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Supreme Court Reins in Criminal Asset Forfeiture Actions

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On Monday, June 5, 2017, the US Supreme Court significantly curtailed the government's power to seize assets from co-conspirators in a criminal enterprise. In *Honeycutt v. United States*, — S.Ct. — (2017), the Supreme Court rejected application of "joint and several liability" to forfeiture among members of a criminal conspiracy. While the Court's decision leaves several unanswered questions for future criminal forfeiture cases, what is clear is that *Honeycutt* will substantially affect white collar prosecutions moving forward.

Background

The Comprehensive Forfeiture Act of 1984 allows for the forfeiture of "any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of" certain crimes.[1] If assets traceable to the crime cannot be located, the government can seize anything else a convicted defendant might have to satisfy the forfeiture order. Prosecutors have increasingly used forfeiture laws to pressure individuals and companies to resolve criminal investigations without a trial. Indeed, the specter of asset forfeiture serves as a powerful bargaining chip for the government in obtaining plea deals.

This practice is especially coercive in the context of a criminal conspiracy. Under the *Pinkerton* rule, the bedrock principle of conspiracy liability for well over half a century, conspirators are responsible for the foreseeable crimes of their co-conspirators, regardless of the individual's knowledge of such actions.[2] Until *Honeycutt*,a majority of federal circuit courts applied the *Pinkerton* rule to conclude that asset forfeiture laws mandate "joint and several liability" among co-conspirators for the proceeds of a criminal enterprise. This was true even if the defendant plays a relatively minor role in the conspiracy. Simply put, the majority rule held even ancillary members liable for the profits of the entire conspiracy.

Honeycutt v. United States

The defendant in *Honeycutt* was a salaried clerk working at a hardware store owned by his brother. The store sold more than 15,000 bottles of a water-purifying product, which is also used to manufacture methamphetamine, obtaining roughly $270,000 in profits. In 2010, a grand jury indicted the defendant and the store owner for conspiring to distribute a controlled substance precursor. The store owner entered a plea agreement with the government that included forfeiture of $200,000. The defendant clerk was convicted at trial, and the government sought forfeiture the remaining $70,000 from the defendant.

Although the government did not argue the defendant "obtained" any of the profits from the unlawful sales, the U.S. Court of Appeals for the Sixth Circuit held that the asset forfeiture statute in question, 21 U.S.C. § 853, incorporates the *Pinkerton* rule. As a result, the Court concluded that federal law permitted the government's seizure of the defendant's "untainted" assets.

The Supreme Court, in a unanimous decision by Justice Sotomayor (with Justice Gorsuch not participating), reversed. Applying its recent holding in *Luis v. United States*,[3] the Court emphasized that federal forfeiture statutes are limited to assets "tainted" by the crime. It concluded that extending forfeiture to assets of a conspirator that cannot be traced to the crime, to satisfy a "joint and

several" judgment for assets never obtained by the defendant, "would require forfeiture of untainted property." Because such results are inconsistent with the language of the statute and its recent jurisprudence, the Court concluded that "joint and several liability" under the *Pinkerton* rule is inapplicable to forfeiture under 21 U.S.C. § 853(a)(1).

Key implications and open questions

Honeycutt represents yet another example of the Court's attempt to rein in over-criminalization and excessive punishment in the federal laws. Since 2013, the Supreme Court has issued three opinions addressing the scope of federal asset forfeiture laws.[4] And in a different context, Justice Thomas issued a broad statement earlier this term questioning the legality of civil asset forfeiture practices.[5] This trend suggests that courts, which consistently upheld forfeiture practices in the past, may now curb the government's power to seize or restrain "untainted" assets of an individual or entity.

Further, the Court's decision will also substantially affect white-collar prosecutions moving forward. Although the forfeiture law at issue in *Honeycutt* concerned criminal drug-related conspiracies, the force and logic of the Court's opinion will likely influence lower courts confronted with similar asset forfeiture provisions. In particular, another federal forfeiture law, 18 U.S.C. § 982, applies to frequently charged white collar crimes, including health care fraud, false statements, and mail and wire fraud. Because Section 982 mirrors the forfeiture statute at issue in *Honeycutt*, lower courts will likely find the *Pinkerton* rule inapplicable to these criminal forfeiture cases as well.

At the same time, numerous questions remain unanswered by the Court's ruling. *Honeycutt* does not provide any additional insight into key statutory definitions, including what constitutes a "personal benefit" in a criminal conspiracy. Similarly, the Court declined to clarify the proper contours of subsequent civil forfeitures and the proper application of the *Pinkerton* rule to civil forfeiture statutes.[6]

Given this ambiguity, it is likely that the government will continue to aggressively pursue future forfeitures from companies and individuals as broadly as statutory language will allow. Our attorneys have extensive litigation experience on these issues. To discuss these issues further or pose questions about this alert, please contact one of the attorneys listed here.

Notes

1. 21 U.S.C. § 853(a)(1) (permitting forfeiture of assets obtained from violations of the Controlled Substance Act); 18 U.S.C. § 982 (allowing criminal forfeiture of assets "obtained" from offenses relating to, among others, health care fraud, false statements, and mail and wire fraud affecting financial institutions).
2. *Pinkerton v. United States*, 328 U.S. 640 (1946).
3. 136 S.Ct. 1083 (2016).
4. *See Luis,* 136 S.Ct. at 1083; *Kaley v. United States*, 134 S.Ct. 1090 (2013).
5. *Leonard v. Texas*, 137 S.Ct. 847 (2017) (Mem) (J. Thomas, statement respecting denial of certiorari).
6. *Compare United States v. Contorinis*, 692 F.3d 136, 146 (2d Cir. 2012), *with S.E.C. v. Contorinis*, 743 F.3d 296, 302 (2d Cir. 2014).

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