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Surviving the Solution: The Extraterritorial Reach of the United States

Kirk W. Munroe

I. Introduction

The old Wild West attitude, "shoot first and ask questions later," is alive and well in United States law enforcement today. It is especially apparent in the "war" against international drug trafficking and money laundering. When coupled with the use of new and powerful law enforcement weapons, the swaggering attitude exhibited by law enforcement can cause great danger to friend and foe alike.

In the spirit of strong law enforcement, the United States has the power to indict a foreign financial institution and to seize its assets worldwide. This power is one which may destroy a financial institution. This can have devastating impact, not only on the institution itself, but also on the financial sector of the home country, particularly if the home country is small. This article will review the extraordinary international power being utilized by the United States to solve its drug problem.

As with any war, the major combatants are driven by their own interests and, as a result, a certain amount of "collateral damage" or injury to non-combatants is expected. Such injury is even inevitable as the adversaries fight each other. This article

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1. The focus of this article is on financial institutions. As such, the expansion of the extraterritorial reach of the United States in other circumstances, such as the invasion of Panama to obtain General Noriega for his drug trial in Miami, or the kidnapping of a Mexican doctor, Dr. Alvarez-Machain, for the California trial for the torture-murder of a U.S. drug agent in Mexico, is beyond the scope of this article.

This article is an extension of an article written by the author, see Kirk W. Munroe, Money Laundering: Problems for International Private Banking, 9 REV. OF BANKING & FIN. SERVICES 9 (1993).
addresses one dimension of the collateral damage issue: the unintended harm caused by the United States when it utilizes the extraterritorial jurisdiction of its criminal justice system against foreign financial institutions of small nations.

II. The Business of International Banking in the Caribbean

International banking for many of the small nations of the Caribbean is an important segment of their economic well-being. Banking provides much needed revenue to small nations as well as good jobs for its people. Banking is considered a clean, desirable industry. However, to attract depositors and investors — the lifeblood of any financial institution, banks in the small countries must necessarily offer a more favorable banking environment. This translates to minimum taxes and maximum confidentiality which, in turn, leads to a higher risk of infiltration by criminally-derived money that always seeks secrecy.

While the issues surrounding the so-called bank secrecy havens are beyond the scope of this article, a few more words are important to place the topic of this article in context. International banking in the Caribbean attracts the affluent foreign bank customer. While domestic retail banking is designed to handle a larger volume of smaller transactions for the average domestic person, international banking is designed to handle more significant banking business for the wealthy individual in a very personalized and confidential manner.

The customer profile of an international banking client is a wealthy nonresident individual. Often the individuals are from

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2. The small nations of the Caribbean provide the clearest example of the "friendly fire" thesis. The simple fact of geography places the Caribbean countries in the middle between two much larger adversaries engaged in an extended "war," the drug war. On one side, to the north, is the United States, the most powerful nation on earth today. On the other side, to the south, are the drug cartels, perhaps the most powerful criminal organizations ever. In the middle are the Caribbean countries.

Literally, the Caribbean countries are "caught in the middle" of this historic struggle. Because this war is over the supply of drugs by the cartels to its huge market, the people of the United States, the product flows from south to north and the profits return from north to south. Whether it is drugs flowing north to their ultimate market or the resulting monies flowing south to safety and to their owners, geography makes the flow and, therefore, the resulting problems to the small Caribbean nations, quite predictable.


lesser developed nations, frequently the countries of Latin America, and they are seeking a safe haven for their capital. The services provided always include confidentiality. This is especially valuable for Latin Americans who continue to be plagued by political instability and violence, including kidnappings for ransom in their home countries. Consequently, international bankers in the Caribbean commonly assist their clientele in achieving their confidentiality goals through such legal vehicles as corporations and trusts. These vehicles are also utilized for other legitimate reasons, most notably tax and estate planning. Avoidance of tax liability and estate complications in a foreign country are certainly understandable and lawful goals. To attain them, locations like tax preferential jurisdictions are favored.

III. The U.S. Money Laundering Law

International banking in the Caribbean offers opportunities for certain higher forms of money laundering. Generally this excludes the cruder or “retail” form of money laundering, namely the structuring of cash deposits to avoid the currency reporting laws, commonly called “smurfing,” simply because international banking is not a cash oriented business. Rather, international banking lends itself to larger non-cash deposits and to more...

Brooks, supra note 3, at 41, 42-44 (labeling the market segmentation as executive, high net worth and multimillionaire/international).

5. Barton, supra note 4, at 5; Brooks, supra note 3, at 43-44. See also William W. Park, Legal Policy Conflicts in International Banking, 50 OHIO ST. L.J. 1067, 1093-94 (1989) (commenting on capital flight and the need for anonymity).

6. In the midst of unprecedented improvement of economic conditions which took place [in Colombia], signs of deep social malaise became ominously apparent: kidnapping for ransom increased drastically, private para-military groups appeared, the private security industry boomed, judges were frequently assassinated, bankruptcies of large manufacturing and financial firms became common, and the general level of violence in the society increased.


7. See Barton, supra note 4, at 8-9.

8. Id.

9. Id. at 9.

sophisticated financial transactions. Accordingly, this article reviews the U.S. money laundering law most applicable to the international banking business.

Money laundering, the cleansing of money earned from an illegal business to appear to be a product of a lawful business, is not new. Most economically motivated criminals always have wanted to appear legitimate. However, a new development is the criminalization of money laundering. The process itself is now a crime separate from the crime that produced the money.

U.S. President Ronald Reagan signed the Money Laundering Control Act in the fall of 1986. The Act was the first United States specific law against the conduct of money laundering. Moreover, in each successive election year: 1988, 1990, 1992, and 1994, the law has been expanded.

The law that has been created is broader than the common usage of the phrase money laundering. When people think of money laundering, people usually think of the legitimization of money obtained from crime, a one time transformation of cash money. The United States law is, however, much broader. It is not limited to cash, but includes all monetary instruments and all financial transactions. The dirty money, in theory, never loses its taint, never is cleansed. In effect, the law criminalizes banking services to criminals. Each movement of dirty money is a separate crime.

The law was specifically designed to be broad. The term "financial transaction" is defined to encompass virtually every-

11. For a review of common international private banking products, see Barton, supra note 4, at 6-9.
12. Welling, supra note 10, at 290-1.
15. Strafer, supra note 13, at 149.
17. Munroe, supra note 1, at 11.
thing.\textsuperscript{19} In the banking context, it includes every deposit, withdrawal, transfer, exchange, loan, delivery, purchase, or sale.\textsuperscript{20}

The enumerated crimes, the proceeds from which can form the basis of a money laundering violation, also are broadly defined. It is a popular misconception that only drug money can be laundered. This is not true in the United States. In the U.S., virtually any felony which generates money is included in the statute.\textsuperscript{21} Such felonies include everything from misapplication of bank funds and bank fraud to environmental crimes and violations of the Arms Export Control Act.\textsuperscript{22} Indeed, the trend toward applying the statute to every crime that generates money continues. In 1992, Congress added more offenses, felonies in violation of the Foreign Corrupt Practices Act, as well as any fraud against a non-U.S. bank.\textsuperscript{23}

The knowledge element of the crime was also intended by Congress to be broad.\textsuperscript{24} The Act does not require knowledge of the precise type of crime which generated the proceeds. The Act only requires knowledge that the proceeds involved in the financial transaction are derived from some federal, state, or foreign felony.\textsuperscript{25}

Moreover, and perhaps most importantly, this knowledge requirement can be satisfied by proof of "willful blindness."\textsuperscript{26} Under the willful blindness doctrine, proof of guilty knowledge may be satisfied by proof that a person intentionally avoided learning the truth and acted "with an awareness of the high probability of the existence of the fact in question."\textsuperscript{27}

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{19} 18 U.S.C. § 1956(c)(3) & (4).
\item\textsuperscript{20} It should be noted that it is unnecessary to prove that all the money in a transaction is from specified unlawful activity. The law only requires that the transaction "involve" dirty money. In other words, tainted money commingled with legitimate money satisfies the statute. United States v. Jackson, 935 F.2d 832, 836-40 (7th Cir. 1991).
\item\textsuperscript{21} See 18 U.S.C. § 1956(c)(7).
\item\textsuperscript{22} Id.
\item\textsuperscript{23} Annunzio-Wylie, supra note 16, at §§ 1534, 1536, 106 Stat. at 4066 & 4067 (to be codified as amended at 18 U.S.C. §§1956(c)(7)(D) and (B)).
\item\textsuperscript{24} S. REP. No. 433, 99th Cong., 2d Sess. 10-12 (1986).
\item\textsuperscript{25} 18 U.S.C. § 1956(c)(1).
\item\textsuperscript{26} S. REP. No. 433, supra note 24, at 10 (quoting United States v. Jewell, 532 F.2d 697, 699-700 (9th Cir.), cert. denied, 426 U.S. 951, 96 S. Ct. 3173, 49 L. Ed.2d 1188 (1976)).
\item\textsuperscript{27} Jewell, 532 F.2d at 700. Also called "deliberate ignorance," one standardized jury instruction for willful blindness reads, in pertinent part, as follows:
\end{itemize}
\end{footnotesize}
Thus, one who is willfully blind is assumed to have full knowledge. "It's none of my business," is not a defense in the U.S. to ignorance that the funds involved were the proceeds of illegal activity. In sum, under the United States law, it is a money laundering violation to participate in any routine private banking transaction which involves dirty money, even if the transaction includes the most time honored vehicle for respecting the client's confidentiality. As long as the participant knows the money is dirty, or is willfully blind to the criminal source of the money, there is a money laundering violation.

IV. Enforcing the U.S. Law against Foreign Banks

The U.S. has put a number of common U.S. legal principles to work in its war against money laundering. These include the U.S. legal concept of corporate criminal liability, as well as the execution of new forfeiture laws and the expansion of transnational or extraterritorial jurisdiction.

A. Corporate Criminal Liability and Collective Knowledge

Under U.S. law, a corporation may be criminally liable for the acts and omissions of its agents and employees who are acting within the scope of their authority so long as the acts are intended to benefit the corporation, at least in part. This rule can be summarized as follows:

A corporation may be convicted for the criminal acts of its agents, under a theory of respondeat superior. But criminal liability may be imposed on the corporation only where the

The government may prove that the Defendant acted "knowingly" by proving, beyond a reasonable doubt, that this defendant deliberately closed [his][her] eyes to what would otherwise have been obvious to [him][her]. No one can avoid responsibility for a crime by deliberately ignoring what is obvious. A finding beyond reasonable doubt of an intent of the defendant to avoid knowledge or enlightenment would permit the jury to infer knowledge. Stated another way, a defendant's knowledge of a particular fact may be inferred from a deliberate or intentional ignorance or deliberate or intentional blindness to the existence of that fact.


agent is acting within the scope of his employment. That, in turn, requires that the agent be performing acts of the kind which he is authorized to perform, and those acts must be motivated — at least in part — by an intent to benefit the corporation.30

This is not a difficult standard to satisfy under U.S. law. The "scope of authority" concept is not deflected by company policy forbidding all employees from violating any law.31 If this were so, there would be no corporate criminal liability in the U.S. Rather, the concept means that the conduct must be in connection with a job-related function. For example, a corrupted bank officer who assists a launderer in wiring transfers of illegal funds to a Caribbean country would be deemed to be acting within the scope of his authority, because assisting bank customers with their wire transfers is one of the officer’s jobs. Further, the "intent to benefit" also poses little problem for U.S. prosecutors because virtually all banking transactions benefit the bank to at least some degree. Using the wire transfer example again, because the bank charged its normal $25 fee for wiring the money to Switzerland, the bank benefitted from the transaction.

The U.S. government can attribute an employee's willful acts to the corporation.32 The U.S. government can prove corporate willfulness by showing that the corporation had either intentionally disregarded the law or had acted with plain indifference to its requirements. The instructions given by the judge to the jury in the Bank of New England33 case is informative on this issue:

Alternatively, the bank as an institution has certain responsibilities; as an organization, it has certain responsibilities. And you will have to determine whether the bank as an organization consciously avoided learning about and observing [the cash reporting] requirements. The Government to prove the bank guilty on this theory, has to show that its failure to file was the result of some flagrant organizational indifference. In this connection, you should look at the evidence as to the

33. Id.
bank's efforts, if any, to inform its employees of the law; its
effort to check on their compliance in response to various bits
of information that it got in August and September of '84 and
February of '85; its policies, and how it carried out its stated
policies.\textsuperscript{34}

Moreover, under a related U.S. legal theory, a corporation is
deemed to have the collective knowledge of all of its employees.\textsuperscript{35} Because guilty knowledge is a crucial element of any U.S. money
laundering crime and because such knowledge, in this context, is
often derived from knowledge of the various circumstances
surrounding a particular transaction, it is possible for a corporation
to be held criminally responsible in the U.S. even though no single
employee is guilty. Even though no single employee knew all the
facts, the corporation, under the collective knowledge theory, is
deemed to know everything known by all of its employees.\textsuperscript{36} This
is precisely what happened in the \textit{Bank of New England} case: the
employees were set free and the bank was convicted.\textsuperscript{37} The court,
in that important case, instructed the jury as follows:

In addition, however, you have to look at the bank as an
institution. As such, its knowledge is the sum of the knowledge
of all the employees. That is, the bank's knowledge is the
totality of what all of the employees know within the scope of
their employment... So, if you find that an employee within
the scope of his employment knew that [the currency transac-
tion reports] had to be filed, even if multiple checks are used,
the bank is deemed to know it. The bank is also deemed to
know it if each of several employees knew a part of that
requirement and the sum of what the separate employees knew
amounted to knowledge that such a requirement existed.\textsuperscript{38}

Apparently, the assessment of criminal responsibility on
corporations by the United States is exceedingly broad. Indeed,
the U.S. is believed to have the broadest corporate criminal liability
laws in the world.

\textsuperscript{34} \textit{Id.} at 855.
\textsuperscript{35} \textit{Id.} at 856.
\textsuperscript{36} \textit{Id.}
\textsuperscript{37} \textit{Bank of New England}, 821 F.2d at 847-48.
\textsuperscript{38} \textit{Id.} at 855.
B. Forfeiture

Forfeitures have assumed an increasingly significant role in U.S. law enforcement. This reflects a belated recognition of the pecuniary motives of most crimes and an effort to strip away the profits from crime.

Section 981 of Title 18 of the U.S. Code provides for civil forfeiture of assets involved in violations of the currency reporting requirements and structuring sections of the Bank Secrecy Act, as well as of assets involved in violations of the Money Laundering Control Act. Section 982 provides for criminal forfeiture of the same assets for the same money laundering violations. Forfeitures can be generally defined as the divestiture without compensation of property used in a manner contrary to the laws of the sovereign.

Forfeitures have a long history in Anglo-American law. In England, the value of an object which caused the death of a King’s subject was forfeited to the Crown. Forfeiture also resulted at English common law from conviction of a felony. The land of a convicted felon was forfeited to his lord and his chattels were forfeited to the Crown. In fact, the term “felony” was defined under English law as “an offence which occasions a total forfeiture of either lands or goods or both.”

These harsh penalties of English common law found little favor in the North American colonies. The first U.S. Congress abolished such common law criminal forfeitures in 1790 by enacting a law which states: “No conviction or judgment shall work . . . forfeiture of estate.” The U.S. Constitution also proscribes forfeiture of estate for treason.
For almost 180 years, the United States did not enact criminal forfeiture laws. Then, in 1970, Congress enacted the RICO statute, as Title IX of the Organized Crime Control Act of 1970, and the Continuing Criminal Enterprise (CCE or drug kingpin) statute as part of The Controlled Substances Act. Each contained the first new criminal forfeiture provisions enacted since the birth of the U.S. republic. This does not mean to suggest, however, that forfeiture was not practiced in the United States. Forfeiture was practiced, and quite actively, but it was largely accomplished in civil proceedings.

Civil forfeiture is an *in rem* proceeding which is brought against the tainted property and resolves rights in the property as against the whole world. There is a long tradition for the civil forfeiture of commodities, vessels, and other property used in violation of U.S. customs, revenue, or criminal laws.

Criminal forfeiture, on the other hand, is an *in personam* action which is brought against the individual who owns the property to be seized. It is part of the criminal case and it is only after a guilty verdict on the charge which is the predicate for the forfeiture, that a criminal forfeiture may be rendered.

In general, the U.S. government can civilly forfeit an asset upon a showing of "probable cause" that violations of certain laws involve the asset. Black's Law Dictionary defines probable cause as follows:

An apparent state of facts found to exist upon reasonable inquiry, (that is, such inquiry as the given case renders convenient and proper), which would induce a reasonably intelligent and prudent man to believe, in a criminal case, that the accused person had committed the crime charged, or, in a civil case, that a cause of action existed.

48. Congress was confused when, in enacting the RICO law in 1970, it believed that this was the first time Congress had provided for criminal forfeiture. To the contrary, these statutes had long existed but were rarely used. See DAVID B. SMITH, 1 PROSECUTION & DEFENSE OF FORFEITURE CASES § 2.03, at 2-11 (1995).
51. SMITH, supra note 48, § 2.03, at 2-9.
52. Calero-Toledo, 416 U.S. at 684.
53. SMITH, supra note 48, § 2.03, at 2-9.
54. Id.
55. See generally SMITH, supra note 48, § 2.05.
Thus, the U.S. government can commence forfeiture actions if it can show, after having made "convenient and proper" inquiries, that it believes the property was involved in a crime. It need not prove this involvement beyond a reasonable doubt. It need not even prove it by a preponderance of the evidence. It only need show that it has probable cause. As this is a civil forfeiture action, the U.S. government need not bring criminal charges, either before or after the forfeiture. Thus, the U.S. government can forfeit assets without ever bringing a criminal charge against anyone involved with the asset.

Once the U.S. government has shown probable cause, it is up to anyone claiming a bona-fide interest in the property to prove that the property was not involved in a crime and should not have been seized. The claimant must prove a negative. Herein lies the power of civil forfeiture. The U.S. government having only probable cause, can seize property. The claimant then has the entire burden of proof to show that the U.S. government should not take the property. If the claimant fails to prove his case, the U.S. government takes the property.

Historically, banks have experienced the power of the U.S. forfeiture laws in two contexts. The first is when the U.S. seizes the assets of the bank's customer, usually either a bank account or real property. In this context, the bank generally has no direct involvement in the case; the matter is between the U.S. government and the bank's customer. Sometimes, however, the bank has a security interest in all, or a portion of, the seized bank account because it was pledged as collateral for a loan, or the bank has a mortgage interest in the seized real property. In these instances, the bank must protect its interest quickly because of the very short time limitations in the U.S. civil forfeiture laws. In essence, the bank must prove that it is an innocent lienholder; that it was not aware the customer's money had an illegal source. Today, this task can be very time consuming and expensive, as reflected in the recent four-year experience of Republic National Bank of Miami in obtaining its mortgage interest from a home seized by the U.S.

57. SMITH, supra note 48, § 11.03[1], at 11-12 - 11-14.
58. Id. § 1.03, at 1-31.
59. This "innocent owner" defense is statutory only. See, e.g., 18 U.S.C. § 981 (a)(2). Recently, the Supreme Court held that there is no constitutional "innocent owner" defense. Bennis v. Michigan, 1996 WL 88269 (Mar. 4, 1996).
60. A claim must be filed within 10 days after execution of process. Rule C(6), Supplemental Rules for Certain Admiralty and Maritime Claims.
government. The bank finally won, but it took years and a trip to the United States Supreme Court to do so.

Banks also confront the U.S. forfeiture laws when the U.S. seizes correspondent accounts located in the U.S. These seizures can occur in connection with a criminal case against the bank, as it did in the 1989 _Banco de Occidente_ case. Such seizures can also occur in a strictly civil context as it did in the _Banco Cafetero (Panama)_ case in 1986 and, more recently in the _Marine Midland Bank_ case. If, as is often the case, the claimed illegal funds merely cleared through the bank’s correspondent account and no longer are deposited with the bank, the bank must fight for its own money.

U.S. government seizures of correspondent accounts was recently in the forefront of law enforcement in New York City. These recent seizures resulted from the tracing of U.S. Postal money orders originally sold in the U.S. in connection with smurfing operations. Because, under U.S. law, the illegal money never becomes clean, when these money orders are returned to the U.S. for collection via a correspondent account, they are at risk of seizure. Moreover, recently, New York prosecutors seized not only the value of the known illegal instruments, but also the balance of the correspondent account under the theory that the account “facilitated,” or made easier, the money laundering transaction. For example, in the _Marine Midland Bank_ case, the prosecutors froze over $7 million in the correspondent account of an affiliate, Hong Kong and Shanghai Bank (Panama), even though they only had evidence of approximately $1.5 million in tainted instruments. In another, more outrageous case, New York prosecutors

62. _Id._
64. United States v. Banco Cafetero Panama, 797 F.2d 1154 (2d Cir. 1986).
66. _Cf._ Banco Cafetero Panama, 797 F.2d at 1161 n.8 (noting that because the Panama accounts were beyond the jurisdiction of the United States, the government looked to the New York correspondent accounts of the bank).
67. _See_ Marine Midland Bank, N.A., 11 F.3d at 1122.
68. _Id._
69. _Id._ at 1119.
seized an entire correspondent account because seven $500 money orders ($3,500) were cleared through the account. 70

C. Extraterritorial Jurisdiction 71

The U.S. money laundering law specifically provides for extraterritorial jurisdiction when (a) the conduct is by a U.S. citizen anywhere in the world or, if by a non-U.S. citizen, the conduct occurs, at least in part, in the United States, and (b) the transaction, or a series of related transactions, exceeds $10,000. 72 Thus, the United States asserts its own jurisdiction and will bring money laundering criminal cases in the United States when at least part of the transaction occurred in the United States. The following two cases provide dramatic examples of the breadth of this self-proclaimed extraterritorial jurisdiction.

V. Case Examples

A. Banco de Occidente (Panama) 73

On March 29, 1989, a criminal indictment against a private Colombian bank, Banco de Occidente, S.A., and its wholly owned Panamanian subsidiary, Banco de Occidente (Panama), S.A., was unsealed in Atlanta. 74 The indictment accused both banks of two conspiracy counts which alleged the laundering of the proceeds of drug transactions. 75 The indictment also included a criminal forfeiture charge. 76

A civil action was brought against both banks and another subsidiary, Banco de Occidente International, Ltd. (Montserrat). 77

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70. United States v. All Funds on Deposit, Civil Action No. CV-93-3643 (E.D.N.Y.).
71. The U.S. Supreme Court continues to rule in favor of an expansive view of the extraterritorial jurisdiction of U.S. courts. On June 15, 1992, the Court held that a citizen of a foreign state, with which the U.S. has an extradition treaty, is subject to the criminal jurisdiction of U.S. courts even though the foreign citizen was abducted by the U.S. government from the foreign state to the U.S. United States v. Alvarez-Machain, 112 S. Ct. 2188 (1992). The international legal community is contesting the merits of this decision.
73. The author and William L. Richey coordinated the world-wide defense of Banco de Occidente, S.A. and its subsidiary, Banco de Occidente (Panama).
76. Id. at 35-75.
77. United States v. $412,308,212.93, Civ. No. 1:89-CV-582-RLV (N.D. Ga.).
This action sought forfeiture of the $412 million in gross receipts allegedly laundered.\textsuperscript{78} It also sought civil penalties for the same amount against the banks.\textsuperscript{79}

Contemporaneously, the government sought and obtained, in the criminal case, an \textit{ex parte} restraining order freezing all assets, namely bank accounts, of both banks in the United States.\textsuperscript{80} Approximately $20 million at several correspondent banks was frozen immediately in the United States.\textsuperscript{81} This frozen money had no link to illegal activity, was not the proceeds of drug trafficking, and, thus, represented money frozen as a substitute for tainted assets.\textsuperscript{82}

Within one week, the United States successfully had prodded three additional countries to freeze bank accounts containing even more substitute assets.\textsuperscript{83} Money in excess of $20 million was frozen in Deutsch Sudamerikanische Bank in Hamburg, West Germany.\textsuperscript{84} Some $13.5 million was frozen in Swiss Bank Corporation in Toronto, Canada.\textsuperscript{85} Almost $30 million was frozen in Swiss Bank and Union Bank of Switzerland in Basel and Zurich, Switzerland, respectively.\textsuperscript{86} In one week, therefore, the United States had coordinated the freezing of approximately $80 million worldwide, the vast majority of which were the funds of the Panamanian subsidiary.

This seizure of such a dramatic percentage of the total assets of Banco de Occidente (Panama) placed the subsidiary into insolvency. It was forced to seek the assistance of the Panamanian Banking Commission.\textsuperscript{87} Within ten days of the unsealing of the

\textsuperscript{78} Id. at 9.  
\textsuperscript{79} Id. at 9-10.  
\textsuperscript{81} Inventory filed in \textit{Banco de Occidente, S.A.}  
\textsuperscript{82} At the time of the indictment, the government was able to trace the alleged narcotics money to various accounts at Banco de Occidente (Panama) in Panama by way of wire transfers from U.S. banks. Because of the bank secrecy laws of Panama, however, the government was unable to trace further.  
\textsuperscript{83} Motion to vacate Seizure Order filed in United States v. Banco de Occidente on May 30, 1989.  
\textsuperscript{84} Id.  
\textsuperscript{85} Id.  
\textsuperscript{86} See id. (the actual amount is not contained in the U.S. court file).  
\textsuperscript{87} Transcript of Plea Hearing on Aug. 14, 1989, at 26, before the Honorable William C. O'Kelley in United States v. Banco de Occidente, S.A.
indictment, on April 7, 1989, the Panamanian Banking Commission intervened and took control of Banco de Occidente (Panama).88

After months of difficult and complicated negotiations which involved the banks' various interests in eight nations, a resolution was reached with the governments of the United States, Canada, and Switzerland (the bank had managed to quickly unfreeze the West German funds through the German courts).89 On August 14, 1989, Banco de Occidente (Panama) entered a guilty plea and agreed to forfeit, over a period of four years, $5 million to the United States.90 The United States, in turn, paid the Swiss and the Canadians $1 million each from the initial $2 million forfeiture payment.91 In exchange, the accounts worldwide were unfrozen, the criminal case against the parent bank was dismissed, the civil case was dismissed as to all parties, and both the Swiss and Canadian cases were dropped.92 The Panamanian Banking Commission also relinquished control of the subsidiary.93

Banco de Occidente, its ownership, and its top management, are among the most respected of all Latin banks in international banking and business circles.94 This fact ultimately saved the bank, however, it did not keep the bank from being indicted, quite simply because no one from the prosecution team had any knowledge about the bank.95 It was assumed by the prosecutors that the bank was dirty because it is a Colombian bank.

According to the U.S. government, the Panamanian subsidiary was criminally liable through the acts of two corrupted bank officials.96 These employees allegedly facilitated the movement of money through the Panamanian subsidiary.97 The government

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88. It is interesting to note that the government of Panama was then controlled by General Manuel Noriega. This was an added problem due to the significant and growing tensions between the governments of Panama and the United States.


90. Id.

91. Id.

92. Id.

93. Personal knowledge and opinion of author (lawyer for bank).


95. Personal knowledge and opinion of author (lawyer for bank).


97. Id.
stated that the bank's employees had been bribed. The money had come into the bank by wire transfers from established United States banks, most of which are located in New York City.

It was only after the indictment, and after entreaties from the highest Colombian public officials to government departments other than the Department of Justice, that the prosecutors investigated and determined the bank's legitimacy. Without question, this "discovery" was a major factor in the ultimate positive resolution of the case.

The lessons learned from the Banco de Occidente case are harsh, but clear. In a short span of time, the United States coordinated a worldwide effort which caused the seizure of approximately $80 million of liquid assets of the Panamanian subsidiary. The gross assets of Banco de Occidente (Panama) annually ranged from $125 to $160 million. The seizure of such a large percentage of the bank's liquid assets immediately placed it into insolvency, which quickly led to its takeover by the Panamanian Banking Commission. The monies seized were not the proceeds of drug transactions. The government made no effort to suggest otherwise. Rather, the government sought and obtained the ex parte pretrial freeze order on a "substitute assets" theory.

B. Banque Leu (Luxembourg)

More than four years later, on December 13, 1993, a Luxembourg bank, Banque Leu (Luxembourg), S.A., entered a plea of guilty to money laundering in United States District Court in San Francisco, California. The bank agreed to forfeit $2.3 million to the United States and more than $1 million to Luxembourg.

98. Id. at 27.
100. Personal knowledge and opinion of author (lawyer for bank).
101. E.g., depositors' money.
102. It is interesting and important to note that since the 1989 Banco de Occidente case, the majority of the U.S. federal appeals courts have disallowed pretrial restraint of substitute assets. Cf. United States v. Ripinsky, 20 F.3d 359 (9th Cir. 1994); United States v. Floyd, 992 F.2d 498 (5th Cir. 1993); In re: Assets of Martin, 1 F.3d 1351 (3d Cir. 1993) with In re: Billman, 915 F.2d 916 (4th Cir. 1990), cert. denied, 500 U.S. 952, 111 S. Ct. 2258, 114 L.Ed.2d 711 (1991).
According to the court papers filed at the time of the plea agreement, Banque Leu (Luxembourg) wanted to expand its private banking deposit base. As part of its efforts to accomplish this objective, the bank hired an experienced account manager fluent in Spanish who had South American contacts. The new manager's efforts led to the opening of various accounts by Colombians. Two of these accounts were the basis of the criminal charge.

The two accounts were related U.S. dollar accounts and were opened in Luxembourg with cash. Thereafter, more than $2.3 million was deposited into the accounts over a one-year period. The deposits were in the form of cashiers checks, each under $10,000, drawn on Los Angeles area banks, predominantly branches of Bank of America. Bundles of these cashiers checks were sent from the bank's customer in Colombia to Luxembourg for deposit. The bank, in turn, sent these U.S. dollar cashiers checks to its U.S. correspondent bank in New York City for collection. The U.S. correspondent bank then sent the cashiers checks to Bank of America's check processing center, located in Northern California, where they were finally paid.

In sum, a Luxembourg bank with no office in the United States was charged and convicted of money laundering in the United States on the basis of clearing U.S. dollar negotiable instruments drawn on a U.S. bank, but deposited by non-U.S. citizens in Luxembourg. In other words, acceptance of U.S. dollar negotiable instruments by a bank anywhere in the world outside of the United States renders the bank susceptible to U.S. criminal jurisdiction in the money laundering area because all such instruments must necessarily clear through the United States. This is, by far, the most extreme example of the breadth of the extraterritorial jurisdiction of the United States in the money laundering field.

106. Id. ¶¶3 & 4.
107. Id. ¶5.
108. Id. ¶¶6-8, ¶¶13-14.
109. Id. ¶10.
111. Id. ¶¶10, 16.
112. Id. ¶¶10, 11.
113. Id. ¶11; Plea Agreement, supra note 103, ¶¶10-12.
114. Plea Agreement, supra note 103, ¶¶10-12.
The Banque Leu (Luxembourg) guilty plea is also noteworthy because of its factual foundation. It is predicated upon the willful blindness theory of knowledge.\textsuperscript{115} The United States could prove that the $2.3 million in cashiers checks were from drug sales because it caught and convicted one of the Colombians controlling the two bank accounts.\textsuperscript{116} The cashiers checks were, in fact, the product of "smurfing" or structuring drug money cash deposits to avoid the U.S. currency reporting laws.\textsuperscript{117} The cashiers checks were sent down to Colombia and then to Luxembourg for deposit. From the actual Colombian money launderer, however, it was learned that the bank had no actual knowledge of the illegal source of the money.\textsuperscript{118} Neither the bank nor the account manager was told of the true source.\textsuperscript{119} Further, no one at the bank was bribed.\textsuperscript{120} As a consequence, the knowledge element of the guilty plea is founded upon the willful blindness of the account manager. Based on the circumstances, both parties agreed that the account manager should have known the illegal source of the deposits.\textsuperscript{121} The stated factors upon which both parties agreed in the stipulated facts filed with the court are the following:\textsuperscript{122}

- the deposits consisted of large numbers of cashier's checks, bearer instruments that are the functional equivalent of cash;
- the checks were made out to a variety of individuals but not, after the first batch of checks, to any account-holder or signatory;
- the checks were uniformly under the amount of $10,000, the threshold for reporting under U.S. law;
- the origin of the account-holders [was] Colombia . . . [a] well-known center of the drug trade;
- there was no apparent connection between the form of the deposits (i.e., numerous U.S. cashier's checks in small amounts) and the nominal activities of the account-holders, who were simply an individual Colombian investor and a Colombian construction business;

\textsuperscript{115} Guilty Plea, \textit{supra} note 105, ¶¶15-16. For a discussion of "willful blindness," see \textit{supra} text accompanying notes 26-28.
\textsuperscript{116} \textit{Id.} ¶14.
\textsuperscript{117} \textit{Id.}
\textsuperscript{118} \textit{Id.} ¶15.
\textsuperscript{119} \textit{Id.}
\textsuperscript{120} Guilty Plea, \textit{supra} note 105, ¶ 15.
\textsuperscript{121} \textit{Id.} ¶¶15-16.
\textsuperscript{122} \textit{Id.} ¶16.
— many of the checks were presented for deposit while bearing
dates more than six months prior to the deposit date;
— blocks of checks in relatively small denominations, made out
in similar amounts, purchased primarily from branches of Bank
of America in Los Angeles on the same or approximately
consecutive dates, were simultaneously deposited.

From these circumstances, which cannot be viewed as overwhelm-
ing evidence of guilty knowledge, the bank accepted criminal
responsibility for the conduct of its account officer.

The agreed penalty, beyond the forfeiture, is quite unique.
The bank, not a United States regulated institution, agreed to
submit to a special money laundering audit by U.S. auditors for
three years. The audit reports must be submitted to the United
States. Further, the bank agreed to prepare and publish an anti-
money laundering monograph plus two annual updates. To
secure these future agreements by the bank, the bank agreed to
open a $250,000 letter of credit at a New York bank in favor of the
United States.

VI. Conclusion

Evidenced by the examples cited in this article, the nature of
the business of international banking lends itself to a higher risk of
certain sophisticated forms of money laundering, and the extraordi-
nary law enforcement weapons of the United States can reach
banks in the Caribbean. This combination begs the question: how
can a small Caribbean country best protect itself and its financial
sector against a surprise, devastating blow against one of its banks?

The key to overcoming the danger of money laundering in the
Caribbean is the establishment and maintenance of good, anti-
money laundering compliance programs at each institution. This
will, at the outset, reduce the risk of the penetration of dirty money
into the financial sector. A vigorous compliance program will also
greatly assist in persuading the United States that the bank is a
good corporate citizen and should not be charged with any
violations that were consummated at the institution.

123. Plea Agreement, supra note 103, ¶7.
124. id.
125. id. ¶8.
126. id. ¶9.
127. When an area of criminal law impacts on a legitimate sector of the
country, such as money laundering and financial institutions, the U.S. law
enforcement community gives much lip-service to the principle that their primary
No matter how vigorous, however, a compliance program is not enough. Each country needs to cultivate the goodwill of the U.S. law enforcement community at every opportunity. Success in this endeavor requires a public relations effort of the first magnitude. Often, friendships can be established between respective law enforcement personnel and bank regulators. Opportunities can be found for mutual assistance. Such efforts will serve to educate U.S. law enforcement personnel and, thus, can help focus law enforcement goals on significant violations of mutual concern.

Positive interaction and mutual assistance will not only help the country’s financial sector in times of trouble, but it will also increase the efficiency of interaction. Positive interactions will also be of genuine service to the many dedicated law enforcement personnel in both countries. The Caribbean country will be doubly served through both promotion of the country and a reduction of narcotics trafficking.

International banking in the Caribbean has unique problems in the money laundering area. By the nature of its business, there is a greater likelihood of certain sophisticated forms of money laundering than in other areas. Consequently, it is imperative that Caribbean countries tailor efforts of detection and prevention to fit the specific money laundering danger present in international banking. The costs of a compliance program may be substantial, but the potential costs for no program are much greater.

goal with regard to the legitimate sector is compliance, not prosecution. As a result, serious and responsible efforts by an institution to comply with the money laundering laws are considered by U.S. prosecutors when making the prosecution decision.