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Supreme Court Narrows Definition of 'Money Laundering'

BY JOHN F. COONEY

On June 2, 2008, the Supreme Court overturned a criminal money laundering conviction in a manner that will make it more difficult for the government to obtain convictions in future prosecutions.

The money laundering statute prohibits the conduct of financial transactions with money that a person knows represents the ''proceeds'' of any one of 250 underlying predicate crimes. In *Santos v. United States*, the Court found that the term ''proceeds'' was ambiguous and has two possible meanings (90 BBR 1080, 6/9/08). It could mean either gross ''receipts'' of an underlying criminal act or net ''profits'' of the illegal act. Since Congress did not define the term ''proceeds'' to choose between these two ordinary interpretations, the Court held by a vote of 5 to 4 that it was required to adopt the definition that was most favorable to the defendant. It held that ''proceeds'' must be interpreted to mean the profits from an underlying offense. Because the government had not introduced evidence that the salary Santos was paid from the profits of a six-year long illegal lottery he was charged with running, the Court overturned his conviction on the money laundering charge.

The dissenters argued that requiring proof that the funds constituted ''profits'' from an underlying crime would hamstring the government's ability to obtain money laundering convictions, and the substantially enhanced sentences that result, in cases involving money derived from an unlawful activity that involves multiple illegal acts committed over a period of time, such as by drug cartels and organized crime syndicates. They argued that proving these transactions were profitable would require creation of special accounting methods for criminal enterprises, such as determining the expenses incurred in committing the crime and in calculating depreciation rates for the fixed assets involved.

The plurality responded that the additional burden on the government is manageable. To satisfy its burden of showing illegal ''profits,'' the prosecution need prove only that a single instance of unlawful activity was profitable and generated the funds involved in the money laundering transaction. In some cases, the government might have to change the indictments it brings. Instead of charging a multi-year course of conduct and having to prove the gains, expenses and losses from the entire criminal enterprise, the government could instead frame the charges to prosecute the individual transaction where profitability is clearest.

The decision in *Santos* likely will not create significant obstacles to the government's ability to pursue money laundering charges in cases involving transfers of tainted money through established financial institutions such as banks. First, the underlying criminal offense involved in these cases is usually mail fraud or wire fraud, rather than a broad scheme to defraud of the type that concerned the dissenters. Second, these transactions leave a significant paper trail, which would assist prosecutors in proving the profits and expenses of the original crime, as *Santos* requires. Nonetheless, money laundering prosecutions are an important weapon in the prosecutor's arsenal, because of the significantly greater sentences that are available for these offenses than for the underlying crime. Unless Congress amends the law to define ''proceeds'' as gross ''receipts,'' *Santos* may have some restraining effect on the government's decision whether to pursue money laundering involving banks through its civil or criminal powers.

John F. Cooney is a partner in the BSA/AML/ OFAC Defense Group at Venable LLP. He served as Assistant to the Solicitor General, Department of Justice, and as Deputy General Counsel for Litigation and Regulatory Affairs, Office of Management and Budget. He has represented financial institutions, and their officers and directors, in criminal and civil investigations, and in regulatory litigation in trial and appellate courts.