

RECENT DEVELOPMENTS IN MONEY LAUNDERING

by

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I.

GOVERNMENT STRATEGY

Money laundering is estimated to make up between two and five percent of the world's gross domestic product, totaling more than \$600 billion dollars.¹ Not surprisingly, the government commits significant resources to combating it.

The government set forth its strategy in the Money Laundering and Financial Crimes Strategy Act of 1998.² This Act mandates that the President, acting through the Secretary of the Treasury and in consultation with the Attorney General, submit yearly "national strategies" for fighting money laundering. The legislation requires the submission of such reports through 2003. This report, as well as the 1998 legislation, reflects a further emphasis on combating money laundering.

In March 2000, the Treasury and Justice Departments issued a report that sets out the government's strategy for battling money laundering over the next several years.³ The report notes the following:

- The areas of New York/Northern New Jersey, Los Angeles, and San Juan, Puerto Rico, have been designated High Risk Money Laundering and Financial Crime Areas (HIFCA's). The money laundering "system" of smuggling cash across the Southwest border has also been designated a HIFCA. In each of these areas, the government will create an anti-money laundering "action team," comprised of federal, state, and local authorities. The action teams will trace funds into and out of the HIFCA, ensure a more complete exchange of information between agencies, and focus on asset forfeiture as part of their anti-money laundering efforts.
- The government will enhance the capacity of the Justice Department's Special Operations Division to engage in financial investigations in drug cases, and the anti-money laundering focus of drug task forces.
- The government will step up the Customs Service's Money Laundering Coordination Center to fight black market Peso exchange systems.

As of this writing, the National Strategy for 2001 was not yet released. It seems likely, however, that at least one focus of future strategies will be on what is called "correspondent banking." In February, a Senate subcommittee issued a report on correspondent banking.⁴ The report explains that correspondent banking refers to situations in which foreign banks gain access to US markets by opening accounts with US banks. The customers of the foreign banks can then transact business in the US without having to deal directly with a US bank. According to the report, many US banks do not sufficiently screen the activities that flow through the accounts, making them conduits for money laundering. The Acting Deputy Assistant Treasury Secretary for Enforcement Policy told the Senate subcommittee that the Treasury Department would take into consideration the report's recommendation that US banks should be required to police these accounts more closely.

II.

OVERVIEW OF THE MONEY LAUNDERING STATUTES

In 1986, Congress enacted the Money Laundering Control Act (MLCA),⁵ which established money laundering as an independent federal offense, punishable by prison sentences of up to 20 years. The intent of the MLCA is:

[t]o create a federal offense against money laundering; to authorize forfeiture of the profits earned by launderers; to encourage financial institutions to come forward with information about money launderers without fear of civil liability; to provide federal law enforcement agencies with additional tools to investigate money laundering; and to enhance the penalties under existing law in order to further deter the growth of money laundering.⁶

The provisions of the MLCA criminalizing money laundering are codified at 18 U.S.C. § 1956 and 1957.

A. Section 1956.

1. Section 1956(a)(1).

Section 1956 includes three different types of money laundering offenses. Subsection (a)(1) makes it unlawful to knowingly engage in certain financial transactions with the proceeds of a specified unlawful activity. “Specified unlawful activity” includes a broad range of criminal offenses, including narcotics trafficking, fraud, violent crimes, terrorism, and other offenses typical of organized crime. These predicate offenses are listed at 18 U.S.C. § 1956(c)(7). Monetary transactions are prohibited under Section 1956 when using proceeds of a specified unlawful activity under the following four circumstances:

- **Intent to promote specified unlawful activity.** Section 1956(a)(1)(A)(i) prohibits conducting a financial transaction involving illegal proceeds with the intent to promote specified unlawful activity. Such transactions include the reinvestment of the proceeds of crime into a criminal organization.
- **Intent to violate certain tax laws.** Section 1956(a)(1)(A)(ii) prohibits conducting a financial transaction involving illegal proceeds with the intent to engage in conduct constituting a violation of § 7201 or § 7206 of the Internal Revenue Code.
- **Concealment of criminal proceeds.** Section 1956(a)(1)(B)(i) makes it an offense to conduct a financial transaction “knowing that the transaction was 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.” This prong of the statute addresses activity that is most commonly associated with money laundering, for example, using drug proceeds to purchase stock in the name of a third party, or purchasing and mistitling automobiles to conceal the fact that the true owner of the vehicle is a drug dealer.

- **Avoidance of Reporting Requirements.** Section 1956(a)(1)(B)(ii) makes it an offense to conduct a financial transaction in order to avoid a state or federal reporting requirement. For example, such conduct would include intentionally structuring bank deposits in numerous \$9,000 increments in order to avoid the Bank Secrecy Act's requirement that banks report currency transactions of more than \$10,000.

2. Section 1956(a)(2).

Subsection (a)(2) involves the international movement of illicit proceeds into, out of, or through the United States. It makes it unlawful to transport, transmit, or transfer a monetary instrument or funds into or out of the United States:

- with the intent to promote the carrying on of specified unlawful activity; or
- where the defendant knows that the funds represent the proceeds of some form of unlawful activity and that the transportation or transfer is designed to conceal or disguise the nature, location, source, ownership, or control of the proceeds of specified unlawful activity or to avoid a transaction reporting requirement.

3. Section 1956(a)(3).

Subsection (a)(3) enables law enforcement to conduct undercover "sting" operations. It makes it unlawful to engage in a financial transaction with property **represented** to be proceeds of specified unlawful activity. The funds in Section 1956(a)(3) cases are not actually derived from a real crime; they are funds provided to money launderers by undercover law enforcement agents.

B. Section 1957.

This section makes it unlawful to knowingly conduct a monetary transaction in criminally derived property in an amount greater than \$10,000 which in fact constitutes proceeds of a specified unlawful activity. Such monetary transactions must be conducted by, through, or to a financial institution. However, for the purposes of this section, financial institutions include not only banks, but also other entities such as currency exchangers, securities brokers, insurance companies, dealers in precious metals, real estate brokers, casinos, and car, boat, or airplane dealers. In other words, this section makes it unlawful in many circumstances to spend large sums of known criminal proceeds.

There are three important distinctions between Sections 1957 and 1956. First, Section 1957 has a \$10,000 threshold requirement for each transaction. There is no threshold requirement for Section 1956. Second, Section 1957 simply requires that a monetary transaction occur with proceeds known to be of criminal origin. Unlike Section 1956, there is no requirement that the transaction occur with the intent to promote a specified unlawful activity or to conceal the origin of the proceeds. Third, unlike Section 1956, Section 1957 requires that the transaction be conducted through a financial institution.⁷

III.

RECENT CASES

A. Definitions of Financial Transaction As Used In Section 1956(a)(1) and of Monetary Transaction As Used In Section 1957(f)(1).

Money laundering occurs when a defendant engages in a financial transaction with certain funds. Two recent cases addressed the definition of “transaction.” In both cases discussed below, the courts focused on substance rather than form and refused to accept a formalistic definition of “transaction.”

1. ***United States v. Lee.***⁸ Jack Lee applied for a loan from Amcore Bank. To support his application, he gave Amcore a false financial statement. Based on the statement, Amcore approved Lee for a \$280,000 loan. Lee owned a company called Equity Investors, which owed Amcore Bank \$41,000. When Amcore issued Lee the \$280,000 loan, it agreed to pay \$41,000 to itself to pay off Equity Investors’ debt to Amcore Bank. Based on the false financial statement and the payment of Equity Investors’ debt, Lee was charged with and convicted of money laundering.

On appeal, Lee claimed that the payment of Equity Investors’ debt could not constitute money laundering because there was only one transaction, without a separate transaction on which to base money laundering charges: “He defrauded Amcore of the money, and part of that fraud was requiring the bank to give the money to Equity Investors, rather than directly to him.” According to Lee, though the money may have been “criminally derived,” he never “engage[d] in a monetary transaction” with it. The government argued that this was a two-step transaction. Lee falsely represented his financial status to get a loan and then engaged in a monetary transaction by using the proceeds to pay off the Equity Investors’ debt.

The Seventh Circuit agreed with the government. It found Lee’s bank fraud complete and the money therefore “criminally derived” when Lee and Amcore signed the bank note on the loan. The Court found that whether Lee physically touched the bank check used to pay off Equity Investors’ debt was irrelevant. “We live in an age where money can be and often is transferred between owners with a few strokes on a computer’s keyboard. The physical transferring of dollar bills may not be quite as obsolete as the medieval English practice of feoffment with livery of seisin, under which land was conveyed with the symbolic handing over of a clod of dirt, but it may be getting there.” The Court continued, “After the signing of the bank note, Amcore acted under Jack’s direction, as it was bound to do under the signed Closing Statement. . . . Amcore’s role in transferring [Lee]’s money does not let [Lee] off the hook, and we conclude that he cannot escape a money laundering conviction by using an agent to launder the money for him.”

Lee’s argument was unpersuasive when he claimed that the fraud was not complete until the bank paid off Equity Investors’ debt. In light of the Court’s focus on substance rather than form, the fraud was complete as soon as Amcore Bank held the money for Lee’s benefit.

2. ***United States v. Richard.***⁹ David Hall was convicted of conspiracy, mail fraud, money laundering and securities fraud all in connection with an underlying bankruptcy fraud. On appeal, Hall argued that he could not be convicted for engaging in a monetary transaction in

criminally derived property because the evidence at trial showed that he handed the criminally derived checks to a co-conspirator who then deposited them. This argument was unsuccessful. The First Circuit held that “giving criminally derived checks to a co-conspirator, who deposits them into a bank account, is a transfer to, and involves the use of, a financial institution, which satisfies the definition of a monetary transaction.” Therefore, the Court rejected Hall’s first argument.

3. *United States v. Hoogenboom.*¹⁰ Carol Hoogenboom engaged in a Medicare fraud scheme. When she learned that the FBI was investigating her, she withdrew \$101,000 from the account containing the proceeds of the scheme, explaining to a witness that she feared the FBI would freeze her accounts. She was convicted of mail fraud, filing false claims with Medicare, obstruction of justice and money laundering.

Hoogenboom challenged the money laundering conviction, claiming that her \$101,000 withdrawal was not “a monetary transaction” under 18 U.S.C. Section 1957(f)(1). This section excludes from the definition of monetary transaction “any transaction necessary to preserve a person’s right to representation as guaranteed by the Sixth Amendment to the Constitution.” Hoogenboom argued that because she eventually used the withdrawn money to pay her attorneys, the withdrawals fell within this exception.

The 7th Circuit rejected this argument. The court reasoned that “under Hoogenboom’s conception of the statute, every defendant charged with money laundering under 18 U.S.C. Section 1957 could, at any time, beat the charge by funneling the proceeds which constituted the initial, illegal transaction toward their defense. Since this interpretation would render the statute useless in the face of any money launderer armed with a minimally competent attorney, we reject it.” The Seventh Circuit held that a defendant can rely on the Sixth Amendment exception to the definition of monetary transaction only “where a defendant engages in a transaction underlying a money laundering charge with the present intent of exercising Sixth Amendment rights.” Because Hoogenboom did not intend to pay her attorneys at the time she withdrew the money, she could not rely on the Sixth Amendment exception. Once again, the defendant was unable to apply a formalistic definition of “transaction” that would obscure the true occurrence: at the time Hoogenboom withdrew the money, her intent was not to use it to pay her lawyers.

B. Definition of “Proceeds” As Used In Section 1956(a)(1) and Section 1957(a).

The financial transaction must involve “proceeds” of certain criminal activities. The word “proceeds” implies that the previous transaction is already complete. Several recent cases involved defendants’ arguments that the money they allegedly laundered did not constitute “proceeds” because the previous transaction was not yet completed at the time of the alleged laundering. Courts applied a fairly lenient standard of determining proceeds, requiring only that a “phase” of the previous transaction be completed rather than the entire transaction. Also, similar to defining “transaction,” courts identified “proceeds” by looking at substance rather than form.

1. *United States v. Nolan.*¹¹ Jeffrey C. Nolan was associated with PZ Construction Company, which had several government contracts. In August, 1993, the government sent PZ a \$595,000 check that included \$345,000 that was duplicated from a prior payment and was accidentally paid to PZ a second time. The government presented evidence at trial that Nolan

was aware he was not entitled to the entire amount of the check. Nevertheless, Nolan caused the check to be deposited into PZ's account. Shortly afterwards, Nolan withdrew the \$345,000 overpayment and deposited it into an account belonging to Renaissance Environmental Corporation, a shell corporation he owned. A jury convicted Nolan of theft of public money and money laundering.

On appeal, Nolan argued that the theft was not completed until the \$345,000 overpayment was transferred out of the PZ account into Nolan's Renaissance account. Therefore, Nolan argued, the facts could not sustain convictions of both theft and money laundering. The Eleventh Circuit disagreed. The Court found that "when the money was deposited in the PZ account, Nolan had control over the money as if he had robbed the government and 'placed the proceeds of the robbery into his own account with the intent to use the money for his own purposes.'" This was despite the fact that the PZ account did not actually belong to Nolan. "Nolan's ability to withdraw the money from the PZ account and deposit it in the Renaissance account shows that he had control over the PZ account as if it was his own." Therefore, the crime of theft of public money was complete upon Nolan's initial deposit and his transfer of the money from the PZ account to the Renaissance account was a transfer of "proceeds," which supported the conviction for money laundering.

2. *United States v. Davis.*¹² Tony Davis was convicted of money laundering and several other crimes in connection with his operation of an advance-fee scheme in which he would agree to obtain funding for clients, but would never do so. The clients would pay Davis advance fees, which he would deposit into an account. The money laundering charges arose from Davis' transfer of funds out of that account.

On appeal, Davis argued that the underlying fraud was not complete at the time he drew the checks on the accounts because he had not yet failed to fund the victims' projects or return their refundable fees. The appellate court disagreed. Because the government showed that Davis made false representations in order to obtain the money in the first place, the fraud was complete as soon as Davis initially obtained the funds. Therefore, the subsequent withdrawals were transactions involving the proceeds of fraud.

Another issue raised by Davis also implicated the definition of proceeds. Davis was convicted under Section 1957 of knowing engagement in a monetary transaction greater than \$10,000 in property derived from specified crimes. One of the transactions at issue was a \$25,000 check, which the government contended derived from wire fraud. The check was drawn on an account that had received \$100,000 in tainted money, or proceeds, but had already contained \$18,000 in clean money. Davis argued that \$18,000 of the \$25,000 check should be considered untainted, which means that the transaction concerned only about \$6,000 of proceeds, less than the \$10,000 threshold. At trial, the government introduced banking records showing that after the account received \$100,000 in tainted funds, Davis withdrew over \$100,000 from the account. On the day the \$25,000 cleared the account, the account balance was \$13,000. The Fifth Circuit noted that other circuits have differing rules about how to deal with commingling of clean and tainted funds under the money laundering statutes. On the one hand, the Third and Fourth Circuits have held that where funds are commingled, any withdrawal from the account is presumed tainted and deemed "proceeds" under Section 1957.¹³ On the other hand, the Ninth Circuit has held that a withdrawal of commingled funds is tainted only if the withdrawal equals the entire balance of the commingled account.¹⁴

The Fifth Circuit declined to adopt either of these rules and instead applied to the money laundering statute the commingling rule the Fifth Circuit uses in cases dealing with interstate transfer of funds obtained by fraud. Under this rule, when the aggregate amount withdrawn from a commingled account exceeds the clean funds, individual withdrawals may be deemed tainted, even if a particular withdrawal was less than the amount of clean money in the account. In other words, the clean money is presumed to be withdrawn from the account first. Once the clean funds are gone, withdrawals are presumed to be tainted and are deemed “proceeds” for money laundering purposes. Because Davis had previously withdrawn much more than the \$18,000 of clean funds in his account, the later check of \$25,000 was presumed tainted and it satisfied the “proceeds” element of statute.

3. *United States v. Richard.*¹⁵ Defendant Hall was convicted of money laundering in connection with an underlying bankruptcy fraud. He had given checks to a co-conspirator, who deposited them. Among other arguments, Hall argued that the bankruptcy fraud was not complete until the checks were diverted from the bankruptcy estate by the co-conspirator’s deposit. If so, they were not yet “proceeds” for purposes of money laundering and the diversion of funds could not be the predicate for money laundering as well as bankruptcy fraud. The First Circuit rejected Hall’s argument, agreeing with the Third and Fourth Circuits that money becomes “proceeds” for purposes of money laundering when they are “derived from an already completed offense, or a completed phase of an ongoing offense.” Because there was evidence that Hall’s receipt of the checks “constituted a completed phase of bankruptcy fraud” his turning over of the checks to his co-conspirator for deposit was a transaction in “proceeds of bankruptcy fraud.”

4. *United States v. Prince.*¹⁶ John Prince and Tony White told investors that they were “bonded with” the U.S. Bankruptcy Court, which enabled them to buy bankruptcy assets at a discount. They solicited clients to invest in a plan to buy these assets and sell them at a profit. The investors were directed to pay into the scheme by giving money to third parties who would forward it to the defendants.

Prince was convicted of fraud and money laundering and he appealed. He argued that he could not be convicted of money laundering because the investors’ funds did not become “proceeds” for purposes of money laundering until Prince received them from the third parties, which meant that there was only a single transaction. The Sixth Circuit was not convinced. The court found that the scheme to defraud was completed as soon as the investors’ money reached the third party’s accounts. “[A] defendant needs only sufficient control, not actual, physical possession, of the funds.” Here, because the third parties involved were people with whom Prince had a relationship and with whom he had reached prior agreements about what they would do with the money, Prince was in constructive control of the money as soon as it reached the third party’s accounts. Therefore, it could immediately be deemed “proceeds” of the fraud and the further transaction that occurred when the funds were forwarded to Prince constituted money laundering.

C. Definition of “Specified Unlawful Activity” As Used in Section 1956(a)(1).

The proceeds involved in money laundering must stem from a “specified unlawful activity.” The statute does not require that the defendant know the proceeds stem from the specified activity, it is enough that the defendant know they stem from “some form of unlawful activity.”¹⁷ Despite this rule, the Tenth Circuit in *Rahseparian* reversed a money laundering conviction because the

government failed to prove the specified activity that was alleged in the indictment. In the *Richard* case, the First Circuit appears to disagree.

1. ***United States v. Rahseparian.***¹⁸ Ardie and Steve Rahseparian engaged in telemarketing fraud. They were convicted of conspiracy to commit mail fraud, mail fraud and money laundering. Their father Jack, who handled their banking, was convicted along with them. Jack appealed his conviction.

After a lengthy discussion of the evidence presented at trial, the Tenth Circuit found insufficient evidence to sustain Jack's conviction of mail fraud and conspiracy to commit mail fraud. The Court then turned to the money laundering conviction.

Upon review of the indictment, the court pointed out that the government had charged Jack with engaging a financial transaction knowing that the money represented proceeds of mail fraud. Though it would have been sufficient for the government to charge Jack with engaging in financial transactions knowing that the money represented proceeds of any felony, the government did not do so. Because the government failed to show that Jack was aware the funds he received from his sons were proceeds of mail fraud specifically, the Tenth Circuit reversed the money laundering conviction.

2. ***United States v. Richard.***¹⁹ As discussed earlier, Hall was convicted of money laundering in connection with a charged bankruptcy fraud. Though he was convicted on the money laundering count, he was acquitted on the underlying count of bankruptcy fraud.

Hall argued that because the indictment charged him with money laundering in connection with the bankruptcy fraud, his acquittal on the bankruptcy charge was fatal to the money laundering charge. The First Court rejected this argument, agreeing with the Eighth Circuit that "the fact that the jury did not convict [defendant] on the relevant underlying . . . charges does not undermine the money laundering convictions. . . . The only relevant question when reconciling inconsistent verdicts . . . is whether there was enough evidence presented to support the conviction." But the First Circuit went even further, holding that in the First Circuit, the money laundering statute does not require proof that the defendant committed the **specified** predicate offense, only a predicate offense, and Hall was convicted on charges other than bankruptcy fraud. Accordingly, the acquittal on bankruptcy fraud did not have any effect on the monetary transaction convictions.

3. ***United States v. Dugan.***²⁰ The Eighth Circuit reached a similar result in *United States v. Dugan*. Dugan was charged with conspiracy to distribute marijuana and with money laundering in connection with the distribution. The jury acquitted him of the marijuana charge but convicted him of the money laundering. He appealed, arguing that the acquittal meant there was insufficient evidence to support the predicate required for the money laundering. The Eighth Circuit rejected the argument, holding that inconsistent verdicts are valid and that the acquittal on the marijuana charge did not prove there was insufficient evidence to conclude Dugan had engaged in the marijuana conspiracy.

D. Definition of "Promotion" As Used In Section 1956(a)(1)(A)(i).

One of the core purposes of the money laundering statutes is to prevent criminals from taking the profits from a criminal enterprise and "ploughing them back" into the enterprise so as to

expand and enhance its operations. Often, however, it is hard to determine whether the defendant had intent to “promote.”

1. ***United States v. Febus***.²¹ Efrain Santos operated a “bolita,” an illegal lottery, in East Chicago, Indiana. He was charged and convicted of several gambling crimes as well as several counts of money laundering. The money laundering counts were based on Santos’ payments to the bolita’s collectors and winners.

On appeal, Santos argued that the payments to collectors and winners could not constitute promotion money laundering because they were essential transactions of the illegal gambling business. The transactions “merely completed the substantive offense of illegal gambling, and thus did not ‘promote’ the carrying on of the bolita.”

The Seventh Circuit considered three similar money laundering cases: *United States v. Jackson*,²² *United States v. Heaps*,²³ and *United States v. Connolly*.²⁴ In each of these cases the defendant used the proceeds of illegal gambling or drug transactions to buy or service equipment, such as pagers or gambling machines, that were to be used in the illegal enterprise. Appellate courts upheld money laundering convictions in all three cases.

For four reasons, the *Febus* court found Santos’ conviction similar to the above-cited cases. First, “the government established that Santos reinvested the bolita’s proceeds to ensure its continued operation for over five years, well beyond the 30 days required to complete the substantive offense of illegal gambling.” Second, Santos’ records showed that the income of his bolita rose by \$160,000 between 1989 and 1994. Third, Santos’ payments to his collectors “compensated them for collecting the increased revenues and transferring those funds back to him.” Fourth, Santos’ payments to the winning players “promoted the bolitas continuing prosperity by maintaining and increasing the players’ patronage.” Based on these four reasons, the Seventh Circuit held that sufficient evidence was presented to enable a reasonable jury to find Santos guilty of promotion money laundering beyond a reasonable doubt.

2. ***United States v. Jolivet***.²⁵ Catherine A. Jolivet was convicted of promotion money laundering in addition to several other crimes arising from her participation in several insurance schemes. The money laundering convictions arose from her deposit of the proceeds she received from the insurance fraud.

Jolivet appealed the money laundering convictions, arguing that the mere deposit of checks into her bank account could not promote the already completed episodes of insurance fraud. The government argued that Jolivet’s acts of endorsing and depositing the checks made the proceeds available for use, thereby furthering the illegal activity. The Eighth Circuit recognized that there is a dispute between the circuit courts about whether the deposit of an illegally obtained check can constitute promotion money laundering because the deposit makes the proceeds available for use. The Third and Ninth Circuits have held that such a deposit constitutes promotion money laundering because a defendant “could not have made use of the funds without depositing the check.”²⁶ On the other hand, the Eleventh and Fourth Circuits have refused to find promotion money laundering based on the mere deposit of a check.²⁷

The Eighth Circuit agreed with the Eleventh and Fourth Circuits. It considered the statutory language that requires a financial transaction “with the intent to promote the carrying on of specified unlawful activity.” The Court acknowledged that “the deposit of funds in a bank

account may promote an antecedent unlawful activity by making the funds available to the wrongdoer.” But the statute requires intent to promote “the carrying on” of unlawful activity and the Eighth Circuit refused to find that “Jolivet could promote the carrying on of an already completed crime.”

Though the Eighth Circuit focuses on the “carrying on” language of the statute, it is difficult to see how that language should make a difference. If, as the Eighth Circuit concedes, a deposit today can “promote an antecedent unlawful activity by making the funds available,” the deposit likewise should be able to promote the antecedent “carrying on” of such activity. In short, it is hard to see why the “carrying on” language of the statute excludes antecedent carrying on and includes only contemporaneous or future carrying on.

3. *United States v. Lyons Capital, Inc.*²⁸ The defendants in this case engaged in an advance-fee scheme. They took fees from clients and promised to obtain funding for the clients’ businesses, but never did so. They were convicted of mail and wire fraud and money laundering.

On appeal, the defendants claimed that under the Fourth Circuit rule, the mere deposit of funds into their account could not constitute promotion money laundering. The Fourth Circuit agreed that while that might be the rule, in this case the defendants were out of luck because they had stipulated that the deposits were used to pay the bills and carry on the business. Thus, although the defendants might have had a good argument under the Fourth Circuit rule, they had previously stipulated it away.

4. *United States v. Hedges.*²⁹ The defendants induced victims to invest in Mercantile Investment Group, a fraudulent scheme. When one victim called one of the defendants to complain about the investments, the defendants transferred the money out of the Mercantile account and into an account controlled by one defendant’s wife. The defendants were convicted of wire fraud and promotion money laundering under 18 U.S.C. Section 1956(a)(1)(A)(i).

On appeal, the defendants argued that the government failed to prove the transfers from the Mercantile account were undertaken “with the intent to promote the carrying on” of the predicate wire fraud. The Second Circuit noted that it had previously rejected the argument that “a defendant may be deemed to ‘promote the carrying on of specified unlawful activity’ only when the laundering would promote **subsequent** criminal activity.” (Emphasis added.) Instead, if the transfer was “integral to the success” of the original unlawful activity, it can be found to be undertaken “with the intent to promote” that activity. Applied to this case, the Court found that the transfers out of the Mercantile account were “clearly integral to the success of the Mercantile scheme. Without these transfers, appellants would not have realized their goal of profiting from the fraudulent scheme.” The Court therefore affirmed the money laundering conviction.

Note that the government could easily have charged the defendants with concealment money laundering, which would have avoided at least one of their grounds for appeal.

5. *United States v. Ross.*³⁰ Arthur Ross participated in a fraudulent advance-fee scheme. The government charged that Ross solicited money from clients seeking funding for

their businesses. Though the clients would pay fees, Ross would not obtain funding. Ross was convicted of wire fraud and promotion money laundering.

On appeal, Ross argued that because all he did was deposit the advance fees into the scheme's account, he did not engage in any "promotion." After reviewing several similar cases, the Eighth Circuit disagreed. Based on the ongoing operation of Ross' scheme, and the fact that the scheme's expenses were paid out of its accounts, the Court found sufficient evidence to support a promotion money laundering charge.

* * * *

These cases present a difficult problem: Many transactions have dual purposes, in that they are intended both to reap the profits of the previous scheme and to lay the groundwork for the next. When such transactions are part of the normal course of business, how does one distinguish between those that are intended to merely pay for already incurred expenses, and those which are intended to "promote" the businesses' future operations? Moreover, if transactions have dual elements, how does one arrive at a dollar amount of funds laundered? The determination of a dollar amount is important for sentencing purposes.

In the end, courts appear to be influenced by the longevity and growth of the operation. Thus, the longevity and growth of Santos' bolita made it easier for the court to find sufficient evidence of promotion. Similarly, Ross's ongoing advance fee operation was sufficient to convict. On the other hand, an isolated transaction such as Jolivet's deposit of a check representing the proceeds of a completed insurance fraud may not be considered an effort to "promote" future activities.

E. Definition of "Concealment" As Used In Section 1956(a)(1)(B)(i).

1. ***United States v. Thayer.***³¹ Adelaide Lipton participated in a fraudulent scheme involving sales of vacation time shares. She was convicted of wire fraud, mail fraud, and money laundering. On appeal, Lipton claimed there was insufficient evidence to convict her of concealment money laundering. But because Lipton had transferred the money out of the account belonging to the fraudulent scheme, then into an intermediate account, and only then into her personal account, the Eleventh Circuit found sufficient evidence of concealment money laundering.

2. ***United States v. Prince.***³² We have already mentioned this case, in which defendants Prince and White solicited investments in their fraudulent scheme to buy bankruptcy assets. They directed investors to pay into the scheme in three different ways. Some were told to wire transfer money into the accounts of third parties who then made payments to Prince. Others were told to use Western Union to make payments to third parties who then transferred cash to Prince. Still others directly transferred money via Western Union to Prince. Prince eventually transferred all the money to White. Prince and White were convicted of wire fraud and concealment money laundering. On appeal, Prince argued that there was insufficient evidence of concealment. The Sixth Circuit discussed at length Prince's elaborate methods of transferring funds and also discussed his use of cash transactions and transactions structured to fall under the \$10,000 threshold for reporting obligations. The evidence supported the conclusion that the defendants did not want to leave a paper trail, which was enough to support the conviction of concealment money laundering.

It appears that the more complex the transaction, the more likely it is that a court will find concealment.

F. Restitution and Sentencing - 18 U.S.C. § 3663A; USSG §§ 2S1.1, 2S1.2.

1. ***United States v. Paradis.***³³ Robert Paradis pled guilty to one count of “concealment” money laundering under 19 U.S.C. § 1956(a)(1)(B)(i). The count arose from Paradis’ participation in a bankruptcy fraud. The District Court ordered Paradis to pay \$3 million in restitution to the United States Trustee in the bankruptcy case in which the fraud occurred. Both the government and Paradis had argued that restitution was inappropriate because the usual victim of money laundering is society. The District Court, however, concluded that because Paradis’ money laundering deprived the bankruptcy trustee of the ability to distribute the laundered funds to creditors, restitution was appropriate and the trustee was a victim for purposes of 18 U.S.C. § 3663A. Paradis appealed.

Section 3663A makes restitution mandatory where the defendant is convicted of “any . . . offense against property under [Title 18], including any offense committed by fraud or deceit . . . in which an identifiable victim or victims has suffered . . . a pecuniary loss.” Paradis claimed that the victim in his case was society but the Appellate Court disagreed. “The direct result of Paradis’ actions was to conceal from the bankruptcy court and from the estate \$3 million that could have been available to satisfy claims of creditors. On these facts, Paradis’ argument that society alone was the victim is untenable and restitution may be appropriate to the extent identifiable victims exist.”

Despite finding that society was not the only victim of Paradis’ money laundering, the Appellate Court vacated the restitution order. It did so because there was “no evidence that the trustee was harmed as a result of this offense. Its effect was to conceal the proceeds of the fraud and to divert those funds from the estate where they could have been available to pay creditors who had filed claims. But again, there is no evidence of harm to creditors, i.e., no evidence of creditors who filed claims that went unpaid.”

Thus, if Paradis had been charged with bankruptcy fraud, the identifiable victim would have been the bankruptcy trustee and Paradis would have been required to pay restitution. But because Paradis was charged with money laundering, the bankruptcy trustee could not be deemed the victim of the laundering, which only concealed the proceeds of the previously committed fraud against the bankruptcy trustee. Though it might be safe to presume that creditors were harmed by the diversion of \$3 million from the bankruptcy estate, because no such evidence was presented, the restitution order had to be vacated.

2. ***United States v. Bockius.***³⁴ Bockius pled guilty to wire fraud, foreign transportation of stolen funds, money laundering and forfeiture. Relying on the recent Third Circuit decision of *United States v. Smith*,³⁵ the district court declined to sentence Bockius under the money laundering guideline because it believed that the sentencing guideline heartland included only money laundering associated with drug trafficking and serious crime. The appellate court rejected the district court’s reading of *Smith* and held that “where money laundering is not ‘minimal or incidental,’ and is ‘separate from the underlying crime’ and intended to ‘make it appear that the funds were legitimate’ or to funnel the money into further criminal activities, [the money laundering guideline] is an applicable guideline.” Thus, *Bockius* has narrowed the holding of *Smith*.

3. ***United States v. Hedges***.³⁶ The defendants induced victims to invest in Mercantile Investment Group, which was a fraudulent scheme. The defendants transferred the money out of the Mercantile account and into an account controlled by the wife of one defendant. They were convicted of wire fraud and promotion money laundering under 18 U.S.C. § 1956(a)(1)(A)(i).

The defendants appealed their sentence, arguing that their conduct fell outside the heartland of the money laundering guideline and that their money laundering conduct was “atypical.” The Second Circuit disagreed. It first noted that a substantial amount of money was involved, over \$350,000. Second, the court noted the multiple transfers designed “to mask the funds origin” and concluded that this was more than “a mere receipt and deposit case.” Therefore, the money laundering guideline properly applied.

4. ***United States v. Thayer***.³⁷ Adelaide Lipton participated in a fraudulent scheme involving sales of vacation time shares. She was convicted of wire fraud, mail fraud and money laundering. Lipton appealed her sentence, arguing that the money laundering guideline should not apply to her case because it was not a “classic” money laundering operation in connection with drug offenses. The Eleventh Circuit rejected this argument, holding that the sentencing guideline for money laundering applies to incidents outside of the “classic” form.

5. ***United States v. Wilson***.³⁸ The Fifth Circuit echoed Thayer’s holding. Defendant David Hittner engaged in money laundering in connection with his insurance business. He was convicted and sentenced under the money laundering guidelines. On appeal, he argued that he should have been sentenced under the more lenient fraud guidelines because the money laundering guidelines were intended for “drug offenses and organized crime.” Without offering much explanation, the appellate court simply held that this position was “clearly without merit.”

In sum, courts in recent cases have been reluctant to find money laundering cases outside the heartland of the Guidelines. This is in contrast to earlier decisions, such as the Third Circuit’s decision in *Smith*, that appeared to limit the heartland to drug cases and the like.

1. U.S. Treas. Dep’t & U.S. Dep’t of Justice, *The National Money Laundering Strategy for 2000* 1 (2000), available at <http://www.treas.gov/press/releases/docs/ml2000.pdf>.

2. Public L. 105-310, *codified at* 31 U.S.C. 5341(a)(2).

3. *See id.* at 2-3.

4. The report is available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_cong_committee_prints&docid=f:69919.pdf

5. Pub. L. 99-570, Title I, Subtitle H, Sections 1351-67, 100 Stat. 3207-18 through 3207-39 (1986).

6. S. Rep. No. 433, 99th Cong., 2d Sess. 1 (1986).

7. This discussion of the money laundering statute is drawn from *The National Money Laundering Strategy for 2000*.
8. 232 F.3d 556 (7th Cir. 2000).
9. ___ F.3d ___, (2000 W.L. 1836042) (1st Cir., Dec. 18, 2000).
10. 209 F.3d 665 (7th Cir. 2000).
11. 223 F.3d 1311 (11th Cir. 2000).
12. 226 F.3d 346 (5th Cir. 2000).
13. See, *United States v. Sokolow*, 91 F.3d 396 (3d Cir. 1996); *United States v. Moore*, 27 F.3d 969 (4th Cir. 1994).
14. See, *United States v. Rutgard*, 116 F.3d 1270 (9th Cir. 1997).
15. ___ F.3d ___, (2000 W.L. 1836042).
16. 214 F.3d 740 (6th Cir. 2000).
17. 18 U.S.C. § 1956(a)(1).
18. 231 F.3d 1257 (10th Cir. 2000).
19. ___ F.3d ___, (2000 W.L. 1836042).
20. 238 F.3d 1041 (8th Cir. 2001).
21. 218 F. 3d 784 (7th Cir. 2000).
22. 935 F. 2d 832 (7th Cir. 1991).
23. 39 F. 3d 479 (4th Cir. 1994).
24. 37 F. 3d 970 (3rd Cir. 1994).
25. 224 F.3d 902 (8th Cir. 2000).
26. See, e.g., *U.S. v. Montoya*, 945 F.2d 1068 (9th Cir. 1991); *U.S. v. Paramo*, 998 F.2d 1212 (3d Cir. 1993).
27. See, e.g., *United States v. Calderon*, 169 F.3d 718 (11th Cir.1999); *United States v. Heaps*, 39 F.3d 479 (4th Cir.1994).
28. 2000 W.L. 1792985 (4th Cir., Dec. 7, 2000).
29. 225 F.3d 647 (2000 W.L. 964767) (2d Cir. July 12, 2000).

30. 210 F.3d 916 (8th Cir. 2000).
31. 204 F.3d 1352 (11th Cir. 2000).
32. 214 F.3d at 740.
33. 219 F.3d 22 (1st Cir. 2000).
34. 228 F.3d 305 (3d Cir. 2000).
35. 186 F.3d 290 (3d Cir. 1999).
36. 225 F.3d at 647 (2000 W.L. 964767).
37. 204 F.3d at 1352.
38. ___ F.3d ___ (2001 WL 396700) (5th Cir. Apr. 19, 2001).