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**HEADLINE:** New tool fights foreign crime;
But critics claim wider ability to freeze non-U.S. assets is being misused.

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**BODY:**

A new law that gave judges broader power to freeze foreign assets is facing a key constitutional test in a Washington federal court.

The U.S. Department of Justice swiftly sought the change in the law last year after the U.S. Court of Appeals for the D.C. Circuit halted a major assetforfeiture case that involved hundreds of millions of dollars. The law passed Congress last December with little fanfare.

Federal judges gained the authority to restrain money before the initiation of any forfeiture proceeding abroad, giving federal prosecutors a more powerful tool to target the financial backbone of criminal enterprises.

Lawyers for corporate account holders in the pending case in Washington contend that the law, officially called the "Preserving Foreign Criminal Assets for Forfeiture Act," is too sweeping and cannot be applied to restraining orders that are already on the books. The attorneys, including a team from Sheppard, Mullin, Richter & Hampton, are urging a trial judge to release control of the disputed funds assets that DOJ claims are tied up in a money laundering probe in

Brazil.

"It's overly broad," said Robert Sikorski of New York's Busson & Sikorski, which represents Midland Financial Inc., one of several British Virgin Islands companies involved in the case. "I think it's a big mistake. It's a knee-jerk reaction to try to do something when what they had before was perfectly fine."

Lawyers with DOJ's asset-forfeiture and money laundering section said the new law isn't being applied retroactively because the government filed a new application, in February, to restrain the target assets.

"All the proposed restraint order will do is to continue to ensure that the U.S. assets are not dissipated or otherwise put beyond the reach of the Brazilian criminal justice system," said DOJ lawyers, including Linda Samuel, deputy chief of the asset-forfeiture section. U.S. District Judge Rosemary Collyer, who is overseeing the case, hasn't yet said whether she will hold a hearing.

QUID PRO QUO

For years, the Justice Department used a provision of the USA Patriot Act to apply for and receive court orders to block transfers of U.S.-based assets at the request of a foreign government. Through legal-assistance treaties, an official in a foreign country sent a request to Justice to seek a restraining order, and DOJ attorneys went to court to help out.

But in July 2010, the D.C. Circuit stopped the practice in its tracks, upholding a trial judge's ruling that said a restraining order can only be issued after not before a foreign forfeiture judgment was entered.

Judge Brett Kavanaugh, writing for a unanimous three-judge panel, rejected DOJ's policy argument that the U.S. needs to help other countries if the government ever wants cooperation abroad. "Of course, if the Department of Justice wants Congress to expand the government's authority, the department can so recommend to the Legislative Branch," Kavanaugh said in the court's opinion.

After the D.C. Circuit decision, DOJ asked federal trial judges in Washington to vacate restraining orders in several pending cases. In November 2010, for instance, DOJ lawyers went to court to ask a judge to release control of $400,000 and a house worth about $660,000. The funds and property were frozen pending the outcome of criminal proceedings in the United Kingdom.

On Capitol Hill, DOJ worked with members of Congress to fix what lawmakers described as a loophole in the forfeiture laws.

That December, Sen. Sheldon Whitehouse (D-R.I.) said in a speech that the inability to block movement of money in the United States will benefit multinational criminal organizations. "That puts at risk hundreds of millions of dollars in criminal proceeds that may not be able to be returned to fraud victims or that criminals will reinvest in drug trafficking offenses or other crimes that affect our communities," said Whitehouse, a sponsor of the bipartisan push to amend the law.

Rep. Steve Scalise (R-La.) said in a speech that "it is critical that we get this passed quickly to close this loophole and prevent those types of shielding from the law as it is currently happening." President Barack Obama signed the law on Dec. 22.

FROZEN ACCOUNTS

In 2008, acting on a request from Brazil, DOJ sought to restrain more than $12 million allegedly tied to a money

laundering scheme with roots in South America. The government's application was not the first time the authorities were fighting to control the money.

The forfeiture proceedings in Washington flow from the prosecution of a woman in New Jersey on charges that included tax evasion and the operation of an unlicensed money-transmitting business. The woman, Maria Carolina Nolasco, a former Valley National Bank international accounts officer, was arrested in June 2002. At that time, federal agents took control of more than $21 million. "This hits them where it hurts," then-U.S. Attorney Christopher Christie, now the governor of New Jersey, said in a prepared statement in 2002. "Largescale movement of money through illegal channels is almost always part of other criminal activity, usually international drug trafficking."

Nolasco agreed to give up millions of dollars. But later court rulings unravelled that agreement because Nolasco did not have an interest in depositors' funds.

A federal judge in New Jersey, Joseph Greenaway Jr., in June 2006 ordered the government to release frozen accounts. Greenaway, now a federal appellate judge, rejected prosecutors' call to stay the proceedings, saying the government "asks this court to continue to take on good faith that it may, somehow, one day, demonstrate a right to this property. After four years, it is neither legal nor just to do so."

The New York County, N.Y., District Attorney's Office didn't fare any better when it went after the money involved in the Nolasco case. A trial judge, New York County Supreme Court Justice Martin Shulman, said in 2007 he was "troubled" about how prosecutors had handled the forfeiture proceedings.

NEW APPLICATION

John Gleason, a name partner at New York's Gleason & Koatz, represents offshore financial company Farswiss Asset Management Ltd. in the case in Washington. In July, Farswiss, a commercial deal broker, moved to intervene in the dispute, saying it wants to protect its interest as the owner of more than $1.51 million in a Valley National Bank account. "Every judge who's seen this has realized what's going on," Gleason said. "But the Justice Department will not let go. It's not only the third bite at the apple. They didn't have the right to take the apple off the tree."

In February, the Justice Department filed a new application to restrain more than $12 million on behalf of Brazil. DOJ asset-forfeiture attorneys said the amended law not the version before December 2010 governs the pending case in Washington.

DOJ's team, including asset-forfeiture trial attorney Jennifer Wallis, said the Constitution's ex post facto clause does not apply because the government is not asking Collyer to apply the new law to the earlier forfeiture application.

"Congress has the power to pass a curative statute to correct a defect in that existing legislation," prosecutors said in court papers filed in August. DOJ also said retroactivity is not an issue because the proceedings are civil, not criminal.

But attorneys for deposit holders, including offshore claimants Avion Resources Ltd. and Tigrus Corp., said prosecutors are unfairly trying to use the new forfeiture law to justify the initial seizure of the funds in 2002.

"In view of the repeated and prolonged violation of intervenors' constitutional rights, the application for further restraint should be denied," said James McCarney, a partner in the business trials practice group at Sheppard Mullin who represents several offshore clients in the dispute.

U.S. courts, McCarney said, should not be a rubber stamp for a foreign country's request to freeze assets. In the least, he said, the deposit holders are entitled to a hearing.

"I have a legitimate concern that under the new law the U.S. courts are not being given as much latitude as they should

have to review whether the defendants have been accorded full due process in the foreign forum," McCarney said.

Nixon Peabody white-collar defense partner Kelly Kramer, who was part of the team that won the major forfeiture dispute in the D.C. Circuit last year, said the pending challenge tests whether federal courts have the authority to reach the merits on requests for restraining orders from foreign countries. "The department's position seems to be that the statute prohibits any such substantive review, which, it seems to me, creates a serious due process issue," Kramer said.

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