

## ADVISORY

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## SECOND CIRCUIT'S NBA GAMBLING OPINION EXPANDS FEDERAL RESTITUTION LAW

In a recent decision, the United States Court of Appeals for the Second Circuit interpreted the federal criminal restitution statutes in a way that may help companies recover compensation for both (1) the harm they suffered from a criminal scheme; and (2) the various expenses they incurred in investigating a criminal scheme and assisting the government with a subsequent prosecution. Rejecting the defendant's proposed narrow interpretation of the Victim and Witness Protection Act of 1982 (VWPA), 18 U.S.C. § 3663, the Second Circuit in *United States v. Battista*, No. 08-3750 (2d Cir. Aug. 6, 2009), held that an entity that was not the direct target of a fraud could be considered a "victim" entitled to restitution under the VWPA, and also that portions of the victim's attorneys' fees and investigative expenses could be recovered as restitution.

The *Battista* case arose out of the much-publicized National Basketball Association (NBA) gambling scandal, in which a former NBA referee provided non-public information to two individuals, including James Battista, as part of a scheme to profit from gambling on NBA games. Battista and the other two co-conspirators pleaded guilty to federal crimes. At sentencing, the District Court, among other things, ordered that the defendants pay restitution to the NBA under both the VWPA (which grants discretion to impose an order of restitution in certain circumstances), and the Mandatory Victims Restitution Act of 1996 (MVRA), 18 U.S.C. § 3663A (which *requires* that restitution be imposed in statutorily-prescribed circumstances). Battista appealed the District Court's restitution decision.

The Second Circuit held that the NBA properly was considered a "victim" for the purposes of the VWPA and therefore was eligible for a restitution award. The Court acknowledged that Battista (who pleaded guilty to conspiring to transmit wagering information, in violation of 18 U.S.C. §§ 371 and 1084) had not defrauded the NBA directly. The Court nevertheless pointed to the broad definition of "victim" in the VWPA, as well as the central purpose of the restitution statutes to "mak[e] victims whole," in concluding that the NBA properly could be considered a "victim" of the scheme for the purposes of restitution. The Court reasoned that the NBA had been "harmed by the conduct committed during the course of the conspiracy to transmit wagering information, e.g., Battista's use of nonpublic information solely belonging to the NBA (conveyed to him by the co-conspirators) to place illegal

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wagers on games. The Court also expanded the reach of its prior decision in *United States v. Amato*, 540 F.3d 153 (2d Cir. 2008),<sup>1</sup> ruling that the VWPA (like the MVRA at issue in *Amato*) allows victims to recover the attorneys' fees and other expenses they incur in assisting with the government's investigation and prosecution.

As we detail further below, we believe that the *Battista* ruling, coupled with prosecutors' increased attention to obtaining restitution for victims in the aftermath of the Justice for All Act, 18 U.S.C. § 3771, and cases such as *Amato*, has significance for private companies and organizations. Among other things:

- Battista will help companies that have been harmed by the criminal misuse of their non-public information recover restitution from persons convicted of such crimes. Alternatively, companies found criminally liable for such conduct may be required to pay restitution to their victims.
- Companies may be able to get court-ordered restitution covering the attorneys' fees and other expenses they incurred while assisting with the government's investigation and prosecution of criminal activity, regardless of whether restitution is ordered under the mandatory MVRA or the discretionary VWPA.
- Companies that have been found guilty of a crime, and companies involved in negotiating deferred prosecution or non-prosecution agreements, may face stronger arguments that they should be required to pay for the expenses that their victims incurred in assisting the government with investigating and prosecuting the case.

## THE SECOND CIRCUIT'S OPINION

As noted, the *Battista* case arose out of the recent heavily-publicized NBA gambling scandal. Battista's co-conspirator, Timothy Donaghy, worked as a referee for the NBA and, because of his position, had inside "knowledge of the officiating crews for upcoming NBA games, the

interactions between certain referees, players and team personnel, and the physical condition of players." Relying on his unique access to such non-public information, Donaghy provided to co-conspirator Thomas Martino his "picks" for NBA games, including games for which he officiated. Martino relayed Donaghy's picks to Battista, who then placed bets. After the scheme was discovered, Donaghy agreed to cooperate with the government's investigation, and ultimately 'pleaded guilty to conspiracy to commit wire fraud, in violation of 18 U.S.C. § 1343, and conspiracy to transmit wagering information, in violation of 18 U.S.C. § 1084. Martino was charged and pleaded guilty to conspiracy to commit wire fraud, and Battista was charged and pleaded guilty to conspiracy to transmit wagering information.

At sentencing, the District Court ordered all three defendants to pay restitution to the NBA, to reimburse the NBA for: (1) the compensation it had paid Donaghy for the portions of the basketball seasons when he officiated games in which he had a financial interest; (2) the portion of salaries of NBA employees attributed to reviewing tapes of the games Donaghy refereed; and (3) attorneys' fees and investigative costs the NBA incurred in connection with assistance it provided to the government in investigating and prosecuting the case. The District Court ordered restitution under both the MVRA and the VWPA in the total amount of US\$217,266.94, and apportioned amounts owed jointly and severally among the defendants.

On appeal, Battista argued: (1) the NBA was not a "victim" of the offense to which he pleaded guilty under either the MVRA or the VWPA; (2) his crime of conviction was not an offense covered by either statute; (3) attorneys' fees and investigative costs incurred by the NBA were not recoverable; and (4) his financial obligations were too burdensome to allow him to pay restitution under the VWPA.

The Second Circuit first discussed whether restitution was mandatory under the MVRA because the defendant had been convicted of "an offense against property under

<sup>1</sup> Arnold & Porter LLP partner Marcus Asner argued the *Amato* matter on behalf of the government while he was serving as an Assistant United States Attorney in the Southern District of New York.

[Title 18] . . . including an[] `offense committed by fraud or deceit.” 18 U.S.C. § 3663A(c)(1)(A)(ii). On appeal, Battista argued that restitution was not required under the MVRA because he technically had been convicted of conspiracy to transmit wagering information which, he claimed, was not “an offense committed by fraud or deceit.” The government countered that, regardless of the specific charge, the underlying wagering conviction was part of a scheme to defraud the NBA of its intangible right to Donaghy’s honest services. Rather than resolve the “open question of whether the language ‘committed by fraud or deceit’ in Section 3663A(c)(1)(A)(ii) refers to the elements of an offense or the manner in which the defendant commits the offense,” the Court instead decided it did not need to decide the MVRA issue because it found that the District Court had properly imposed restitution pursuant to the VWPA.

Turning to the VWPA, the Second Circuit first evaluated whether the NBA could be considered a “victim” for purposes of federal restitution provisions. The VWPA (like the MVRA) defines a “victim” as:

a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element of a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant’s criminal conduct, in the course of the scheme, conspiracy, or pattern. 18 USC § 3663(a)(2); see also 18 USC § 3663A(a)(2).

The Court reaffirmed that restitution may only be ordered for “loss caused by the specific conduct that is the basis of the offense of conviction.” It concluded, however, that although Battista did not defraud the NBA directly, the NBA nevertheless was a “‘victim’ under the VWPA because it was harmed by the conduct committed during the course of the conspiracy to transmit wagering information, e.g., Battista’s use of nonpublic information solely belonging to the NBA (conveyed to him by the co-conspirators) to place illegal wagers on its games.” The Court further noted that, because Battista’s “offense” of conviction was conspiracy,

his own criminal conduct encompassed the acts of his co-conspirators.<sup>2</sup>

The Second Circuit also examined whether the NBA’s attorneys’ fees and investigative costs were recoverable under the VWPA’s discretionary restitution provisions. The Court noted that the VWPA, like the MVRA, explicitly permits recovery for “other expenses,” and that, in the recent *Amato* decision, the Court had held that the term “other expenses” in the MVRA included expenses “‘incurred during the victim’s participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense may include attorneys’ fees and accounting costs.’” 540 F.3d at 159. The Court reiterated the requirement set out in *Amato* that the “other expenses” be “‘necessary,’ and that they be incurred during the participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense,” and that they be “incurred by a ‘victim’ within the meaning of 18 U.S.C. § 3663A(2), and that they not require unduly complicated determinations of fact....” *Id.* at 160. The Court then ruled that its holding in *Amato*—that “other expenses” under the MVRA includes legal fees incurred in the assistance of the government’s investigation and prosecution of a criminal offense—would be extended to apply in the context of restitution under the discretionary restitution provisions of the VWPA.<sup>3</sup>

## IMPLICATIONS OF THE DECISION

The Second Circuit’s decision in *Battista* will help companies that have been harmed by the criminal misuse of their non-public information recover restitution from persons convicted of such crimes. In addition, under *Battista*, companies may now recover through restitution orders the various expenses (such as attorneys’ fees and investigative costs) they incurred in assisting with the

2 While the Second Circuit made this determination within the context of a case applying the VWPA, the statutory definition of “victim” is identical in the VWPA and the MVRA, suggesting that the Court’s analysis likely would be generalized to an MVRA case as well.

3 The Second Circuit rejected Battista’s argument that restitution under the VWPA was improper because he was financially incapable of making payments, pointing to the District Court’s finding that Battista had a “reasonable potential for future income.”

government's investigation and prosecution of criminal activity, regardless of whether the order of restitution is founded on discretionary restitution provision (VWPA) or the mandatory restitution provision (MVRA). While individual criminal wrongdoers often will have limited resources to pay restitution, companies that have been found guilty of a crime, or companies involved in negotiating deferred prosecution or non-prosecution agreements, may well be faced with arguments that that they should be required to pay for the expenses that their victims incurred in assisting the government with investigating and prosecuting the case.

*We hope that you have found this advisory useful. If you have questions, please contact your Arnold & Porter attorney or:*

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