

Case o' the Week

A little memo on a big case.

From: Steven Kalar, Federal Public Defender, N.D. Cal. FPD Date: Monday, Oct. 10, 2016
Re: *United States v. Henry Lo*, 2016 WL 5799706 (9th Cir. Oct. 5, 2016) **Restitution:** Big decision reviews restitution, forfeiture, and appellate waivers

Players: Decision by Judge Ikuta, joined by Judge Clifton and DJ Lamberth. Hard fought appeal by NorCal CJA stalwart Martha Boersch, of Boersch Shapiro LLP.

Facts: Lo was charged with wire and mail fraud. *Id.* at *1. He pleaded guilty to *some of the* counts in the indictment, in a standard NorCal plea agreement: a detailed fact pattern in paragraph 2, a concession of fraud proceeds of over \$2 million, and an appellate waiver. *Id.* at *2-*3. The plea agreement specified a restitution amount of no less than \$1.7 million. *Id.* at *3. Before sentencing, the government moved for a forfeiture order of over \$2.3 million. *Id.* After sentencing, the Court ordered a forfeiture money judgment of over \$2.3 million, and also ordered Lo pay \$2.3 million in restitution. *Id.* Lo appealed. *Id.*



"Before we send a man to prison, shouldn't we at least be positive that he's not rich?"
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Issue(s): "Before addressing Lo's claims, we must first address the government's argument that Lo waived his right to appeal any aspect of the sentence by agreeing to an appeal waiver in his plea agreement." *Id.* at *4.

Held: "Because Lo validly waived his right to appeal, and none of the exceptions to such waivers are applicable, we dismiss this appeal." *Id.* at *1.

Of Note: *Lo* is, unfortunately, now a seminal case in the Ninth on restitution and forfeiture. The decision first lays out the contractual interpretations of plea agreements, discusses exceptions to those interpretations, and describes the interplay between restitution and forfeiture. In so doing *Lo* sets forth several new rules. It has long been a requirement that a defendant receive notice before being hit with *restitution*. That notice requirement doesn't apply, Judge Ikuta explains, to *forfeiture* orders – a beast authorized by an entirely different statute. *Id.* *8. "Therefore, an appeal waiver can validly waive the right to appeal a forfeiture order issued as part of the sentence regardless of whether the plea agreement provides the defendant with a reasonably accurate estimate of the amount of forfeiture or whether the defendant was given adequate notice before a district court determined that amount." *Id.* at *9. The take-away? Your client's dough is being grabbed: either through a restitution order, or a forfeiture order. If the money is seized through restitution, there are specific notice requirements that – if not followed – can undermine the validity of an appellate waiver. If the funds are seized through forfeiture? Not so much.

How to Use: Under the forfeiture statute the government can get a forfeiture order to seize proceeds of the crimes for which the defendant was convicted. If the defendant is convicted of counts 1, 2, and 3, can the court order forfeiture of proceeds from crimes alleged in *dismissed* (or acquitted) counts 4, 5, and 6? In another new rule, Judge Ikuta holds, "yes." Joining the Seventh Circuit, the Ninth concludes that the "proceeds of the crime of conviction" for forfeiture "consist of the funds involved in that fraudulent scheme, including additional executions of the scheme that were not specifically charged or on which the defendant *was acquitted*." *Id.* at *12 (emphasis added). Is analogous to cursed guideline "relevant conduct:" a concept that can scoop up and punish charges for which your client was acquitted. Before assuring your client a deal or trial could provide some finality, have a hard talk about the forfeiture ramifications of those dismissed (or even acquitted) counts.

For Further Reading: What's with the surging interest in forfeiture and restitution? Turns out that grabbing the funds is an active prosecution priority of DOJ. For an accessible summary of DOJ's blurb on restitution and forfeiture, see <https://www.justice.gov/usao/priority-areas/victims-rights-services/returning-money-victims> For a gleeful DOJ Powerpoint that gloats a lack of a criminal conviction needn't stand in the way of forfeiture, see <http://victimsofcrime.org/docs/default-source/Policy/using-asset-forfeiture-slides.pdf?sfvrsn=2> ("No criminal restitution order? No problem!")