



APRIL 4, 2013

Current Issues in Unlawful Money Transmitting Litigation (Section 1960)

IMTC West 2013 Conference

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18 U.S.C. § 1960



- Makes it a crime knowingly to conduct, control, manage, supervise, direct, or own all or part of an unlicensed money transmitting business. 18 U.S.C. § 1960(a).
- Under § 1960(b)(1), “unlicensed money transmitting business” means a money transmitting business which affects interstate or foreign commerce in any many or degree and –
 - (A) operates without a money transmitting license in a State where such operation is punishable as a misdemeanor or felony under State law, or
 - (B) fails to comply with the money transmitting business registration requirements under 31 U.S.C. § 5330.

Section 1960 Is Scary and Complex

- Section 1960 is scary because it virtually creates a strict liability offense: Operate a money transmitting business without a license in a state where a license is required and go to federal prison. It does not matter if you believed the licensing requirement did not apply to you.
- Section 1960 is complex because it potentially incorporates the licensing requirements of all 50 states. Thus, the reach of the federal criminal statute changes as state law changes.

Topics for Today:

- California's Money Transmission Act
- Extraterritorial Application of 18 U.S.C. § 1960
- Recent Developments:
 - The *Banki* decision
 - Keeping an Eye On IGBA Litigation

California's Money Transmission Act ("MTA")



- AB2789, effective January 1, 2011
- Prohibits a person from engaging in the business of money transmission in CA unless licensed by the Commissioner of the Department of Financial Institutions or exempt from licensure.
- The Act's definition of "money transmission" covers a wide range of activities, *i.e.*, selling or issuing payment instruments, selling or issuing stored value, receiving money for transmission.

The MTA – Broadening “Money Transmitting”



- One of the big issues in Section 1960 litigation has been: what is a “money transmitter.” Is it money transmitting in the narrow sense, *e.g.*, receiving money and transmitting it electronically, or in the broad sense, *e.g.*, to include selling prepaid access cards, travelers checks, etc.
- California’s Money Transmission Act defines the term broadly, thus bringing more potential conduct within Section 1960’s reach.

The MTA – Who Requires a License?

The federal regulations, in contrast, take the narrow view. “Money transmitting” does not include check cashing, selling prepaid access, currency exchange, or selling traveler’s checks. See 49 CFR 1010.100(ff).

The definition of “money transmitting” in Section 1960 is arguably broad enough to sweep within its reach all “money transmitting” activities under California’s broader definition. See 18 U.S.C. § 1960(b)(2)

Extraterritorial Application of § 1960

The definition of “money transmitting business” in Title 31 includes the requirement that it be a “domestic financial institution.” That term would seemingly exclude foreign-based MTB’s.

But not so fast.....

United States v. Mazza-Alaluf, 621 F.3d 205 (2d Cir. 2010).

Holding that § 1960(b)(1)(A) does not require proof that the charged money transmitting business was a “domestic financial institution” covered by federal reporting requirements.

- Mazza-Alaluf's money transmitting business, Turismo, based in Chile, transmitted approx. \$244 million into NY, IL and MI.
- District court dismissed § 1960(b)(1)(B) charge. Only state licensing provision -- § 1960(b)(1)(A) -- was at issue.
- The government was not required to prove Turismo was a money transmitting business under 31 U.S.C. § 5330(d)(1)(B), which only applied to the federal registration provision.
- *Sidenote*: Turismo would have still qualified as a domestic financial institution under Title 31 based on its substantial banking activities in the U.S.

FinCEN's Interpretation

FinCEN initially took the view that a foreign currency exchanger with its principal place of business in a foreign country is not required to register with FinCEN, notwithstanding the fact that the currency exchanger uses a U.S. bank account to clear transactions. (FinCEN Ruling 2004-1, March 29, 2004).

In 2011, shifted its position. FinCEN still maintains it is not enough for a foreign MSB to maintain an account in the U.S. But the regulations take a “facts and circumstances” approach as to other foreign MSBs whose operations touch the U.S.

TRENDS – The *Banki* Decision

- Banki’s family transferred approx \$3.4 million from Iran to the U.S. using a “matching” *hawala* system. Banki received as many as 56 hawala-related deposits in his Bank of America account from at least 44 different individuals and companies.
- Banki was found guilty of operating an unlicensed money transmitting business.
- Banki argued the jury instructions erroneously failed to define a money transmitting business as (1) an enterprise (not a single transaction); (2) that is conducted for a fee or profit. *See United States v. Velastegui*, 199 F.3d 590, 592, 595 n.4 (2d Cir. 1999)

TRENDS – The *Banki* Decision con't

- The Second Circuit agreed, holding that Banki's proposed jury instruction was legally correct.
- The district court “compounded the problem” by instructing the jury that “a hawala is a “money transmitting business,” thereby taking away from the jury the question of whether Banki operated an MTB.

TRENDS – IGBA Litigation

- What does On-line Poker have to do with Money Transmitting?
A lot.
- In the past two years there has been intense litigation around the lawfulness of offering on-line poker in the U.S. The Government has prosecuted on-line poker operators under the IGBA (Section 1955). Section 1960 was modeled after Section 1955, and thus interpretations of Section 1955 litigation can sometimes tell us how to read Section 1960.

TRENDS – IGBA Litigation

- The issues in IGBA litigation parallel those we see in Section 1960 litigation:
 - » Is Poker a game of chance or skill? *United States v. DeCristina* (EDNY 2012)
 - » Does the IGBA reach on-line poker operations based overseas?
 - » Do state gambling laws, incorporated by the IGBA, reach on-line poker based overseas?
 - Money drives litigation, and the litigation around the IGBA has the potential to tell us more about the reach of Section 1960.
- Stay tuned.