

Bloomberg reports:

The money-laundering complaint U.S. Attorney Preet Bharara filed against SAC Capital Advisors LP last week raised the prospect that all of the hedge fund's \$14 billion in assets may be subject to forfeiture.

"The government couldn't put Steve in jail," said Michael Bachner, a defense attorney and former New York prosecutor. "But they decided to give his money the death penalty."

Bharara seeks forfeiture of "all right, title and interest" in all of SAC's assets, should he prove his money-laundering case. Rulings interpreting the statute, however, suggest a less drastic outcome is possible for the Stamford, Connecticut-based hedge fund and its founder Steven Cohen.

Bharara wouldn't say exactly how much he wanted to recover when he announced the lawsuit and SAC's parallel indictment for insider trading. The law underlying the civil case states that any property involved in money-laundering activities, or traceable to them, can be forfeited.

Judges have approved forfeiture of illegal profits from a crime plus money derived from those profits, including appropriate interest, according to lawyers who have dealt with the money-laundering law. Bharara said that criminal conduct at fund had resulted in "hundreds of millions of dollars of illegal profits."

#### Commingled Funds

If those illegal funds are commingled with clean money, such as a hedge fund's main account, there is some precedent for getting the combined amount. A judge could rule there are sufficient links between the two types of funds, and that the amount involved is appropriate given the nature of the offense.

To get access to commingled funds, the government has to show it traced profits from SAC's alleged insider trading activities to other funds within the firm, said Samuel Buell, a former federal prosecutor who teaches at Duke University School of Law.

"But the government doesn't get to take everything just because some of the funds are tainted," Buell said.

Under the theory of commingling, profits from an insider trading scheme that are ploughed into a hedge fund's general account could expose all of the hedge funds money to a claim of forfeiture if such a transfer was shown to be money laundering. At the same time, the Excessive Fines Clause of the U.S. Constitution's Eighth Amendment has led some judges to stop prosecutors from punishing a defendant disproportionately.

#### Government View

Stefan Cassella, then deputy chief for legal policy of the asset-forfeiture and money-laundering section of the Department of Justice, said in a 2004 law review article that as long as at least \$10,000 of the commingled funds were tainted in a money-laundering transaction, the government could lay claim to a larger pool of mostly "clean" money.

One thing that might help the government in making such an argument is how large SAC has grown since it allegedly began a decade of insider trading in 1999, said Thomas Ajamie, who specializes in securities litigation. SAC was formed in 1992.

“What’s been lost so far is the significance of going back to 1999,” Ajamie said. “How large was SAC in 1999, and how much growth was there over the subsequent 14 years? And was the genesis of the fund’s growth since then funded by illegal activity?”

Cohen, 57, who controls \$9 billion of SAC’s assets, hasn’t been charged with a crime or sued in relation to Bharara’s allegations. According to marketing documents prepared for investors by Cohen’s hedge fund, SAC managed \$1.4 billion in 1999, meaning it grew tenfold in the ensuing 13 years. All told, Ajamie said, “You could take this through to some fairly large numbers.”

#### Flawed View

John Coffee, a securities-law professor at Columbia Law School, said Bharara’s view that the government is entitled not only to ill-gotten gains but also to a share of any funds with which those gains have been commingled is flawed.

“They are pushing the commingling theory to the limits of its logic and beyond” he said. “The government is stretching the envelope further than it is entitled to. It’s like taking an eyedropper full of tainted chemicals, dropping it into Lake Superior and saying you have to forfeit everything in the lake.”

Michael Zeldin, former director of the U.S. government’s offices of asset forfeiture and money laundering, said just because the government can try to seize all of a defendant’s property doesn’t mean it should.

“You’ve got to charge what you can prove,” said Zeldin, who retired last month as head of Deloitte & Touche LLP’s money-laundering practice. “You don’t want to overreach. If one guy at Goldman Sachs got caught in insider trading, you’re not going to go after all of Goldman Sachs in forfeiture.”

#### No Precedent

Bachner, the defense lawyer, said he doesn’t expect the government to use the SAC money-laundering precedent to sue hedge funds for all their money if there are only isolated instances of insider trading.

“Unless a fund has demonstrated a systematic course of criminal conduct, I don’t think it has to be worried,” he said.

Taken to its extreme, the government’s demand for assets in its money-laundering suit could cover even Cohen’s personal property, from his mansion in the Hamptons to his art collection, said Hillary Sale of the Washington University School of Law.

“If the government can establish that the funds were comingled with other funds, and it stands to reason that is the direction the government will take, then the amount could be as large as the company’s net capital and, then, possibly Cohen’s own assets, including that Picasso he just bought,” she said.

## Poker Cases

In some cases, involving gambling or drug transactions, where an entire enterprise is based on unlawful activity, the government has succeeded in seizing all of a company's assets.

Bharara's office used civil money-laundering statutes to go after Internet poker companies accused of circumventing U.S. laws that prevent American banks from processing player payments. Last year PokerStars, Full Tilt Poker and Absolute Poker agreed to pay at least \$731 million to settle money-laundering allegations in an accord with Bharara's office.

Full Tilt agreed to forfeit virtually all of its assets, while PokerStars agreed to forfeit \$547 million to the U.S and pay \$184 million owed to foreign players by Full Tilt.

While the U.S. agreement with Absolute Poker didn't specify a monetary figure, the deal required the company to give up all its assets, including money held in accounts, hardware and intellectual property.

Jerry Bernstein, a partner at Blank Rome LLP in New York who represented Absolute Poker, said many money-laundering cases end with a settlement, given the potential sweep of the money-laundering law.

### Settlement Thinking

"Some settle because the company isn't able to do business any longer and isn't able to fight on," he said.

The government's forfeiture claims against SAC might be one of the few cases of its kind to make its way to trial, Buell said.

"It will be interesting because forfeiture cases rarely get litigated to the end, but it might be worth defending fully here," he said.

If the government wins the civil case, it gets another bite at the fund's assets beyond the forfeited amount: It has also asked in its complaint for fines for money laundering. Those can be as much as twice the illegal proceeds, according to the money-laundering statute.

Jonathan Gasthalter, a spokesman for SAC, declined to comment on the money laundering suit. Gasthalter has said SAC Capital has never "tolerated insider trading" and that it "will continue to operate."

### Criminal Forfeiture

"Some people might view this as a money grab by the government but would you prefer that the government not enforce the law?" said Anthony Sabino, a law professor at St. John's University in New York. "This is the government seeking to punish a very large organization accused of enormous wrongdoing."

The money-laundering suit isn't the government's only alternative: In the indictment of SAC, prosecutors included forfeiture allegations seeking "all property, real and personal" which are the proceeds of the fund's alleged insider trading. The commingling theory isn't available under the criminal statute.

## Illicit Profits

If the money can't be located or property has been sold, the indictment allows for prosecutors to obtain substitute assets. If the hedge fund is convicted, the law allows for the federal judge presiding over the case to determine how much should be forfeited as illicit profits from the crime.

For example, Galleon Group LLC co-founder Raj Rajaratnam was ordered to forfeit \$53.8 million which his trial judge determined were the proceeds he reaped from his crimes.

"What the criminal law hopes to achieve and what we intend to do," Bharara said at a press conference last week, "is to get back what makes sense, given the actions that have been taken before and given what the conduct was of people at the company, given what profits were made and given what an appropriate criminal penalty may be."

The case is U.S. v. SAC Capital Advisors LP, 13-05182, U.S. District Court for the Southern District of New York (Manhattan)