s "innocent owner" provisions, it is tempting to say that those decisions are mere aberrations. The Eleventh Circuit, however, has recently held the *Calero-Toledo* dicta applicable to section 881(a)(6) proceedings.[88]

Until mid-1991, the seminal case in the Eleventh Circuit interpreting the "without knowledge or consent" language of section 881(a)(6) was *United States v. Four Million, Two Hundred Fifty-Five Thousand.*[89] In that case the court of appeals held that the "innocent owner" provision of section 881(a)(6) turned "on the claimant's actual knowledge"[90] and left it to another day to decide if the *Calero-Toledo* dicta applied to actions under section 881(a)(6).[91] Most of the subsequent decisions by courts in the Eleventh Circuit have cited *Four Million, Two Hundred Fifty-Five Thousand* as authority for rejecting the incorporation of the *Calero-Toledo* dicta into section 881(a)(6) or (7)[92] or have followed that court's example and avoided a decision on the issue.[93]

District courts rejecting the application of the *Calero-Toledo* standard to the statutory "innocent owner" provision of section 881(a)(7) have relied on three basic arguments to support their position.[94] First, the courts

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owner defense of section 881(a)(7) fully comports with the reasoning of the Supreme Court in *Calero-Toledo*).

87. *See, e.g., Real Property Located at 2011 Calumet, Houston, Tex.*, 699 F. Supp. at 110; *Premises Described as Route 2, Box 61-C, Crosset, Ark.*, 727 F. Supp. at 1299. Both courts cited pre-1988 section 881(a)(4) cases as authority.

88. *See* United States v. One Single Family Residence Located at 15603 85th Ave. North, Lake Park, Palm Beach County, Fla., 933 F.2d 976 (11th Cir. 1991). For a discussion of that case and its possible ramifications, *see infra* text accompanying notes 104-22.

89. 762 F.2d 895 (11th Cir. 1985).

90. *Id.* at 906. Like other courts at this time, the court of appeals was following a conjunctive interpretation of the "without knowledge or consent" language of section 881(a)(6)'s "innocent owner" provision. The issue of whether the language should be interpreted disjunctively would not arise until 1989 with United States v. Certain Real Property & Premises Known as 171-02 Liberty Ave., 710 F. Supp. 46 (E.D.N.Y. 1989).

91. Four Million, Two Hundred Fifty-Five Thousand, 762 F. Supp. at 906 n.24.

92. *See* United States v. Certain Real Property, 724 F. Supp. 908, 914 (S.D. Fla. 1989); United States v. One Parcel of Real Estate Consisting of Approximately 4,657 Acres, Located in Martin County, Fla., 730 F. Supp. 423, 427 (S.D. Fla. 1989).

93. *See* United States v. One Single Family Residence Located at 6960 Miraflores Ave., Coral Gables, Fla., 731 F. Supp. 1563, 1573 n.14 (S.D. Fla. 1990). *But see* United States v. One Parcel of Real Estate at 5745 N.W. 110 Street, Miami, Fla., 721 F. Supp. 287, 290 (1989) (finding actual knowledge on part of claimant and avoiding decision on applicability of Calero-Toledo dicta to section 881(a)(7) in light of a section 881(a)(4)(C) case).

94. The leading case rejecting *Calero-Toledo* in the Eleventh Circuit is United States v. One Parcel of Real Estate Consisting of Approximately 4,657 Acres, Located in Martin

held *Calero-Toledo* inapplicable to section 881(a)(6) or (7) because that case did not involve an express statutory "innocent owner" provision and therefore should not control the interpretation of cases that are brought under such statutory "innocent owner" provisions.[95] Second, the courts reasoned that "[i]f the legislature intended to incorporate the 'reasonable standard' defense of *Calero-Toledo* into Section 881(a)(7), they could have done it considering Section 881(a)(7) was enacted ten years after the *Calero-Toledo* decision."[96] Finally, those courts argue that governmental policy disfavors forfeiture and intends it as a penalty only on those who are "significantly involved in a criminal enterprise."[97] Thus, an interpretation of the statute incorporating *Calero-Toledo's* strict requirements, instead of allowing a claimant to succeed on lack of knowledge alone, would be "inconsistent with the policy behind the forfeiture statutes."[98]

Despite these cases rejecting the incorporation of the *Calero-Toledo* dicta into section 881(a)(6) and (7)'s statutory "innocent owner" provisions, courts in two other decisions have held the *Calero-Toledo* dicta applicable to section 881(a)(6).[99]

County, Fla., 730 F. Supp. 423 (S.D. Fla. 1989). The reasoning in this case was followed by the court in United States v. Certain Real Property, 724 F. Supp. 908, 914-916 (S.D. Fla. 1989). The other case rejecting the application of *Calero-Toledo* to section 881(a)(7) relied on the same basic argument as the 4,657 Acre court, and cited this as the majority view. *See* United States v. One Parcel of Property Located at Rt. 1, Box 137, Randolph, Chilton County, Ala., 743 F. Supp. 802, 806 (M.D. Ala. 1990).

95. One Parcel of Real Estate Consisting of Approximately 4,657 Acres, 730 F. Supp. at 427. *Accord* One Parcel of Property Located at Rt. 1, Box 137, 743 F. Supp. at 806.

96. *One Parcel of Real Estate Consisting of Approximately 4,657 Acres*, 730 F. Supp. at 427. This argument would apply equally well to section 881(a)(6) which was enacted four years after *Calero-Toledo*. *See supra* text accompanying notes 31-34.

The court in *4,657 Acres* also attempted to back up this argument by claiming that Congress did explicitly provide for the "reasonable standard" of *Calero-Toledo* when it enacted 881(a)(4)(C), while at the same time it refused to enact this "reasonable standard" into section 881(a)(7). This argument is weak for two reasons. First, it is questionable whether the "without knowledge, consent, or willful blindness" language of section 881(a)(4)(C) can be equated with the *Calero-Toledo* standard. *See supra* text accompanying notes 47-64 for a discussion of what constitutes innocence under section 881(a)(4)(C). Second, the court was mistaken when it stated that section 881(a)(4)(C) was enacted during the same time as section 881(a)(7). While section 881(a)(7) was enacted in 1984, section 881(a)(4)(C) was not enacted until 1988. For a discussion of the historical development of the various statutory "innocent owner" provisions *see supra* text accompanying notes 31-46.

97. 730 F. Supp. at 427-28.

98. *Id.*

99. *See* United States v. One Single Family Residence Located at 2901 S.W. 118th Court, Miami, Fla., 683 F. Supp. 783 (S.D. Fla. 1988); United States v. One Single Family Residence Located at 15603 85th Ave. North, Lake Park, Palm Beach County, Fla., 933 F.2d 976 (11th Cir. 1991).

In *United States v. One Single Family Residence Located at 2901 S.W. 118th Court, Miami, Fla.*,[100] a district court held that a claimant must meet the *Calero-Toledo* requirements in order to succeed on section 881(a)(6)'s "innocent owner" defense.[101] The court did not give a rationale for this decision, but merely cited the deferral of the question by the court in *Four Million, Two Hundred Fifty-Five Thousand*[102] and consequently concluded that the *Calero-Toledo* standard applied.[103]

The most important decision regarding the applicability of the *Calero-Toledo* dicta to the statutory "innocent owner" provisions of section 881(a)(6) and (7) is *United States v. One Single Family Residence Located at 15603 85th Ave., North, Lake Park, Palm Beach County, Fla.*[104] In that case, a claimant had invested legitimate funds in the purchase of real estate with the knowledge that his co-investor's funds were the proceeds of drug transactions. The court held that when a claimant "ha[d] actual knowledge that . . . legitimate funds [we]re commingled with drug proceeds, traceable in accord with the forfeiture statute, the legitimate funds [we]re subject to forfeiture."[105] Citing its own deferral of the question of whether the *Calero-Toledo* dicta was applicable to forfeiture actions under section 881(a)(6),[106] the court then stated "[w]e now hold that the "reasonably possible language of *Calero-Toledo* applies to section 881(a)(6) proceedings."[107] On its face, this language suggests that claimants in the Eleventh Circuit would have to meet the literal requirements set forth in the *Calero-Toledo* dicta[108] in order to succeed on a defense under the "innocent owner" provision of section 881(a)(6), and by extension under section 881(a)(7). On closer inspection, however, that conclusion proves erroneous.

Courts have construed the application of the *Calero-Toledo* dicta to the statutory "innocent owner" provisions of section 881(a)(6) and (7) in two different ways.[109] The majority of courts that have applied the *Calero-*

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100. 683 F. Supp. 783 (S.D. Fla. 1988).

101. *Id.* at 788. The court found that the claimant, a bail bonding company, had not done everything reasonably possible to inform itself that the collateral it had taken as security was proceeds of a drug transaction, especially when it was present at the bond hearing where evidence was presented that cocaine was found in the house. *Id.* at 788-89.

102. 762 F.2d 895 (11th Cir. 1985).

103. 683 F. Supp. at 788.

104. 933 F.2d 976 (11th Cir. 1991).

105. *Id.* at 982 (citing its decision in United States v. Four Million, Two Hundred Fifty-Five Thousand, 762 F.2d 895, 906 n.24 (11th Cir. 1985)).

106. *Id.*

107. *Id.*

108. *See infra* text accompanying note 111 for a description of the literal requirements of the *Calero-Toledo* dicta.

109. *See* O'Brien, *supra* note 60, at 544-45.

Toledo dicta to the "innocent owner" provisions of sections 881(a)(6) and (7) have in effect substituted the *Calero-Toledo* requirements as the standard for prevailing on the statutory defense of innocent ownership.[110] Under this substitutionary view, to succeed on a statutory defense of innocent ownership, a claimant would have to prove three elements: (1) that he was unaware of the illegal activity, (2) that he was uninvolved in that activity; and (3) that he did all that reasonably could be expected to prevent the proscribed use of his property.[111] Because all three requirements must be met before a claimant can succeed on his defense, this approach is, in effect, a conjunctive interpretation of the statute.[112]

The second approach, however, requires a court to have decided first on a disjunctive interpretation to the statutory phrase "without knowledge or consent."[113] Under this approach, first adopted in *United States v. 141st Street Corp. By Hersh*,[114] the only requirement incorporated into the statute is the third *Calero-Toledo* requirement that a claimant has done "all that reasonably could be expected to prevent the proscribed use of his property."[115] The court uses that requirement to define what constitutes a lack of consent under the statute.[116] Thus, under this application of the *Calero-Toledo* dicta, a claimant can succeed on a statutory defense of "innocent ownership" even though he has knowledge of illegal activity if he can "prove that he did all that reasonably could be expected to prevent the illegal activity once he learned of it."[117]

Which view, then, did the court of appeals adhere to in *One Single Family Residence Located at 15603 85th Ave. North*[118] when it stated "we now hold that the 'reasonably possible' language of *Calero-Toledo*

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110. *See, e.g.*, United States v. Two Tracts of Real Property Containing 30.80 Acres, 665 F. Supp. 422, 425 (M.D.N.C. 1987), *aff'd sub nom*, 856 F.2d 675 (4th Cir. 1988).

111. *See* United States v. Premises Described As Route 2, Box 61-C, Crosset, Ark., 727 F. Supp. 1295, 1299 (W.D. Ark. 1990) (tracking language of Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 689 (1974)).

112. *See* O'Brien, *supra* note 60, at 544-45 (stating that the *Calero-Toledo* dicta under this approach is merely another element of knowledge which must be established to succeed on the innocent owner defense).

113. *See* United States v. 141st Street Corp. By Hersh, 911 F.2d 870, 878-79 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1017 (1991).

114. 911 F.2d 870 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1017 (1991).

115. 911 F.2d at 878-89.

116. *Id.*

117. *Id.* The Second Circuit has affirmed this approach in two cases subsequent to *141st Street Corp. By Hersh*. *See* United States v. Certain Real Property & Premises, Known as 890 Noyac Road, Noyac, N.Y., 945 F.2d 1252 (2d Cir. 1991); United States v. Certain Real Property & Premises, Known as 418 57th Street, Brooklyn, N.Y., 922 F.2d 129 (2d Cir. 1990).

118. 933 F.2d 976 (11th Cir. 1990).

applies to section 881(a)(6) proceedings"?[119] Arguably, since the court was deciding the applicability of the *Calero-Toledo* dicta to section 881(a)(6)'s "innocent owner" provision, the court meant its holding to refer to the literal requirements of *Calero-Toledo*. However, the language of the court's holding refers only to the "reasonably possible" requirement, not to all three *Calero-Toledo* requirements as the court might have used if it were adopting the "substitutionary" approach.

More importantly, it is clear that the court meant to require a disjunctive interpretation in its application of the *Calero-Toledo* "reasonably possible" standard to section 881(a)(6)'s innocent owner "without knowledge or consent" language. The court said that "in applying this rule, a claimant *who has actual knowledge* of the commingling of legitimate and drug funds may be spared forfeiture as an innocent owner if the claimant can prove that everything reasonably possible was done to withdraw the commingled funds or to dispose of the property."[120] The court reinforced its adoption of this approach by its citation to *141st Street Corp. By Hersh* as support for that language.[121]

Because the Eleventh Circuit has adopted the approach of the court in *141st Street Corp. By Hersh* with regard to section 881(a)(6) proceedings, it is likely that district courts will also adopt that approach in section 881(a)(7) proceedings.[122] Because this approach best balances the deterrent and remedial purposes of Congress in enacting the civil forfeiture provisions of section 881(a)(6) and (7), it is likely that other circuits will soon be considering whether to follow suit.

III. CONCLUSION

In deciding what constitutes "innocence" within the meaning of the "innocent owner" provisions of the civil drug forfeiture statute, courts are forced to confront questions of statutory interpretation, congressional intention and purpose, the applicability of Supreme Court dicta, and prior precedent. Obviously, there are no easy answers to these questions. Further, given the newness of section 881(a)(4)(C) and the likelihood that

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119. *Id.* at 982.

120. *Id.* (emphasis added). Clearly, under the conjunctive approaches of the actual knowledge standard or the literal *Calero-Toledo* requirements, the claimant's having actual knowledge alone would have defeated his claim of "innocence."

121. *Id.*

122. No apparent reason exists why such an approach will not be adopted given the identical "innocent owner" language of sections 881(a)(6) and (7), especially since *141st Street Corp.* involved section 881(a)(7). For a recognition of the potential applicability of this approach to section 881(a)(7) in the Eleventh Circuit based on the court of appeals recent decision, see United States v. One Single Family Residence Located at 15526 69th Drive N., Lake Park, Fla., 778 F. Supp. 1215 (S.D. Fla. 1991).

courts will increasingly have to choose between the various competing approaches to the interpretation of section 881(a)(6) and (7)'s "innocent owner" provisions, this area of the law will probably remain unsettled for some time to come.

The Eleventh Circuit Court of Appeals' adoption of the *141st Street Corp by Hersh* approach to interpreting the innocent owner provision of section 881(a)(6) seems immensely satisfying. Under either the regular conjunctive interpretation of that provision or the conjunctive interpretation that substitutes the *Calero-Toledo* standard for the statutory terms, a claimant was denied access to any type of consent defense. The argument that Congress was not merely repeating itself when it enacted the knowledge or consent language in section 881(a)(6) and, that to give it effect, a court should adopt a disjunctive interpretation of that language proves itself acceptable through application. The value of the specific disjunctive approach used in *141st Street Corp. By Hersh* and adopted by the Eleventh Circuit lies in the guideline it provides in defining what constitutes a lack of consent under the statute. With the third *Calero-Toledo* requirement as a definitional guideline, case law will soon fashion precedents under which lenders, apartment owners, and others can structure their conduct.[123]

No such enthusiasm for the Eleventh Circuit's interpretation of section 881(a)(4)(C)'s innocent owner provision exists. That provision allows an owner to establish his innocent status by showing that the act giving rise to forfeiture occurred without his knowledge, consent, or willful blindness.[124] The blind recitation of *Calero-Toledo* as the applicable standard under this provision is simply poor jurisprudence.[125] In the case of a claimant asserting his "innocence" under this statutory provision, the question before the court is one of statutory interpretation. This interpretative process requires, at a minimum, that the court consider the meaning of the words of the statute as enacted by Congress.

That a court, reasonably construing the phrase "without knowledge, consent or willful blindness," could in any way find that Congress intended that language to be a codification of the *Calero-Toledo* standard is simply an unpersuasive argument.[126] That the court failed to consider the statutory language is regrettable in and of itself, but is even more regret-

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123. For an example of this process already in action, see the court's opinion in United States v. Certain Real Property & Premises, Known as 418 57th Street, Brooklyn, N.Y., 922 F.2d 129, 132 (2d Cir. 1990).

124. *See* 21 U.S.C. § 881(a)(4)(C) (1988).

125. *See supra* text accompanying notes 47-52 for a discussion of the court's decision in United States v. One 1980 58' Motor Yacht, Known as the M/V Mologa, 876 F.2d 884 (11th Cir. 1989).

126. *See supra* text accompanying notes 59-64.

table when its opinion is precedent setting for the entire circuit.[127] If a court's persuasiveness is the foundation for its legitimacy, then the Eleventh Circuit has lost a great deal of that legitimacy on this issue. Because of its erroneous reasoning, the Eleventh Circuit undoubtedly will eventually be forced to reconsider its position, and in all likelihood, to adopt the better-reasoned interpretation of the statute offered by another circuit.

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127. *Id.*