

# Restitution from the Victim's Perspective—Recent Developments and Future Trends



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## I. Introduction

Restitution is becoming an increasingly significant feature of sentencing, and lawyers practicing federal criminal law will be well-served to become familiar with it. To be sure, the main focus at sentencing has been and likely will remain on prison time. But recent developments in the law of restitution, coupled with an ever-increasing focus on victims' rights, may well lead to a defendant convicted in federal court—and her family—facing the burdens of a restitution order long after her release from prison. And defendants aren't the only ones who need to worry about restitution. Restitution also provides many crime victims with a powerful weapon they can use to help recover full compensation (including possibly attorneys' fees and investigative expenses) for the losses caused by a defendant's crime—without having to bother with the expense, hassle, and uncertainty of filing their own civil action, going to court, or trying to collect on a judgment themselves. Restitution also plays a role where a corporate target hopes to stave off a conviction by settling out of court—negotiating a deferred prosecution or non-prosecution agreement, for example—since the resolution often requires the corporation to provide full compensation to the victims.

This article provides a brief overview of the legal landscape governing restitution and examines some of the significant trends and emerging issues we think all parties involved in federal criminal cases should know. We will focus on: (1) the expansion of restitution to cover a broad array of crimes and harms; (2) the broadening view of who qualifies as a "victim" under the Mandatory Victims Restitution Act of 1996 (MVRA)<sup>1</sup> and the Victim and Witness Protection Act of 1982 (VWPA)<sup>2</sup>; and (3) the expansion of restitution to cover a larger range of victims' expenses, including in some cases portions of the victims' legal expenses, under *United States v. Amato*<sup>3</sup> and subsequent cases.

## II. Restitution—A Brief History and the Statutory Landscape

For many years, restitution was dismissed as almost an afterthought in federal criminal cases. Courts infrequently ordered restitution, and then only did so as a condition of parole.<sup>4</sup> Things started to change in the 1970s and '80s, however, when the victims' rights movement began to reflect a growing sentiment that the criminal justice system

focused too heavily on the offender himself, and often failed to address adequately the interests and needs of the victim.<sup>5</sup> In 1982, President Reagan's Task Force on Victims of Crime recommended, as one of its central reforms, that courts order "restitution in all cases, unless [they] provide specific reasons for failing to require it."<sup>6</sup> That led to Congress passing the VWPA later the same year, which gave federal courts statutory authority to order restitution at sentencing in a wide range of federal criminal cases, including Title 18 cases and any criminal case in which the parties included restitution in the plea agreement.<sup>7</sup>

The trend continued over the next few decades, with Congress enacting a number of statutes that have served to expand significantly the role that restitution plays in the statutory sentencing structure. In 1994, Congress passed the Violence Against Women Act, which made restitution mandatory for certain sex crimes and—significantly for white-collar cases (as we'll discuss further in Part V below)—amended the VWPA to allow crime victims to recover "necessary . . . expenses related to participation in the investigation or prosecution of the offense."<sup>8</sup> Two years later, in 1996, Congress enacted the MVRA, making restitution mandatory in many federal criminal cases, and requiring defendants in those cases to pay "the full amount of each victim's losses" regardless of their economic circumstances.<sup>9</sup>

In 2004, as a part of the Justice for All Act, Congress enacted the Crime Victims' Rights Act (CVRA), which codified the rights of crime victims—including "the right to full and timely restitution"—and provided victims with the means to enforce those rights.<sup>10</sup> The CVRA imposes affirmative duties on the Department of Justice and federal courts to ensure that crime victims are afforded their rights under the statute.<sup>11</sup> The CVRA also gives a crime victim the power to assert his rights independently in district court, and to petition the court of appeals for a writ of mandamus if the district court denies the relief he requested.<sup>12</sup> This means that a crime victim, in certain circumstances, actually has the power to overturn a district court's decisions, including decisions regarding guilty pleas, sentences, and restitution, if she is denied her rights under the CVRA.<sup>13</sup>

The upshot of all this is that the restitution statutory scheme now evidences clear legislative intent to provide broad compensation to crime victims. It is now well settled

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that “[t]he goal of restitution, in the criminal context is ‘to restore a victim, to the extent money can do so, to the position he occupied before sustaining injury.’”<sup>14</sup> These developments most obviously have a significant impact at sentencing, both on the criminal defendant himself and on the victim. But the present restitution framework also may have a significant, and sometimes unexpected, impact on pre-indictment strategy, on how practitioners go about conducting investigations, and even in traditional civil disputes.

### III. The Scope of Crimes and Harms Covered by the Restitution Statutes

“Federal courts have no inherent power to order restitution,”<sup>15</sup> and may order restitution only if a statute explicitly calls for it. In the federal white-collar world, the MVRA and the VWPA are the main statutes courts rely upon to order restitution. The MVRA provides for mandatory restitution for certain crimes, such as “an offense against property under [Title 18] . . . including any offense committed by fraud or deceit.”<sup>16</sup> The VWPA covers a lot of the same ground, but gives the court discretion whether to order restitution, and also applies to those Title 18 offenses not covered by the MVRA.<sup>17</sup>

At first blush, the focus of both the MVRA and the VWPA on Title 18 would appear to preclude restitution for a wide variety of white-collar crimes, such as tax offenses under Title 26 or securities fraud cases under Title 15. But as a practical matter, defendants in tax or securities fraud prosecutions in fact have little reason to cheer. The federal conspiracy statute, 18 U.S.C. § 371, falls under Title 18 and therefore is covered by the VWPA—and potentially by the MVRA if the case involves an offense “against property” under the meaning of the statute. That means a federal conspiracy charge may well lead to a court ordering restitution “even when it could not be awarded for the underlying predicates.”<sup>18</sup> In *United States v. Helmsley*, for example, the defendant was convicted of conspiracy, mail fraud, and income tax offenses. On appeal, the defendant challenged the district court’s restitution order, arguing that, although conspiracy and mail fraud are Title 18 offenses, the particular charges in that case nevertheless were “tax-related” and that Congress had not authorized restitution for tax-related offenses. The Second Circuit rejected the argument, and affirmed the restitution order, reasoning that the VWPA applies to conspiracy and mail fraud because they are Title 18 offenses and are “crimes distinct from their underlying predicate acts and purposes, and involve additional harms.”<sup>19</sup> *United States v. Bengis*<sup>20</sup> provides a more recent example of a court ordering restitution based on a conspiracy offense, even though it would have been unable to order restitution under the underlying predicate offense (violations of the Lacey Act, which prohibits trafficking in illegal wildlife, fish, plants, and plant products).

As practitioners well know, conspiracy charges can sweep very broadly, covering a wide range of acts, many of

which standing alone would not be deemed criminal. So what sorts of harms count for the purposes of the restitution statutes? Does a victim get restitution for damage suffered only as a result of the specific crime charged, or does she get compensated more fully for the broader impact of the conspiracy? The Supreme Court wrestled with this issue in a 1990 opinion in *United States v. Hughey*,<sup>21</sup> where it held, under an earlier version of the VWPA, that “restitution as authorized by the statute is intended to compensate victims only for losses caused by the conduct underlying the offense of conviction.”<sup>22</sup> Congress quickly jumped in with a legislative fix, enacting the Crime Control Act of 1990 (CCA), which overturned *Hughey* by expanding the definition of victim to include “any person directly harmed by the defendant’s criminal conduct in the course of the scheme, conspiracy, or pattern . . .”<sup>23</sup> The MVRA, passed six years later, also contains this more expansive definition. The *Hughey* statutory fix broadened the scope of losses for which victims could recover “from losses attributable solely to the offense of conviction to all losses caused in the course of a defendant’s criminal conduct, whether the defendant is convicted of each of those offenses or not.”<sup>24</sup> This result can have a big impact for innocent bystanders harmed during the course of a criminal scheme. In one recent case, for example, we obtained restitution (including a portion of our legal fees) for a corporate client that had been defrauded by a group of defendants engaged in a scheme to bribe New York State Senator Carl Kruger.<sup>25</sup> We were able to get restitution, even though our client was not a direct victim of the underlying substantive bribery crime, because the harm to our client occurred “in the course of the scheme, conspiracy, or pattern.” By getting restitution through the criminal case, we were able to save much of the expense, hassle, and uncertainty of pressing for compensation in a parallel civil action pending at the time.

The broad scope of conspiracy law also increases the number of defendants potentially on the hook for restitution. The VWPA and the MVRA “provide for restitution payable by all convicted co-conspirators in respect of damage suffered by all victims of a conspiracy, regardless of the facts underlying counts of conviction in individual prosecutions.”<sup>26</sup> In *United States v. Battista*,<sup>27</sup> for example, the National Basketball Association (NBA) was found to be a “victim” of the defendant’s crime of conspiracy to transmit wagering information, even though the defendant did not defraud the NBA directly. The court explained that, in viewing the defendant’s conspiracy offense, the court must consider “not just [the defendant’s] own acts but also those of his co-conspirators.”<sup>28</sup>

A victim in a white-collar case generally is entitled to restitution under the MVRA only if the defendant commits an offense “against property.” The VWPA is broader—in theory at least—because it technically authorizes restitution in any Title 18 case. But as a practical matter, the VWPA won’t add much in most white-collar cases because the victim still will be able to recover restitution only for “damage to or loss or destruction of property.”<sup>29</sup> An upshot

of this is that the scope of the term “property” is crucial in the restitution area. In *United States v. Cummings*, the district court drew a distinction between tangible and intangible property,<sup>30</sup> which led some courts to conclude that the term “property” should be read narrowly to cover only physical or tangible property.<sup>31</sup> However, in 2007, the Second Circuit rejected this interpretation by adopting a broad view of “property” and clarifying that “not all property covered by the provision will be tangible in nature[.]”<sup>32</sup> Subsequently, the court in *Bengis* concluded that the South African government’s legal authority to seize and sell illegally harvested lobsters qualified as a property right under the MVRA.<sup>33</sup> This trend of broadening the scope of “property” to include “intangible property” means that victims should be able to recover restitution in a wide array of cases, including cases involving intellectual property<sup>34</sup> and stock options.

#### IV. The Broadening View of Who Is a “Victim” under the VWPA and the MVRA

Determining whether an individual or a company qualifies as a “victim” is crucial to a restitution determination. Having an identifiable “victim” is required for a restitution order, and the identification of a victim triggers important rights for the victim and duties on the government and court.<sup>35</sup> The CVRA imposes an implicit duty on federal prosecutors to identify victims in criminal cases.<sup>36</sup> And when victims are identified, prosecutors have a duty to ensure the victims are afforded their rights under the statute.<sup>37</sup> Defense counsel obviously need to be ready for this, because more victims may well translate to a more challenging defense and a larger restitution award. Lawyers representing clients who may have been harmed by an offense also should be prepared to advocate that their clients are victims of the criminal scheme, in large part because working through the criminal justice process, rather than pursuing a parallel civil action against the defendant, often can prove a much more effective and efficient way of getting compensation.

The government bears the burden of proving that an individual or a company is a “victim” and the amount of loss suffered.<sup>38</sup> Both the MVRA and the VWPA define victim as follows:

[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 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.<sup>39</sup>

Courts typically take a broad view of who qualifies as a crime victim for the purposes of the restitution statutes. For example, courts have held that employers can be victims of their employees’ criminal conduct.<sup>40</sup> In *United States v. Gordon*,<sup>41</sup> the defendant, who pleaded guilty to wire fraud and insider trading, was ordered to make restitution

to his former employer, Cisco, for its losses, including the value of embezzled cash and shares. Similarly, a corporation could be considered the victim of another corporation’s criminal conduct—in cases involving the theft of trade secrets, bribery, or counterfeiting, for example—which, as noted, may well help a corporate victim get full compensation for its losses (including attorneys’ fees, discussed in Part V below) without incurring the expense of commencing and litigating a civil suit.

Foreign countries and states also may qualify as victims under the restitution statutes.<sup>42</sup> In *United States v. Bengis*, for example, the Second Circuit ruled that South Africa was entitled to restitution for harm inflicted in a large scheme to overharvest rock lobster in South African waters, and import the poached lobster into the United States, in violation of the Lacey Act.<sup>43</sup> One consequence is that restitution may come to play an increasingly significant role in Foreign Corrupt Practices Act (FCPA) enforcement actions. Although an FCPA violation is a Title 15 offense,<sup>44</sup> and therefore not itself covered by the MVRA or the VWPA, many FCPA enforcement actions include a conspiracy offense, thus providing a basis for restitution.<sup>45</sup> In 2011, for example, Instituto Costarricense de Electricidad (ICE), the Costa Rican state-owned electric company, petitioned the U.S. District Court for the Southern District of Florida to recognize ICE as a “crime victim” in the *Alcatel* FCPA enforcement action, and pressed the court to reject the pending plea agreements and DPA.<sup>46</sup> ICE argued that, as a result of Alcatel’s conspiracy to bribe ICE officials, ICE had been deprived of Alcatel’s honest services and had suffered pecuniary losses. The courts ultimately denied ICE victim status on the facts, holding that ICE was not a victim because it acted as a co-conspirator in the bribery scheme. In upholding the denial of restitution, the Eleventh Circuit pointed to “the pervasive, constant, and consistent illegal conduct conducted by the ‘principals’ (i.e., members of the Board of Directors and management) of ICE.”<sup>47</sup>

Although ICE ultimately was unsuccessful on the particular facts, there’s nothing wrong with ICE’s basic point that a foreign country can seek restitution in an FCPA enforcement action.<sup>48</sup> For example, at the conclusion of the BAE investigation, BAE reached a settlement with the Serious Fraud Office whereby it agreed to plead guilty to failing to keep accurate accounting records and to make a payment of £29.5 million for the benefit of the people of Tanzania.<sup>49</sup> In particular cases, this may well affect settlement negotiations with the DOJ as well as the courts’ willingness to approve such settlements.<sup>50</sup> DOJ attorneys are obliged to consider whether a settlement will protect victims’ rights; therefore, during negotiations, they may well insist that broad restitution be included.<sup>51</sup> Add to the mix the growing trend of judges increasing their scrutiny of corporate settlement agreements. In a recent case, for example, U.S. District Judge Richard J. Leon refused to approve a settlement agreement resolving civil FCPA charges that the SEC brought against IBM, pressing IBM to agree to more rigorous reporting.<sup>52</sup> This increased judicial scrutiny

of settlements, coupled with judges' affirmative obligation to protect victims' interests, puts pressure on both the government and settling companies to address restitution as part of the resolution of the enforcement action.

That said, there are some limits on who gets afforded victim status and restitution. A number of courts (such as the court in the ICE matter) have refused to order restitution between or among co-conspirators, holding that it is "beyond the authority conferred by the MVRA" and "contrary to public policy."<sup>53</sup> In applying the judicially created co-conspirator exception, courts will "conduct[] fact-specific inquiries into an alleged 'victim's' willingness as a participant in the scheme and whether he or she shared the same criminal intent as the defendant."<sup>54</sup> In *United States v. Ojeikere*,<sup>55</sup> for example, the defendant was convicted of wire fraud and conspiracy for his role in an "advance fees" scam that tricked victims into paying the defendant to release funds from Nigeria. On appeal, the Second Circuit affirmed the restitution order and rejected the defendant's argument that the "victims' hands are too dirty to claim restitution."<sup>56</sup> The court held that restitution "may not be denied simply because the victim had greedy or dishonest motives, where those intentions were not *in pari materia* with those of the defendant."<sup>57</sup> Courts also may deny restitution in cases where "the number of identifiable victims is so large as to make restitution impracticable."<sup>58</sup>

#### **V. Restitution Awards—Amato Restitution and Other Developments Bearing on Victims' Abilities to Recover Full Compensation**

So what sorts of damages or costs can a victim recover under the restitution statutes? It turns out that the losses covered by the restitution statutes are quite broad, in many cases broader than the recovery a victim could hope to obtain in a private civil action. As recent cases have made plain, victims may recover compensation for the full extent of the crime, which may include costly out-of-pocket investigative expenses and attorneys' fees.

The MVRA provides that sentencing courts must order restitution to "each victim in the *full amount of each victim's losses* as determined by the court and without consideration of the economic circumstances of the defendant."<sup>59</sup> The VWPA provides for discretionary restitution and requires courts to consider "the financial resources of the defendant,"<sup>60</sup> although the cases make clear that "[d]espite the use of the word 'may' [in the VWPA], we have held that the purpose of the restitution provision is to require restitution whenever possible."<sup>61</sup> Both statutes provide that orders of restitution include "lost income and necessary child care, transportation, and *other expenses incurred during participation in the investigation and prosecution of the offense or attendance at the proceedings related to the offense.*"<sup>62</sup> The statutes include exemption provisions that permit courts to decline to make a restitution order if they determine that fashioning such an order will complicate and prolong the sentencing process.<sup>63</sup> Courts, nevertheless, construe these exemptions narrowly and invoke them infrequently.<sup>64</sup>

#### **A. Amato Restitution and Recent Developments in "Other Expenses"**

In recent years, a growing number of courts have been asked to determine what sorts of "other expenses" are compensable under the restitution statutes. The general trend is that "other expenses" is read to encompass certain investigative costs and attorneys' fees.<sup>65</sup> In *Amato*, for example, the defendants were convicted in a scheme to defraud their employer, Electronic Data Systems Corporation (EDS), and a number of states.<sup>66</sup> The district court held a restitution hearing and ordered the defendants to pay EDS \$12,799,795, which included a portion of the attorneys' fees and accounting costs EDS incurred in investigating the scheme and assisting in the prosecution.<sup>67</sup> On appeal, the defendants challenged the portion of the restitution order attributable to EDS's attorneys' fees and accounting costs.<sup>68</sup> The Second Circuit affirmed the restitution order and held that "other expenses" under the restitution statutes may include attorneys' fees and accounting costs.<sup>69</sup> The court ruled that attorneys' fees and accounting costs must be included under the MVRA *only if* the expenses were "necessary" and "incurred during participation in the investigation or prosecution of the offense or attendance at the proceedings related to the offense."<sup>70</sup> The court considered the Ninth Circuit's requirement that "such expenses must be the 'direct and foreseeable result' of the defendant's wrongful conduct," but declined to formulate such a test because that requirement was "clearly met" in this case.<sup>71</sup>

*Amato* provides guidance on how courts will approach restitution requests that include attorneys' fees and accounting expenses. First, the attorneys' fees or other investigative expenses must be "necessary" to the victim's involvement in the government's investigation and prosecution of the defendants' criminal offenses—they cannot be indirectly or merely consequentially related.<sup>72</sup> In *Battista*, for example, the Second Circuit affirmed a restitution order that included attorneys' fees attributable to investigating the scheme and assisting with the prosecution, and noted that the district court correctly excluded attorneys' fees incurred for the purpose of counseling the NBA on its public response to the defendant's guilty plea.<sup>73</sup> The scope of what qualifies as a "necessary" expense is developing. The District of Columbia Circuit took a narrow view in *United States v. Papagno*,<sup>74</sup> holding that the MVRA "does not reach the costs of an internal investigation that was not required or requested by the criminal investigators or prosecutors." Other courts, however, take a more liberal view of what sorts of expenses are necessary. In *United States v. Gupta*,<sup>75</sup> for example, District Judge Jed Rakoff of the United States District Court for the Southern District of New York recently ordered the defendant to pay over \$6 million in *Amato* restitution, including attorneys' fees that victim Goldman Sachs had incurred in a parallel civil enforcement proceeding and in connection with the criminal prosecution of Gupta's co-conspirator. In his memorandum order, Judge Rakoff explicitly rejected the defendant's argument—based on *Papagno*—that *Amato*

restitution covers only expenses incurred for work required or requested by the criminal investigators or prosecutors, noting that the Second Circuit has taken a “very broad view” of necessary expenses.<sup>76</sup>

Second, the victim should submit to the government detailed records reflecting the amount and purpose of the legal fees or other investigative expenses.<sup>77</sup> The government bears the burden of demonstrating the expenses by a preponderance of evidence,<sup>78</sup> and the courts will need records detailing the purpose of the legal fees. In *United States v. Chong Lam*,<sup>79</sup> for example, the court concluded that the government failed to submit enough information to show Burberry was entitled to restitution for its legal fees, where the only evidence submitted was an e-mail from the law firm claiming entitlement to fees.

Since *Amato*, a number of courts have issued restitution orders for a variety of other expenses, including attorneys’ fees incurred during participation in an SEC investigation,<sup>80</sup> forensic accounting expenses, and internal investigative costs. The law is still developing in this area, and different courts no doubt will handle *Amato* restitution claims differently. All said, the costs of investigating and dealing with the fallout of a criminal scheme can prove significant, and victims conducting internal investigations or assisting in a prosecution should think about *Amato* restitution at the beginning of a matter, so that they can best document later which particular expenses may be covered by the statute.

## B. Getting a Restitution Order

The government bears the burden of proving the proper restitution amount.<sup>81</sup> As a practical matter, though, the government will need to rely a great deal on the victim to help establish the proper restitution amount. In general, victims should begin early to think about their losses and how best to document them. Although the restitution calculation often is fairly straightforward, in many cases calculating the loss will prove complex and may require the assistance of subject matter experts. In *Bengis*, for example, South Africa engaged the services of outside consultants to help estimate the economic harm that the defendants had caused to its rock lobster population.<sup>82</sup>

Victims often will be best served to press for a stipulated restitution amount to be included in the defendant’s plea agreement, which will help the victim avoid the burdens and risk involved with litigation over the proper restitution amount. Depending on the circumstances, such an agreement could include a requirement that the defendant pay all or some of the agreed-upon amounts in advance of sentencing. We’ve found that approaching the prosecutor early and with a conservative, well-documented calculation of the victim’s loss helps ensure that the plea agreement includes a stipulated restitution amount. The prosecutor likes to resolve restitution issues by stipulation because it saves her the time and effort involved in conducting a restitution hearing and in any subsequent appeal. And as a practical matter, a defendant often will be inclined to stipulate to

a specific restitution amount both because it can help her demonstrate contrition to the court and because it may make the victim less likely to participate actively at sentencing, which in turn serves the defendant’s interests by keeping the focus on her own personal circumstances, rather than on the details of the crime and the harm inflicted on the victim. That said, not all victims will want to resolve the restitution issue by submitting a conservative loss number and pressing for a stipulated restitution amount. In a theft of trade secrets case, for example, a victim may feel it is best served to seek a full and substantial restitution order, not only for recovery purposes, but for the general deterrent effect.

If the restitution order fails to provide adequate recovery, a crime victim has the option pursuant to the CVRA to assert his rights independently in district court and to petition the court of appeals for a writ of mandamus if the district court denies the relief he requested.<sup>83</sup> In the *Alcatel* FCPA litigation discussed above, ICE petitioned the district court and filed a mandamus petition with the court of appeals requesting to be recognized as a “crime victim.”<sup>84</sup> Although relatively few victims have asserted these rights successfully, a growing number of courts have granted CVRA mandamus petitions brought by victims in cases involving defendants charged with possession of child pornography.<sup>85</sup> The law is still developing in this area, and we anticipate seeing more of these cases as increased attention is placed on restitution and victims’ rights.

## C. Enforcement of Restitution Orders

The MVRA requires courts to order restitution without consideration of the defendant’s financial circumstances.<sup>86</sup> This requirement, coupled with the restitution enforcement mechanisms, can afford victims greater recovery and burden defendants with significant debt. Court-ordered restitution is treated like a tax lien so that it is “effective against every interest in property accorded a taxpayer by state law.”<sup>87</sup> Some courts have even concluded that certain retirement funds may be subject to a restitution order.<sup>88</sup> Additionally, a restitution order issued under Title 18 is nondischargeable in bankruptcy.<sup>89</sup> The First Circuit recently held that the sale proceeds from a homestead property were not protected from a restitution order issued under the MVRA. The court reasoned that, because of the MVRA’s “unambiguous language” indicating that the MVRA applied “[n]otwithstanding any other Federal law,” the MVRA did not yield to the Massachusetts homestead exemption.<sup>90</sup>

Collecting on a restitution order can prove tricky, depending on the defendant’s circumstances. One way to ensure payment is to address the issue during plea discussions, and find ways to require payment before sentencing or as a condition of supervised release. One source of restitution could be property that the defendant was required to forfeit to the government as part of sentencing. In cases where the defendant forfeits property to the government, the Department of Justice’s Restoration Policy

permits the government in its discretion to transfer the forfeited property to the crime victim, in order to reduce the restitution award by the amount already forfeited.<sup>91</sup> As a practical matter, the DOJ is interested in making sure that victims get compensation, and the Restoration Policy provides a good way to help make the victim whole. Finally, victims always can help themselves and enhance their chances of recovery by doing their own investigation and alerting the government to property held by the defendant that may be subject to forfeiture.

## VI. Conclusion

Restitution won't supplant prison time as the headline in white-collar cases; however, it has become an important issue to all parties in these cases. Restitution orders have the potential to cripple defendant corporations, but also to help restore victims to their position prior to the crime. As the legal landscape continues to develop, practitioners in the white-collar area must keep abreast of the emerging issues in restitution law so that they can counsel and advocate effectively on behalf of their clients. Additionally, while parties tend to focus on restitution when it comes time for sentencing, practitioners should consider restitution in their pre-indictment strategy—whether representing a corporate target or victim.

## Notes

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- <sup>1</sup> Mandatory Victim's Restitution Act of 1996, Pub. L. No. 104-132, § 204, 110 Stat. 1214, 1227 (codified as amended principally at 18 U.S.C. §§ 3663A and 3664 (2006)).
- <sup>2</sup> Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, § 5, 96 Stat. 1248, 1253-55 (codified as amended at 18 U.S.C. § 3663 (2006)).
- <sup>3</sup> 540 F.3d 153 (2d Cir. 2008). Marcus Asner argued the *Amato* matter on behalf of the government while he was serving as an Assistant United States Attorney for the Southern District of New York.
- <sup>4</sup> See S. Rep. No. 97-532, at 30 (1982), *reprinted in* 1982 U.S.C. C.A.N. 2515, 2536.
- <sup>5</sup> See Matthew Dickman, Comment, *Should Crime Pay?: A Critical Assessment of the Mandatory Victims Restitution Act of 1996*, 97 CAL. L. REV. 1687, 1688 (2009); Brian Kleinhaus, Note, *Serving Two Masters: Evaluating the Criminal or Civil Nature of the VWPA and MVRA Through the Lens of the Ex Post Facto Clause, the Abatement Doctrine, and the Sixth Amendment*, 73 FORDHAM L. REV. 2711, 2719-20 (2005).
- <sup>6</sup> President's Task Force On Victims of Crime, Final Report, at 18 (1982), available at [www.ojp.usdoj.gov/ovc/publications/presdntstskforcrprt/87299.pdf](http://www.ojp.usdoj.gov/ovc/publications/presdntstskforcrprt/87299.pdf).
- <sup>7</sup> Victim and Witness Protection Act of 1982, *supra* n.2.
- <sup>8</sup> Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322, § 40504, 108 Stat. 1796, 1947.
- <sup>9</sup> Mandatory Victim's Restitution Act of 1996, *supra* n.1.
- <sup>10</sup> Justice for All Act of 2004, Pub. L. No. 108-405, § 102, 118 Stat. 2260, 2269 (codified at 18 U.S.C. § 3771 (2006)).

- <sup>11</sup> 18 U.S.C. § 3771(c)(1) (Department of Justice personnel "shall make their best efforts to see that crime victims are notified of, and accorded, the rights described in subsection (a)"), (b)(1) ("[T]he court shall ensure that the crime victim is afforded the rights described in subsection (a).").
- <sup>12</sup> 18 U.S.C. § 3771(d)(1), (d)(3).
- <sup>13</sup> See, e.g., *In re Morning Star Packing Co.*, 13-71048, 2013 WL 1278086, at \*1-2 (9th Cir. Mar. 29, 2013) (granting the victims' CVRA mandamus petition and ordering the district court to vacate its judgment with respect to restitution on the grounds that the court heavily based its decision to deny restitution on the defendant's alleged inability to satisfy a restitution award and the potential availability of civil remedies).
- <sup>14</sup> *United States v. Battista*, 575 F.3d 226, 229 (2d Cir. 2009) (quoting *United States v. Boccagna*, 450 F.3d 107, 115 (2d Cir. 2006)); see *United States v. Gordon*, 393 F.3d 1044, 1048 (9th Cir. 2004) ("The primary and overarching goal of the MVRA is to make victims of crimes whole.").
- <sup>15</sup> *United States v. Helmsley*, 941 F.2d 71, 101 (2d Cir. 1991).
- <sup>16</sup> 18 U.S.C. § 3663A(c)(1)(A)(ii).
- <sup>17</sup> 18 U.S.C. § 3663(a)(1)(A).
- <sup>18</sup> *United States v. Cummings*, 189 F. Supp. 2d 67, 73 (S.D.N.Y. 2002) (citing *Helmsley*, 941 F.2d at 101).
- <sup>19</sup> *Helmsley*, 941 F.2d at 101.
- <sup>20</sup> 631 F.3d 33 (2d Cir. 2011).
- <sup>21</sup> 495 U.S. 411 (1990).
- <sup>22</sup> *Id.* at 416 (emphasis added).
- <sup>23</sup> 18 U.S.C. § 3663(a)(2) (emphasis added); Pub. L. No. 101-647, § 2509, 104 Stat. 4789, 4863 (1990).
- <sup>24</sup> *United States v. Collins*, 209 F.3d 1, 3 (1st Cir. 1999).
- <sup>25</sup> See *United States v. Kruger*, No. 11-CR-300 (JSR) (S.D.N.Y. April 27, 2012) (order of restitution).
- <sup>26</sup> *United States v. Boyd*, 222 F.3d 47, 50 (2d Cir. 2000).
- <sup>27</sup> 575 F.3d 226 (2d Cir. 2009).
- <sup>28</sup> *Id.* at 231-32.
- <sup>29</sup> 18 U.S.C. § 3663(b)(1).
- <sup>30</sup> 189 F. Supp. 2d 67, 74 (S.D.N.Y. 2002) ("It appears that an offense 'against property' applies to those offenses in which physical or tangible property, including money, is taken (or attempted to be taken) by theft, deceit or fraud.").
- <sup>31</sup> See, e.g., *United States v. Bengis*, 03 CR 308, 2006 WL 3735654 (S.D.N.Y. Dec. 19, 2006), *vacated and remanded*, 631 F.3d 33 (2d Cir. 2011). Marcus Asner prosecuted the *Bengis* case on behalf of the government while he was serving as an Assistant United States Attorney for the Southern District of New York.
- <sup>32</sup> *United States v. Milstein*, 481 F.3d 132, 137 (2d Cir. 2007) (finding that trademark infringement resulted in damage to "property").
- <sup>33</sup> 631 F.3d at 40-41 n.3 (rejecting the defendant's argument that "'offenses against property' are limited to offenses against 'tangible property,' including money").
- <sup>34</sup> See, e.g., *United States v. Dove*, 585 F. Supp. 2d 865, 868 (W.D. Va. 2008) (holding that the defendant's conspiracy count that was predicated on criminal copyright infringement satisfies the MVRA).
- <sup>35</sup> See *supra* Part II.
- <sup>36</sup> See 18 U.S.C. § 3771(c)(1) (Department of Justice personnel "shall make their best efforts to see that crime victims are notified of, and accorded, the rights described in subsection (a)").
- <sup>37</sup> *Id.*
- <sup>38</sup> 18 U.S.C. § 3664(e) ("Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the attorney for the Government.").

- 39 18 U.S.C. §§ 3663A(a)(2), 3663(a)(2).  
 40 See, e.g., *United States v. Amato*, 540 F.3d 153 (2d Cir. 2008);  
*United States v. Skowron*, 839 F. Supp. 2d 740, 744–46  
 (S.D.N.Y. 2012).  
 41 393 F.3d 1044 (9th Cir. 2004).  
 42 See, e.g., *United States v. Bengis*, 631 F.3d 33 (2d Cir. 2011)  
 (concluding that South Africa was a “victim” under the MVRA);  
*United States v. Butler*, 694 F.3d 1177, 1184 (10th Cir. 2012)  
 (holding that Kansas was a “victim” under the MVRA, and  
 suffered a loss as a result of defendants’ conspiracy to sell and  
 transport poached deer in violation of the Lacey Act).  
 43 631 F.3d at 41–42.  
 44 15 U.S.C. §§ 78dd-1, *et seq.*  
 45 See, e.g., *United States v. Baker Hughes*, H-07-129, information  
 (S.D. Tex. Apr. 11, 2007) (charging BHSI with conspiracy to  
 violate the FCPA; a substantive violation of the FCPA; and aiding  
 and abetting the falsification of book and records violation).  
 46 Petition for Relief Pursuant to 18 U.S.C. § 3771(d)(3) and  
 Objection to Plea Agreements and Deferred Prosecution  
 Agreement, *United States v. Alcatel-Lucent, S.A.*, No. CR-  
 20907 (S.D. Fla. May 2, 2011).  
 47 *In re Instituto Costarricense de Electricidad*, Nos. 11-12707-G,  
 11-12708-G, order denying writ of mandamus (11th Cir. June  
 17, 2011).  
 48 See Bruce E. Yannett, Philip Rohlik & David M. Fuhr, *Victim or  
 Villain? A Costa Rican State Entity’s Claim for Restitution from  
 Alcatel*, 25(11) WHITE-COLLAR CRIME (Aug. 2011) (Westlaw).  
 49 Press Release, Serious Fraud Office, *BAE Fined in Tanzania  
 Defence Contract Case* (Dec. 21, 2010), available at <http://www.sfo.gov.uk/press-room/press-release-archive/press-releases-2010/bae-fined-in-tanzania-defence-contract-case.aspx>.  
 50 See Yannett, *supra* note 48.  
 51 18 U.S.C. § 3771(b)(1).  
 52 Tom Schoenberg & Andrew Zajac, *IBM Judge Questions SEC on  
 Foreign Bribe Settlement*, Bloomberg, Dec. 21, 2012, available  
 at <http://www.bloomberg.com/news/2012-12-20/ibm-judge-questions-sec-posture-on-foreign-bribe-settlement-1.html>.  
 53 *United States v. Lazar*, 770 F. Supp. 2d 447, 450 (D. Mass.  
 2011) (quoting *United States v. Reifler*, 446 F.3d 65, 127 (2d  
 Cir. 2006)).  
 54 *Id.* at 450.  
 55 *Ojeikere*, 545 F.3d 220, 221–23 (2d Cir. 2008).  
 56 *Id.*  
 57 *Id.* at 223.  
 58 18 U.S.C. § 3663A(c)(3)(A); see also 18 U.S.C.  
 § 3663(a)(1)(B)(ii) (permitting a court to decline to make  
 a restitution order if “the complication and prolongation of the  
 sentencing process resulting from the fashioning of an order  
 of restitution under this section outweighs the need to provide  
 restitution to any victims”).  
 59 18 U.S.C. §§ 3663A(a)(1), 3664(f)(1)(A) (emphasis added).  
 60 18 U.S.C. § 3663(a)(1)(A)–(B) (requiring the courts to con-  
 sider “the financial resources of the defendant, the financial  
 needs and earning ability of the defendant and the defen-  
 dant’s dependents, and such other factors as the court deems  
 appropriate”).  
 61 *United States v. Porter*, 41 F.3d 68, 70 (2d Cir. 1994).  
 62 18 U.S.C. § 3663A(b)(4) (emphasis added); see 18 U.S.C.  
 § 3663(b)(4) (“other expenses related to participation in the  
 investigation and prosecution of the offense”) (emphasis  
 added). The VWPA’s “other expenses” provision is very similar  
 to the MVRA’s—the only difference is that the VWPA uses  
 “related to,” instead of “incurred during.”  
 63 18 U.S.C. §§ 3663A(c)(3), 3663(a)(1)(B)(ii).  
 64 See *United States v. Dupre*, 117 F.3d 810, 824 (5th Cir. 1997)  
 (“The language of the exemption provision gives the district  
 court a certain amount of discretion in determining whether to  
 consider additional evidence in assessing restitution. How-  
 ever, thus far, courts have exercised that discretion infre-  
 quently and only when considering difficult issues of causation  
 or speculative loss.”).  
 65 See, e.g., *United States v. Amato*, 540 F.3d 153, 159 (2d Cir.  
 2008); *United States v. Gordon*, 393 F.3d 1044, 1057 (9th Cir.  
 2004).  
 66 540 F.3d at 156–59.  
 67 *Id.* at 158.  
 68 *Id.*  
 69 *Id.* at 159–60.  
 70 *Id.* at 161–62.  
 71 *Id.* at 162.  
 72 *Id.*  
 73 575 F.3d 226, 234 (2d Cir. 2009).  
 74 639 F.3d 1093, 1100 (D.C. Cir. 2011).  
 75 *United States v. Gupta*, 925 F. Supp. 2d 581 (S.D.N.Y. 2012).  
 76 *Id.* at 585–86.  
 77 See *Amato*, 540 F.3d at 162–63; *Gupta*, 925 F. Supp. 2d at  
 587 (rejecting the defendant’s assertion that the victim  
 Goldman Sachs had not met its “burden” to properly docu-  
 ment its legal fees, where the victim provided voluminous  
 records that specified “the work performed with sufficient  
 particularity to assess what was done, how it was done, and  
 why it was done”); see also Daniel M. Gitner & Brian A. Jacobs,  
*Seeking Restitution for the Costs of Internal Investigations*, N.Y.L.  
 J. (Online), Sept. 29, 2008, available at <http://www.newyork-lawjournal.com>.  
 78 18 U.S.C. § 3664(e).  
 79 *Chong Lam*, 3:07-CR-374, 2011 WL 1167208, at \*9–10 (E.D.  
 Va. Mar. 28, 2011).  
 80 See *United States v. Skowron*, 839 F. Supp. 2d 740, 747–49  
 (S.D.N.Y. 2012) (ordering restitution for legal fees and related  
 costs that the defendant’s employer incurred in cooperating  
 with SEC investigation of defendant’s insider trading and in  
 conducting an internal investigation).  
 81 18 U.S.C. § 3664(e).  
 82 *United States v. Bengis*, 631 F.3d 33, 36–37 (2d Cir. 2011)  
 (basing the restitution amount on one of the loss calculation  
 methodologies set forth in a report prepared by a group of  
 experts commissioned by victim South Africa).  
 83 18 U.S.C. § 3771(d)(1),(3).  
 84 *In re Instituto Costarricense de Electricidad*, Nos. 11-12707-G,  
 11-12708-G, order denying writ of mandamus (11th Cir. June  
 17, 2011).  
 85 See, e.g., *In re Amy*, 13-70858, 2013 WL 1197266, at \*1–2  
 (9th Cir. Mar. 18, 2013) (granting the victims’ CVRA manda-  
 mus petition in part and holding that the petitioners provided  
 sufficient evidence to establish the necessary causal connec-  
 tion between the defendant’s child pornography offense and  
 their losses to support a restitution order).  
 86 18 U.S.C. § 3664(f)(1)(A); see *In re Morning Star Packing Co.*,  
 13-71048, 2013 WL 1278086, at \*1–2 (9th Cir. Mar. 29, 2013)  
 (concluding that the district court committed legal error in  
 denying restitution because of the defendant’s claimed finan-  
 cial status and the potential availability of civil remedies).  
 87 *United States v. Kollintzas*, 501 F.3d 796, 802 (7th Cir. 2007)  
 (quoting *United States v. Denlinger*, 982 F.2d 233, 235 (7th  
 Cir. 1992)); see 18 U.S.C. § 3613 (“[A]n order of restitution  
 made pursuant to sections 2248, 2259, 2264, 2327, 3663,  
 3663A, or 3664 of this title, is a lien in favor of the United  
 States on all property and rights to property of the person  
 fined as if the liability of the person fined were a liability for  
 a tax assessed under the Internal Revenue Code of 1986. The  
 lien arises on the entry of judgment and continues for 20 years  
 or until the liability is satisfied, remitted, set aside, or is ter-  
 minated under subsection (b).”).

<sup>88</sup> See, e.g., *United States v. Hosking*, 567 F.3d 329, 334–35 (7th Cir. 2009) (holding that a district court may consider the defendant’s retirement account as a source of funds to provide restitution); *United States v. Novak*, 476 F.3d 1041, 1053 (9th Cir. 2007) (concluding that the MVRA authorizes the enforcement of restitution orders against certain retirement plans benefits); *United States v. Irving*, 452 F.3d 110, 126 (2d Cir. 2006) (same).

<sup>89</sup> 11 U.S.C. § 523(a)(13) (2006) (discharge under Chapter 7 or Chapter 11 “does not discharge an individual debtor from any debt . . . for any payment of an order of restitution issued under title 18, United States Code”); see *United States v. Pipkin*, 541 F. Supp. 2d 1068, 1072 (N.D. Iowa 2008).

<sup>90</sup> *United States v. Hyde*, 497 F.3d 103, 107–09 (1st Cir. 2007) (citing 18 U.S.C. § 3613(a)).

<sup>91</sup> See *Bengis*, 631 F.3d at 41.