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Part II of II

Money Laundering Forfeiture: What Property Is "Involved In" a Money Laundering Offense?

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The first part of this article, found in the September–October 1993 edition of *Asset Forfeiture News*, discussed the legislative history of 18 U.S.C. §§ 981-82 as it related to the meaning of the phrase "property involved in" a money laundering offense. This discussion demonstrated that Congress intended the money laundering forfeiture statutes to be broad in scope, encompassing not only the actual money laundered, but facilitating property as well.

Part I also discussed recent cases in which the courts have required that the government demonstrate a substantial connection between the subject property and the offense giving rise to the forfeiture. The discussion concluded by asking how the broad legislative intent and the substantial connection requirement could be reconciled.

The way to approach the problem is to relate the subject property to the elements of the money laundering offense that is the basis for the forfeiture. If the property was integral to the commission of one of the elements of money laundering, it must by definition have been "involved in" and "substantially connected" to the offense. But if the property was not involved in the money laundering offense in that way, the government will have a much more difficult time establishing the necessary connection.

For example, one of the elements of money laundering under both 18 U.S.C. §§ 1956 and 1957 is that the property involved in the financial transaction be the "proceeds of specified unlawful activity." Thus, if in the course of establishing that a money laundering offense was committed, the government shows that a given asset was the proceeds of another crime and was therefore the property being "laundered," that asset obviously would be "involved in" the money laundering offense and would be subject to forfeiture.[1] That is what Congress meant in the legislative history when it said that the "actual money laundered" was forfeitable as "property involved in" the offense.

Another element of money laundering under §§ 1956 and 1957 is that the defendant conduct a "financial transaction."[2] If, for example, the financial transaction in question is the use of illegally derived funds to make a payment on a car, the car is undoubtedly "involved in" the financial transaction and is subject to forfeiture. As one court has held, that is so even if only one of the payments on the car constituted a money laundering offense while other payments were made with legitimate funds.[3] The question is whether or not the asset was integrally related to the commission of one of the elements of the money laundering offense. Once that question is answered in the affirmative, the property is subject to forfeiture regardless of what other legitimate purposes it might have served, or what other legitimate funds might have been used to acquire it.

There are, of course, many ways in which a money laundering "transaction" may be conducted. Merely transporting cash in the trunk of a car may, in certain circumstances, constitute a financial transaction for money laundering purposes.[4] In such cases, it would seem that the vehicle used to conduct the financial transaction would necessarily be "involved in" the money laundering offense and would be subject to forfeiture.[5]

Most cases in which facilitating property has been found subject to forfeiture as "property involved" in a money laundering offense have been those where the property in question was an integral part of the "conceal or disguise" element of a § 1956 violation.[6] Several courts have found that "clean" money in a bank account may be forfeited as "property involved" in a money laundering offense where the clean money served to "conceal or disguise" the nature, source, location, or control of criminally-derived funds deposited into the same bank account.[7] As one court held, "[c]riminal activity such as money laundering largely depends upon the use of legitimate monies to advance or facilitate the scheme. It is precisely the commingling of tainted funds with legitimate money that facilitates the laundering and enables it to continue."[8] Similarly, "clean" inventory in a business may be forfeited as "property involved" in an offense where it served to conceal or disguise the use of other inventory to launder criminal proceeds through the business.[9]

Simply spending money in a manner calculated to conceal or disguise the true nature of criminal proceeds can render the property purchased subject to forfeiture. For example, where criminal proceeds were hidden by using them to pay for the construction of a building, the building and the entire parcel of land on which it was located were forfeited as "property involved" in the money laundering offense because the property was involved in the concealment of the money.[10]

Finally, an entire business and all of its assets may be forfeited as "property involved" in a money laundering offense if the business is used to conceal or disguise the true nature or ownership of the criminal proceeds being laundered. Thus, where the proceeds of a mail fraud scheme were "cleared" through corporate bank accounts, there was a substantial connection between the business and the laundering activity, and the entire business and all of its assets were subject to forfeiture.[11] Similarly, a business was forfeitable under § 981 when corporate checks were used to make a drug trafficker's purchase and improvement of real property with drug money appear to be legitimate business activity.[12]

Cases Where the Substantial Connection Was Lacking

The cases where courts have declined to order forfeiture under §§ 981 and 982 illustrate how the absence of a relationship between the property in question and one of the elements of the money laundering offense can lead to the failure to satisfy the "substantial connection" requirement. For example, property acquired by the money launderer before the money laundering offense occurs,[13] or after it is completed,[14] may not be forfeited. Nor may property be forfeited that merely affords the launderer with a means of transportation to the scene of the crime.[15] In neither case does the property have anything to do with one of the essential elements of the offense.[16]

The best illustration of this point comes from cases involving "structuring" violations under 31 U.S.C. § 5324. That statute makes it an offense to conduct cash transactions in amounts under $10,000 for the purpose of evading the currency transaction reporting requirements.[17] Sections 981 and 982 provide for forfeiture of property involved in structuring violations; therefore, it is not surprising that any money traceable to the structured sub-$10,000 transactions would be subject to forfeiture.[18] The government has been generally unsuccessful, however, in establishing that funds in an account into which structured deposits are made, but which are not themselves traceable to structured deposits, are forfeitable under a facilitation theory.[19]

The reason for this adverse result in structuring cases appears to be that in such cases, in contrast to § 1956 cases, concealing and disguising the nature or source of the funds involved in the transaction is not an element of the offense.[20] The crime is simply the conduct of a cash transaction with the intent to evade a reporting requirement. Whereas clean money in an account might facilitate a "conceal or disguise" offense by masking the true nature of the transaction in a § 1956 case, it is not evident how the presence of clean money makes it any easier to commit a structuring viola-

tion unless the government is able to show that the presence of the clean money somehow made the structuring offense itself more difficult to detect.[21]

None of this means that the government can never establish a substantial connection between property and a money laundering offense without showing that the property was integrally related to one of the elements of the crime. It is conceivable that property that provides transportation to a crime scene or a location where planning may occur may be found to be "involved in" an offense if the property is used repeatedly and extensively to facilitate the commission of a number of offenses over time.[22] The point is only that such *external* facilitation of money laundering will require a substantial showing by the government, whereas property shown to be integrally related to one of the elements of the offense should satisfy the substantial connection test without much difficulty.[23]

The Excessive Fines Clause

In *Austin v. United States* and *Alexander v. United States*, two cases decided on June 28, 1993, the Supreme Court held that both civil and criminal forfeitures were a form of punishment subject to the limitations of the Excessive Fines Clause of the Eighth Amendment.[24] While a thorough discussion of how the Excessive Fines Clause might apply to the forfeiture of property involved in a money laundering offense is beyond the scope of this article, certain principles may be gleaned from the existing case law.

In his concurring opinion in *Austin v. United States*, Justice Scalia offered the following analysis of what the Excessive Fines test should be:

> The question is not *how much* the confiscated property is worth, but *whether* the confiscated property has a close enough relationship to the offense.
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> The relevant inquiry for an excessive forfeiture under § 881 is the relationship of the property to the offense: Was it close enough to render the property, under traditional standards, "guilty" and hence forfeitable?[25]

This analysis bears a remarkable resemblance to the "substantial connection" test applicable to forfeitures of property involved in a money laundering offense. For example, in *United States v. Swank Corp.*,[26] the court said the following regarding the forfeiture of a business in a § 982 case:

> The so-called 'substantial connection' test is not a measure of the amount of money laundered, and the proportionality between the value of the forfeitable property and the severity of the injury inflicted by its use is irrelevant. In other words, the *quantity* of money laundered can be relatively small, so long as the *quality* of the relationship between the forfeitable property and the crime is substantial.[27]

If it is true that the Excessive Fines analysis under *Austin* and *Alexander* is a measure of the "quality" of the relationship between the property and the money laundering crime, and not a comparison of the value of the property to the "quantity" of money laundered, it would follow that any forfeiture that satisfies the "substantial connection" test under existing law would satisfy the "excessiveness" standard of the Eighth Amendment. If it fails to meet that standard, the forfeiture would be both statutorily and constitutionally impermissible.

Certainly, the forfeiture of the criminal proceeds being laundered would always satisfy both the substantial connection test and the Excessive Fines Clause. The same should be true of any other property that is integrally related to the commission of one of the elements of the money laundering offense. The difficult situations under the Excessive Fines Clause are likely to be those that already present difficult questions under the substantial connection test: cases where the role a given asset plays in a money laundering scheme is "external" to the offense, and not integrally related to one of the elements of the offense.

Conclusion

The money laundering forfeiture statutes are broad provisions that provide prosecutors with

useful tools in combatting money laundering. The statutes, however, are not without limits. Both the "substantial connection" requirement and the Excessive Fines Clause provide protection against the forfeiture of property only tenuously related to the commission of a money laundering offense. By gearing their forfeiture actions to the elements of the money laundering offense that is the basis for the forfeiture and demonstrating the connection between the property to be forfeited and those elements, prosecutors are most likely to avoid adverse decisions by the courts as the law in this area develops.

Endnotes

[1] *See United States v. Saccoccia*, 823 F. Supp. 994 (D.R.I. 1993) (sum equal to the drug proceeds laundered is forfeitable under § 982).

[2] Section 1957 uses the term "monetary transaction." The differences in terminology are not material to the forfeiture issue.

[3] *See United States v. One 1987 Mercedes Benz 300E*, 820 F. Supp. 248, 252 (E.D. Va. 1993).

[4] *See United States v. Gallo*, 927 F.2d 815, 822 (5th Cir. 1991); *United States v. Dimeck*, 815 F. Supp. 1425 (D. Kan. 1993).

[5] *See United States v. One 1989 Jaguar XJ6*, No. 92 C 1491, 1993 U.S. Dist. LEXIS 6583 at *7 n.2 (N.D. Ill. May 13, 1993) (noting that if the car had been used to transport the devices used to commit the money laundering offense it would have been subject to forfeiture).

[6] *See* 18 U.S.C. § 1956(a)(1)(B)(i) (1988) (making it an offense to conduct a financial transaction knowing that the purpose of the transaction is to conceal or disguise the nature, location, source, ownership, or control of the proceeds of specified unlawful activity).

[7] *See United States v. All Monies*, 754 F. Supp. 1467, 1475-76 (D. Haw. 1991) (untainted money in account provided "cover" for laundering operation); *United States v. Certain Funds on Deposit in Account No. 01-0-71417*, 769 F. Supp. 80, 84 (E.D.N.Y. 1991) (same); *United States v. Certain Accounts*, 795 F. Supp. 391, 397 (S.D. Fla. 1992); *United States v. Tencer*, No. 92-570 (E.D. La. Aug. 11, 1993).

[8] *United States v. Certain Funds*, 769 F. Supp. at 84-85.

[9] *See United States v. All of the Inventories of the Businesses Known as Khalife Brothers Jewelry*, 806 F. Supp. 648, 650 (E.D. Mich 1992) (following *All Monies*, inventory of jewelry business forfeitable as facilitating property).

[10] *United States v. Real Property in Mecklenburg County*, 814 F. Supp. 468, 479 and n.38 (W.D.N.C. 1993).

[11] *United States v. Swank Corp.*, 797 F. Supp. 497, 502 (E.D. Va. 1992).

[12] *United States v. 155 Bemis Road*, 760 F. Supp. 245, 251 (D.N.H. 1991). *See also United States v. Any and All Assets of Shane Co.*, 816 F. Supp. 389 (M.D.N.C. 1991) (drug proceeds laundered through trucking business); *United States v. South Side Finance, Inc.*, 755 F. Supp. 791, 797-98 (N.D. Ill. 1991) (bank accounts into which laundered money is deposited, and a business through which such money moved, forfeitable under § 981 as property "involved" in the money laundering offense); *United States v. Sonny Cook Motors*, 819 F. Supp. 1015 (N.D. Ala. 1993) (entire parcel of real property on which car dealership is located is "involved in" effort to launder money through the business in "sting" case).

[13] *United States v. Swank Corp.*, 797 F. Supp. at 500.

[14] *United States v. All Funds on Deposit (Great Eastern Bank)*, 804 F. Supp. 444, 447 (E.D.N.Y. 1992). *See United States v. All Funds Presently on Deposit at American Express Bank*, 832 F. Supp. 542 (E.D.N.Y. 1993) (funds deposited into account after laundered funds removed were not involved in the offense).

[15] *United States v. One 1989 Jaguar XJ6*,

1993 U.S. Dist. LEXIS 6583 at *6 (N.D. Ill. May 13, 1993) (automobile used to drive to/from site of money laundering offense is not substantially connected).

[16] *But cf. United States v. 1990 Toyota 4Runner,* No. 92-3709 (7th Cir. Nov. 16, 1993) (car driven to scene where drug sale was planned was forfeitable as facilitating property under 21 U.S.C. § 881(a)(4)).

[17] *See* 31 U.S.C. § 5324(a)(3) (1992).

[18] *United States v. Certain Accounts*, 795 F. Supp. 391, 396 (S.D. Fla. 1992); *United States v. Saccoccia*, 823 F. Supp. 994 (D.R.I. 1993).

[19] *See United States v. All Funds on Deposit (Great Eastern Bank)*, 804 F. Supp. 444, 447 (E.D.N.Y. 1992) (legitimate funds in bank account do not facilitate structuring; cases involving facilitation of § 1956 or 1957 offenses distinguished); *Marine Midland Bank N.A. v. United States*, No. 93 Civ. 0307 (RPP) (S.D.N.Y. May 11, 1993) (untainted funds in interbank account used to "clear" structured money orders not forfeitable under facilitation theory), *aff'd on other grounds*, No. 93-6167 (2d Cir. Dec. 14, 1993); *United States v. American Express Bank*, *supra,* note 14 (funds in account when structured deposit made not forfeitable). *But see United States v. Certain Accounts*, 795 F. Supp. at 397 (probable cause exists to forfeit entire balance of account upon showing that large number of structured deposits were made into the account, and no evidence exists that any legitimate funds were deposited).

[20] *United States v. All Funds on Deposit (Great Eastern Bank)*, 804 F. Supp. at 447.

[21] *Id.* Another theory offered by the government in these cases was that the account itself was "involved in" the offense, and that, therefore, any money found in the account at any time was subject to forfeiture. Two courts have rejected this theory, holding that an account is merely a "routing device" that describes the location of funds, and that it is the funds themselves that must be shown to be subject to forfeiture. *See id.* at 446-47; *United States v. $488,342.85*, 969 F.2d 474, 476-77 (7th Cir. 1992).

[22] *Cf. Alexander v. United States*, 113 S. Ct. 2766, 2776 (1993) ("It is in the light of the extensive criminal activities which petitioner apparently conducted through this racketeering enterprise over a substantial period of time that the question of whether or not the forfeiture was excessive must be considered") (majority opinion of Rehnquist, C.J.); *United States v. 1990 Toyota 4Runner, supra,* note 16.

[23] One question unanswered by the case law is whether property that facilitates the commission of the "specified unlawful activity" underlying the money laundering offense, but not the money laundering itself, is "involved in" the money laundering. One court has held that the answer is "yes," presumably because proof of the specified unlawful activity is an element of money laundering under §§ 1956 and 1957. *See United States v. All Assets of Blue Chip Coffee, Inc.,* No. 91 CV 2713 (SJ) (E.D.N.Y. Oct. 27, 1993); *United States v. $488,342.85*, 969 F.2d at 477 (*dicta*); *United States v. Puello*, 814 F. Supp. 1155 (E.D.N.Y. 1993) (*dicta*).

[24] *Austin v. United States*, 113 S. Ct. 2801 (1993) (civil forfeiture); *Alexander v. United States*, 113 S. Ct. 2766 (1993) (criminal forfeiture).

[25] *Austin*, 113 S. Ct. at 2815 (emphasis in original) (concurring opinion of Scalia, J.).

[26] 797 F. Supp. 497 (E.D. Va. 1992).

[27] *Id.* at 503 (citations omitted) (emphasis in original). ✹