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RESTITUTION

Two Seyfarth Shaw LLP attorneys analyze the U.S. Supreme Court's recent grant of certiorari on the question of whether the Mandatory Victims Restitution Act requires defendants to reimburse victim entities for the costs of internal investigations undertaken in relation to their criminal conduct.

To Be or Not to Be: U.S. Supreme Court Grants Cert to Decide Whether Victims Are Entitled to Internal Investigative Costs



BY ANDREW S. BOUTROS AND JOHN R.
SCHLEPPENBACH

From the simplest act of shoplifting to the most complex wire fraud scheme, companies can all too often find themselves to be victims of crimes. These offenses may be committed by outside individuals or businesses, or they may come from within, as employees or executives give in to the temptation to embezzle or steal. So businesses must have systems in place to detect wrongdoing, investigate its causes, and prevent its repetition. But these systems come with monetary costs, which can sometimes be considerable. As a result, a number of federal courts have found that those internal investigatory costs are reimbursable as part of the mandatory restitution that convicted defendants must pay to victims under the Mandatory Victims Restitution Act (MVRA), 18 U.S.C. § 3663A.

However, not all courts have agreed on this, and now the U.S. Supreme Court has decided to weigh in on the issue, granting certiorari within the first two weeks of 2018 in *Lagos v. United States*, No. 16-20146 (2018).

Whichever way the Court decides, *Lagos* will have significant impact on the recoverability of corporate investigative costs in cases resulting in convictions, especially in those cases where the defendant is not judgment proof and thus the issue is not just academic. And, the Supreme Court's holding in *Lagos* might also significantly impact how victim companies investigate and report crimes to law enforcement, an area often most influenced by Department of Justice and other executive agency policies, as opposed to the judiciary. In this regard, *Lagos* might serve as a bellwether of change in the corporate investigative field.

***Lagos v. United States*: Fifth Circuit Upholds District Court's Award of Investigative Costs To Crime Victim**

The defendant in *Lagos* pleaded guilty to five counts of wire fraud and one count of conspiracy stemming from a scheme in which he and his co-conspirators misled a large corporation about the value of the defendants' accounts receivable to induce that company to increase the amount of their revolving loan and provide them with uncollateralized funds. 864 F.3d 320, 322 (5th Cir. 2017). To investigate and prove up the scheme, the company employed forensic experts to secure and preserve electronic data and lawyers and consultants to investigate the fraud and ultimately provide legal advice. *Id.* In sentencing the defendant, the district court ordered him to pay restitution for those internal investigatory costs pursuant to a provision of the MVRA that includes "other expenses incurred during participation

in the investigation or prosecution of the offense” within the actual losses for which federal crime victims must be reimbursed as a matter of law. *Id.* The defendant appealed this portion of his sentence.

The Fifth Circuit affirmed, largely on the basis that it had previously held investigatory costs to be subject to mandatory restitution in *United States v. Phillips*, where a victim university had incurred costs to investigate a hacking and notify other victims. 477 F.3d 215, 224 (5th Cir. 2007). Although the *Lagos* court noted that the D.C. Circuit had subsequently taken a more narrow view of what costs were subject to restitution (thereby creating a circuit split), the Fifth Circuit concluded that it was bound by its circuit’s precedent. 864 F.3d at 323. Because the corporate costs incurred by the victim in *Lagos* were “necessary,” the Fifth Circuit held those costs were “compensable in the restitution award.” *Id.* at 322.

The Circuit Split: D.C. Circuit Holds Crime Victim Is Not Entitled to Reimbursement for Pre-Prosecution Internal Investigative Costs

As the Fifth Circuit in *Lagos* recognized, the federal circuit courts are split as to whether internal investigatory costs constitute “other expenses incurred during participation in the investigation or prosecution of the offense” pursuant to 18 U.S.C. § 3663A(b)(4) and therefore should be a component of restitution under the MVRA. The Second, Sixth, Seventh, Eighth, and Ninth circuits have concluded, as the Fifth Circuit did, that such costs are subject to mandatory restitution. See *United States v. Elson*, 577 F.3d 713, 726–29 (6th Cir. 2009); *United States v. Hosking*, 567 F.3d 329, 331–32 (7th Cir. 2009); *United States v. Stennis-Williams*, 557 F.3d 927, 930 (8th Cir. 2009); *United States v. Amato*, 540 F.3d 153, 159–63 (2d Cir. 2008); *United States v. Gordon*, 393 F.3d 1044, 1056–57 (9th Cir. 2004). These courts have reasoned that “[t]he primary and overarching goal of the MVRA is to make victims of crime whole,” and that internal investigation costs are a “direct and foreseeable” result of a defendant’s criminal conduct. *Gordon*, 393 F.3d at 1048, 1057. They have rejected the argument that, by enumerating expenses for “lost income, child care expenses, and travel expenses” as recoverable, the statute intended to exclude other expenses. *Amato*, 540 F.3d at 160. And, they have brushed off concerns about restitution being sought for unnecessary or unrelated investigatory expenses by noting that the MVRA already contains language limiting restitution to expenses that are “necessary” and “incurred during participation in the investigation or prosecution of the offense.” *Id.* at 161-62.

Becoming a circuit of one, the D.C. Circuit reached the opposite conclusion in *United States v. Papagno*, determining that internal investigatory costs were not subject to restitution, “at least when . . . the internal investigation was neither required nor requested by the criminal investigators or prosecutors.” 639 F.3d 1093, 1095 (D.C. Cir. 2011). It focused on the MVRA’s use of the phrase “participation in the investigation,” which the court read narrowly as meaning “taking part or sharing in” the government’s investigation, as opposed to merely “significantly assisting” with it, as the gov-

ernment had proposed. *Id.* at 1098. Because the internal investigation took place *prior* to the government investigation, the D.C. Circuit concluded that it could not have constituted “participation” in the government investigation, and the costs of the internal investigation must be excluded from the restitution order. *Id.* at 1099.

U.S. Supreme Court Grants Certiorari to Resolve Circuit Split

In his petition for certiorari, *Lagos* relied heavily on the D.C. Circuit’s decision in *Papagno*, arguing that it “reflects the most extensive analysis of any case resolving the issue” and that other courts have failed to adequately respond to its reasoning. Cert. Petition, *Lagos v. United States*, No. 16-1519. In particular, *Lagos* criticized the other circuits for concluding, without explanation, that the MVRA’s reference to “participation in the investigation” includes *any* investigation, as opposed to the actual government investigation. *Lagos* also challenged their apparent adoption of a standard allowing restitution for any expenses “directly or proximately caused by the crime,” despite the absence of such language in the provision of the MVRA defining eligible restitution expenses.

The Supreme Court granted the petition on Jan. 12, 2018, in a miscellaneous order that simply listed the case as one in which certiorari had been granted, without further comment.

Conclusion

Supreme Court’s Interpretation of When “Other Costs” Might Be Available to Crime Victims Under the MVRA May Further Incentivize Companies to Make Early Voluntary Disclosures to the Government

It is rarely easy to divine the Supreme Court’s intentions in granting certiorari in any given case. But, here, certainly the nature and tone of the question presented in the *Lagos* cert petition suggest that the Court might reverse and announce a rule that internal investigatory costs are not subject to mandatory restitution. After all, *Lagos* phrased the question presented as raising “[w]hether Section 3663A(b)(4) covers costs that were ‘neither required nor requested’ by the government, including costs incurred for the victim’s own purposes and unprompted by any official government action.”

But no matter how the Court might decide the issue, certainty is almost always good for companies and with certainty companies can plan—and take strategic steps—accordingly. In this regard, were the Court to reverse *Lagos*’s holding, informed corporate victims represented by sophisticated counsel might well have yet another reason to report corporate crimes to the government earlier in time. In doing so, they would be ensuring that all subsequent investigative and other related costs are in fact required or requested by the government or otherwise prompted by official government action, thereby falling within the scope of Section 3663A(b)(4). In this regard, *Lagos* stands as a potentially significant case in the internal investigations and corporate white collar space as it has the prospect of creating bottom-line incentives above and beyond those

created by the Department of Justice (or its sister agencies) and their policies for corporate victims to report crimes early to the government. After all, there is nothing like making a defendant pay a victim's investigatory costs to motivate a victim to report a crime early, especially if that victim has confidence that it can recover those costs from a defendant with deep pockets.

About the Authors

Andrew S. Boutros is the National Co-Chair of Seyfarth Shaw LLP's White Collar, Internal Investigations and False Claims Team and Lecturer in Law at The University of Chicago Law School. A former Assistant U.S. Attorney in Chicago, his investigations and prosecutions spanned the globe and are regarded as among the most extensive and complex multi-district, international corporate fraud and cybercrime cases in the nation's history. Boutros represents companies large and small, public and private, victims and targets

as well as their officers, directors, and other individuals in their most sensitive and important white collar matters, internal and cross-border investigations, and complex litigations. He can be reached at aboutros@seyfarth.com.

John R. Schleppenbach is Counsel in the Litigation Department of Seyfarth Shaw's Chicago office. He is a member of the White Collar, Internal Investigations and False Claims Team, and has experience representing major corporations in all manner of internal investigations and litigated matters, including cases involving the Foreign Corrupt Practices Act, the Securities Act, and the Securities Exchange Act. A former State's Attorney General and appellate prosecutor, Schleppenbach has also published more than three dozen articles on emerging issues in litigation and currently serves as the coach to the international arbitration moot court team at Northwestern Pritzker School of Law. He can be reached at jschleppenbach@seyfarth.com.