MEMORANDUM OF LAW

DATE: December 11, 1987

TO: Donovan Jacobs, Asset Seizure Officer via
Deputy Chief Davis and Captain Tyler

FROM: City Attorney

SUBJECT: Seizure, Forfeiture and Release of Motor Vehicles Incident to Narcotics Violations

You asked by memorandum a series of five questions concerning vehicles seized for forfeiture incident to sales of narcotics pursuant to federal or state laws when such vehicles are encumbered by liens. In a separate conversation, you also asked similar questions concerning leased vehicles. Since your questions included some misunderstandings about the law itself, this memorandum will discuss the forfeiture statutes as pertaining to vehicles and then answer your questions seriatum.

DISCUSSION

1. Federal Law

The Comprehensive Crime Control Act of 1984 (the "1984 Act") (PL 98-473) included an enhancement of laws relating to forfeiture of assets seized incident to arrests for illegal narcotics activity. The forfeiture provisions had substantively preexisted and the 1984 Act served to procedurally streamline the process. The provisions concerning motor vehicles are contained in 21 U.S.C. section 881 which read in pertinent part as follows:

> . 881. Forfeitures
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> (a) Subject property. The following shall be subject to forfeiture to the United States and no property right shall exist in them:
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> . . . .
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> (4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1) or (2), except that--
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> (A) no conveyance used by any person as a common carrier in the transaction of business as a common carrier shall be forfeited under the provisions of this section unless it shall appear that the owner or other person in

charge of such conveyance was a consenting party or privy to a violation . . . ; and

(B) no conveyance shall be forfeited under the provisions of this section by reason of any act or omission established by the owner thereof to have been committed or omitted by any person other than such owner while such conveyance was unlawfully in the possession of a person other than the owner in violation of the criminal laws of the United States, or of any State.

. . . .

(6) All 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 title, 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 title, except 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 the owner to have been committed or omitted without the knowledge or consent of that owner.

Id., emphasis added.

It is clear that a lien is a property right. In re Pennsylvania Central Brewing Co., 114 F.2d 1010, 1013 (3d Cir. 1940). Such a right is clearly subject to the forfeiture sanctions.

The doctrine which may be invoked to assert a lienholder's interest in the face of a forfeiture proceeding is the defense of innocent ownership. An early articulation of this doctrine is found in The Mount Clinton, 6 F.2d 418 (2d Cir. 1925), where the court held that no forfeiture of a vessel was allowed where the owner had no knowledge that opium was on board. The forfeiture action was a libel of information in admiralty under the provisions of the Opium Act of 1914. (38 Stat. 277 Comp. St. . 8801f.) It was stipulated that the ship's master had posted a gangway watch, provided for supplementary watchmen, caused every package other than regular cargo to be searched and had conducted an "at sea search." At the time, opium and cocaine could be imported for medicinal purposes, but only if properly manifested.

Id., Comp. St. . 8800. The law at that time imposed a penalty against the master for the value of the unmanifested merchandise which could be satisfied by lien against the vessel. The Court of Appeals, in an opinion by Judge Learned Hand, held that no penalty could be imposed "upon those who are innocent and have used all reasonable precautions to prevent the evil against which the statute is directed." The Mount Vernon, 6 F.2d at 420.

Subsequent case history has considerably narrowed this doctrine. In United States v. Gramling, 180 F.2d 498 (5th Cir. 1950), a taxicab was used to violate narcotics laws. The district court held for claimant cab company, finding that the violating driver held a police permit, had prior recommendations and had no prior criminal violations. The Court of Appeals reversed, holding that "innocence or good faith is no defense in a matter such as this. Congress has not extended to the courts any power of remission or mitigation of forfeiture in cases involving the violation of the narcotic laws." Id. at 501, citing United States v. One 1941 Plymouth Sedan, 153 F.2d 19 (10th Cir. 1946). The subject of ownership for insurance purposes was considered in United States v. One 1972 Toyota Mark II, 505 F.2d 1162 (8th Cir. 1974). In that case the vehicle was given by the appellee to her daughter. Appellee had retained title solely for insurance purposes. The daughter had total control of the vehicle and used it to unlawfully transport cocaine. In holding for forfeiture, the court characterized the daughter as the equitable owner of the vehicle and thus the innocent owner exception did not apply. The court then went beyond the specific holding to state that: "the innocence, noninvolvement or lack of negligence of the owner in allowing the

vehicle to be used for the forfeitable offense is no defense to the forfeiture action." Id. at 1165, citations omitted. See also, United States v. One 1971 Porsche Coupe Automobile, 364 F. Supp. 745 (E.D. Penn. 1973).

The leading case accommodating defense of innocent ownership is Astol Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974). In Calero an owner business had leased a yacht to two individuals. Unknown to the owner the yacht was subsequently used to transport controlled substances; it was seized and forfeited. On review, the Supreme Court held for forfeiture, saying: "to the extent that . . . forfeiture provisions are applied to lessors, bailors, or secured creditors who are innocent of any wrongdoing, confiscation may have the desirable effect of inducing them to exercise greater care in transferring possession of their property." Id. at 687-688. The Court also set a standard of review for the defense of innocent ownership,

saying that an owner could prevail if he established that the property had been taken without his privity or consent or that he was uninvolved and unaware of the wrongful activity and that he had done all that reasonably could be expected to prevent the proscribed use of the property. Id. at 689. See also, United States v. One 1976 Lincoln Continental Mark IV, 584 F.2d 266 (8th Cir. 1978).

Cases subsequent to Calero have indicated that the federal courts have upheld forfeiture in all types of "innocent owner" situations. See, e.g., United States v. One 1982 28 Foot International Vessel, 741 F.2d 1319 (11th Cir. 1984) (forfeit of vessel transporting contraband seized while under control of engine testing contractor); United States v. One 1977 Cherokee Jeep, 639 F.2d 213 (5th Cir. 1981) (forfeiture of vehicle used to transport drugs by husband who died extinguishes community property right of innocent widow); United States v. One 1980 Stapleton Pleasure Vessel, 575 F. Supp. 473 (S.D. Fla. 1983) (forfeit where vessel owner failed to investigate charter party); United States v. One 1978 Chrysler LeBaron, 531 F. Supp. 32 (E.D. NY 1981) (forfeit of corporate vehicle used by employee for drug transportation); United States v. One 1976 Buick Skylark, 453 F. Supp. 639 (D. Colo. 1978) (forfeit where owner aware of drug use of borrower boyfriend); but see, United States v. One 1979 Datsun 280 ZX, 720 F.2d 543 (8th Cir. 1983) (no forfeit where ex-husband allowed to drive car to another state for sale); United States v. One 1976 Lincoln Mark IV, 462 F. Supp. 1383 (W.D. Penn. 1979) (no forfeit where owner did all reasonably possible to prevent illegal use).

The issue of stolen vehicles has also been reviewed. In United States v. One 1977 36 Foot Cigarette Ocean Racer, 624 F. Supp. 290 (S.D. Fla. 1985) the court ordered forfeiture after expert testimony and evidence indicated that the "stolen boat report" was part of an elaborate scheme. See also, United States v. One 30 Foot 1982 Morgan, 597 F. Supp. 589 (M.D. Fla. 1984) ("stolen boat" defense rejected).

The lessor as innocent owner has recently been reviewed in United States v. One Boeing 707 Aircraft, 750 F.2d 1280 (5th Cir. 1985), which involved weapons as contraband. Forfeiture was ordered when the court found that the owner had not done all that reasonably could be done by an aircraft leasing company after becoming suspicious about a requested stop-off in South Africa. A similar result was reached in United States v. One Rockwell Intern. Commander 690 C/840, 594 F. Supp. 133 (D. N.D. 1984) where the court found that the aircraft was based in an area well known for drug related activities and such circumstances would

require more caution to prevent the aircraft from being used in the illegal transportation of drugs.

The matter of forfeiture of vehicles with some type of security interest has a parallel yet distinct history. An early case was United States v. One Saxon Automobile, 257 F. 251 (4th Cir. 1919) wherein a dealer had sold the automobile, taking a deed of trust for the unpaid balance. A third person borrowed the car and was using it to transport contraband liquor. The Saxon was seized and forfeiture proceedings were instituted under the provisions of R.S. . 3450 (Comp. St. . 6352). The district court held that the rights of the deed of trust holder were unaffected by the forfeiture and the proceeds of sale must first satisfy the debt. The Court of Appeals reversed, holding that the lien on the automobile was overridden by the forfeiture. The Court distinguished the innocent owner as the unwilling victim of a trespasser or thief, whereas the lien or mortgage is a voluntary arrangement. After recognizing the same principle had long been applied against vessels in prize cases See, e.g., The Hampton, 72 U.S. (5 Wall.) 659 (1867), the Court said:

> The same practical considerations apply with force to the use of automobiles in violation of the statute now before us. The enforcement of the revenue statute concerning transportation of liquor is difficult, because of the facility with which automobiles may be used for that purpose without detection. If one thus engaged in illicit transportation could protect his automobile from forfeiture
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> on proof that the legal title was in some one else, or that some one else had a mortgage on it, the difficulty of enforcing the law would be greatly increased, and the penalty of forfeiture almost always evaded. It seems to us the statute requiring forfeiture is explicit, leaving no room for construction. It is true that it is not violated unless the liquor is removed with intent to defraud the United States of the taxes. But, when fraud in the removal is shown, the statute provides that the conveyance used for the purpose shall be forfeited. There is no limitation or exception that the forfeiture shall depend upon proof of fraud in the owner of the conveyance or on any other condition.

Id. at 253.

Two years later the Supreme Court reviewed the issue in Goldsmith, Jr. - Grant Co. v. United States, 254 U.S. 505 (1921), a case involving a Hudson automobile used in unlawful liquor transport and which had been sold to the violator with title retained as security for the purchase balance. The Court carefully examined the background of forfeiture law, including the law of deodand, by and which any personal chattel which was the immediate occasion of the death of any reasonable creature was forfeited to the crown to be applied to pious uses Black's Law Dictionary, 392 (5th ed. 1979), Mosaical law, Athenian Law and Admiralty (Goldsmith, 254 U.S. at 510-511). The Court held that: "it is the illegal use that is the material consideration, - it is that which works the forfeiture, the guilt or innocence of its owner being accidental . . . an automobile . . . is a 'thing' that can be used . . . and the law is explicit in the condemnation of such things." Id. at 513.

The first case involving an "innocent owner" claimant against forfeiture of a vehicle for unlawful transport of drugs appears to be United States v. One 6-54-B Oakland Touring Automobile, 9 F.2d 635 (1925), where the claim of a securities company as title holder was rejected in a cocaine case. This case is instructive insofar as the technical violation was evasion of some twenty cents in duty tax under the Tariff Act of 1922 (Comp. St. Ann. Supp. 1923, . 5841a), but the court noted "the public policy, which forbids importation of and subsequent dealings with cocaine and the evils consequent upon this policy's violation . . ." and ruled "whatever be the hardships, if any, to claimant . . . forfeiture is clear, and must be upheld." Id. at 636-637.

Subsequent cases have given secured interests no relief. See, e.g., United States v. One Dodge Coupe, 43 F. Supp. 60 (S.D. N.Y. 1942) (conditional vendor claimant). In United States v. One 1957 Oldsmobile, 256 F.2d 931 (5th Cir. 1958) the Court ruled against General Motors Acceptance Corporation as a lienholder, finding that forfeit of the secured property did not constitute a due process violation. See also, United States v. One 1952 Model Ford Sedan, 213 F.2d 252 (5th Cir. 1954) (bank as lienholder). Similarly in General Finance Corporation of Florida South v. United States, 333 F.2d 681 (5th Cir. 1964) the Court denied an intervention, holding that "a mere security-holder . . . must apply for remission of the penalty to the Secretary of the Treasury." Id. at 682. See also, United States v. One 1955 Ford Convertible, 137 F. Supp. 830 (E.D. Pa. 1956).

A related issue is the conditional sales contract. In United States v. One 1967 Cadillac Coupe Eldorado, 415 F.2d 647 (9th Cir. 1969) the claimant bank argued that, since the conditional

sales contract prohibited unlawful activity with the automobile, the transport of cocaine made the purchasing owners unlawfully in possession. The Court rejected this reasoning, in part reflecting: "we pause to wonder if, had (registered owner) violated the speed laws or failed to make a boulevard stop while driving this Cadillac, appellee would seriously urge he had taken 'illegal possession' of the Cadillac without the owner's consent. We doubt it." Id. at 649, emphasis in original. The consistency of holdings against secured interests in these cases may have caused such creditors to abandon such claims, instead seeking remission from the attorney general. See, e.g., United States v. One 1972 Datsun, 378 F. Supp. 1200, 1201 Fn. 1 (D. N.H. 1974) (security interest holder withdrew objection to forfeiture upon granting of petition for remission).

Lienholders have attempted to appeal an unsuccessful petition for remission. In United States v. One 1970 Buick Rivera, 463 F.2d 1168 (5th Cir. 1972), cert. denied, 409 U.S. 980 (1972), the Court held that the decision of the attorney general was not reviewable. See also, United States v. One 1969 Plymouth Fury Automobile, 476 F.2d 960 (5th Cir. 1973), reh'g denied, 509 F.2d 1324 (1975)(record owner paid only $100 down). A recent case, United States v. One Hughes Helicopter, Model 269C, 595 F. Supp. 131 (N.D. Tex. 1984) also involved a pickup truck, helicopter trailer and 12-gauge shotgun, and the property was used in violation of the Airborne Hunting Act, 16 U.S.C. . 742j-1. The lienholders filed a petition for remission or mitigation which was denied by the attorney general. In a brief opinion the Court noted that the statute provided no right of appeal and the lienholder's innocence is no defense to a suit for forfeiture. Id. at 133.

In summary, the provisions of federal law pertaining to forfeiture of seized assets incident to illegal drug trafficking do not protect any interest of a lessor or lienholder. Any such interest in a seized vehicle can only be requested by petition for remission or mitigation to the Attorney General or, possibly, by overcoming a burden of proof in court that the lessor/interest holder had no knowledge of the illegal activity and had taken all reasonable steps to prevent the proscribed use of the property. See, Astol Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 669 (1974).

2. California

The original statute providing for forfeiture of vehicles used for transport of narcotics was included as section 15 of the Narcotics Act (1929 Cal. Stats. 216) and read as follows:

> Any automobile or other vehicle used to

> convey, carry or transport any of the drugs mentioned in section 1 of this act, which are not lawfully possessed or transported, is hereby declared to be forfeited to the state, and may be seized by any duly authorized peace officer and when such seizure is made shall be considered as part of the evidence under this act and the magistrate shall upon conviction of the party charged with the violation of said act, turn the automobile or other vehicle over to the department of finance of the State of California and said department of finance shall deliver to the division of narcotic enforcement of the State of California such number of said automobiles or other vehicles as may be needed by the said narcotic division in enforcing the provisions of this act; provided, that nothing contained herein shall apply to common carriers, or to an employee acting within the scope of his employment under this act.

The statute made no provision for any secured interest or other innocent owner claim. In 1932 the Supreme Court held section 15 to be unconstitutional insofar as it authorized forfeiture without due process notice. People v. Broad, 216 Cal. 1 (1932). The legislature amended section 15 the following year to include notice requirements, a hearing and other protections for legal owners and lienholders. Section 15, as amended, included the following:

> (e) At the time set for the hearing, any of the owners who have verified answers on file may show by competent evidence that the automobile or other vehicle was not in fact used in the unlawful transportation of drugs in violation of this act; provided, however, that the claimant of any right, title or interest in said vehicle may prove his lien, mortgage, or conditional sales contract to be bona fide and that such right, title or interest was created after a reasonable investigation of the responsibility, character and reputation of the offender and without any knowledge that the vehicle was being, or was to be, used for the illegal transportation of such drugs.

(f) In the event of such proof, the court shall order said vehicle released to such bona fide or innocent owner, lienholder, mortgagee or vendor if the amount due to such person shall be equal to, or in excess of, the value of the auto-mobile, it being the intention of this section to forfeit only the right, title or interest of the offender; . . . .

1933 Cal. Stats. 253, p. 789.

The "reasonable investigation" was reviewed in People v. One Harley-Davidson Motorcycle, 5 Cal.2d 188 (1936). The claimant had sold the motorcycle on a conditional sales contract after receiving three references, including the purchaser's employer. The purchaser subsequently used the motorcycle in the unlawful transportation of narcotics; it was seized and forfeited. The claimant had verified the employment but had not actually interviewed the references. The Supreme Court denied the claimant's lien, holding that he had not reasonably sought reliable information on the whereabouts and activities of the purchaser. See also, People v. One Ford V8 Tudor Sedan, 12 Cal.App.2d 517 (1936). In People v. One Lincoln Eight, 12 Cal.App.2d 622 (1936) the seller-claimant under a conditional sales contract had contacted the three references and had been told the purchaser was "a good old soak" and "a very fine gentleman." Id. at 626. The court found the investigation legally insufficient. Id. at 626-627. See also, People v. One Packard 6 Touring Sedan, 26 Cal.App.2d 150 (1938) (purchaser operated a house of prostitution).

The legislature enacted the Health and Safety Code in 1939 and the vehicle forfeiture provisions of the Narcotics Act became sections 11610-11629 (1939 Cal. Stats. 60, pp. 767-769). Section 11620 contained the provisions for lien holder moral responsibility investigation.

California case law, under the reorganized statutes, remained quite severe. In People v. One 1941 Ford 8 Stake Truck, 26 Cal.2d 503 (1945), the owner of a produce company had ordered an employee to deliver a load of cucumbers. The employee had requested and been refused permission to subsequently attend to a "personal errand." Nonetheless the employee delivered the cucumbers and then embarked on his frolic, which in reality was securing some marijuana. The truck was stopped, the employee arrested, and the truck was seized. The trial court found that the employee was in violation of his orders and the company had no knowledge of his intentions. The court, however, found that the possession of the truck was with consent of the owner and

ordered forfeiture. The Supreme Court affirmed saying "an owner who entrusts the possession of his vehicle to another thereby accepts the risk that it will be used contrary to law. . . ." Id. at 507. The court went on to say:

> Clearly shown by the terms of section 11620 et seq. is a legislative policy that the vicious traffic in narcotics, with its disastrous effect upon the unfortunate members of society, is so great an evil as to justify the drastic penalty of confiscation of vehicles used to transport the contraband. The public interest to be protected against the drug and its victims outweighs the loss suffered by those whose confidence in others proves to be misplaced, and although, in some cases, hardship may result from the enforcement of the statute, no constitutional guarantees are invaded.

Id. at 508.

In People v. One 1940 V-8 Coupe, 36 Cal.2d 471 (1950) the Supreme Court held that the lien interest of a bank in the vehicle was forfeited because it failed to make the section 11620 investigation of moral responsibility. In People v. One 1948 Chevrolet Conv. Coupe, 45 Cal.2d 613 (1955), the registered owner had lent the vehicle, secured by a lien, to her son who was subsequently arrested while using the vehicle to transport marijuana. The Supreme Court held the lien interest to be

forfeited insofar as the holder failed to investigate the moral responsibility of the owner-mother.

The impact on lienholders was apparently appreciated by the legislature which amended section 11620 in 1955 to read:

> The claimant of any right, title or interest in the vehicle may prove his lien, mortgage, or conditional sales contract to be bona fide and that his right, title, or interest was created after a reasonable investigation of the moral responsibility, character, and reputation of the purchaser, and without any knowledge that the vehicle was being, or was to be, used for the purpose charged but, in any case, a reasonable investigation of the moral responsibility, character and reputation of the purchaser or mortgagor shall be deemed to have been made if it was made in good faith and it disclosed and

the fact also was that:

(a) The purchaser or mortgagor was at the time the holder of any occupational or business license issued by the State of California, or

(b) . . . a civil service employee . . . or,

(c) . . . officer . . . armed forces . . . or,

(d) . . . for at least one year immediately prior . . . had been regularly employed in a legitimate occupation and his present or last employer reports in substance that he is a good moral responsibility, character and reputation,

(e) and no facts were known to the claimant or his success or tending to show that the purchaser or mortgagor was not of good moral responsibility, character and reputation.

1955 Cal. Stats. 1209.

In 1959 the Legislature amended section 11610 to provide for forfeiture only of "the interest of any registered owner of a vehicle . . ." and repealed section 11620 (1959 Cal. Stats. 2085). The forfeiture provisions were repealed in their entirety in 1967. The urgency statute contained the following language:

> The Commission on California State Government Organization and Economy, in a report dated December 12, 1966, stated that the people of this state will save at least six hundred thousand dollars ($600,000) each year if the motor vehicle forfeiture provisions of the Health and Safety Code are abolished. The report further stated that such provisions have had no deterrent effect. In order to immediately effectuate the annual savings to the state of such a great sum of money, and in order to enable numerous personnel of the Bureau of Narcotic Enforcement to redirect their efforts toward the enforcement of laws which have real influence as deterrents to illegal narcotic activities, it is necessary that this act go into immediate effect.

1967 Cal. Stats. 280.

Five years later the Legislature again reversed its position and reenacted the motor vehicle forfeiture provision by adding Health and Safety Code section 11470 (1972 Cal. Stats 1407).

The revised statutory scheme is similar in procedural aspects to the former statutes but is more specific as to type and quantity of contraband. The overall scheme is also significantly different from the federal statute. Health and Safety Code section 11470 provides, in pertinent part:

The following are subject to forfeiture:

> (e) The interest of any registered owner of a boat, airplane, or any vehicle . . . which has been used as an instrument to facilitate the possession for sale or sale of 14.25 grams or more of heroin or cocaine . . . or 28.5 grams or more of Schedule I controlled substances except marijuana, peyote, or psilocybin; 10 pounds dry weight or more of marijuana, peyote, or psilocybin; . . . or 28.5 grams or more of cocaine hydrochloride or methamphetamine; . . . or 28.5 grams or more
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> of Schedule II controlled substances. No interest in a vehicle which may be lawfully driven on the highway with a class 3 or class 4 license, as prescribed in Section 12804 of the Vehicle Code, may be forfeited under this subdivision if there is a community property interest in the vehicle by a person other than the defendant and the vehicle is the sole class 3 or class 4 vehicle available to the defendant's immediate family.

As can be seen from the above, a security interest is not subject to forfeiture, so only the leased vehicle issues are to be considered.

With respect to leased vehicles or any similar situation such as where the registered owner is not the "equitable owner" (One 1972 Toyota, 505 F.2d at 1162) or operator (One 1976 Buick Skylark, 453 F. Supp. at 639), the California scheme makes forfeiture unlikely by converting the innocent owner defense from a burden of proof on the claimant to a burden of proof beyond reasonable doubt on the agency seeking forfeiture. Health and Safety Code section 11488.4 requires a petition of forfeiture (subsection (a)), notice to any interested party (subsection (d)), published notice (subsection (e)), and allows a motion for return by a defendant on the grounds of no probable cause for forfeiture (subsection (h)). Subsection (i) provides that:

(1) With respect to property described in subdivision (e) of Section 11470 for which forfeiture is sought, the state or local governmental entity shall have the burden of proving beyond a reasonable doubt that the property for which forfeiture is sought was used, or intended to be used, to facilitate a violation of one of the offenses enumerated in subdivision (f) of Section 11470.

In summary, California Vehicle forfeiture statutes have evolved from a strict liability scheme parallel to the federal statutes to an increasingly narrow scheme in which only the equity of an offender can ordinarily be subject to forfeit and that only after a proof beyond reasonable doubt by the agency involved. While there is a wealth of case law on the predecessor statutes, a computer-assisted search has not disclosed a single published case involving section 11470(e) since its enactment in 1972. Telephone contact with the Asset Forfeiture Coordinator for the California Department of Justice revealed that section

11470(e) has seldom been used and they are aware of only one superior court case in which there has been a trial involving the section. The legislative end product can thus be properly regarded as ineffectual and of little value when the federal statute is available.

As an overall summary, if a vehicle is seized pursuant to the federal statute (21 U.S.C. . 881(a)(4)), there is no inherent protection of the interest of a lessor or lienholder and such claimant may only seek relief by petition to the attorney general or overcoming a burden of proof as to innocent ownership in court. Conversely, if a vehicle is seized pursuant to the California statute (Health and Safety Code section 11470(e)) the only interest which may be forfeited is the equity interest of the registered owner of the vehicle, that interest may not be subject to forfeiture if it is the only vehicle in the family and the seizing agency must prove the illegal use beyond reasonable doubt.

QUESTIONS

1. "If the vehicle is being repossessed, may we release it to the lienholder? Even if the registered owner objects?"

Federal: No. Once an asset is seized it is the property of the federal government as of the occurrence of the offending use in narcotics commerce. 21 U.S.C. . 881(h), see also, United States v. $5,644,540.00 in U.S. Currency, 799 F.2d 1357, 1364 (9th Cir. 1986). The interest of the lienholder is not exempt from forfeiture, so no release is proper.

California: No. Once an asset is seized by a peace officer it may be held as evidence if appropriate (Health and Safety Code .. 11470(e), 11488 and 11488.1) or shall be withheld if an appropriate notice is issued by the Franchise Tax Board. Otherwise, within fifteen days after the seizure, the peace officer must return the vehicle to the registered owner. Section 11488.2. The forfeiture action is conducted without physical possession of the vehicle by the agency, but with notice to any legal owner or lienholder. Section 11488.4.

2. "If the lienholder feels their vehicle is at risk and the registered owner has violated his contract (by the drug involvement), may we release it to the lienholder?"

Federal: No. Same analysis as Question No. 1.

California: No. Same analysis as Question No. 1. Health and Safety Code section 11488.6 provides for a lienholder or other secured interest in a forfeitable asset to pay the equity value of the registered owner to the seizing agency after which the asset is turned over to the lienholder and all further forfeiture proceedings concern only the equity. Alternatively, the lienholder may elect to wait until the forfeiture action is complete and then be paid the lien amount from the sale proceeds. Sections 11488.6 and 11489.

3. "If a third party was driving the vehicle may we release it to the lienholder instead of the registered owner?"

Federal/California: No. Same analysis as Question No. 1.

4. "Must we release it to the driver if he is a third party (often the registered owner's son or wife) or may we insist upon returning it to the registered owner?"

Federal: No release is required to anyone. Same analysis as Question No. 1.

California: If the registered owner properly executes a document designating another party as his agent or attorney for receipt of the vehicle, then you should respect such an agency and release it to the agent or attorney, retaining a copy of the agency or power of attorney.

5. "In any of the (above) instance(s) we release the vehicle to a lienholder, do they need a court order?"

This question is not applicable based on the preceding answers. A potential reverse situation, however, is a party appearing with a court order to release the vehicle to them instead of to the registered owner. This could arise from a number of collateral circumstances, such as the car having been ordered transferred to an ex-spouse or creditor prior to the seizure or by a civil intervention by another party. In such

cases it is only necessary to ascertain that the court order fully reflects the material circumstances (e.g., the facts of ownership, seizure under Health and Safety Code section 11470(e) and intended release to the owner) in order to comply. Another, more complex situation would exist where a vehicle was seized incident to 21 U.S.C. . 881(a)(4) and the release order was signed by a state judge based on Penal Code section 1538.5. This raises a jurisdictional issue which would have to be resolved by a federal magistrate. In any situation of this nature, this

office should be contacted to assist in the legal resolution of the issues.

JOHN W. WITT, City Attorney
By
Grant Richard Telfer
Deputy City Attorney

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