

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT KANSAS CITY

MARK A. WYNN, et al.)	Case No.: 01CV201764
)	
PLAINTIFFS,)	Division 10
)	
vs.)	
)	
THE KANSAS CITY, MISSOURI)	
POLICE DEPARTMENT, et. al.,)	
DEFENDANT.)	

**JUDGMENT AND ORDER GRANTING CLASS CERTIFICATION; DENYING CERTAIN
DISPOSITIVE MOTIONS WITHOUT PREJUDICE; AND RECOMMENDING
APPELLATE REVIEW OF THIS COURT'S ORDER**

Introduction

The essence of this lawsuit arises as a result of two rulings of the Missouri Court of Appeals, Western District: *Karpierz v. Easley*, 31 S.W.3d 505 (Mo. Ct. App. 2000) and *Karpierz v. Easley*, 68 S.W.3d 565 (Mo. Ct. App. 2002). These cases generically hold that if a state agency seizes property of a citizen for the purpose of forfeiture, the state agency is required to abide by provisions of the Criminal Activity Forfeiture Act (hereinafter CAFA). See, e.g., *Karpierz*, 31 S.W.3d 505 (Mo. Ct. App. 2000); *Karpierz*, 68 S.W.3d 565 (Mo. Ct. App. 2002). This includes a provision that prohibits the transfer of property to the Federal Government for forfeiture without first conducting a hearing (hereinafter bypass hearing) to determine the propriety of that forfeiture by the Federal Government. See RSMo. § 513.647.1 (2008).

Forfeiture of assets has long been a tool of law enforcement for a substantial period of time. See, e.g., 21 U.S.C.S. § 853 (2008); 21 U.S.C.S. § 881 (2008); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974). In Federal Court, forfeiture can be achieved by criminal case, civil case or administrative order. See, e.g., Title 18, U.S.C. §§ 1961-1964 (2008). Various

states have also enacted forfeiture laws. See, e.g., RSMo. 513.647 (2008); N.J. STAT. ANN. § 2C:64-1 (2008); Kan. STAT. ANN. § 60-4105 (2006); ALA. CODE § 20-2-93 (2008). Failure to respond to a federal forfeiture notice generally constitutes a waiver which causes forfeiture of property before a lawsuit is even filed. See, e.g., 21 U.S.C.S. § 853(n); 19 U.S.C. § 1608; 19 U.S.C. § 1609; *In re U.S. Currency, \$844,520.00 v. United States*, 136 F.3d 581, 582. (8th Cir. 1998).

Concerns over the abuses of forfeiture statutes has been the subject of substantial concern and has been subject to scrutiny of federal judges. See *Id.* at 583 (8th Cir. 1998).¹ “[T]he underlying facts of this case should prompt Congress to investigate whether federal law enforcement officials are using their extensive forfeiture powers to frustrate the fiscal policy of States such as Missouri.” *Id.* at 584. Justice Thomas also expressed concerns regarding forfeiture abuse in *United States v. James Daniel Good Real Property*, 510 U.S. 43, 81 (1993) (Thomas, J., concurring).² *Id.* at 81-82. A federal court also noted that the forfeiture statutory scheme and its implementation provide substantial opportunity for abuse and corruption. *Jones v. United States*, 819 F. Supp. 698 (M.D. TN. 1993).

For a number of years in the State of Missouri, local police agencies would work together with the Federal Government in various investigations, usually in the narcotics area. It was common for State agents to seize property and cause them to be forfeited in Federal Court. Forfeiture of assets through CAFA requires that those assets go to the state school fund, whereas federal forfeiture proceeds can be shared by local law enforcement. See *Ensor v. Dir. of Revenue*, 998 S.W.2d 782 (Mo. En banc 1999). The state legislature recognized that state agents

¹ Judge Loken criticized the Missouri Highway Patrol and the DEA as conspiring to frustrate the Missouri Constitution and RSMo. 513.647

² “I am disturbed by the breadth of new civil forfeiture statutes such as 21 U.S.C. § 881(a)(7). ... Given that current practice under 881 (a)(7) appears to be far removed from the legal fiction upon which the civil forfeiture doctrine is based, it may be necessary – in an appropriate case - to reevaluate our generally deferential approach to legislative judgments in this area of civil forfeiture.”

were using the federal government to forfeit assets that arguably should be going to the state and thus passed legislation requiring the bypass hearing. RSMo. § 513.647.1.

After the two Karpierz cases, the Plaintiffs in this case cause filed the original litigation seeking return of property or money damages. In the initial lawsuit, the Defendants included the Kansas City, Missouri Police Department and the Highway Patrol. Early in that litigation, the Plaintiffs also sought class certification. Since its filing, this cause has had a long procedural history which includes: (1) an opinion by the Western District Court of Appeals. *See State of Missouri ex rel. Missouri State Highway Patrol v. Atwell*, 119 S.W.3d 188 (Mo. Ct. App. 2003); (2) dicta from the Missouri Supreme Court appearing to overrule portions of *Atwell*. *See Kubley v. Brooks*, 141 S.W.3d 21, 27 (Mo. banc 2004); (3) multiple writs; (4) the trial court dismissing the Highway Patrol; (5) the use of a Special Master to achieve a limited discovery relative to certain dispositive motions and the class certification issues; and (6) a class certification hearing.

There have been lengthy submissions provided by the parties as well as a day long hearing on the issue of class certification. The purpose of this judgment and pleading is to order class certification and to strongly recommend appellate review of the issues in this case.

Factual Findings

1. Plaintiffs allege that the Defendant violated provisions of CAFA when the Kansas City, Missouri Police Department ("KCPD") seized property from persons incident to criminal investigations or arrests, and the property was then forfeited by the federal authorities without the benefit of a bypass hearing in the State Circuit Court.

2. Plaintiffs seek to represent a class of persons pursuant to Missouri Rules of Civil Procedure 52.08 as defined as follows: Persons whose property (including currency) at any time since January 24, 1996, has been seized by agents or employees of the KCPD, in which the property was

thereafter transferred or released by KCPD to a federal agency, without the KCPD first obtaining approval from the Missouri county prosecuting attorney and the Missouri circuit judge in the county in which such property was seized, and which property has not been returned to such persons.

2. In the fourth amended petition, Plaintiffs assert four common law claims: (a) money had and received; (b) unjust enrichment; (c) replevin; and (d) unlawful taking of property pursuant to the Missouri Constitution, Article I, Section 26. Plaintiffs are seeking class certification under Missouri Rules of Civil Procedure 52.08(b)3.

4. Plaintiff George Ricketts is an individual whose property was seized by law enforcement in Jackson County, Missouri, in April and October of 1996.

5. The property seized from Ricketts was thereafter transferred to a federal agency.

6. The transfer of the property seized from Ricketts to a federal agency occurred without obtaining approval for such transfer from the Jackson County Prosecutor and a Jackson County Circuit Judge.

7. At some point in time KCPD received a percentage of value relative to the property seized from Ricketts.

8. To date, the property seized in April and October of 1996 has not been returned to Ricketts despite his request.

9. Ricketts was known to members of the KCPD and federal authorities as a drug dealer. After Ricketts sold drugs on two occasions to a confidential informant in April 1996, police and FBI agents executed a search warrant on Ricketts' home on April 19, 1996.

10. At Ricketts' home the authorities found weapons, drug paraphernalia and several thousand dollars of currency. The Defendant has presented evidence that the seizure from Ricketts was

accomplished by the FBI, as opposed to the KCPD. This is an issue disputed by Plaintiffs.

11. Law enforcement also seized from Ricketts four automobiles, one of which was stolen, and the other three of which, including a BMW 735i, had been used in drug trafficking.

12. A subsequent search of Ricketts' place of business, G's Jamaican Cuisine, uncovered more weapons and large amounts of currency.

13. Ricketts was arrested, charged, and convicted of possession of a controlled substance with intent to sell.

14. The Missouri Court of Appeals reversed Ricketts' drug conviction based upon the legality of the search that had taken place. Despite the evidence against Ricketts, he alleges in this action that the property seized was neither the product of nor used in conjunction with any criminal activity.

15. Law enforcement seized currency as well as certificate of deposits found in Ricketts' home and in a safe deposit box, and they were forfeited in accordance with federal law.

16. The Defendant has presented evidence that Ricketts was given notice of at least some of the proposed forfeiture, but did nothing to assert his purported rights to the property.

17. The police reports state that Ricketts sold drugs from the 1986 BMW just five days before it was seized.

18. Evidence from Defendant suggests that Ricketts has filed no tax returns, has no receipts, or other documents to demonstrate that the property seized were legitimately obtained.

19. Plaintiff Raymond Pearsall is an individual whose property was seized by law enforcement in Jackson County, Missouri on November 15, 1999. Pearsall's seized property was transferred to a federal agency. The transfer of Pearsall's property to a federal agency occurred without obtaining approval from such transfer from a Jackson County prosecuting attorney and a Jackson County

circuit judge as required by RSMo 513.647.1.

20. The KCPD received a percentage of the value of the property seized from Pearsall.

21. To date the property which KCPD seized in November 1999 has not been returned to Pearsall.

22. Anthony Pearsall lived in Albuquerque, New Mexico, in 1999. Mr. Pearsall did not appear to testify at the class hearing.

23. Mr. Pearsall has been convicted twice on federal drug trafficking charges and was on parole in 1999.

24. In November 1999, a Highway Patrol Trooper intercepted a drug courier bringing cocaine from Albuquerque to a Mark Wynn in Kansas City.

25. Because Wynn was a federal parolee, local police contacted the FBI which became involved in the case.

26. The police questioned Wynn who consented to a search of his residence on East 112th Street occupied by Wynn's wife LaQuita. A search of the residence revealed marijuana, drug paraphernalia and other indications of drug activity.

27. A search of the house also revealed a safe obtaining over \$38,000 in cash. That currency tested positive for the presence of drugs.

28. The money seized at Wynn's house was later forfeited under federal law.

29. Wynn pled guilty to federal drug charges.

30. Wynn told officers that at least half of the money in the safe belonged to him. In addition, Wynn agreed to disclose to federal authorities all forfeitable assets in which he had any interest and consented to federal forfeiture of the \$38,000 found in the safe in his house.

31. Neither Wynn nor anyone else objected to the forfeiture. He later filed this lawsuit in which

he alleged the \$38,000 belonged, at least in part, to him.

32. Wynn also implicated Pearsall in drug trafficking when Wynn was questioned by the authorities about the apartment that was searched. Wynn claimed that he rented the apartment from Pearsall and that the marijuana, ammunition, and money found during the search of the apartment was Pearsall's.

33. Defendants' evidence reveals Pearsall had no documentation showing that the money in the safe was his or that it came from a legitimate source.

34. Defendants' evidence reveals that Pearsall filed no tax returns between 1993 and 2006 and maintained no bank accounts.

35. Defendants' evidence reveals that Pearsall received official notice from the United States Attorneys Office that the cash seized would be forfeited under federal law unless he came forward and made a claim to the money.

36. At the class certification hearing, Plaintiffs' counsel utilized a document described as the Federal Seizure Forfeiture Status Report in presenting their evidence.

37. The evidence presented demonstrated that some of the matters contained in the Federal Seizure Forfeiture Status Report were situations in which the KCPD had little or minimal contact with the investigations that caused the seizure of some of the property.

38. It is common practice for local law enforcement to work with federal law enforcement in the investigation and processing of criminal cases both in State and in Federal Court.

39. The forfeiture status report and the forfeiture files reviewed by Plaintiffs' counsel and used in the certification hearing does not demonstrate the following: (1) Whether the person from whom the property was seized was ever convicted or prosecuted; (2) If they were prosecuted, by what sovereign; and (3) Whether the forfeiture was a product of a plea agreement or any kind of

administrative hearing.

40. It is clear that in a number of the forfeitures on the federal status report list that federal authorities or other state authorities other than KCPD were involved to some degree in the investigations that led to the seizure.

41. Further evidence at the hearing suggested that some of the forfeiture files do not clearly demonstrate what law enforcement agency was involved in the actual seizure.

42. Plaintiffs suggest that the common issues of law and fact for the Plaintiffs include: (1) Whether the KCPD seized property belonging to class members; (2) Whether KCPD transferred such seized property to a federal agency; (3) Whether such transfer to a federal agency was made without KCPD first obtaining a Bypass order; (4) Whether KCPD shared in the proceeds of any federal forfeiture; (5) Whether the seized property has ever been returned to a class member from whom it was taken; (6) Whether KCPD violated RSMo. 531.647.1 in seizing the class members' property and thereafter transferring such seized property to a federal agency without first obtaining a bypass order; (7) The remedies available to class members for KCPD's failure to adhere to the applicable provisions of CAFA, RSMo. 513.647.1.

43. As to typicality, Plaintiffs suggest that their claims are typical of class members because they arise from the same common course of conduct by KCPD. This involves the seizure of property and the transfer to a federal agency for the purpose of forfeiture and the actual forfeiture without obtaining a bypass order.

44. Plaintiffs' attorneys in this cause have had substantial experience in handling class action cases and have been involved in preparation and trial of complicated commercial litigation. Thus, counsel is adequately capable of representing the class in this cause.

45. Keeping in mind the nature of the class that is proposed, Ricketts and Pearsall appear to be

qualified to represent the class.

45. Plaintiffs' theory of predominance is based upon KCPD engaging in what is described as common course of conduct, which impacted the class members in a similar way. This conduct included the seizure of property; the transfer of property to a federal agency; the failure to receive a bypass order; the actual federal forfeiture of the property; KCPD sharing in the proceeds of that forfeiture; and the failure to return or compensate class members for said forfeiture.

Discussion

Class actions are governed by Missouri Supreme Court Rule 52.08 and must satisfy four prerequisite elements. First, the class must be so numerous that joinder of all members is impracticable. Mo. Sup. Ct. R. 52.08 (a)(1) (2007). Second, there must be common questions of law or fact. *Id.* at (a)(2). Third, the claims or defenses of the representative parties must be typical of the claims or defenses of the class. *Id.* at (a)(3). Lastly, the representative parties must fairly and adequately protect the interests of the class. *Id.* at (a)(4). However, the rule does not explicitly define a class definition. Yet, a properly defined class is necessary to realize the protections and benefits for which the class action device was created. *State ex rel. v. Nixon*, 249 S.W. 3d 855, 861 (MO. 2008). Failure to define a class properly must result in the circuit court denying certification. *Id.*

Rule 52.08(b) enumerates additional factors for maintaining a class action after the prerequisites of 52.08(a) have been satisfied. Mo. Sup. Ct. R. 52.08(b) (2007). A cause can be maintained as a class action only if:

(1) The prosecution of separate actions by or against individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class thus establishing incompatible standards of conduct for the opposing party, or

(2) Adjudications for individual class members which would be dispositive of the interest of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interest; or

(3) The party opposing the class has acted or refused to act on ground generally applicable to the class thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to each class as a whole; or

(4) The court finds that a common question of law or fact pertaining to members of the class predominate over any question affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings of predominance include: (1) an interest of the members of the class in individually controlling the prosecution or defense of separate actions; (2) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (3) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (4) the difficulties likely to be encountered in the management of a class action.

However, the predominance requirement does not demand that every single issue in the case be common to all class members. *Meyer ex rel. Coplin v. Flour Corp.*, 220 S.W.3d 712, 715 – 716 (Mo. Banc. 2007). Substantial common issues which predominate over individual issues are sufficient. *Id.* Furthermore, courts should err in favor of certification in close cases as the class can be modified as the case progresses. *Dale v. Daimler Chrysler Corp.*, 204 S.W. 3d 151, 164 (Mo. App. 2006).

Plaintiffs have made a prima facie case for typicality by proving that their claims arise from the same course of conduct as the claims of Class members.

The burden of demonstrating typicality is fairly easily met so long as other class members have claims similar to the named plaintiff. Factual variations in the individual claims will not ... preclude class certification if the claim arises from the same event or course of conduct as the class claims, and gives rise to the same legal or remedial theory.

Dale, 204 S.W.3d 151, 169.

The Plaintiffs claims are typical of the claims of the other Class members. Furthermore, named Plaintiffs are seeking the same remedies for themselves and for the defined class based on the pattern of conduct by the KCPD. Both the factual bases and the legal theories for the Plaintiffs claims and the claims asserted on behalf of the Class appear to be the same. Consequently, the typicality requirement is satisfied.

In this cause, all plaintiffs would have had property seized in which KCPD played a role in the seizure. Additionally, federal agents forfeited the property in the absence of a bypass hearing and in violation of RSMo. 513.647 (1). Thus, the evidence also suggests the commonality requirement has been met.

Evidence advanced at the hearing also seems to suggest that Plaintiffs have satisfied the numerosity requirement. Plaintiffs are not required to specify the exact number of class members. *Id.* at 167. Instead, Plaintiffs must prove the impracticability of joinder via a good faith estimate of the number of purported class members. *Dale, S.W.3d 151, 167.* Plaintiffs were able to identify several hundred potential plaintiffs as identified in the KCPD forfeiture files and thus have satisfied the numerosity prong.

Plaintiffs have also satisfied the adequacy requirement. The representative parties must adequately and fairly protect the interests of the class. *Rule 52.08 (4).* There is no evidence to sufficiently suggest that the named Plaintiffs have a conflict of interest with the class members that will diminish the protection of the class. In fact, the named Plaintiffs share identical interest in

recovering compensation for their losses as a result of KCPD's conduct. Therefore, the adequacy requirement has been satisfied.

Plaintiffs have proven a prima facie case that questions of law or fact common to the members of the Class predominate over any question affecting only individual members. See Rule 52.08 (b)(3). The predominate issues in this case appear to be: (1) whether the KCPD seized property belonging to members of the Class; (2) whether the KCPD thereafter transferred such seized property to a federal agency without first obtaining approval from a Missouri county prosecuting attorney or circuit court judge; and (3) whether the seized property was returned to the persons from whom such property was taken. The predominance element has therefore been satisfied.

The superiority element has also been satisfied. Rule 52.08(b)(3) requires a finding that a class action is superior to all other available methods of the fair and efficient adjudication of the controversy. This element is satisfied by the following: (1) none of the members of the defined class have expressed any interest in prosecuting a separate lawsuit against the KCPD; (2) it is desirable to concentrate the litigation of these claims in the Jackson County Circuit Court because KCPD is headquartered in Kansas City, Missouri and the Jackson County Circuit Court would be the most convenient forum for the parties and for the witnesses who are likely to testify at trial; and (3) there are no unusual difficulties which are likely to be encountered in the management of this Class action. Accordingly, the element of superiority has been satisfied.

The theory in this cause in Defendants' submissions have raised a variety of thoughtful and meritorious issues. Among them are the following:

- (1) Whether ownership can be proved for the various potential claimants.
- (2) Who actually did the seizure?

- (3) What constitutes a seizure?
- (4) What factor dictates as to who actually is the seizing agency? This analysis may well involve choice of law and supremacy clause issues.
- (5) Does the failure to respond to a forfeiture notice constitute a waiver for this litigation?
- (6) Are there legitimate res judicata issues based upon the federal judgments that were entered?
- (7) Which class members have been the subject of federal judgments?
- (8) Are there plea bargain agreements that exist that would constitute a waiver to this litigation?
- (9) Are there any of the class members affected by conduct of others under doctrines of conspiracy or acting in concert?
- (10) If, in fact, members of the class obtained the seized property from drug trafficking or other illegal activity, does that have any bearing on their ability to bring this litigation?
- (11) Can the class members adequately meet the elements of the common law claims that have been pled?

The issue for the class certification actually centers upon what are the elements of any cause of action pled by Plaintiffs. Plaintiffs take the position that *Karpierz* holds that, if property is seized in whole or in part by a State agency and it is forfeited by the Federal Government without the benefit of a bypass hearing as dictated by CAFA, that the property owner is entitled to a return of the property or compensation. There is a reasonable reading of *Karpierz* that could suggest that very thing. There is also persuasive legal reasoning found in Defendants' submissions that reading that would put that interpretation in doubt. If the cause of action that Plaintiffs seek is consistent

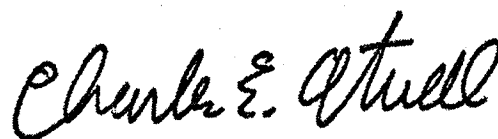
with their theory of *Karpierz*, they have made a case for class certification. Conversely, if all the various defenses suggested by Defendant are meritorious, then this case may well present so many individual circumstances that these causes should not proceed under the umbrella of a class action.

See Dale, 204 S.W. 3D 151 (Mo.Ct. App. 2006)

The Court believes that, based upon the reading of the two *Karpierz* cases, as well as the doctrine that one should err on the side of certification, the Court should grant the same in this cause. *Dale*, 204 S.W. 3d at 164. The Court strongly believes that the legal issues in this case are serious and complex and that they should be the subject of appellate review. Mo. Sup. Ct. R. 52.08(f) (2007). Therefore, the Court hereby sustains Plaintiffs' motion for classification and further denies without prejudice the dispositive motions of Defendant that are pending. Anticipating the potential for appellate review, additional discovery is hereby stayed until further order of the Court.

It is so ordered.

September 10, 2008
Date



JUDGE CHARLES E. ATWELL