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WHITE-COLLAR CRIME

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Federal Money-Laundering Statutes: Course Correction?

Since the enactment in 1986 of the federal money-laundering statute, aggressive enforcement and broad interpretation of key elements of the statute have raised serious concerns that the power of prosecutors in utilizing the statutes has been unfairly and improperly expanded.

Prosecutors often seek to lodge money-laundering charges where the alleged "laundering" conduct is virtually indistinguishable from the underlying offense. That expanded power includes the ability to exact harsh penalties for money-laundering charges that far exceed those available for the underlying predicate offense. The prospect of a higher sentence often allows prosecutors to obtain plea bargains that may not be in the interest of justice. Thus, even the mere threat of a money-laundering charge can be a powerful weapon for the prosecutor in the negotiating process.

Section 1956

The federal money-laundering statute is set forth in §1956 of Title 18, U.S. Code. The first provision of that statute makes it illegal to engage in a financial transaction with proceeds "of some form of unlawful activity…knowing that the transaction is designed in whole or in part to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of the specified unlawful activity."[1] The second provision of the money-laundering statute similarly prohibits individuals from transporting money known to represent the proceeds of illicit activity, knowing that such transportation "is designed in whole or in part to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity."[2]

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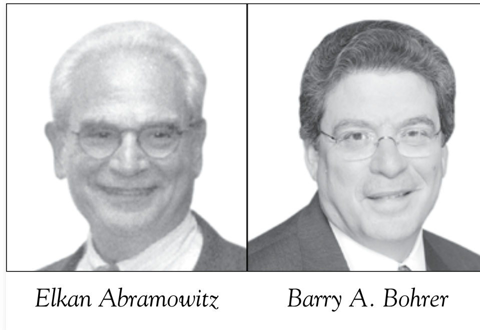
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As enacted, the legislation was and is a powerful tool for prosecutors. Compared with RICO and various criminal conspiracy statutes, prosecutors can bring cases relatively easily under §1956, and its long list of predicate offenses facilitates convictions. And since its enactment, many courts since have interpreted the statute to apply to conduct substantially beyond what is traditionally regarded as money laundering.

Several cases currently pending before the U.S. Supreme Court raise the question of whether the federal money-laundering statute has become a vehicle for increasing potential sentences substantially in excess of what otherwise would be permissible for the underlying conduct, without evidence of the aggravated social harm that the statutes were designed to redress.

'United States v. Santos'

In the first case, *United States v. Santos*, according to the defendant, the question presented is whether the undefined term "proceeds" in the money-laundering statute should be construed to mean "profits" where the consequence of the government's "gross receipts" construction makes every violation of the illegal gambling business statute also a money-laundering violation. As stated by the government, the question presented is whether "proceeds" means the gross receipts from the unlawful activities or only the profits, i.e., the gross receipts less the expenses. And the amicus brief says the case simply presents the question of whether merely hiding funds with no design to create the appearance of legitimate wealth is sufficient to support a money-laundering prosecution.

The other two cases raise an issue over which federal courts of appeals are divided: the meaning of "designed to conceal or disguise" in the statute. The interpretation of the words "conceal or disguise" is significant to both the transaction and transportation provisions of this statute. Indeed, because both subsections contain identical language describing the concealment element of the crimes, courts rely on cases under either subsection as controlling on the issue of concealment.[3] That being said, courts have differed on the degree and type of concealment required to support a conviction under §1956.

'United States v. Cuellar'

In *United States v. Cuellar*,[4] the question presented explores the nature of the concealment element of money-laundering crimes. As simply stated by the defendant and by amicus curiae National Association of Criminal Defense Lawyers (NACDL), the Court will determine "[w]hether merely hiding funds with no design to create the appearance of legitimate wealth is sufficient to support a money-laundering conviction." According to the government, the question presented is whether proof that defendant transported cash proceeds of drug trafficking concealed in a hidden and disguised compartment in a car destined for Mexico was sufficient to establish that he transported money in a manner "designed," at least "in part," to "conceal or disguise" either "the nature, the location, the source, the ownership, or the control" of those proceeds, within the meaning of the statute.

And in *Ness v. United States*, the defendant owned a licensed, insured business that was engaged in transporting large amounts of U.S. currency by armored car, apparently complying with all federal reporting requirements. According to Mr. Ness, although some of his customers "turned out to be drug dealers, there is no suggestion that [Mr. Ness was] guilty of any drug crime." The government frames the question presented as "whether proof that petitioner transported large amounts of illicit cash from drug traffickers to their foreign associates in such

a way as to avoid detection of the cash or its link to the traffickers was sufficient to establish that he conducted a financial transaction with, and transported, money in a manner 'designed,' at least 'in part,' to 'conceal or disguise' either 'the nature, the location, the source, the ownership, or the control' of those proceeds, within the meaning of the statute. The defendant presents the question as whether "the statute reaches conduct 'designed to conceal or disguise' illegal proceeds by making illegitimate funds appear legitimate," as some courts of appeals have held, or whether "the 'designed to conceal or disguise' requirement is met by any conduct that hides money regardless of whether or not the conduct was designed to create the appearance of legitimate wealth," as other appeals courts have held.

Mr. Ness argues that the U.S. Court of Appeals for the Second Circuit's "expansive reading" of the money-laundering statute to reach the "'hiding' of cash independent of any effort to create the appearance of legitimate wealth [was] wrong" and further deepened a split among on the circuits. Citing legislative history and various law enforcement agencies, Mr. Ness argues that the definition of "launder" under the statute required participation in an effort to "disguise illegally obtained money by making it appear legitimate."[5] Mr. Ness claims that although the money he transported included drug proceeds, he was operating a legitimate and legal armored car business and took no steps to "launder" the money or create the appearance that the cash was legitimate.[6]

'Level of Secrecy' Test

Mr. Ness further argues that the Second Circuit's "level of secrecy" test—offering no standard, no set of factors or guideposts, but declaring only that the conduct in the instant case was sufficient (albeit likely to be found insufficient by some other circuits)—is unworkable because almost all transportation of funds, whether illicit or not, involves some secrecy on behalf of the bearer. Noting that Congress could have defined money laundering as the mere transportation of illicit funds if it had desired, Mr. Ness said that the Second Circuit's decision "has untethered the money-laundering statute from the evil it was written to proscribe."[7]

The cases come before the Court in the face of an emerging trend among federal courts to interpret various provisions of §1956 in an expansive fashion. Although the statute does not define the term "proceeds," some courts have interpreted it very broadly, an issue on which the Court has granted certiorari in *Santos*. And many courts, including the U.S. Court of Appeals for the Fifth Circuit in *Cuellar,* have adopted extraordinarily expansive constructions of the word "conceal," interpreting it to encompass the mere hiding of funds.

In *Ness,* the Second Circuit recently upheld the money-laundering conviction of the owner of an armored-car business for transportation of cash, without evidence that the cash transportation was designed to give the appearance of legitimate wealth. Some courts also have found the "conceal" element satisfied when the defendant has done no more than commingle the proceeds of lawful and unlawful activity in a single bank account.[8] In addition, some courts have construed the phrase "or other means" to be virtually unlimited.[9]

The Supreme Court is unlikely to be sympathetic to the defendants or their circumstances in the pending cases. In *Santos,* the defendant was running an illegal lottery, known as a bolita, for decades, paying runners a commission from the bet money that they collected. He successfully argued in the court of appeals that payments to the collectors and winning bettors did not "promote" the bolita because they were essential transactions of the illegal gambling business and thus merely completed the gambling offense. He argued that the money-laundering statute only punishes the practice of reinvesting the proceeds of an already completed unlawful activity to promote the expansion of that unlawful activity. The court of appeals interpreted the term "proceeds" in the statute to mean profits and vacated his conviction. In *Cuellar,* the defendant was driving toward Mexico, when his car was stopped in Texas. After the car was stopped, officers noted a bulge in his pocket, and found a roll of $10 and $20 bills. A drug-sniffing dog then alerted to the scent of the currency and to a floorboard in the rear of the car. Inside a compartment there, officers found $83,000 in cash wrapped in duct-taped bundles. He was charged with and convicted of the concealment prong of the international money-laundering statute.

'Tacking On' Charges

The Court may well be more sympathetic to the policy arguments advanced by the NACDL, which has filed amicus briefs in support of the defendants in *Santos*, *Cuellar*, and *Ness*. Those briefs argue that, if allowed to stand, the decisions endorsing unduly expansive readings of the money-laundering statute will allow prosecutors "to 'tack on' money-laundering charges where the alleged 'laundering' conduct is incidental to or virtually indistinguishable from the underlying offense."[10] Moreover, the NACDL asserts that these opinions are indicative of a trend among courts to very broadly construe the money-laundering statute and the terms contained therein.[11]

According to the NACDL, and numerous commentators cited in its brief, this trend improperly expands the scope of §1956 and creates unjust results for criminal defendants who are subjected to longer sentences under the statute. The NACDL argues that expansive interpretations of the money-laundering statute have a significant negative impact on the criminal justice system, and particularly on white-collar defendants. This is so because "the prospect of a higher sentence allows prosecutors to extract plea bargains and forfeitures that might not otherwise be forthcoming" from white-collar defendants.[12] The NACDL also contends that many defendants subject to overbroad applications of the money-laundering statute also are subject to prosecution under different criminal statutes. For this reason, a more restrictive reading of the money-laundering statute's elements and limiting of its scope would not deprive the government of its ability to punish financial crimes.

Given the state of the law, it is apparent that even in the absence of corrective action by the Supreme Court, attention must be paid to the manner in which the money-laundering statutes are enforced. In contrast to the broad RICO statutes, which require authorization by the Department of Justice (DOJ) prior to prosecution, the U.S. Attorneys' Manual imposes limited obligations on prosecutors to notify DOJ before pursuing money-laundering charges.[13] In the words of the author of the now-iconic Thompson Memorandum, at a minimum "additional guidelines are needed to prevent overzealous prosecutors from misapplying the statutes and to ensure that corporations are not deterred from entering into legitimate business transactions."[14] Although once thought of only in the context of cases involving drugs and organized crime, money laundering is now an issue for white-collar practitioners to consider.

Conclusion

The Supreme Court heard argument in *Santos* on Oct. 3, 2007. Merits briefs have been filed in *Cuellar,* and the case awaits argument. The *Ness* case, which raises substantially similar issues regarding §1956 as in *Cuellar,* is being held pending the Court's decision in that case.

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1. 18 U.S.C. §1956(a)(1)(B)(i).
2. Id. at §1956(a)(2)(B)(i).
3. *United States v. Bieganowski*, 313 F.3d 264, 279 (5th Cir.), cert. denied, 123 S.Ct. 1956 (2003).
4. __S.Ct.__, 2007 WL 2982279 (Oct. 15, 2007).
5. *Ness v. United States*, 06-1604, Petition for Writ of Certiorari at pp. 10-12.
6. Id. at p. 2.
7. Id. at pp. 14-15.
8. See *United States v. Posters 'N' Things, Ltd.*, 969 F.2d 652, 661 (8th Cir. 1992) (deposit by "head shop" owner of shop proceeds into business account), aff'd on other grounds, 511 U.S. 513 (1994).
9. See, e.g., *United States v. Reed*, 77 F.3d 139, 143 (6th Cir. 1996).
10. *Cuellar v. United States*, 06-1456, Amicus Curiae Brief of National Association of Criminal Defense Lawyers in Support of Petition for a Writ of Certiorari at p. 4.
11. Amicus Curiae Brief at pp. 3-6. As further evidence of this trend, the NACDL refers to the circuit courts' split on the definition of "proceeds" under the money-laundering statute and the Supreme Court's decision to resolve the split by granting certiorari in *United States v. Santos*. 127 S. Ct. 2098 (April 23, 2007).
12. Amicus Curiae Brief of NACDL at p. 11.
13. Teresa A. Adams, Note & Comment, "Tacking on Money-laundering Charges to White Collar Crimes: What Did Congress Intend, and What Are the Courts Doing?," 17 Ga. St. U.L. Rev. 531, 569 (citing U.S. Attorneys' Manual §§9-150.310-.330, 9-110.101).
14. Larry D. Thompson & Elizabeth Barry Johnson, "Money-laundering: Business Beware," 44 Ala. L. Rev. 703, 723 (1993).

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