

ARTICLE: The Interplay Between Forfeiture and Restitution in Complex Multivictim White-Collar Cases

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Text

Forfeiture and restitution are both mandatory and are often imposed in identical amounts. For this reason, defense attorneys, judges, and even prosecutors sometimes perceive forfeiture and restitution as double-counting--twice the punishment for the same conduct. But in fact, when applied properly, forfeiture and restitution are two complementary processes that may further compensation for victims and rarely result in a double penalty. This article examines forfeiture and restitution from the different perspectives of the prosecutor, the criminal defendant, and the victim, and explains why understanding the interplay between restitution and forfeiture is critical for all parties in a complex, multivictim, white-collar case.

I. Background

In 1982, Congress enacted the Victim Witness Protection Act (VWPA), which authorized courts to impose restitution as part of a criminal sentence, rather than a condition of probation. Although the VWPA expanded the court's discretion to order restitution, it limited that authority by requiring courts to consider "the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents."¹ Accordingly, courts rarely imposed restitution

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¹ n1 Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, § 5, 96 Stat. 1248, 1255 (codified as amended at 18 U.S.C. § 3664 (2006)).

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as part of a criminal sentence. In 1996, Congress enacted the Mandatory Victims Restitution Act (MVRA), which was hailed as a turning point in criminal prosecution because it made restitution a mandatory part of the sentence in federal criminal cases regardless of a defendant's financial resources.²

Although the MVRA dramatically changed the nature of criminal sentencing, it was largely ineffective at compensating victims, particularly in complex fraud schemes that precipitated massive losses for hundreds of victims at a time. In 2001, the Government Accountability Office (GAO) issued a report with detailed findings about the problems that United States Attorney's Offices and Financial Litigation Units had nationwide in collecting criminal debts.³ The GAO's findings, coupled with concerns from individual victims and victims' rights groups, led to the passage of the Crime Victims' Rights Act of 2004 (CVRA).

The CVRA was significant because for the first time, it required officers and employees of the Department of Justice to "make their best efforts to see that crime victims are notified of, and accorded" certain rights, including "the right to full and timely restitution as provided in law."⁴ The CVRA also conferred on victims the right to be heard at various public court proceedings in a criminal case, including the sentencing proceeding where restitution was likely to be imposed. If the district court denied relief to a victim asserting any of the rights set forth in the CVRA, the statute further empowered victims to petition the court of appeals for a writ of mandamus.⁵

As a result of the CVRA, many prosecutors began to use the forfeiture laws affirmatively as a means of carrying out their obligation to ensure that victims receive full and timely restitution, principally because forfeiture is a far more powerful tool for locating, restraining, and collecting criminal proceeds (ensuring that they will be available to compensate victims) than restitution. Today, forfeiture and restitution are both mandatory parts of a criminal sentence.⁶ Naturally, the imposition of forfeiture and restitution means something different depending on the context and your perspective, whether you are a prosecutor, defendant, or victim.

II. Forfeiture and Restitution in the Context of a Criminal Prosecution

At first blush, it seems as though forfeiture and restitution punish the defendant for the same conduct. Whereas restitution is measured by the losses to victims and forfeiture is measured by the proceeds of a criminal offense, both amounts frequently turn out to be the same--especially in financial fraud cases. So why are both mandatory?

² Mandatory Victims Restitution Act of 1996 18 U.S.C. § 3663(A); see also Matthew Dickman, *Should Crime Pay? A Critical Assessment of the Mandatory Victims Restitution Act of 1996*, 97 CAL. L. REV. 1687 (2009).

³ n3 See U.S. Gen. Accounting Office, GAO-01-664, *Criminal Debt: Oversight and Actions Needed to Address Deficiencies in Collection Processes*, 84 app. II (July 2001).

⁴ n4 Crime Victims' Rights Act of 2004, 18 U.S.C. §§ 3771(a)(6) & (c)(1).

⁵ See 18 U.S.C. § 3771(d)(3). Victims have occasionally sought this extraordinary remedy, most notably in *Adelphia Communications Corp.*, where certain defrauded Adelphia shareholders unsuccessfully petitioned for a writ of mandamus because the district court declined to impose a restitution order and instead approved a forfeiture settlement and a procedure for compensating victims administered by a Special Master. See *In re W.R. Huff Asset Management Co., LLC*, 409 F.3d 555, 560 (2d Cir. 2005). In *Adelphia*, the court found that factors including the numerosity of victims and the complexity of the case justified an alternate compensation procedure in lieu of restitution. See *id.* More often though, courts have denied mandamus petitions under the CVRA because they find that the petitioner is not properly considered a victim or otherwise lacks standing to seek a writ of mandamus. See, e.g., *In re Fisher*, 640 F.3d 645, 647 (5th Cir. 2011); *In re McNulty*, 597 F.3d 344, 351 (6th Cir. 2010).

⁶ n6 Under 18 U.S.C. § 3663A, restitution is mandatory in all criminal cases, requiring the court to order restitution in the "full amount of each victims' losses" without regard to economic circumstances. Similarly, the criminal forfeiture statute requires that the court "shall" order forfeiture as part of the defendant's sentence. See 21 U.S.C. § 853.

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First, forfeiture and restitution have different purposes (See Figure 1). The purpose of restitution is to compensate victims for losses, whereas the purpose of criminal forfeiture is to punish the defendant.⁷

Second, unlike a restitution order, where the court considers the defendant's assets, financial needs, and earning ability to determine whether the final restitution order will direct the defendant to make a single lump-sum payment, in-kind payments, a combination of payments at specified intervals, or nominal periodic payments, an order of forfeiture is not limited to property or other assets that are in the defendant's possession at the time of his arrest or conviction.⁸ Courts have almost uniformly held that a forfeiture order may be imposed in the form of a money judgment, whether or not the defendant has those assets in his possession.⁹ In *United States v. Vampire Nation*, the Third Circuit expressly rejected the argument that a forfeiture order must be directed to specific property, and held that as an in personam order, it may take the form of a money judgment equal to the proceeds the defendant obtained from the offense, even if he no longer has those proceeds, or any other assets, at the time he is sentenced.¹⁰ Following *Vampire Nation*, the Second Circuit in *United States v. Awad* noted that under the criminal forfeiture statute, 21 U.S.C. § 853, "Mandatory forfeiture is concerned not with how much an individual has but with how much he received in connection with the commission of the crime."¹¹ *Awad* further held that a contrary interpretation could have the undesirable effect of creating an incentive for a criminal actor to "rid . . . himself of his ill-gotten gains to avoid the forfeiture sanction."¹²

[SEE Figure 1 Differences between Restitution and Forfeiture IN ORIGINAL]

Courts have also routinely rejected challenges to an order of forfeiture as a double-penalty, declining to offset the amount of a forfeiture order by the amount of restitution, and vice versa.¹³

III. Forfeiture and Restitution and the Rights of Victims

Although 18 U.S.C. § 3663A requires the court to order restitution in the "full amount of each victims' losses" without regard to the defendant's economic circumstances, the restitution statute provides no mechanism to restrain a defendant's assets during the many months or even years it may take before a defendant is finally sentenced and restitution is ordered. For example, even if the defendant has all of the fraud proceeds from the crime sitting in a bank account, and even if the Government learned of that account and confirmed that it contained the fraud proceeds, the restitution laws do not authorize the Government to freeze those criminal proceeds so they are available for restitution later. Because restitution is only ordered at sentencing, the defendant is free to do whatever he wants with that money, including transfer it out of the country,

⁷ n7 See *United States v. Navarette*, 667 F.3d 886, 887--88 (7th Cir. 2012) (holding that forfeiture measures gain to the defendant and restitution measures loss to the victim); *United States v. Browne*, 505 F.3d 1229, 1281 (11th Cir. 2007) (holding that forfeiture forces the defendant to disgorge the proceeds of the offense as punishment, whereas restitution focuses on the victim).

⁸ n8 See 18 U.S.C. § 3664.

⁹ See *United States v. Newman*, 659 F.3d 1235, 1242--43 (9th Cir. 2011) (forcing defendants to disgorge their ill-gotten gains, "even those already spent," ensures that defendants do not benefit from their crimes), cert. denied, 132 S. Ct. 1817 (2012); *United States v. McGinty*, 610 F.3d 1242, 1246 (10th Cir. 2010) (same, joining all other circuits and collecting cases); *United States v. Awad*, 598 F.3d 76, 79 (2d Cir. 2010) (same, following all other circuits); *United States v. Day*, 524 F.3d 1361, 1378 (D.C. Cir. 2008) (same, following *Vampire Nation* and *Hall*); *United States v. Vampire Nation*, 451 F.3d 189, 202 (3d Cir. 2006); *United States v. Casey*, 444 F.3d 1071, 1074--76 (9th Cir. 2006) (same); *United States v. Hall*, 434 F.3d 42, 59 (1st Cir. 2006) (same, holding that "the Government need not prove that the defendant actually has the forfeited proceeds in his possession at the time of conviction," and is entitled to a money judgment whether the defendant has the forfeited proceeds, or any other assets, in his possession at all).

¹⁰ *Vampire Nation*, 451 F.3d at 202.

¹¹ 598 F.3d at 78.

¹² *Id.* at 78--79.

¹³ n13 See, e.g., *Navarette*, 667 F.3d at 888 (restitution and forfeiture are cumulative, and are "a form of punitive damages piled on top of the other penalties for the defendant's crime"); *Newman*, 659 F.3d at 1241--43 (holding that forfeiture and restitution serve different purposes, and "the district court may not reduce forfeiture because of an order of restitution to a victim or because the victim has already been made whole"); *United States v. Pescatore*, 637 F.3d 128, 137 (2d Cir. 2011) (holding that defendant was not entitled to have the Government apply \$ 2.5 million in forfeited funds to a \$ 3 million restitution order).

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put it in an irrevocable trust, or otherwise spend it at any time--after he learns of the investigation, after he is indicted, before and during trial, even after he is convicted--all of which can happen long before restitution is ordered. In fact, most restitution orders do not provide for a lump-sum payment at sentencing, but instead set a payment schedule where the defendant pays restitution according to his adjusted gross income after he completes his jail term (which, again, can be many years after the fraud was initially discovered). Thus, in many cases, restitution by itself cannot effectively compensate victims.

Forfeiture, on the other hand, expressly provides for the pretrial restraint of assets so that assets may be preserved while the criminal case is pending and remain available for forfeiture and to compensate victims in the event of a conviction. Under 21 U.S.C. § 853(e) or (f), the Government can obtain a criminal restraining order or criminal seizure warrant for property by showing probable cause that the property would be subject to forfeiture in the event of a conviction. In addition, the Government can obtain a civil seizure warrant under 18 U.S.C. § 981. Just like a criminal seizure warrant, a civil seizure warrant requires a probable cause showing that the property is subject to forfeiture because it is traceable to criminal proceeds. But under 18 U.S.C. § 984, the civil forfeiture law provides that with respect to money in bank accounts or other "fungible property," the Government need not trace every dollar in a bank account to the crime. As long as crime proceeds have been deposited in that account within the preceding year, the Government can seize up to the total amount of crime proceeds that were deposited into the account within that preceding year, even if some of those proceeds have since been transferred out of the account. When the Government seizes forfeitable assets through a civil seizure warrant, it can include the money seized by a civil seizure warrant in the criminal case (through a criminal restraining order under 21 U.S.C. § 853(e)), or file a parallel in rem civil forfeiture action against the seized assets.¹⁴

The forfeiture laws also confer broad powers on the Government to enforce an order of forfeiture after a defendant is convicted. Generally, the Government cannot seize or restrain property before conviction without a probable cause showing that the property is traceable to the criminal activity--in other words, that the property or asset is "dirty."¹⁵ But after conviction and even before sentencing, the Government can seek forfeiture of what are known as "substitute assets"--otherwise "clean" money or property that can satisfy a forfeiture judgment. To do so, the Government need only make a showing that the "dirty" or traceable asset, as a result of an act or omission by the defendant: "(A) cannot be located upon the exercise of due diligence; (B) has been transferred or sold to, or deposited with a third party; (C) has been placed beyond the jurisdiction of the court; (D) has been substantially diminished in value; or (E) has been commingled with other property which cannot be divided without difficulty."¹⁶ In fact, the Government can even take discovery--through depositions and document demands--to identify and locate property that has been forfeited as part of a criminal case.¹⁷

IV. Challenges to Forfeiture by Defendants and Victims

A. Defense Challenges

While the Government's expansive authority to seize and restrain forfeitable property before and even after trial can work to the victim's advantage, that authority can present a thorny situation for a criminal defendant in a complex white-collar case. One of the biggest questions facing criminal defense practitioners is how, and when, to challenge the pretrial seizure of assets. Unlike an asset freeze by the Securities and Exchange Commission, which is imposed to preserve assets that can later be used to satisfy a judgment (and therefore contains a carve-out for reasonable attorneys fees and living expenses),¹⁸ there are very limited circumstances in which a criminal defendant can challenge the pretrial seizure or restraint of forfeitable assets. Many circuits follow the Jones-Farmer rule, which holds that a post-restraint, pretrial hearing is required

¹⁴ n14 Unlike criminal forfeiture, which seeks an in personam order against the defendant that can take the form of a money judgment or list the specific property to be forfeited, a civil forfeiture case is an in rem civil action against the property itself.

¹⁵ n15 The one exception to this rule is the Fourth Circuit, where the Government can seize and restrain substitute assets before conviction. See, e.g., *United States v. Bromwell*, 222 F. App'x 307, 311 (4th Cir. 2007); *United States v. Bollin*, 264 F.3d 391, 421 (4th Cir. 2001); *In Re Billman*, 915 F.2d 916, 919 (4th Cir. 1990).

¹⁶ 21 U.S.C. § 853(p).

¹⁷ 21 U.S.C. § 853(m).

¹⁸ n18 See Securities Exchange Act of 1934 §§ 21(d)(1), 21(d)(5) (codified at 15 U.S.C. §§ 78u(d)(1), 78u(d)(5)).

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only when (1) a defendant's Sixth Amendment right to counsel is implicated; and (2) the defendant makes a prima facie showing that there is no probable cause to support the forfeiture of the restrained property.¹⁹

The Second Circuit follows the Monsanto line of decisions, which establish a slightly different procedure for challenging the pretrial restraint of assets. In *Monsanto III*, the Supreme Court held that there is no exemption to a pretrial restraint of property under 21 U.S.C. § 853 for the purpose of hiring a defendant's counsel of choice: "neither the Fifth nor the Sixth Amendment to the Constitution requires Congress to permit a defendant to use assets adjudged to be forfeitable to pay that defendant's legal fees."²⁰ On remand from the Supreme Court, the Second Circuit in *Monsanto IV* found that the defendant's Sixth Amendment right to counsel of choice depends on whether the restrained assets are ultimately forfeitable, and held that the "Fifth and Sixth Amendments, considered in combination, require an adversary, post-restraint, pretrial hearing as to probable cause."²¹ If the assets are in fact traceable to criminal activity and therefore forfeitable, the pretrial restraint does not affect a criminal defendant's Sixth Amendment rights because there is no "right to spend another person's money for services rendered by an attorney, even if those funds are the only way that the defendant will be able to retain the attorney of his choice."²² Accordingly, after *Monsanto IV*, courts have established a procedure where the defendant is required to make an initial showing that all of his assets have been restrained and that he has no other assets to pay for counsel.²³ If the defendant can make that showing, through a financial affidavit or other means, the burden shifts to the Government to show probable cause for the underlying indictment and the forfeitability of the assets.

Although nearly all federal circuits have recognized that a defendant should be afforded a post-restraint, pretrial hearing to challenge the seizure of assets where the defendant can make the required showing that the seizure impairs his ability to retain counsel, the circuits are currently split on the issue of whether the defendant making such challenge should also be permitted to attack the grand jury's finding of probable cause to indict the defendant on the offenses for which forfeiture is sought. The Second, Ninth, and D.C. Circuits have held that the post-restraint hearing must allow the defendant to challenge the probable cause for the underlying indictment.²⁴ On March 18, 2013, the Supreme Court granted certiorari to review this issue in *Kaley v. United States*.²⁵

Notwithstanding how the Supreme Court will decide *Kaley*, as a practical matter, even in those Circuits that afford the defendant the right to challenge the underlying indictment, most challenges to the pretrial seizure of assets will ultimately boil down to the underlying forfeitability of the assets. For example, in a recent Second Circuit case, *United States v. Walsh*, following a *Monsanto* hearing, the defendant declined to appeal the district court's finding that there was probable cause to believe he committed the fraud.²⁶ Instead, he challenged the forfeitability of assets--proceeds from the sale of his house--that were frozen in a parallel civil enforcement action. *Walsh* initially purchased the house in his wife's name with funds unrelated to the fraud. Later, he obtained the house through his divorce settlement, and in exchange paid his wife a \$ 12.5 million distributive award, of which \$ 6 million was directly traceable to the fraud. The Second Circuit rejected

¹⁹ See *United States v. Jones*, 160 F.3d 641, 647 (10th Cir. 1998) (holding that defendant has the initial burden of showing that he has no funds other than the restrained assets to hire private counsel or pay for living expenses, and that there is bona fide reason to believe the restraining order should not have been entered); *United States v. Farmer*, 274 F.3d 800, 804--05 (4th Cir. 2001) (following *Jones* and holding that the same two-part test applies where the property at issue was seized or restrained in a related civil forfeiture case); see, e.g., *United States v. Jamieson*, 427 F.3d 394 (6th Cir. 2005) (affirming district court's application of *Jones*); *United States v. Yusuf*, 199 F. App'x 127, 132--33 (3d Cir. 2006) (following *Jones*, *Farmer*, and *Jamieson*).

²⁰ *United States v. Monsanto (Monsanto III)*, 491 U.S. 600, 614 (1989).

²¹ *United States v. Monsanto (Monsanto IV)*, 924 F.2d 1186, 1203 (2d Cir. 1991).

²² *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 626 (1989).

²³ See *United States v. Egan*, No. 10CR191JFK, 2010 WL 3000000, at *5 (S.D.N.Y. July 29, 2010); *United States v. Kramer*, No. 1:06CR200-ENV-CLP, 2006 WL 3545026, at *4 (E.D.N.Y. Dec. 8, 2006).

²⁴ See *United States v. E-Gold, Ltd.*, 521 F.3d 411 (D.C. Cir. 2008); *United States v. Monsanto*, 924 F.2d 1186 (2d Cir. 1991) (en banc), *United States v. Roth*, 912 F.2d 1131 (9th Cir. 1990).

²⁵ No. 12-464.

²⁶ No. 12-2383-cr (2d Cir. March 18, 2013).

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Walsh's challenge and found that the district court properly applied the tracing analysis in *United States v. Banco Cafatero Panama*, which holds that "traceable proceeds" of the criminal activity include a withdrawal or an asset purchased with a withdrawal of funds from an account that commingles criminal proceeds with clean money.²⁷ Applying *Banco Cafatero*, the district court analogized the sale proceeds of the home to a withdrawal from a commingled account--in this case, the marital estate.²⁸

B. Victim Challenges

With all of the powerful tools available to the Government to locate, seize, and forfeit assets that can eventually be used to compensate victims, one might ask why a victim would wish to challenge or otherwise intervene in a forfeiture proceeding. There can be many reasons. For example, some victims cannot wait the years it may take for the defendant to be convicted and the assets forfeited and then distributed, and they want to accelerate the process. Some victims may believe that their right to recovery is superior to other classes of victims that also stand to recover through a forfeiture proceeding. Finally, certain victims may feel that they have an interest in certain specific property or assets that should, in fairness, trump the Government's interest in forfeiture. There are limited circumstances in which a victim's interest (or that of another third party) can be asserted in a forfeiture proceeding.

Criminal forfeiture proceedings are governed by 21 U.S.C. § 853 and Federal Rule of Criminal Procedure 32.2.²⁹ Under Rule 32.2, once a criminal defendant is convicted of the offenses giving rise to the forfeiture allegations--either by trial or by plea--the district court must enter a preliminary order of forfeiture, which thereby vests title in the Government "without regard to any third party's interest in all or part of it."³⁰ The preliminary order also requires the Government to serve notice of its intent to finally forfeit the property on any potentially interested third parties, either by publication or, where practicable, by individual notice.³¹

The district court then determines whether property is subject to forfeiture as part of the sentencing process, applying a preponderance of the evidence standard.³² Importantly, the sentencing court may determine that property is forfeitable regardless of whether it is held by the criminal defendant or a third party. If the Government can establish that property derived from or used to commit a criminal offense belongs to the defendant but is held by a nominee, the Government can forfeit the property.³³ The purpose of the relation-back doctrine, set forth at 21 U.S.C. § 853(c), is to "prevent defendants from escaping the impact of forfeiture by transferring assets to third parties."³⁴

Significantly, a criminal defendant can only be made to forfeit his own interest in property.³⁵ Thus, the forfeiture law explicitly provides a mechanism for allegedly innocent third parties to recover their interest in any property preliminarily forfeited to the Government.

Under the criminal forfeiture statute, 21 U.S.C. § 853(n), a third party may petition for a hearing to adjudicate its alleged interest in property to be forfeited in a so-called ancillary proceeding, conducted after the court enters its preliminary order

²⁷ *Banco Cafatero*, 797 F.2d 1154, 1159 (2d Cir. 1986).

²⁸ *Id.* at 10.

²⁹ n29 See 28 U.S.C. § 2461(c).

³⁰ Fed. R. Crim. P. 32.2(b)(1) & (2).

³¹ See 21 U.S.C. § 853(n)(1); Fed. R. Crim. P. 32.2(b)(3).

³² n32 See *United States v. Fruchter*, 411 F.3d 377, 383 (2d Cir. 2005).

³³ See, e.g., *United States v. Totaro*, 345 F.3d 989, 995--96 (8th Cir. 2003); *United States v. Houlihan*, 92 F.3d 1271, 1289--1300 (1st Cir. 1996); *United States v. Ida*, 14 F. Supp. 2d 454, 460--61 (S.D.N.Y. 1998), *aff'd*, 181 F.3d 83 (2d Cir. 1999) (unpublished).

³⁴ *United States v. Reckmeyer*, 836 F.2d 200, 203 (4th Cir. 1987).

³⁵ n35 *Pacheco v. Serendensky*, 393 F.3d 348, 355 (2d Cir. 2004) ("Although partial forfeitures may occasionally make for strange bedfellows--such as making the government co-owners of real property with the spouse of a criminal defendant--the alternative could give the government an undeserved windfall and deny an innocent third party her valid property interest.").

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of forfeiture.³⁶ As the Second Circuit made clear in *Pacheco*, a court resolving a third-party petition does not necessarily need to conduct a hearing; rather, these ancillary proceedings resemble civil actions, may involve discovery, and may be resolved by motion to dismiss or for summary judgment.³⁷ If the court does conduct a hearing, both the petitioner and the Government are entitled to present evidence, and the court may also consider relevant portions of the criminal record.³⁸ The burden is ultimately on the petitioner to prove her claim by a preponderance of the evidence.³⁹

There are only two ways that a third party can show a valid interest in property subject to forfeiture under § 853(n): The petitioner "must either (a) have an interest in the property that is superior to the criminal defendant's because it arose prior to 'the time of the commission of the acts [that] gave rise to the forfeiture.' 21 U.S.C. § 853(n)(6)(A), or (b) be a 'bona fide purchaser for value' of property who was 'reasonably without cause to believe that the property was subject to forfeiture at the time of purchase, id. § 853(n)(6)(B)." ⁴⁰

A third party comes under paragraph 6(A) if she had an interest in the property at the time of the offense, and under 6(B) if she acquired her interest after the offense. If the third party comes under 6(A), she must only show an interest in the property superior to the defendant's interest--for example, a secured creditor--whereas if she comes under 6(B), she must be a bona fide purchaser for value. In either case, the third-party petitioner must have an interest in specific property. General creditors have no standing in an ancillary proceeding because they have no interest in a "particular, specific, asset, as opposed to a general interest in an entire forfeited estate or account."⁴¹ If the petitioner cannot meet the requirements of either paragraph 6(A) or 6(B), she cannot demonstrate an interest in property subject to forfeiture.⁴²

Following the sentencing court's disposition of all petitions filed in ancillary proceedings, or if no petitions are filed following the expiration of the requisite time periods, the court enters a final order of forfeiture and the United States has clear title to the property.⁴³ The order may be amended at any time to include subsequently located property or property qualifying as substitute assets.⁴⁴

In white-collar criminal cases, victims typically lack standing to challenge the forfeiture in an ancillary proceeding because they are among hundreds or thousands of victims whose money was taken by fraud, and therefore cannot trace their money to specific property. But ultimately, the issue of whether a third party can establish an interest in the specific property is governed by state law, and a victim may argue that the court should impose an equitable remedy called a "constructive trust," allowing her to establish a property interest in the assets subject to forfeiture. The elements of a constructive trust vary by state, but generally include four core requirements: (1) a fiduciary relationship between the defendant and the victim; (2) that the property is a traceable asset of the victim; (3) that the absence of a constructive trust would result in

³⁶ n36 See 21 U.S.C. § 853(n)(2) (requiring that any such petition be filed "within thirty days of final publication of notice . . . or receipt of notice under paragraph (1), whichever is earlier").

³⁷ See *Pacheco*, 393 F.3d at 351--52.

³⁸ See 21 U.S.C. § 853(n)(5).

³⁹ See 21 U.S.C. § 853(n)(6).

⁴⁰ n40 *Pacheco*, 393 F.3d at 353.

⁴¹ n41 *United States v. Ribadeneira*, 105 F.3d 833, 835--36 (2d Cir. 1997) (per curiam).

⁴² See, e.g., *United States v. Hooper*, 229 F.3d 818, 822--23 (9th Cir 2000) (given the clear direction in § 853(n)(6) limiting recovery to two categories of claimants, courts are not at liberty to create additional grounds for relief); *United States v. Kennedy*, 201 F.3d 1324, 1335 (11th Cir. 2000) (alternative grounds set forth in §§ 853(n)(6)(A) & (B) are the only grounds for recovery in ancillary proceedings, and one of them "is emphatically not that the criminal defendant gave the third party a gift").

⁴³ n43 See 21 U.S.C. § 853(n)(7); Fed. R. Crim. P. 32.3(b)(3) & (c)(2).

⁴⁴ See Fed. R. Crim. P. 32.2(e).

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unjust enrichment; and (4) the lack of an adequate remedy at law.⁴⁵ Victims have had some limited success with constructive trust claims, most often in single-victim cases with a limited number of assets at issue. For example, in *Willis Mgmt. (Vt.) Ltd. v. United States*, the Second Circuit clarified that the Attorney General's authority under 21 U.S.C. § 853(i) did not preclude the imposition of a constructive trust, but was rather one factor the district court could consider in deciding whether a constructive trust was warranted.⁴⁶ In its ruling, the Second Circuit noted, "This is not a case where imposing a constructive trust would unfairly elevate the petitioners' claims over those of multiple 'similarly situated victims.'" ⁴⁷

Courts are reluctant to impose a constructive trust in multivictim cases because it may in fact result in the unjust enrichment of certain victims over others, depending on whether the defendant chose to spend a victim's money on a neatly traceable asset, such as a boat or a house, or in some other way. Creating a constructive trust in favor of the select victims who were lucky enough to be able to trace their money to a particular asset actually undermines basic principles of equity. In other words, it allows the defendant to choose which of his victims receive compensation. Courts have also sometimes found that a constructive trust is not warranted where there is a forfeiture proceeding because the restoration and remission processes (discussed below) provide adequate remedies at law for victims, obviating the need for an equitable remedy.⁴⁸ But even in multivictim cases, courts have occasionally imposed a constructive trust, most notably in *Boylan*, a civil forfeiture case in which the Ninth Circuit found that the Government had entered into a constructive trust for the benefit of the victims when seizing more than \$ 4 million in fraud proceeds, and held that the defrauded investors had standing to assert their claims to that money in the forfeiture proceeding.⁴⁹

V. Understanding How Restitution and Forfeiture Work Together in a Criminal Case is Important for Victims and for Defendants

Recognizing the power of forfeiture laws to locate, seize, and forfeit criminal proceeds, Congress has vested the Attorney General with the discretion to use forfeited funds to compensate victims. Under 21 U.S.C. § 853(i), the criminal forfeiture statute, the Attorney General has the authority to "grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims . . . or take any other action to protect the rights of innocent persons which is in the interest of justice . . ." The parallel civil forfeiture statute, 18 U.S.C. § 981(e), similarly authorizes the Attorney General to transfer forfeited property for purposes that include "as restoration to any victim of the offense giving rise to the forfeiture, including, in the case of a money laundering offense, any offense constituting the underlying specified unlawful activity."

To interpret the Attorney General's discretion, the Department of Justice promulgated regulations that govern how the Department uses forfeited funds to compensate victims. These regulations, found at 28 C.F.R. Part 9, define a "victim" as "a person who has incurred a pecuniary loss as a direct result of the commission of the offense underlying a forfeiture."

⁴⁵ n45 *United States v. Dreier*, No. 09-CR. -085 (JSR), 2010 WL 1223087, at *2 (S.D.N.Y. Mar. 24, 2010); see also *In re Ades & Berg Group Inv.*, 550 F.3d 240, 245 (2d Cir. 2008); *In re N.Y. Agency of Bank of Commerce & Credit Int'l S.A.*, 90 N.Y.2d 410, 660 N.Y.S.2d 850, 683 N.E.2d 756, 763 (N.Y. 1997).

⁴⁶ See *Willis Mgmt.*, 652 F.3d 236, 242 (2d Cir. 2011) (quoting *United States v. Ramunno*, 599 F.3d 1269, 1275 (11th Cir. 2010), which affirmed district court's decision not to impose a constructive trust because doing so would give one similar victim priority over another).

⁴⁷ *Id.*

⁴⁸ n48 See, e.g., *Dreier*, 2010 WL 1223087, at *2 (dismissing constructive trust claim where imposing a trust on behalf of one fraud victim would be unfair to others, even though the victims were defrauded in different ways); *Ribadeneira*, 105 F.3d at 837 n.5 (district court correctly declined to impose a constructive trust because 21 U.S.C. § 853(i) provides a legal remedy which obviates the need for an equitable remedy); *United States v. \$ 79,000 at Bank of New York*, No. 96-CIV-3493 (MBM), 1996 WL 648934, at *6 (S.D.N.Y. Nov. 7, 1996) (constructive trust cannot be imposed where claimants have the administrative remedy of filing petitions for remission or mitigation).

⁴⁹ *United States v. \$ 4,224,958.57 (Boylan)*, 392 F.3d 1002, 1005 (9th Cir. 2004). In *Boylan*, the funds were forfeited through a civil forfeiture action rather than a criminal action, so there was no ancillary proceeding under 21 U.S.C. § 853(n). Instead, the victims, who had not received notice of the Government's motion for a default judgment, appealed the entry of a default judgment in the Government's favor.

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⁵⁰ This definition parallels the meaning of "victim" for the purposes of restitution as "a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered."⁵¹ The regulations limit pecuniary loss to "the fair market value of the property of which the victim was deprived as of the date of the occurrence of the loss," and do not allow claims for lost interest or "collateral expenses incurred to recover lost property or to seek other recompense."⁵² Contrary to the limitations on loss contained in the remission regulations (which were initially adopted in 1997), recent case law in some circuits has expanded the definition of pecuniary loss under the MVRA to include attorney's fees, investigative expenses, and prejudgment interest.⁵³

Under the Attorney General's discretionary authority, the Department of Justice uses two alternative procedures to compensate victims with forfeited funds: (1) by petitions for remission or mitigation filed under 28 C.F.R. Part 9; or (2) by using forfeited property to satisfy an outstanding order of criminal restitution. These two procedures are known, respectively, as "remission" and "restoration."⁵⁴

Petitions for remission or mitigation of forfeiture are decided by the Chief of the Asset Forfeiture and Money Laundering Section of the Criminal Division of the Department of Justice (AFMLS), according to the criteria set forth in 28 C.F.R. Part 9. Because forfeited assets are property of the United States, courts and defendants lack authority to use them to satisfy a defendant's criminal debts, including fines or restitution obligations.⁵⁵ Before the passage of the Civil Asset Forfeiture Reform Act (CAFRA) in 2000, victims could recover their losses only by filing petitions for remission with the Attorney General.⁵⁶

CAFRA amended 18 U.S.C. § 981(e) to broaden the Attorney General's authority to restore property to the victim of any offense that gives rise to forfeiture. In October 2002, the Attorney General issued a policy directive on restoration, which delegated to the Chief of AFMLS authority to restore property to victims. The Government is now able to forfeit a defendant's property and apply that forfeited property directly to an order of restitution. This allows victims to obtain fair compensation from the forfeited assets, in accordance with the court's restitution order, without having to file petitions for remission with the Government and wait for decisions.

Restoration can only take place after a court has entered an order of restitution and an order of forfeiture. To the extent that the victims named and the amounts listed in the restitution order match the victims and the amounts that would be paid

⁵⁰ n50 28 C.F.R. § 9.2(v).

⁵¹ 18 U.S.C. § 3663(B)(ii)(2).

⁵² 28 C.F.R. § 9.8(5)(b).

⁵³ See, e.g., *United States v. Bahel*, 662 F.3d 610, 647 (2d Cir. 2011) (victim's attorneys' fees incurred as a result of internal fraud investigation were recoverable as restitution under MVRA, and victim was not required to use in-house counsel where outside counsel's fees were reasonable); *United States v. Elson*, 577 F.3d 713 (6th Cir. 2009) (victim's attorneys' fees and investigative costs were recoverable under 18 U.S.C. § 3663A); *United States v. Battista*, 575 F.3d 226 (2d Cir. 2009) (attorneys' fees expended by victim as it aided the government in its investigation and prosecution were recoverable under the MVRA); *United States v. Amato*, 540 F.3d 153 (2d Cir. 2008) (holding that MVRA gives courts "broad authority to determine which of the victim's expenses may be appropriately included in a restitution order" and affirming award of attorneys' and accountants' fees as part of restitution); *United States v. Cummings*, 281 F.3d 1046, 1053 (9th Cir. 2002) (affirming award of restitution award of attorneys' fees and expenses incurred in state and international proceedings that were not "wholly separate" from the criminal prosecution). Most recently, Judge Rakoff ordered defendant Rajat Gupta to pay \$ 6.2 million in legal fees incurred by Goldman Sachs to conduct an internal investigation relating to insider trading by Gupta and others, finding that Goldman's expenses were the "necessary, direct, and foreseeable result of the investigation of Gupta's offense of conviction, and thus well within the [MVRA's] coverage as interpreted by the Second Circuit." *United States v. Gupta*, 925 F.Supp. 2d 581, 585 (S.D.N.Y. 2013).

⁵⁴ n54 See Department of Justice Asset Forfeiture Program, *Returning Forfeited Assets to Crime Victims: An Overview of Remission and Restoration*, available at <http://www.justice.gov/criminal/afmls/forms/pdf/victims-faqs.pdf> [hereinafter, DOJ Remission and Restoration Overview].

⁵⁵ n55 See, e.g., *United States v. Trotter*, 912 F.2d 964 (8th Cir. 1990).

⁵⁶ Civil Asset Forfeiture Reform Act (CAFRA) of 2000, Pub. L. No. 106-185, 114 Stat.102 (Apr.2000).

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through the remission process, the forfeited assets are made available to the court to satisfy (or partially satisfy) the order of restitution. Once the Chief of AFMLS has approved the request for restoration of forfeited assets, the Government transfers the net proceeds of the forfeiture to the clerk of court for distribution pursuant to the order of restitution.

For victims, the restoration process ensures the fair, equitable distribution of forfeited assets. First, all of the assets forfeited in connection with the criminal case are pooled together and distributed according to the restitution order. Unlike creating a constructive trust, where victims are left to rely on their own resources to litigate and otherwise assert their interest in forfeitable property, the restoration process puts victims on a level playing field with each other, irrespective of what the defendant decided to do with each victim's money. Second, the forfeited assets are restored according to the restitution order, which reflects the careful consideration of the district judge who presided over the case. In most cases, the district judge is in the best position to determine who should qualify as a victim and how the pool of assets should be divided among the victims, because the district judge has heard the evidence in the case and conducted the sentencing proceeding where the loss amount is established. The district judge has also had the opportunity to consider victim impact statements and hear from victims at the sentencing proceeding.

The restoration process is also important for criminal defendants who are subject to mandatory orders of forfeiture and restitution. In most criminal cases, the defendant lacks sufficient funds to satisfy an order of restitution and an order of forfeiture, so restoration is critical to ensure that victims obtain full and timely restitution as required by the CVRA. Although the decision to grant a restoration request lies solely in the Attorney General's discretion, the United States Attorney's Office handling the criminal case makes a recommendation to the Department of Justice about whether restoration should be granted, and the Department of Justice follows that recommendation in the vast majority of cases.⁵⁷ But there are rare cases in which the Department of Justice does not follow a United States Attorney's Office's recommendation and denies restoration. For example, in *Pescatore*, the Department of Justice denied a restoration request from the United States Attorney's Office, and the Second Circuit affirmed the district court's decision not to order the Attorney General to grant restoration.⁵⁸ The Second Circuit explained that it need not reach the issue of whether the Attorney General's decision was reviewable as a matter of law because the record reflected a reason for the denial--the sufficient resources of the defendant to pay both restitution and forfeiture--and the Court therefore found no abuse of discretion. Although a criminal defendant cannot guarantee how the Department of Justice will respond to a restoration request, a defendant can, in the course of plea negotiations or otherwise, bring to the prosecutor's attention why a recommendation for restoration would be fair and appropriate based on the circumstances. For example, a defendant could make a factual proffer to the Government demonstrating that he has insufficient resources to pay restitution or forfeiture, or otherwise explain why the denial of a restoration request would be unjust or unfair to the defendant or to the victims based on the facts and circumstances of that particular case. Although the prosecutor only makes a restoration request after the forfeiture has been ordered, it is best to raise these issues early so that they can be given full consideration in advance of sentencing when the court typically imposes the forfeiture.

Despite the availability of restoration, the remission process continues to play a critical role in compensating victims, especially in complex, multivictim, white-collar cases. The MVRA carves out exceptions to the rule establishing mandatory restitution for victims in cases where the district court determines that "the number of identifiable victims is so large as to make restitution impracticable," or where "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."⁵⁹

For example, in the *Adelphia Communications Corp.* prosecution, the district court approved a global settlement agreement that resolved forfeiture claims against certain members of the Rigas family, potential claims to that property by other members of the Rigas family, and various potential criminal and civil claims against Adelphia.⁶⁰ The settlement resulted

⁵⁷ n57 DOJ Remission and Restoration Overview, *supra* note 54, at 4--5.

⁵⁸ *Pescatore*, 637 F.3d at 137.

⁵⁹ n59 18 U.S.C. § 3663A(c)(3).

⁶⁰ n60 *In re W.R. Huff Asset Management Co., LLC (Adelphia)*, 409 F.3d 555, 560 (2d Cir. 2005).

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in the creation of a \$ 728 million fund to be used to compensate defrauded investors. Because the defrauded Adelphia shareholders numbered in the tens of thousands, the Government retained a special master to identify and notify potential victims, verify and process petitions for remission, and recommend a distribution. Significantly, some victims objected to the district court's decision not to impose a restitution order, and petitioned for a writ of mandamus.⁶¹ In denying the petition, the Second Circuit highlighted the complexities of the case, including "the numerosity of the victims, the uncertainty of recovery, and the prospect of unduly prolonging the sentencing proceeding" to explain why the forfeiture settlement and remission procedure was better suited to compensate tens of thousands of victims in a timely fashion and was not an abuse of discretion.⁶²

Like Adelphia, the Madoff prosecution presents another instance where restitution was found impracticable under the MVRA, not only because of the large number of victims, but because of the way the defendant perpetrated the fraud. Reconstructing a record of the defendant's fraud and victim losses was particularly difficult because of the condition of the records kept by the defendant, as well as the scope and duration of the fraud.⁶³ In these circumstances, the goal of compensating victims was best achieved through the appointment of a special master who could work with the Government and the Securities Investor Protection Act Trustee to evaluate victims' petitions for remission, verify loss amounts, and recommend to the Attorney General a pro rata distribution of assets to these victims.

VI. Conclusion

Contrary to popular belief, restitution and forfeiture are not duplicative. Each has a distinct purpose, and each is governed by a different legal framework. But once we understand how restitution and forfeiture are different, we can see how they can work together as two complementary processes that, when applied properly, can result in effective compensation for victims.

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⁶¹ Id. at 560--61.

⁶² Id. at 564.

⁶³ n63 See Court's Order Regarding Restitution to Victims in *United States v. Madoff*, 09 Cr. 213 (DC) (Sept. 24, 2009) (granting Government's Motion Regarding Restitution to Victims in *United States v. Bernard L. Madoff*, dated September 22, 2009); Court's Order Regarding Restitution to Victims, 09 Cr. 213 (DC) (June 24, 2009) (granting Government's Motion Regarding Restitution to Victims, dated June 19, 2009).