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# 'Victim' Entities Recovery of Restitution Under MVRA

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While commonly perceived to be the perpetrators of crimes, corporations, organizations, and governmental entities are often themselves victims of criminal acts performed by third-parties or their own employees and agents. These criminal acts often cost millions of dollars in losses and immeasurable reputational harm, which are compounded by the costs associated with remediation and other internal and external actions often accompanying the discovery of illegality.

In the resulting criminal prosecutions, the US, particularly given its broad and powerful reach, is often able to recover large sums of money from the perpetrators of criminal activities. Despite the large coffers amassed by the US government through phenomenal settlements and asset forfeiture actions, restitution is still not the norm, no clear standards have been set, and some petitioners for recovery have been curiously unsuccessful.

For example, in 2021, a federal court rejected a restitution claim by PDVSA, a Venezuelan state-owned oil and natural gas company, against a rogue employee who participated in a wide-ranging money laundering scheme. See *USA v. Guruceaga et al*, Docket No. 1:18-cr-20685, [Document 428](#) (S.D. Fla. Aug 16, 2018). The claim was rejected because the court found PDVSA to have been complicit in the scheme. Similarly, Ecuador's state-owned oil company also failed in its efforts to obtain victim restitution in a separate corruption case. See *In re Empresa Publica De Hidrocarburos Del Ecuador*, No. 20-11430-Q, [2020 BL 195529](#) (11th Cir. May 26, 2020).

Instead, organizations seem subject to the good will of the US Department of Justice (DOJ), which is heavily involved in the process of "making victims whole" by returning forfeited proceeds, even if such requests need to ultimately be approved by the courts. Many of these forfeiture remission cases proceed without much fanfare, even when their parent case generated headlines.

In August 2022, for instance, the DOJ returned approximately \$686,000 in [forfeited criminal proceeds](#) to the Republic of Peru related to the corruption and bribery of former Peruvian President and Odebrecht S.A. Likewise, in November 2022, the DOJ transferred [\\$20.6 million](#), and in February 2023, approximately [\\$1 million](#) to the Federal Republic of Nigeria in forfeited assets related to embezzlement, misappropriation, and extorted funds by former dictator General Sani Abacha and his co-conspirators.

For those select entities that have successfully sought and recovered restitution, there has been little consistency in the amount of relief granted. Some have recovered millions while others were denied completely. However, simply because recovery attempts have proven unpredictable does not mean that there are not paths proving more probable toward restitution for organizational victims. How can organizations successfully recover as victims? And are there any noticeable trends that make some more likely to recover than others? This article explores answers to these questions.

## Legal Foundation for Victim Recovery

The Victim and Witness Protection Act (VWPA) and Mandatory Victim Restitution Act (MVRA) provide the legal vehicles for potential recovery for organizational victims. The VWPA gives courts discretion to award criminal restitution to victims of certain federal crimes, while the MVRA goes a step further, creating a statutory obligation for courts to order criminal restitution to victims for certain offenses, including property and Title 18 offenses, committed against organizational entities. "Victim" is defined broadly to include individuals, entities, and organizations, including foreign governmental entities, "directly and proximately harmed as a result of the commission of an offense."

The purpose of both Acts are to "make the victim whole," by allowing those that have suffered losses to recoup from criminal perpetrators. Under certain circumstances, the entity may also recoup the expenses incurred in assisting in the government's prosecution of criminal defendants, including employees of the entity or other third-party actors.

## Victims Must Suffer a Pecuniary Loss

An entity seeking restitution should be prepared to demonstrate that it suffered an actual pecuniary loss directly related to the commission of the criminal offense. Losses can, of course, have an actual cash value, such as sustaining a quantifiable economic harm, but the MVRA also includes provisions for the recovery of physical assets as well as for losses related to indirect or intangible interests, like shareholder and development rights.

One example of the less tangible interests of shareholders can be observed in Och-Ziff Capital Management Group case, which, in 2019, settled FCPA charges with the DOJ and the Security and Exchange Commission (SEC) for \$412 million. As part of this complex bribery scheme, Och-Ziff and its affiliates bribed officials in the Democratic Republic of Congo to illegally forfeit the interests of another company in a valuable mine and transferred those interests to a holding company that Och-Ziff then acquired.

The shareholders of the company whose mining interests were forfeited sought to recover the value of the “lost opportunity” resulting from the forfeited mining rights. The court determined that these shareholders qualified as victims under the MVRA and were legally entitled to pursue their “lost opportunity” claim. See *United States v. Oz Africa Management*, No.1:16-cr-00515-NGG, [Document 51](#) (E.D.N.Y. Aug. 29, 2019) (finding that MVRA defines victim broadly and claimants have demonstrated the actual harm suffered by the defendant). In December 2020, as part of a settlement agreement with the US government and victims, the shareholders received \$135 million in restitution.

On the other end of the spectrum of more easily quantifiable economic losses, courts have found that victim entities may recover salaries and benefits paid to criminal employees for their dishonest services. In 2011, a federal court in New York allowed the United Nations to recover restitution equivalent to the amount of a corrupt employee's salary. See *United States v. Bahel*, [662 F.3d 610](#) (2d Cir. 2011).

The prosecutors secured a conviction against the employee for engaging in a bribery scheme that helped a friend's family win supply contracts with the United Nations. As a result, he received a number of financial benefits from the family while working for, yet unbeknownst to, the United Nations. After a three week trial, the employee was ordered to forfeit title in a Manhattan apartment received from the friend's family, forfeit currency received, and pay restitution in the amount of \$932,165.

Of course, it is more challenging, for victims to recover in cases where the pecuniary losses are intellectual or speculative in nature—e.g. stolen trade secrets or projected lost revenues. The Act's plain language sets forth that recovery is limited to the actual, quantifiable loss a victim suffers as a result of a violation, rather than allowing for recovery of the defendant's ill-gotten gains.

Generally, victim corporations seeking restitution related to intellectual property will be challenged in proving a discernable loss particularly where they still hold and are able to benefit from the intellectual property at issue. See *United States v. Johnson*, [790 F. Supp. 2d 945](#), 946 (E.D. Wis. 2011) (denying restitution for intellectual property issue as the MVRA requires actual loss for issuance of an order restitution).

In short, to obtain restitution entities must be prepared to prove up specifically identified and quantifiable pecuniary losses. Without a sufficient level of precision, prosecutors and courts will be reluctant to support and approve, respectively, a restitution award to an entity that may be impacted by the commission of a crime.

## Recovery of Cooperation Related Expenses

An entity may also recover for losses incurred in assisting in the government's investigation of a defendant's criminal conduct. As a part of restitution, the MVRA provides that the defendant must “reimburse the victim for lost income and [other] necessary . . . expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense.”

In practice, this has been interpreted to mean that a victim entity may recover only some of the expenses associated with its cooperation in the *government's investigation* of attendant crimes. See *Lagos v. United States*, [138 S. Ct 1684](#), 1690 (2018) (denying recoverable expenses for private investigations as the MRVA refers to “government investigations and criminal proceedings”). This may include attorney's fees and other costs associated with responding to formal governmental requests, such as document demands or the preparation of witnesses.

However, not all costs resulting from internal investigation and the underlying misconduct will be recoverable. In 2018, the U.S. Supreme Court narrowed the scope of expenses that were recoverable by entities under the MVRA. See *Lagos*. For instance, costs attendant to internal investigations initiated by the entities as opposed to government requests, and remediation actions – inclusive of enhancements to compliance programs – self-initiated by victim entities are unlikely to be recoverable.

For costs associated with an entity's investigatory activities to be recoverable, these activities must be performed specifically at the request of the government. Even if the information collected in a self-initiated internal investigation is eventually turned over to the government, those costs are unlikely to be recoverable because they were not first incurred at the government's express request.

Lower courts have expanded on this Supreme Court guidance by disallowing recovery for expenses not directly associated with the criminal action. Thus, costs incurred in related civil proceedings – including SEC investigations – are likely to be disallowed even if the criminal and civil actions run in parallel. See *United States v. Afriyie*, 27 F.4th 161 (2d. Cir. 2022) (vacating SEC expenses related to the investigation because the MVRA reference to “investigation” does not include an SEC investigation).

Restitution requests are also limited to a reasonableness standard. It is not unusual for courts to reduce the amount to be awarded to the victim entity seeking restitution if the fees are deemed excessive. As part of this analysis, the courts have considered, among other things, whether the staffing on the matter is unwarranted. See *United States v. Gupta*, 925 F. Supp. 2d 581, 587 (S.D.N.Y. 2013) (finding fees expensed “exceeded what was reasonably necessary under the MVRA”).

While recent case law draws increasing parameters on recoverability, avenues are still available to recoup some losses and expenses. It is important for victim entities to keep these parameters in mind and plan accordingly when taking actions that may eventually be considered for recovery. Victim entities will want to clearly delineate the “necessary” expenses incurred in specific responses to government requests and have a clear understanding of what might be permissibly recoverable to maximize their chances of recovery.

These limitations should not significantly deter or delay victim entities from taking on self-initiated internal investigations or remediation actions. An entity who acts swiftly to identify, remediate, and, where appropriate, self-report may reap other benefits that dwarf restitution, such as declination or deferral of prosecution if the misconduct is deemed to implicate corporate exposure. Also, as explained below, such actions may serve as evidence of the entity's lack of blame in misconduct it has independently sought to remedy.

## Clean Hands

Entities should ensure they have clean hands when seeking restitution. This is not a well-defined concept, leading to somewhat inconsistent results. The general principle is that victim entities seeking recovery should endeavor to establish that it did not perpetrate the misconduct.

This may involve establishing that high-level employees or executives were not involved in the unlawful conduct, that a criminal employee's actions could not be construed as being performed within the scope of their job responsibilities, or the existence of a rogue actor. It may also involve providing substantial assistance to federal prosecutors in securing guilty pleas or convictions in the related criminal matters.

In the *Odebrecht* case, the DOJ highlighted the Peruvian government's “extensive and wide-ranging assistance.” The DOJ noted in particular that “the documentary evidence provided by the Peruvian government provided the evidence necessary to seize assets located in the United States and substantially contributed to the timely success of the U.S. forfeiture actions.” As noted, the Peruvian government was ultimately awarded some restitution despite its head of state being implicated in the misconduct.

In contrast, a Costa Rican wholly-state owned company was precluded from attaining victim status in its search for restitution because of “pervasive, constant, and consistent illegal conduct” among the corporation's principals. See *United States v. Alcatel-Lucent France, SA*, 688 F.3d 1301, 1304 (11th Cir. 2012). Federal prosecutors secured a resolution on FCPA allegations against a private French company, Alcatel-Lucent, for its role in paying bribes to Instituto Costarricense de Electricidad (ICE), a Costa Rican entity, and government officials to secure telecommunications contracts in Costa Rica.

ICE sought recovery for the loss of the honest services of its employees involved in the misconduct and damages from the inferior services and products it received as a result of the contracts awarded through corrupt payments. It also sought recovery for costs related to the internal investigation, responding to prosecutors' requests, and attendance at the resulting criminal proceedings. In denying victim status to the Costa Rican entity, the court held that because high-ranking company officials and board members had accepted bribes and kickbacks in exchange for lucrative contracts, the entity could not qualify as a victim.

Similarly, in late 2020, a court denied victim status to a state-owned oil enterprise, again categorizing the involvement of the entity's executives and board members as "pervasive, constant, and consistent illegal conduct." See *In re Empresa Publica*. The fact that action against the perpetrators did not occur until after external discovery of the misconduct, was unhelpful in its bid for restitution.

Actively following the underlying criminal matters to ensure that parties' and entities' actions and roles in the alleged misconduct are appropriately characterized, may also serve a savvy long term investment. Not only will this assist in safeguarding against reputational risks, but may assist down the road in restitution requests.

Entities caught in the crosshairs of employees' and agents' criminal conduct should safeguard against pitfalls by acting swiftly to investigate and remediate. Not only will these preventive measures help minimize liability in the long term, but it will likely be viewed favorably by a court considering a restitution request.

## Conclusion

With recent record-breaking settlements that have led to billions of dollars in restitution recoveries by the US government, entities should not dismiss opportunities to potentially assert victim-status. Such opportunities, if well presented, may aid these entities and, if foreign, their nations recover some of the losses that can be inflicted by criminal misconduct and the costly prosecutions that ensue.

Victim entities must act quickly and decisively to document the harm suffered, keep detailed and discrete records of expenses incurred in response to government inquiries, take prompt and appropriate self-investigatory and remediation actions, as well as be prepared to make timely, proportionate, and compelling requests for restitution. Victims have a right to be heard in public proceedings, which may help to set the stage for their restitution claims. Victim entities following these guideposts are well-positioned to tap into the US restitution coffers to which they have been statutorily invited.