

Restitution in Corporate Criminal Cases: An Underappreciated But Effective Remedy

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Victims of corporate misconduct have traditionally relied on civil litigation to force corporate wrongdoers to make them whole. While our civil justice system has been an effective vehicle for compensating victims, that system has drawbacks, including the time and expense involved in litigating a case to conclusion.

However, when corporate misconduct rises to the level of a crime, and when that crime results in a federal criminal conviction, victims have an alternative: an order of restitution as part of the corporate defendant's criminal sentence. As discussed below, victims enjoy several strategic advantages in a restitution proceeding that they do not in civil litigation.

In addition, the time and expense for a victim to pursue a restitution application are generally a fraction of what would be required to litigate a claim. Attractive as the option of a restitution claim may be, pursuing a restitution claim remains a relatively underutilized alternative, likely because victims' rights to restitution, and the procedures for obtaining restitution through the federal criminal justice system, are not widely understood (or at least not as well understood as the procedures for filing and litigating a civil complaint).

This article first explains those restitution rights and the procedures for vindicating them and then discusses the advantages that a restitution application offers. In particular, it begins by outlining the statutory framework for seeking restitution in a criminal proceeding and the common issues that arise within that framework.

The article then explains how the restitution process works in practice and highlights several cases that illustrate the importance of a victim's ability to claim restitution on the victim's own behalf.

Finally, the article discusses a number of advantages of asserting a claim for restitution over filing a civil complaint.

STATUTORY FRAMEWORK FOR SEEKING RESTITUTION IN A CRIMINAL PROCEEDING

The statutory framework for seeking restitution has both substantive and procedural components. A victim's substantive right to restitution can be found in either the Mandatory Victims Restitution Act (MVRA), 18 U.S.C.

§3663A, or the Victim and Witness Protection Act (VWPA), 18 U.S.C. §3663. The Crime Victims' Rights Act (CVRA), 18 U.S.C. §3771, which is implemented by the Federal Rules of Criminal Procedure (Fed. R. Cr. P.), provides victims with procedural mechanisms to vindicate their substantive rights.

Altogether, this framework gives victims a roadmap for when and how to assert restitution claims in criminal proceedings.

MVRA: The MVRA *requires* that a court order restitution payments to victims of specified crimes without consideration of the defendant's economic circumstances. 18 U.S.C. §3663A(a)(1) ("Notwithstanding any other provision of law, when sentencing a defendant convicted of an offense described in subsection (c), the court shall order, in addition to, or in the case of a misdemeanor, in addition to or in lieu of, any other penalty authorized by law, that the defendant make restitution to the victim of the offense or, if the victim is deceased, to the victim's estate.").

There are three primary considerations to determine whether a crime victim qualifies for restitution under the MVRA: (1) whether the defendant committed a qualifying offense; (2) whether the crime victim is a "victim," as defined in the MVRA; and (3) whether the crime victim has suffered physical injury or pecuniary loss. 18 U.S.C. § 3663A(a)(1), (c)(1)(A), (c)(1)(B)); *United States v. Archer*, 671 F.3d 149, 169 (2d Cir. 2011).

As to the first issue, the MVRA sets forth the types of offenses which trigger a restitution obligation: (1) crimes of violence as defined in 18 U.S.C. § 16; (2) offenses against property under Title 18 or under section 416 of the Controlled Substances Act, including any offense committed by fraud or deceit; (3) offenses described in section 3 of the Rodchenkov Anti-Doping Act of 2019; (4) offenses described in 18 U.S.C. §1365 (relating to tampering with consumer products); and (5) offenses under 18 U.S.C. §670 (relating to the theft of medical products). 18 U.S.C. § 3663A(c)(1)(A).

As to the second issue, the MVRA broadly defines "victim" to mean "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." 18 U.S.C. § 3663A(a)(2); see *also United States v. Marsh*, No. 10-cr-0480, 2011 WL 5325410, at *14 (E.D.N.Y. Oct. 26, 2011) ("A crime is the proximate cause of victims' losses where the nature of the scheme makes those losses reasonably foreseeable.").

Although this definition is broad, whether a person qualifies as a victim under the MVRA is often contested and may ultimately be a reason the court denies a victim's restitution request, particularly if that request is not supported by the government. Compare, e.g., *United States v. Dharia*, 284 F. Supp. 3d 262 (E.D.N.Y. 2018) (intervenors were not "victims" under the MVRA because they could not demonstrate direct harm resulting from the criminal conduct), with *U.S. v. Martin*, 803 F.3d 581, 594 (11th Cir. 2015) (affirming district court's decision to treat successor lenders as victims of mortgage fraud because it was "entirely foreseeable to [Defendant] not only that the original lenders would rely on the fraudulent applications, but that the mortgages would be resold to other lenders that would rely on the applications as well"), and *United States v. Boeing Co.*, No. 21-cr-5-O, 2022 WL 13829875, at *9 (N.D. Tex. Oct. 21, 2022) (concluding that the "tragic loss of life that resulted from the two airplane crashes was a reasonably foreseeable consequence of Boeing's conspiracy to defraud the United States").

Third, with respect to loss, a victim of a qualifying offense must be able to demonstrate actual losses. *United States v. Rivernider*, No. 10-cr-222, 2014 WL 12692296, at *2 (D. Conn. Nov. 25, 2014). To satisfy this requirement, the victim must set forth "[a] reasonable approximation of losses supported by a sound methodology." (Quoting *United States v. Gushlak*, 728 F.3d 184, 196 (2d Cir. 2013)). This, too, can be a controversial aspect of a restitution claim, as loss calculations may be complicated, and there may be other "victims" in the chain of causation, making it difficult to determine who bore what losses.

Finally, there are two caveats to the MVRA that apply when certain offenses are at issue: in the case of an offense against property or an offense under the Anti-Doping Act, the MVRA does not apply if the court finds that (i) "the number of identifiable victims is so large as to make restitution impracticable," or (ii) "determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process." 18 U.S.C. §3663A(c)(3)(B); *Fed. Ins. Co. v. U.S.*, 882 F.3d 348, 366 (2d Cir. 2018) ("A victim's right to restitution is not

absolute: even the MVRA, the very name of which conveys that restitution is mandatory, recognizes that restitution need not be imposed if the court finds that correctly calculating or apportioning restitution would be impractical or would unduly prolong the sentencing process.”).

VWPA: The VWPA provides a discretionary alternative to the MVRA. The VWPA applies to a wider range of offenses, but many of the other requirements of the MVRA still apply.

CVRA and the Fed. R. Cr. P: The CVRA guarantees victims the right to *inter alia*, notice of criminal proceedings, information, the right to confer with the government, and “full and timely restitution as provided in law.” 18 U.S.C. § 3771(a)(6). As the U.S. Court of Appeals for the Second Circuit has explained, “the CVRA confers standing on victims to seek restitution on their own behalf, rather than relegating them to bystander status while the government decides, for its own reasons and pursuant to its own strategy, whether, for whom, and in what amount to seek restitution.” *Fed. Ins.*, 882 F.3d at 359.

The CVRA further imposes obligations on both the court and the government to ensure that a crime victim is afforded their rights under the CVRA, including the right to restitution. 18 U.S.C. § 3771(b), (c)(1).

Fed. R. Cr. P. 60 (Victim’s Rights) implements the procedural protections of the CVRA and similarly mandates that a victim is entitled to timely notice of criminal proceedings, to attend the proceedings, and to be heard at those proceedings. Fed. R. Cr. P. 60(a). Rule 60 also states that the rights provided under the rule can be asserted by a victim, a victim’s representative or an attorney for the government in the district where the defendant is being prosecuted.

Fed. R. Cr. P. 32(i)(4)(B) (Sentencing and Judgment) further implements the CVRA by requiring the court to address any victim who is present at sentencing and to “permit the victim to be reasonably heard.”

ASSERTING RESTITUTION CLAIMS: ENGAGING WITH THE GOVERNMENT

The CVRA imposes an obligation on federal prosecutors to “make their best efforts to see that crime victims are notified of, and accorded, the rights described in [the CVRA],” and provides victims with a right to “confer with the attorney for the Government in the case.” 18 U.S.C. §3771(c)(1), (a)(5).

In addition, recently updated Department of Justice Guidelines require department personnel to make their best efforts to provide victims with the rights set forth in the CVRA “as early in the criminal justice process as is feasible and appropriate, including prior to the execution of a non-prosecution agreement, deferred prosecution agreement, pretrial diversion agreement, or plea agreement.” U.S. Dep’t of Just., 2022 Attorney General Guidelines for Victim and Witness Assistance.

Victims should take advantage of these protections and should engage with the government early and often regarding their potential entitlement to restitution. Although the government should—and in many cases will—initiate such contact and keep victims apprised of case developments, victims should be proactive about initiating these conversations if the government has not. Engaging the government early will ensure that the victim is top-of-mind *before* important developments occur that may implicate a victim’s right to restitution—for example, the negotiation of a plea agreement.

Early engagement is particularly important in situations where the government may disagree with a victim’s entitlement to restitution. For example, the government may dispute whether the claimed victim was directly and proximately harmed by the defendant’s conduct or otherwise qualifies for restitution under the MVRA.

Alternatively, the government may take the position that calculating the victim’s actual losses is too complex such that the work required to formulate a restitution order would unduly “complicate or prolong the sentencing process.” See 18 U.S.C. § 3663A(c)(3)(B).

Although victims theoretically have the same rights to assert claims for restitution after a plea agreement has been negotiated and presented to the court for approval, in practice it may be much more difficult for a victim to do so at that point.

In particular, if the government has already entered into a plea agreement with a defendant that does not call for restitution, the prosecutors may have an incentive to resist any potential modification, such as the imposition of restitution, which might derail a carefully negotiated resolution. In that circumstance, a victim might well find its restitution application opposed not just by the defendant but by the government as well.

On the other hand, a victim that engages with the government before a plea agreement is finalized has an opportunity to persuade the prosecutors that restitution is appropriate, and, if successful, the government can use its leverage in plea negotiations to convince the defendant to agree to restitution as part of the resolution.

In sum, the best-case scenario is that a victim engages with the government early, and the government advocates for a restitution award on the victim's behalf. However, regardless of the government's position, the CVRA provides victims with a right to appear in the criminal case and to request restitution. Several recent cases illustrate that process.

ASSERTING RESTITUTION CLAIMS: GOING TO COURT

United States v. OZ Africa Mgmt. GP

First, in *United States v. OZ Africa Management*, 16-00515 (E.D.N.Y. 2016), an alternative investment and hedge fund manager, Och-Ziff Capital Management Group LLC, and its wholly owned subsidiary, OZ Africa Management GP LLC, pleaded guilty to one count of conspiracy to bribe officials in the Democratic Republic of Congo and Libya to secure natural resources deals and other investments, in violation of the Foreign Corrupt Practices Act.

The bribery scheme caused investors (former shareholders of mining company Africo Resources Ltd.) to lose mining rights in an African mine. The plea agreement provided that “any fine or restitution imposed by the Court will be due and payable within ten (10) business days of sentencing,” but otherwise was silent as to who, if anyone, was entitled to restitution and in what amount(s). *OZ Africa Mgmt. GP* 16-00515 (Docket Entry No. 11 ¶ 12).

Two weeks before the defendant was scheduled to be sentenced, approximately 50 shareholders in Africo filed a motion requesting confirmation of victim status and an award of restitution pursuant to the MVRA. (Docket Entry No. 26). The government opposed the shareholders' request for restitution, arguing that the shareholders had not shown direct or proximate causation of quantifiable harm from defendant's conduct specifically, and that the shareholders' damages were too speculative to merit a restitution award. (Docket Entry No. 39 at 13–15).

The court ultimately sided with the shareholders, deeming them victims under the MVRA and later awarding them over \$135 million in restitution. (Docket Entry No. 110 at 1).

United States v. Glencore (Glencore I)

More recently, in *United States v. Glencore*, 22-00071 (D. Conn. 2022) (*Glencore I*), defendant Glencore Ltd. admitted to engaging in a scheme to commit commodity price manipulation, in violation of 18 U.S.C. §371, by fraudulently manipulating the price of certain fuel oil benchmark prices.

As set forth in the plea agreement between Glencore and the government, Glencore's manipulation either fraudulently lowered the cost of fuel oil that Glencore purchased from, or fraudulently raised the cost of fuel oil that Glencore sold to “Trading Firm A.” *Glencore I* (Docket Entry No. 18, Attachment A ¶¶ 7–9). The government and the defendant further agreed, however, that “the amount of loss resulting from the offense c[ould] not be reasonably determined, and thus the parties believe[d] there [wa]s no basis for an order of restitution.” (Docket Entry No. 18 ¶ 21(e)).

Prior to sentencing, P.M.I. Trading Designated Activity Company (PMI) and its parent company Petróleos Mexicanos (PEMEX) appeared in the action identifying PMI as “Trading Firm A” and requesting an opportunity to be heard on the issue of restitution pursuant to the CVRA and MVRA. (Docket Entry No. 26) (The authors were counsel for PMI and PEMEX in this proceeding). The court adjourned Glencore's sentencing to give PMI and PEMEX an opportunity to be heard on the issue of restitution. (Docket Entry Nos. 28 & 29).

Before any briefing was submitted, Glencore and Pemex/PMI reached a confidential settlement agreement that resolved the restitution claims. (Docket Entry No. 58).

United States v. Glencore (“Glencore II”)

Finally, in a related case filed against Glencore involving bribery and market manipulation allegations, potential victims of the scheme appeared in the action to seek restitution on their own behalf. See *United States v. Glencore Int’l A.G.*, 22-0297 (S.D.N.Y. 2022) (“*Glencore II*”). In response, Glencore acknowledged that the victims were harmed by its crime and stated that it was “prepared to pay restitution,” but disputed the amount of loss claimed by the victims. *Glencore II* (Docket Entry No. 25 at 1, 6).

The government did not oppose an award of restitution to the victims, but took “no position on the amount of direct and proximate loss suffered by Claimants resulting from Glencore’s bribe,” claiming that all of the relevant evidence belongs to defendants and the claimants. (Docket Entry No. 28 at 2).

The court resolved the restitution request on Feb. 27, 2023—one day before Glencore’s sentencing. The court awarded the victims \$29,691,165 in restitution and prejudgment interest at a rate of over 5%. (Docket Entry No. 38).

In each of these cases, the government failed to initiate or pursue restitution claims for the victims. Yet the CVRA enabled the victims to seek restitution on their own behalf, leading to a restitution award in *Och-Ziff* and *Glencore II* and a settlement in *Glencore I*.

ADVANTAGES OF RESTITUTION OVER CIVIL LITIGATION

As the cases discussed herein demonstrate, there are a number of advantages to pursuing restitution in a criminal case rather than relying on separate civil proceedings to make a victim whole.

To start, victims have a strategic advantage at a sentencing proceeding in a criminal case because the defendant has already been found guilty of (and in some cases pled guilty to) the challenged conduct. Thus, a victim does not have the burden of proving that the defendant committed the offense.

Moreover, in a case where the defendant has pled guilty, the defendant will almost always be seeking credit at sentencing for having accepted responsibility for its actions. However, one of the customary indicators of whether a defendant has fully accepted responsibility is whether that defendant has taken steps to make amends for its wrongdoing, most importantly by making its victims whole (at least where the defendant has the financial resources to do so).

Indeed, the Sentencing Guidelines specifically reference the voluntary payment of restitution as a factor for the court to consider in determining whether a downward adjustment for acceptance of responsibility is appropriate. See, e.g., Application Note 1 to U.S.S.G. § 3E1.1 (listing “voluntary payment of restitution prior to adjudication of guilt” as a factor for courts to consider in determining whether an individual defendant qualifies for a reduction for acceptance of responsibility).

Victims’ rights include the right to be heard at sentencing generally, and, thus, victims have the right to object to a request for such a downward adjustment (or, indeed, to any request for leniency) on the basis of a defendant’s failure to make voluntary restitution. See 18 U.S.C. § 3771(a)(4); Fed. R. Civ. P. 60(a)(3). Because most defendants who have pled guilty will want to avoid victims’ presentations of such arguments at sentencing, victims have considerable leverage to induce pleading defendants to provide restitution voluntarily.

Second, resolution of restitution claims in a criminal proceeding typically occurs within a relatively quick time frame. For example, in *Glencore I*, only a few months elapsed between the time Glencore entered into its plea agreement (in May 2022) and the time of the settlement (in August 2022).

Third, and relatedly, the burden and cost of submitting a request for restitution are less than those associated with bringing a civil litigation. This is attributable, in part, to the relatively quick timeframe of restitution proceedings and, in part, to the fact that the victim need not engage in lengthy discovery and motion practice to prove a defendant’s guilt. While there still are expenses associated with asserting a restitution claim, including those associated with

proving victim status and loss amount, those burdens and costs are substantially lower than those involved in a civil litigation.

Fourth, there may be a number of technical defenses available to a defendant in a civil litigation that are not applicable in the restitution context. For example, although defendants in civil litigation may be able to defeat claims on jurisdictional grounds or on the basis of the applicable statute of limitations, no similar rules preclude claims for restitution under the CVRA and MVRA for a defendant who has been convicted of a crime.

Finally, pursuant to the CVRA, victims are entitled to full and “timely” restitution. And when such awards are ordered as part of a judgment in a criminal case, there is often a quick payment. For example, in *OZ Africa Mgmt. GP*, the restitution award was due “immediately and in full.” *OZ Africa Mgmt. GP*, 16-00515 (Docket Entry No. 110). Similarly, in *Glencore II*, the court ordered that the restitution be paid to the clerk of court 10 days after sentencing. *Glencore II* (Docket Entry No. 39).

CONCLUSION

In sum, the CVRA provides crime victims with an important procedural tool to vindicate their rights to restitution—it allows crimes victims to advocate for themselves, even when the government does not, and provides them with a cost-efficient and timely way to be made whole.

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