Constitutional Issues Concerning Civil Forfeiture

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This article addresses whether a recent decision by the U.S. Supreme Court may provide an additional basis for states that have not already done so to heighten the burden of proof on governments seeking civil forfeiture of privately held property. This article is divided into three parts. Part I discusses the Supreme Court's recent decision in *Nelson v. Colorado,*[1] which held that a Colorado statute requiring defendants whose criminal convictions were reversed or vacated to demonstrate their innocence in order to obtain a refund of previously paid costs, fees, and restitution violated the Fourteenth Amendment's guarantee of due process. Part II discusses certain prior opinions in which certain justices of the Supreme Court, including Justice Clarence Thomas, have raised concerns about the expansive use of civil forfeiture practice. Part III discusses the desirability of states enacting a burden of proof beyond the preponderance of the evidence standard required under the Civil Asset Forfeiture Reform Act of 2000.[2]

Part I. *Nelson*

Colorado State Court Proceedings

On April 19, 2017, the Supreme Court in *Nelson* invalidated a Colorado statutory scheme that required defendants whose criminal convictions were reversed or vacated to demonstrate their actual innocence in order to obtain a refund of previously paid costs, fees, and restitution (traditionally defined as an equitable remedy designed to cure unjust enrichment of the defendant absent consideration of the plaintiff's losses). The Supreme Court considered two cases, both of which involved criminal defendants whose convictions for child-related sexual crimes were reversed or vacated by Colorado courts and who had, prior to having their convictions undone, each paid some part of costs, fees, and restitution ordered by trial courts.[3] After their convictions were undone, both exonerated defendants moved in the trial court for a return of funds they paid to the state of Colorado.[4] In one case, the trial court denied the motion for return of funds; in the other case, the trial court ordered costs and fees returned, but not restitution.[5]

The statute at issue in *Nelson* was Colorado's Compensation for Certain Exonerated Persons statute (the so-called "Exoneration Act"),[6] which set forth the sole mechanism by which individuals whose convictions had been reversed or vacated could seek to reclaim monies they had paid to the state in the form of costs, fees, and restitution. In order to prevail, the Exoneration Act required an exonerated defendant to establish his or her actual innocence by clear and convincing evidence.[7]

On intermediate appeal, the Colorado Court of Appeals reversed, concluding that (1) costs, fees, and restitution had to be "tied to a valid conviction," and (2) in the absence of a valid conviction, the trial court was required to "retur[n] the defendant to the status quo ante."[8] On further appeal, the Colorado Supreme Court reversed, finding that in neither case did either of the former defendants seek a refund under the Exoneration Act, the sole method for seeking refunds after criminal convictions were reversed or vacated, and that there was no violation of the former defendants' rights to due process because the act provided a mechanism for obtaining refunds.[9] In both cases,

a dissenting opinion argued that because the former defendants' convictions had been overturned, due process required that they be presumed innocent, and the act, which required them to establish their innocence, did not meet the demands of due process.[10]

The Supreme Court's Decision in *Nelson*

The issue that very likely prompted the Court to grant certiorari in *Nelson* was constitutional in nature: Whether due process required that, after exoneration, a former criminal defendant should be presumed actually innocent of the crime for which he or she was charged, instead of having to establish his or her innocence prior to being able to recoup funds previously paid to the state when the conviction was in effect. As discussed below, the Court held that once the defendants were exonerated, the presumption of innocence was restored such that due process precluded imposing any burden on the defendants to establish their innocence. In civil forfeiture proceedings, the government is required to establish, by a preponderance of the evidence, that the property at issue is subject to forfeiture; once that burden is met, the defendant-property owner must establish, also by a preponderance of the evidence, that he or she is an "innocent owner."[11] *Nelson* tends to support the proposition that the preponderance of the evidence standard imposed on the government in civil forfeiture proceedings, which do not necessarily require a criminal conviction, should be heightened. Many states have enacted laws to that effect, and this author suggests that it would be a good thing if the rest of the states followed suit.

Writing for the Court, Justice Ruth Bader Ginsburg explained that "recovery under the act is available only to a defendant who has served all or part of a term of incarceration pursuant to a felony conviction, and whose conviction has been overturned for reasons other than insufficiency of evidence or legal error unrelated to actual innocence," and that to prevail on a claim under the act, "a petitioner must show, by clear and convincing evidence, her actual innocence of the offence of conviction."[12] Justice Ginsburg first rejected application of *Medina v. California*[13] (which analyzes the validity of state procedural rules invoked as part of the criminal judicial process) as urged by Colorado, instead opting to apply *Mathews v. Eldridge*[14] (a more open-ended due process inquiry), explaining that because the cases before the Court concerned continued deprivations of property after reversal, where there is no prospect of a future criminal prosecution, *Mathews* provided the appropriate analytical framework.[15]

Justice Ginsburg explained that *Mathews* provides a three-part balancing test wherein a court considers the: (1) private interest affected, (2) risk of erroneous deprivation of that interest through the procedures employed, and (3) governmental interest at stake.[16] Regarding the first factor, Justice Ginsburg explained that both former defendants "have an obvious interest in regaining the money they paid to Colorado."[17] Justice Ginsburg rejected Colorado's argument that the funds in question belonged to it since the underlying convictions were in place when it obtained the funds, explaining that "once their convictions were erased, the presumption of their innocence was restored."[18] Justice Ginsburg further explained that Colorado "may not presume a person, adjudged guilty of no crime, nonetheless guilty *enough* for monetary exactions" and that even though Colorado prevailed at the trial level, it was of no moment when the convictions were ultimately undone on appeal.[19]

Justice Ginsburg pronounced that there was, "indeed yes," a risk of erroneous deprivation of the former defendants' interest in the return of funds given Colorado's position that the Exoneration Act, which required proof of innocence by clear and convincing evidence, was the sole means by which they could recoup those funds.[20] Justice Ginsburg's focus was on the burden of proof imposed on the defendants—after their convictions were undone—who were entitled to the presumption of innocence that was then restored.[21] Finally, Justice Ginsburg explained that Colorado has no interest in withholding funds to which there was no claim of right, and that no equitable considerations suggested by Colorado were identified that would be relevant to the defendants' cases.[22]

According to Justice Thomas, because civil forfeiture proceedings "often lack certain procedural protections that accompany criminal proceedings, such as the right to a jury trial and a heightened standard of proof," such proceedings "ha[ve] in recent decades become widespread and highly profitable" to the federal and state governments.

Part II. Civil Forfeiture Pronouncements by Justice Thomas

Justice Thomas has, on several occasions, noted the widespread use, and misuse, of civil forfeiture proceedings that do not provide the defendant with the protections afforded in the criminal arena. It is these concerns, among others, that have prompted calls for a heightened burden of proof on the part of the federal government, as well as state governments, in establishing the right to forfeiture of privately owned property.

Most recently, in *Leonard v. Texas*,[23] Justice Thomas issued a statement in conjunction with denial of a petition for a *writ of certiorari* that, according to him, "ask[ed] an important question: whether modern civil forfeiture statutes can be squared with the Due Process Clause [of the Fourteenth Amendment[24]] and our nation's history."[25] In *Leonard*, the state of Texas initiated a forfeiture proceeding involving $201,000 in cash found in a safe in a car traveling in a known drug corridor, where the driver and passenger gave conflicting accounts as to the source of the funds: the driver stated that the proceeds were from the recent sale of his mother's home in Pennsylvania.[26] A Court of Appeals affirmed the trial court's order of forfeiture in which the trial court (1) found that Texas had established that the funds in question were proceeds of drug sales or would be used as such; and (2) rejected the mother's innocent-owner defense.[27] The mother-petitioner challenged the constitutionality of the procedures employed in forfeiting the funds arguing that under the Due Process Clause the state should have been required, in order to prevent an unconstitutional deprivation, to meet its burden of proof by clear and convincing evidence, not by the lower preponderance of the evidence standard.[28]

According to Justice Thomas, because civil forfeiture proceedings "often lack certain procedural protections that accompany criminal proceedings, such as the right to a jury trial and a heightened standard of proof," such proceedings "ha[ve] in recent decades become widespread and highly profitable" to the federal and state governments.[29] Continuing, Justice Thomas explained that the "system—where police can seize property with limited judicial oversight and retain it for their own use—has led to egregious and well-chronicled abuses," especially at the expense of "the poor and other groups least able to defend their interests in forfeiture proceedings."[30] Noting the widespread use of civil forfeiture proceedings, Justice Thomas expressed his skepticism that the continued "practice is capable of sustaining, *as a constitutional matter*, the contours of modern practice" because historically (1) the scope of forfeiture laws was significantly more narrow (i.e., by subject matter and type of property) than at present; and (2) it is not clear if courts allowed civil forfeiture "in all respects."[31] Concluding, Justice Thomas concurred in denial of certiorari because the Due Process Clause argument the petitioner advanced was not first raised in the state court, but he stated that the question of the Supreme Court's "treatment of the broad modern forfeiture practice can be justified by the narrow historical one is certainly worthy of consideration in greater detail."[32]

In discussing forfeiture practice historically, Justice Thomas cited to *Bennis v. Michigan*,[33] a 1996 decision in which the Supreme Court upheld the Michigan Supreme Court's reinstatement of a trial court's order forfeiting a car owned by a husband and wife in which the husband engaged in sex with a prostitute. The Supreme Court held that the procedures employed by the state of Michigan did not deprive the petitioner-wife of her interest in the car without due process in violation of the Fourteenth Amendment, and that there was no taking for Fifth Amendment purposes. Specifically, citing a long line of cases going back to 1827 in *The Palmyra*[34] standing for the proposition that an owner's interest in property is subject to forfeiture by its use even where the owner had no knowledge of such use,[35] which was the case since there was no evidence that the petitioner-wife had knowledge of her husband's intent to use the car, or actually used the car, in the manner that led to its forfeiture. The Court rejected the wife's contention that *Austin v. United States*[36]—a 1993 decision in which it held that because forfeiture proceedings have, in part, a punishment component—are proscribed by the Eighth Amendment, explaining that the Court did not address the viability of the innocent-owner defense. As summarized by Justice William Rehnquist, the wife's claims are premised on the proposition that Michigan's forfeiture statute "is unfair because it relieves prosecutors from the burden of separating co-owners who are complicit in the wrongful use of property from innocent co-owners."[37]

In the majority opinion he authored in *Austin*, Justice Harry A. Blackmun noted that the Court's case law has generally applied constitutional protections afforded in criminal cases only to criminal forfeiture proceedings, not civil forfeiture proceedings.[38] Justice Blackmun explained that the Court had held that the requirement that guilt in a criminal proceeding be proven beyond a reasonable doubt did not apply to civil forfeiture statutes, but noted that certain provisions of the Constitution applicable to criminal cases might apply in the civil forfeiture context where the owner of the property might later face criminal proceedings or the forfeiture statute made relevant the owner's culpability.[39]

In his concurring opinion in *Bennis*, Justice Thomas suggested that the absence of a requirement on the state to prove collusion, acquiescence, or negligence on the part of the owner of property subject to forfeiture was "intensely undesirable," but due to the long line of cases relied upon in the majority opinion, not unconstitutional.[40] He recounted the state's position that it wanted to punish "persons who *may* have colluded or acquiesced in criminal use of their property, or who *may* at least have negligently entrusted their property," but the states did "not want to have to *prove* (or to refute proof regarding) collusion, acquiescence, or negligence."[41] Justice Thomas explained that one unfamiliar with the above-referenced long-standing case law, "might well assume that such a scheme is lawless—a violation of due process," but not so based on that case law.[42]

Part III. States Move to Heighten the Burden of Proof on State Governments Prior to Civil Forfeiture

Prior to enactment of the Civil Asset Forfeiture Reform Act of 2000 (CAFRA)[43] in August 2000, property connected to criminal proceedings was deemed subject to forfeiture upon a showing by the federal government of "probable cause."[44] CAFRA heightened the burden of proof required by a government seeking forfeiture to a preponderance of the evidence (i.e., where evidence offered in support of a proposition is equal to or greater than 50.01 percent of the total evidence adduced).[45] Barclay Thomas Johnson, the author of an *Indiana Law Review* article on civil forfeiture laws pre- and post-CAFRA, opines, persuasively, that the preponderance of the evidence is not strict enough: "In a country based on the cry of life, liberty, and property, it is surprising that, barely two centuries after its founding, the government should be able to deprive its citizens of their core constitutional right to property based on a mere preponderance of the evidence.… Given the punitive and quasi-criminal nature of civil forfeiture proceedings, a higher standard of proof is appropriate. The fact that a number of states have adopted such an approach suggests that higher burdens of proof do not overly burden police and prosecutors."[46]

In light of the valid concerns regarding the modern, expansive use of civil forfeiture proceedings (state and federal), as expressed most recently by Justice Thomas in *Leonard*, the author agrees with the proposition that a higher burden of proof should be imposed on governments, federal and state, prior to being able to forfeit property

in civil proceedings, and he submits that states that have not yet increased that burden should do so as soon as practicable.

Conclusion

Civil forfeiture attendant to criminal proceedings has run amok. One way to at least minimize the abuses recognized by Justice Thomas would be for more states to increase the burden placed on state governments under their forfeiture statutes before there could be a forfeiture of private property, which is entitled to protection prior to any deprivation under the U.S. Constitution. The sooner the balance of states that have not already legislated higher burdens of proof enact such legislation, the better. ⊙

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Endnotes

[1]*Nelson v. Colorado,* ___ U.S. ___, 137 S. Ct. 1249 (2017).
[2]The genesis of this article is a May 2, 2017, opinion piece by Nick Sibilla entitled *Supreme Court Rejects Guilty Until Proven Innocent, Says States Cannot Keep Money From The Innocent*, which can be found at https://www.forbes.com/sites/instituteforjustice/2017/05/02/supreme-court-rejects-guilty-until-proven-innocent-says-states-cannot-keep-money-from-the-innocent/#4a72aab871f6.
[3]*Nelson*, 137 S. Ct. at 1253.
[4]*Id.*
[5]*Id.*
[6]Colo. Rev. Stat. §§ 13-65-101 *et seq.* to 13-65-103 (2017).
[7]*See id.*, §§ 13-65-101(1), 13-65-102(1).
[8]*Nelson*, 137 S. Ct. at 1253 (quoting *People v. Madden*, No. 09CA8021, 2013 WL 1760869, *2 (Colo. Ct. App. Apr. 25, 2013)).
[9]*Id.* at 1253 (citing *People v. Nelson*, 362 P.3d 1070, 1075, 1078 (Colo. 2015); *People v. Madden*, 364 P.3d 866, 867 (Colo. 2015)).
[10]*Id.* at 1254 (citing *People v. Nelson*, 362 P.3d at 1081).
[11]*See* discussion *infra* note 45
[12]*Nelson*, 137 S. Ct. at 1254 (citing Colo. Rev. Stat. §§ 13-65-102, 13-65-101(1), 102(1)).
[13]505 U.S. 437, 445 (1992).
[14]*Mathews v. Eldridge,* 424 U.S. 319 (1976).
[15]*Nelson*, 137 S. Ct. at 1255 (citing *Kaley v. United States,* ___ U.S. ___, n.4, 134 S. Ct. 1090, 1110 n.4 (2014) (Roberts, C.J., dissenting)).
[16]*Id.* (citing *Mathews*, 424 U.S. at 335).
[17]*Id.*
[18]*Id.*
[19]*Id.* at 1256 (emphasis in original).
[20]*Id.*
[21]*Id.* Justice Ginsburg quoted from *Johnson v. Mississippi*, 486 U.S. 578, 585 (1988), as follows: "After a 'conviction has been reversed, unless and until [the defendant] should be retried, he must be presumed innocent of that charge.'" *Id.*
[22]*Id.*
[23]*Leonard v. Texas*, ___ U.S. ___, 137 S. Ct. 847 (2017).
[24]The Due Process Clause of the Fourteenth Amendment prohibits states from depriving "any person of life, liberty, or property, without due process of law." It "was intended to prevent government from abusing [its] power, or employing it as an instrument of oppression." *DeShaney v. Winnebago County Dep't of Soc. Serv.,* 489 U.S. 189, 196 (1989) (quotation omitted).
[25]*Leonard*, 137 S. Ct. at 847.
[26]*Id.*
[27]*Id.*
[28]*Id.*
[29]*Id.* at 847-48. In a more recent decision, the Supreme Court rejected the government's attempt, under 21 U.S.C. § 853, to sustain a judgment of the Sixth Circuit imposing forfeiture on an employee of a store who had been convicted of drug-related offenses (along with the store's owner) and who had no ownership interest in the business beyond that obtained by the owner who profited from the sale of an illegal substance. *See Honeycutt v. United States* 137 S. Cf. 1626 (2017).
[30]*Id. Leonard*, 1375 S. Ct. at 848. To the same effect is a spirited dissent to denial of a petition for review authored by Justice Don Willett of the Texas Supreme Court in *El-Ali v. State*, 428 S.W.3d 824, 825-31 (Tex. 2014), urging the court to revisit a 1957 opinion that rejected the petitioner's argument that the Texas forfeiture statute was unconstitutional because it did not require the state to prove that the property owner knew or should have known of the illegal conduct that was the basis for forfeiture. In *El-Ali*, the petitioner sold a vehicle to a third party who was arrested while driving it for DWI, evading arrest, and possession of cocaine; the seller was not in the car at the time nor was he involved in the charged crimes. 428 S.W.3d at 826. Under applicable Texas law, El-Ali had to prove he was innocent of the crime (i.e., he did not know or should not reasonably have known that the vehicle was being used in an illegal manner). *Id.* A concurring opinion denying review authored by Justice Jeff Boyd noted El-Ali's argument was rejected in the Texas Supreme Court's prior opinion, as well as the U.S. Supreme Court in *Bennis*. *Id.* at 824.
[31]*Id.* at 849.
[32]*Id.*
[33]*Bennis v. Michigan,* 516 U.S. 442 (1996).
[34]25 U.S. 1 (12 Wheat. 1), 6 L.Ed. 531 (1827).
[35]*Bennis*, 516 U.S. at 446.
[36]*Austin v. United States,* 509 U.S. 602 (1993). Another precedent cited in *Leonard* was *United States v. James Daniel Good Real Prop.*, 510 U.S. 43 (1993). There, the Supreme Court held, in part, that the Due Process Clause requires the United States to provide notice and a meaningful opportunity to be heard by an owner of real property before the government can seize such real property through civil forfeiture proceedings. 510 U.S. at 62. In a concurring and dissenting opinion, Justice Thomas stated that he was "disturbed by the breadth of new civil forfeiture statutes…." *Id.* at 81. In a corresponding footnote, Justice Thomas further stated that "[o]ther courts have suggested that government agents, and the statutes under which they operate, have gone too far in the civil forfeiture context." *Id.* at 81, n.1. In one of the cases it cited, the Second Circuit stated that it "continued to be enormously troubled by the government's increasing and virtually unchecked use of the civil forfeiture statutes and the disregard for due process buried in those statutes." *United States v. All Assets of Statewide Auto Parts Inc.*,

971 F.2d 896, 905 (2d Cir. 1992).
[37]*Bennis,* 516 U.S. at 453.
[38]*Austin*, 509 U.S. at 608, n.4 ("As a general matter, this Court's decisions applying constitutional protections to civil forfeiture proceedings have adhered to th[e] distinction between provisions that are limited to criminal proceedings and provisions that are not.").
[39]*Id.*
[40]*Id.* at 454.
[41]*Id.* at 453-54 (emphasis in original).
[42]*Id.* at 454.
[43]*See* 18 U.S.C. § 983.
[44]Barclay Thomas Johnson, *Restoring Civility—The Civil Asset Forfeiture Reform Act of 2000: Baby Steps Toward a More Civilized Civil Forfeiture System*, 35 Ind. L. Rev. 1045, 1058, 1072 (2002) [hereinafter Restoring Civility].
[45]*Id.* at 1071-72, 1075; 18 U.S.C. § 983(c)(1). CAFRA requires the government to "establish that there was a substantial connection between the property" and the asserted offense. 18 U.S.C. § 983(c)(3). In a civil forfeiture action, an *in rem* proceeding against defendant property, the government as plaintiff seeking forfeiture asserts that, "[a]ll right, title, and interest in [the defendant] property" vests in "the United States upon commission of the act giving rise to forfeiture." 18 U.S.C. § 981(f). It is not until the government first meets the preponderance of the evidence standard that an individual whose property is at issue has to establish the "innocent owner defense" by a preponderance of the evidence (i.e., an "innocent owner" is one who "(i) did not know of the conduct giving rise to forfeiture; or (ii) upon learning of the conduct giving rise to the forfeiture, did all that reasonably could be expected under the circumstances to terminate such use of the property."). 18 U.S.C. §§ 983(d)(1), (d)(2)(A).
[46]Restoring Civility *supra* at 1076. As examples, Johnson cites to decisions from the Nevada, Florida, Nevada, and Louisiana Supreme Courts requiring the governments, in civil forfeiture proceedings, to establish the right to forfeiture beyond a reasonable doubt. *Id.* at 1076, n.163, and 1078 n.173.

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[67]*PersonalWeb Techs., LLC v. Apple, Inc.*, 848 F.3d 987 (Fed. Cir. 2017).
[68]*Id.* at 993 ("For example, claim 24 requires 'causing the content-dependent name of the particular data item to be compared to a plurality of values.' ….The Board found this element satisfied…. That discussion, however, mentions only Stefik, not Woodhill, and yet Apple has made clear that it relies solely on Woodhill as disclosing this claim element. The Board-cited page of Apple's petition does not explain Woodhill's disclosure of this element. The Board's discussion does not cite, let alone explain or analyze or adopt, an earlier portion of Apple's petition that refers to part of column 17 of Woodhill.").
[69]*Id.* at 993-94 ("The Board's reasoning is also deficient in its finding that a relevant skilled artisan would have had a motivation to combine Woodhill and Stefik in the way claimed in the '310 patent claims at issue and would have had a reasonable expectation of success in doing so. The Board's most substantial discussion of this issue merely agrees with Apple's contention that 'a person of ordinary skill in the art reading Woodhill and Stefik would have understood that the combination of Woodhill and Stefik *would have allowed for* the selective access features of Stefik to be used with Woodhill's content-dependent identifiers feature.' (emphasis added). But that reasoning seems to say no more than that a skilled artisan, once presented with the two references, would have understood that they could be combined. And that is not enough: it does not imply a motivation to pick out those two references and combine them to arrive at the claimed invention.").
[70]*Id.* (quoting *Chenery*, 318 U.S. at 94).
[71]*Shinn Fu Tire Hanger*, No. 16-2250, 2017 U.S. App. LEXIS 11787 (Fed. Cir. 2017).
[72]*Husky Injection Molding Sys. v. Athena Automation Ltd.,* 838 F.3d 1236 (Fed. Cir. 2016).
[73]*Nidec Motor Corp. v. Zhongshan Broad Ocean Motor Co.*, 851 F.3d 1270 (Fed. Cir. 2017).
[74]*Smartdoor Holdings, Inc. v. Edmit Indus., Inc.*, No. 16-2152, 2017 U.S. App. LEXIS 17264 (Fed. Cir. Sept. 7, 2017) (unpublished).
[75]*Knowles Elecs. LLC v. Matal*, No. 16-1954, Dkt. No. 61 (Fed. Cir).
[76]Brief for Petitioner, *Oil States Energy Serv., LLC v. Greene's Energy Group LLC,* ___ U.S. ___ (2017) (No. 16-712), http://www.scotusblog.com/wp-content/uploads/2017/08/16-712-ts.pdf.
[77]*Oil States Energy Serv., LLC v. Greene's Energy Group LLC,* Scotus blog, http://www.scotusblog.com/case-files/cases/oil-states-energy-services-llc-v-greenes-energy-group-llc (last visited Dec. 26, 2017).
[78]*SAS Inst., Inc. v. Lee*, 137 S. Ct. 2160 (2017).
[79]Brief for Petitioner, *SAS Inst. Inc. v. Matal,* ___ U.S. ___ (2017) (No. 16-969), http://www.scotusblog.com/wp-content/uploads/2017/08/16-969-ts.pdf.
[80]Brief of Amicus Curiae, *Intellectual Property Owners Association in Support of Petitioner, SAS Inst. Inc. v. Matal,* ___ U.S. ___ (2017) (No. 16-969), http://www.scotusblog.com/wp-content/uploads/2017/08/16-969-cert-tsac-IPOA.pdf.
[81]Brief for Respondent *Complementsoft LLC, SAS Inst. Inc. v. Matal,* ___ U.S. ___ (2017) (No. 16-969), http://www.scotusblog.com/wp-content/uploads/2017/09/16-969-bs-complementsoft.pdf.