What asset forfeiture teaches us about providing restitution in fraud cases

Abstract (Summary)
Purpose - In today's global economy, the public routinely engages in international financial transactions via the internet. This has created opportunities for online fraud. The paper aims to explain what policymakers who are serious about providing crime victims with an effective restitution remedy can learn from the US Government's experience with forfeiture. Design/methodology/approach - The paper, by an Assistant US Attorney, combines narrative with argument and analysis. Findings - Existing restitution law is ineffective. Prosecutors have used forfeiture laws as an indirect mean of providing compensation for crime victims, but forfeiture law has its limits. The better approach would be for Congress to authorize the pretrial seizure and restraint of assets directly for restitution, utilizing standards comparable to those that exist in current forfeiture law. To address situations where a defendant places money overseas to avoid restitution, Congress should enact international restitution laws comparable to those that exist in forfeiture to facilitate the recovery of those assets. Without these kinds of reforms, the government will continue to struggle to collect restitution. Originality/value - The paper provides information of value to all involved with international financial transactions and law enforcement activities.

Full Text (19637 words)

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1 Introduction

In today's global economy, the public routinely engages in international financial transactions. A buyer locates a painting on the internet, negotiates a price for the painting with a foreign seller through Ebay or a comparable website, and pays for the painting using a financial intermediary such as Paypal or Mastercard. The entire transaction may take just a few minutes to conclude. The internet and globalization have put revolutionary technologies in the hands of ordinary people.

While a transnational internet transaction may take the ordinary person just a few minutes to conclude, if fraud is involved, the transaction may take skilled law enforcement agents years to unravel. Law enforcement agencies "have a hard time working effectively outside their country, assuming they have the opportunity to do so thanks to a partnership or diplomatic agreement" ([21] Naím, 2005). Those of us in the USA who enjoy the benefits of globalization learn of these difficulties when the painting we buy through the internet (let us say from a seller in England) turns out to be a fake ([63] Walton, 2006)[1]. We learn that the US law enforcement agencies are not as nimble at apprehending foreign scoundrels as they are at apprehending homegrown scoundrels. Even in cases where the USA has a strong law enforcement relationship with a foreign country - England is just such a country - the process of obtaining evidence of the cybercrime, and extraditing the perpetrator, requires extraordinary cooperation between governments.

Suppose that the victim of this internet fraud wants his or her money back. Tracing the flow of money in transnational crimes is as hard - if not harder - than apprehending the transnational offenders ([4] Candler, 1997)[2]. And, there is no good legal mechanism for enforcing a US restitution order against the offender's foreign assets. In fact, the government would be hard pressed to cite a single instance where a US court has entered a restitution order against a criminal defendant, and a foreign government enforced that restitution order against an offender's foreign assets. Transnational crime is a reality. Restitution for victims of transnational crime - cybercrime or otherwise - virtually does not exist.

But the internet is not the only place to find people who have been defrauded of money. Victims have been "clamoring to be made whole after losing billions of dollars in the accounting frauds and Wall Street scandals of the past several years" ([65] White and Johnson, 2004). One conservative estimate fixed the total cost of white-collar crimes in the USA in 1997 at $338 billion - a figure more than 80 times the total value of property stolen in theft-type crimes for that
same year ([24] Reiman, 2000). Cases involving the collapses of companies such as Enron and Adelphia Communications are just well publicized and recent examples of those in which large numbers of victims seek large amounts of restitution from white-collar defendants[3].

Suppose a victim of one of these corporate frauds wants his or her money back? Though the transnational crime element has been removed, the problem of providing restitution in these cases remains, even after years of legislative reform. In 1982, Congress enacted the Victim Witness Protection Act (VWPA) which, for the first time granted courts discretionary authority to order defendants convicted in a criminal case to pay restitution[4]. In 1996, Congress enacted the Mandatory Victims Restitution Act (MVRA), which augmented and partially superceded the VWPA by mandating restitution (without regard to the offender's ability to pay) in any case where a defendant is convicted of a crime involving fraud or deceit[5]. By an overwhelming vote, in October 2004, Congress passed the Crime Victims Rights Act (CVRA), a statute that created a new set of statutory victims' rights that are both enforceable in a court of law and supported by increased funding for victims' assistance programs[6].

Seldom has there been an instance where Congress has made such a concerted effort to respond to a problem and has come away with so little to show for its effort. Victim restitution orders are now mandated in cases involving fraud and deceit, and victims have even been granted the right to full restitution, but without much effect. According to the Government Accountability Office (GAO), between 1995 and June 2004, the government collected on average about 4-7 percent of the criminal debt owed by defendants[7]. Of the total criminal debt owed, two-thirds consisted of restitution debt arising out of fraud-type cases. As of September 2002, the total outstanding criminal debt stood at a staggering $25 billion.

Paradoxically, at the same time that the USA has almost totally failed to collect restitution for victims of fraud, it has been extraordinarily successful in forfeiting property in connection with federal crimes, including crimes involving fraud. In fiscal year 2005, the government deposited approximately $459,079,898 in assets forfeited through civil and criminal judicial forfeiture actions into the justice department's Assets Forfeiture Fund[8]. In the same fiscal year, the treasury department, which maintains a separate forfeiture fund, deposited an additional $287,584,542 in forfeited assets into its fund. The government has also succeeded in forfeiting foreign assets. Using provisions of law that authorize in rem forfeiture actions against foreign assets and orders requiring the repatriation of assets for forfeiture in criminal cases, the government has forfeited hundreds of millions of dollars in assets located abroad.

Indeed, the government's success in forfeiting assets largely accounts for the few successes it has achieved in collecting restitution debt. Congress has authorized the government to use forfeited assets to provide restitution to crime victims ([35] United States v. BCCI Holdings (Luxembourg) S.A. (Final Order of Forfeiture and Disbursement), [1999])[9]. According to a recent GAO report examining five significant white collar cases in which the court ordered restitution, the limited collections for restitution in these cases resulted predominately from asset forfeiture actions or from payments made prior to the offender's sentencing[10]. In just two of the largest and most celebrated cases, the government collected nearly $2 billion in assets for restitution to crime victims by using asset forfeiture tools to recover the assets ([35] United States v. BCCI Holdings (Luxembourg) S.A. (Final Order of Forfeiture and Disbursement), [1999])[11]. Between fiscal year 1998 and fiscal year 2005 the government distributed an additional $72 million in forfeited assets to approximately 11,000 crime victims[12]. In other words, if not for the use of forfeiture laws in recent years, the department of justice would be facing a near total failure to collect and distribute money for victims of fraud-type crimes ([1] Beale, 2003; [19] Linn, 2004; [26] Saler, 1999)[13].

What can forfeiture teach us about restitution? First, forfeiture teaches us that Congress needs to confront the problem of the defendant who dissipates or secretes assets prior to the imposition of an order of restitution[14]. Congress long ago recognized that to make forfeiture an effective tool, it had to grant the government authority to restrain and seize assets before trial. And, in the case of transnational crimes, such as internet fraud, Congress has granted the government authority to pursue for forfeiture assets located abroad, and to compel a defendant to repatriate assets for forfeiture. Nothing comparable to these grants of authority exist in restitution law.

Second, forfeiture teaches us that restitution requires comprehensive and flexible procedures for managing assets, and for handling the many competing claims to those assets. Forfeiture law includes provisions for the appointment of trustees and receivers to manage assets, and even to assist the government in identifying victims and their losses. Forfeiture law has also developed quiet-title procedures to deal with third-party claims to forfeitable assets, including (with mixed results) the third-party claims of crime victims. And, forfeiture law has developed flexible procedures for distributing forfeited assets to crime victims. Congress could learn from these developments in forfeiture law by providing for the pre-trial preservation of assets; the appointment of trustees in restitution cases; forfeiture-like procedures for resolving third-party claims to assets in restitution cases; and, a more flexible scheme for identifying victims and their losses than exists under current restitution law.

Third, forfeiture teaches us the value of centralizing policy, training, and program functions within the department of
As explained in greater detail below, these basic reforms will allow the government to move away from the dichotomy that exists in current practice between forfeiture and restitution, and move towards an "asset preservation and recovery" model that unifies the objectives of forfeiture and restitution ([32] United States v. Bach [1999]).

2 Overview of US restitution law

Restitution for crime victims is an ancient concept. Its origins trace back to the earliest laws that governed primitive and ancient societies ([11] Frank, 1992). However, in Anglo-Saxon law a distinction emerged in medieval times between the restitution owed the crime victim, and that owed the king for a violation of the king's peace ([11] Frank, 1992). Over time, the law's emphasis fell on the latter form of restitution. As governments came to take increasing responsibility for prosecuting property crimes, the crimes came to be seen as crimes against the state, i.e. violations of the king's peace ([11] Frank, 1992). Crime victims were left to pursue private remedies.

Today's restitution laws emerge from the establishment of penal laws in the first part of the twentieth century that began to restore the concept of victim restitution to the criminal case. These early laws afforded relief to crime victims, but limited restitution to the context where the court imposed an alternative punishment such as a suspended sentence and probation ([11] Frank, 1992). Until 1982, a federal court could order restitution only as a condition of probation ([3] Brown, 1999).

In the early 1980s, victim rights movements began to take hold throughout the states. Congress nourished this movement by providing federal funding for state restitution programs ([18]). Between 1965, when California enacted the first modern restitution statute, and 1982, when Congress enacted the first federal restitution statute, two-thirds of the states enacted some form of victim restitution legislation ([15] Greer, 1994).

2.1 The Victim Witness Protection Act

Congress enacted the VWPA in 1982 with the declared purpose of ensuring "that the Federal Government does all that is possible within limits of available resources to assist victims ... without infringing on the constitutional rights of the defendant" ([16] Hughey v. United States, [1990]). The legislative history confirms Congress' goal of ensuring "that Federal crime victims receive the fullest possible restitution from criminal wrongdoers" ([19]). Congress declared that:

... whatever else the sanctioning power of society does to punish wrongdoers, it should also insure that the wrongdoer is required to the degree possible to restore the victim to his or her prior state of well-being.

Thus, beginning with the VWPA, federal judges began to order restitution at sentencing in cases involving punishment more severe than probation.

The VWPA has never fulfilled Congress' lofty statements of purpose. Faced with a docket in which two-thirds of the offenders coming before it were indigent, federal courts did not impose restitution in many cases for the simple reason that the defendants had no money and no prospects for making money - at least not legitimately ([21]). The VWPA allowed a sentencing court to take this consideration, i.e. the defendant's inability to pay, into account when deciding whether to order restitution ([38] United States v. Bruchey, [1987]). As a result, by 1988, district courts were awarding restitution under the VWPA in only 9 percent of the criminal cases ([29] Tobolowsky, 1993). By 1991, that figure had risen to only 16 percent. In those cases where restitution was imposed under VWPA, the courts confronted a defendant with limited financial means - means made even more limited by a term of imprisonment. To address this problem, courts devised repayment schedules that required a defendant to pay only nominal periodic amounts towards restitution. These generous repayment schedules fit the defendant's circumstances, but accomplished little in the way of meaningful restitution to crime victims ([13] Furgeson et al., 2000).
2.2 The Mandatory Victim Restitution Act

By the early 1990s, Congress came to perceive that the problem with the VWPA was a simple lack of judicial backbone. Courts were exercising discretion under the VWPA not to impose restitution for what perceived to be the spineless (in fact, eminently defensible) reason that by the time the defendant reached the sentencing stage of a criminal case he or she had no means to pay a restitution order. In response, the MVRA mandated restitution in certain kinds of cases by amending the VWPA to provide that a sentencing court "shall order" the defendant to pay restitution to a "victim" of any covered offense[24] . Covered offenses include "any offense committed by fraud or deceit"[25] . A "victim" under the MRVA is:

... a person directly and proximately harmed as a result of the commission of an offense ... including, in the case of an offense that involves as an element a scheme ... any person directly harmed by the defendant's criminal conduct in the course of the scheme[26] .

The MVRA does not include any provision for the pretrial restraint of assets for restitution[27] . Thus, by the time a lengthy criminal case reaches the stage where the court may make a defendant pay restitution, whatever assets may once have existed to provide restitution to crime victims may have been spent, secreted, or transferred to third parties.

In enacting the MVRA, Congress intended to create a "more victim-centered justice system" by increasing the number of restitution orders in federal criminal proceedings[28] .

Congress increased the number of restitution orders, but in doing so it only succeeded in exploding the amount of uncollected restitution-type criminal debt. In the year prior to the passage of the MVRA, the amount of uncollected federal criminal debt stood at $5.6 billion[29] . By 1999 that figure had more than doubled to 13.1 billion[30] . As of September 2002, the amount of uncollected criminal debt had risen to almost $25 billion. According to the GAO, this "significant upward trend started with the enactment of the MVRA of 1996"[31] .

The MVRA did nothing to improve the government's ability to collect restitution. The legislation included no additional funding for prosecutors, with the obvious outcome being that prosecutorial resources needed to collect restitution have been stretched too thin[32] . And, the legislation did nothing to combat the problem of defendants who transfer assets or hide them abroad to avoid restitution. Congress mandated restitution, but few defendants paid it. Some defendants willfully avoided restitution without consequence[33] . The MVRA is ideally suited for recovering restitution from the honest (atypical) crook, who keeps hoards of money on deposit at the neighborhood bank to meet the contingency of a large restitution order. What is needed is a law aimed at the dishonest (typical) con man who, when caught, would much prefer to spend his ill-gotten gains, conceal them in foreign bank accounts, or spend them on high-priced counsel, than to use the money to provide restitution.

2.3 The Crime Victims Rights Act of 2004

Almost nothing in the way of meaningful restitution for victims came out of either the VWPA or the MVRA, and crime victims grew increasingly vocal in expressing their frustration. A problem - or so it seemed to Congress after its prior legislative attempts - was that victims did not have a sufficient voice in the criminal justice system. The USA inherited a criminal justice system from England that "long functioned on the assumption that crime victims should behave like good Victorian children - seen but not heard" ([18] Kenna v. United States District Court for the Central District of California , [2006]). The 2004 CVRA sought to change this by making victims independent participants in the criminal justice process[34] . Among other things, the CVRA grants victims the right to "full and timely restitution as provided in law" holds the court accountable for ensuring this right, and obligates government attorneys to use their best efforts to accord victims this right[35] . Congress seems to be saying in the CVRA that if only courts and prosecutors try harder, and listen more closely to the complaints of crime victims, all will be better.

It is too early to predict the CVRA's full impact. Its objectives go beyond simply recovering money for crime victims and include remedying the problem that victims have been shut out of the criminal justice process [41] United States v. Degenhardt , [2005][36] . The CVRA gives the victims rights in connection with a proceeding involving the crime of which they are a victim, and even affords them the "right to full and timely restitution as provided by law" but it does nothing to address the core reasons why the government has been so unsuccessful in providing full restitution to crime victims[37] .

3 The essential flaws in US restitution law
As discussed above, Congress has repeatedly sought to improve US restitution laws. It enacted the VWPA to afford courts discretion to impose restitution in fraud cases. When that statute did not live up to its promise, Congress enacted the MVRA based on the assumption that to fix the VWPA it needed to make restitution mandatory in certain cases, including fraud cases. It enacted the CVRA based on the assumption that a problem was the inability of victims of crime to participate fully in the criminal justice process. But none of these statutory reforms begins to address the problem that the government only collected a few pennies on every dollar of restitution that federal courts order in criminal cases.

3.1 The lack of pretrial seizure and restraint authority

The major flaw in US restitution law is that it does not allow for the preservation of assets before trial. Neither the VWPA nor the MVRA include any authority for the Department of Justice to obtain a pretrial seizure or restraining order against assets that might be used to satisfy a potential restitution order ([47] United States v. Payment Processing Center, LLC , [2006]) [38]. The absence of such authority has undercut the government's efforts to collect restitution. As the GAO reported in January 2005:

A major problem hindering the [government’s] ability to collect restitution debt in the selected cases was the long time intervals between the criminal offense and the judgment. Court records show that 5-13 years passed between when the offenders began to engage in the criminal activity for which they were sentenced and the date of their judgments [of conviction]. For each of the selected cases, by the time the court rendered the judgment establishing the restitution debt, certain of the offenders' assets had been, among other things, transferred to family members or others, involved in forfeiture actions, subject to bankruptcy, or moved to a foreign account[39].

In its report, the GAO examined five cases in which the offenders had been ordered to pay a total amount of about $568 million in restitution:

However, according to court records, only about $40 million, or about 7 percent of the total, had been collected several years after the courts had sentenced each of the offenders[40].

Of the amount that had been collected, $24 million of that amount had been collected through forfeiture. Another $11 million had been collected from the defendants prior to sentencing. Thus, only $5 million dollars (approximately 1 percent of the total amount of restitution ordered) had been collected after the restitution had been ordered. At the point at which restitution is ordered (usually at or following sentencing) the government's collection efforts amount to a clean up operation. Only the rare defendant retains any significant assets for the government to collect ([64] Washington Post , 2006; [10] FTC v. Assail, Inc. , [2005])[41].

The need for pretrial seizure and restraint authority is particularly great in fraud cases. Unlike many violent crimes or other cases where the offender never had any assets to begin with, defendants who commit fraud often have significant assets. In its examination of five white-collar financial fraud cases, the GAO found that:

...[e]ach of the offenders, at some point prior to the judgments establishing the restitution debts, either reported having wealth or significant financial resources to the courts or to [the government], or there were indicators that this was the case[42].

Nevertheless, following the entry of judgments of conviction, each of the offenders claimed that they were financially unable to pay full restitution to their victims.

It is unthinkable that a bank robber should get to retain the bank robbery proceeds after he is apprehended and spend the proceeds hiring lawyers ([5] Caplin & Drysdale, Chartered v. United States , [1989]) [43]. But, that is exactly what happens under existing restitution law. Unless the government is able to intervene with a seizure or restraint for purposes of forfeiture, or a regulatory agency such as the Securities and Exchange Commission (SEC) or the Federal Trade Commission (FTC) gets involved in a parallel proceeding, the existing restitution scheme allows defendants to keep and spend his or her assets until a restitution order is entered. Years pass between the time that the government first charges the defendant and the date of sentencing. If the defendant has not spent his fraud proceeds (or assets of equivalent value) on "wine, women and song" in the interim, he or she has used these assets to pay for defense lawyers ([10] FTC v. Assail, Inc. , [2005]) [44]. In the Enron case, for example, the law firm representing Jeffrey Skilling burned through an estimated $40 million in fees ($23 million from Skilling, and $17 million from insurance policies) before the trial even begins ([17] Johnson, 2006)[45]. What assets the defendant does not spend, and the defense lawyers do not take in fees, the defendant hides by transferring them overseas or to third parties. Under existing law, there is no sanction for wilfully evading restitution before restitution is ordered[46]. By the time the defendant is convicted and sentenced, no money remains for the crime victims.
3.2 The absence of provisions for recovering overseas assets

3.2.1 "International restitution" exists only in legal assistance treaties

In cases involving forfeiture, Congress long ago figured out that crimes can occur in the USA, but the proceeds of crime may be transmitted to a foreign jurisdiction, or vice versa ([7] Cassella, 2002). It has responded to this problem by enacting a bevy of international forfeiture and repatriation provisions. Some create extraterritorial jurisdiction in cases involving foreign assets ([25] Cassella, 2006; [19] Linn, 2004). Others require defendants to repatriate assets ([47] . Still others permit the US Government to assist foreign governments in recovering assets for forfeiture[48] . And, still others allow the government to forfeit funds in US correspondent accounts of foreign banks([49] . These statutes respond to a problem that is only going to grow and become more intractable with the globalization of commerce and banking.

These same problems of recovering assets in transnational cases exist in fraud cases where restitution has been, or likely will be, ordered. In its evaluation of restitution, the GAO also reported that transfers of funds to foreign accounts complicated debt collection efforts([50] . In one of the five cases the GAO reviewed, the offender had established a foreign bank account explicitly for the purpose of shielding his assets([51] .

Congress has made no provision for the recovery of foreign assets for restitution, despite the fact that treaty provisions contemplate such recoveries. Many Mutual Legal Assistance Treaties (MLATs) between the USA and other countries routinely include provisions for assistance in restitution, including the restraint of assets for restitution ([52] . However, in the absence of any US law that makes it possible to restrain or recover foreign assets for restitution, the treaty provisions are utterly useless. No statutory framework authorizes the pretrial restraint of assets for restitution, or for transmitting a pretrial restraining order for enforcement by a foreign jurisdiction. In the absence of such laws, the government cannot invoke these treaty provisions - placing the government at a comparative disadvantage when pursuing the assets of criminal defendants. Such defendants do not need a grant of authority from Congress to transfer funds abroad ([21] Naím, 2005)[53] . But the USA cannot ask a foreign government to freeze an asset on its behalf if the laws of the USA do not authorize such a restraint ([8] Cf. Christopher Kim A/K/A Kyung Joon Kim v. United States Department of Justice , [2005]; [9] Colello v. United States , [1995])[54] .

Moreover, a request for assistance to a foreign country under an MLAT, or even a letter rogatory, carries with it at least the implied assurance that the USA would make every effort to provide comparable assistance on behalf of the foreign country, if requested[55] . In the case of restitution, however, the USA could not reciprocate if it wanted to do so. It lacks any statutory authority to restrain assets for restitution at the request of a foreign authority, much less enforce a foreign restitution order. This lack of authority exists despite the fact that the USA has authority to restrain assets for forfeiture at the request of a foreign authority, and has authority to enforce foreign forfeiture orders[56] . Unless and until Congress enacts legislation allowing the government to assist foreign countries in restitution matters, the government will be hard pressed to ask that a foreign government provide the USA with assistance in a restitution matter.

3.2.2 Defendants should be required to repatriate assets for restitution

In Title III of the USA Patriot Act, Congress granted the court authority to order a criminal defendant to repatriate assets for forfeiture([57] . If the defendant fails to comply with the court's repatriation order, the court may punish the defendant by civil or criminal contempt, and may also enhance the defendant's sentence under the obstruction of justice provision of the Federal Sentencing Guidelines[58] .

No comparable provision exists in restitution law. The court may impose a restitution order, and the defendant may have assets overseas, but nothing requires the defendant to repatriate those assets and make them available for restitution.

3.3 A counterproductive rush to judgment

Restitution laws operate from the premise that restitution should be imposed promptly at or near the time of sentencing, and should only be revisited in narrow circumstances. In furtherance of this goal, Congress has specified that the district court must determine each victim and the amount of his or her loss at the time of sentencing, or at the very latest within 90 days after sentencing([59] . Beyond 90 days the district court arguably loses jurisdiction to impose restitution of any kind ([59] US v. Kapelushnik , [2002]; [60] US v. Maung , [2001]; [58] US v. Jolivette , [2001]) [60] . Except in narrow circumstances, e.g. the victim discovers new losses, the restitution order cannot be amended past the date by which it must be issued[61] :
The purpose behind the statutory 90-day time limit on the determination of victim losses is not to protect defendants from drawn-out sentencing proceedings or to establish finality; rather, it is to protect crime victims from the willful dissipation of the defendant's assets ([40] United States v. Cienfuegos, [2006]; [56] United States v. Zakhary, [2004]).

This is a noble, but futile purpose. As discussed above, in the absence of any provision for the pretrial restraint of assets the defendants assets have typically been dissipated long before sentencing. Fixing a short deadline for determining restitution on the theory that the defendant might dissipate the assets after sentencing gives new meaning to the expression "closing the barn door after the horses have left". Moreover, if, as discussed elsewhere, Congress authorized the pretrial restraint of assets for restitution, the government would be able to take action to prevent the willful dissipation of the defendant's assets long before sentencing, thus mooting the rationale for the 90-day deadline.

The 90-day deadline leaves the district court rushing to enter a restitution order for no good reason. In corporate and other large-scale fraud cases the task of computing victim loses is time consuming and requires extensive resources ([65] White and Johnson, 2004). Congress has provided the court with no additional resources with which to compute victim loses in large cases, and (as discussed elsewhere) has not provided funding for the court to appoint outside experts to assist it ([52] United States v. Salim, [2003]);[62] . Thus, in many cases involving a large number of fraud victims, say for example 1,000 victims or more, it is simply not feasible to expect a busy district judge (or magistrate judge) to identify each victim and determine the amount of his or her loss, much less within 90 days of sentencing [63] . Even if the court could do so, the court might make a mistake ([65] White and Johnson, 2004). The restitution laws make no allowance for mistakes. Except in cases where a victim discovers new losses, a district court cannot modify a restitution order once it is entered[64] .

The upshot is that in fraud cases involving a large number of victims, a district judge often faces one of two unpleasant alternatives. He or she can invoke the "complexity" exception in the MVRA, and decline to impose any restitution at all ([3] Brown, 1999)|65| . Or he or she can delay the entry of a restitution order beyond the 90-day period, and run the risk of reversal. Such delays may be in the victim's interests, and courts have sanctioned delays past 90 days in certain circumstances ([40] United States v. Cienfuegos, [2006]; [56] United States v. Zakhary, [2004]; [61] US v. Terlingo, [2003]; [57] US v. Catoggio, [2003]; [50] United States v. Reano, [2002]; [53] United States v. Stevens, [2000]; [44] United States v. Grimes, [1999]);[66] . But a court that ignores the time limit in which the restitution order must be fixed invites possible reversal on appeal[67] . Moreover, if the court identifies victims and their losses, but discovers later that it made a mistake, there is no mechanism for correcting the mistake under the MVRA.

The rushed and inflexible scheme that currently exists for determining victim losses stands in contrast to the more flexible approach taken in forfeiture law. Competing third-party claims to forfeitable assets often "involve enormous complexity that require years to resolve"[68] . Thus, in the forfeiture context the courts have broad authority to defer complex issues involving such competing claims until long after the defendant is sentenced. Moreover, in cases in which the government is using forfeited assets to make restitution to victims of crime through the attorney general's remission authority, the government has the authority to hire outside trustees and contractors to assist in determining each victim's loss, and the process of deciding remission petitions is not driven by arbitrary time deadlines[69] .

The use of trustees and receivers has been particularly effective outside the context of forfeiture and restitution[70] . The SEC, the FTC, and the Commodities Futures Trade Commission (CFTC) make frequent use of the services of outside contractors to manage assets, pursue foreign assets, and analyze victim claims in large cases ([27] SEC v. Financial Group, [1981]; [28] SEC v. Keller Corp., [1963]);[71] . In larger fraud cases, e.g. those involving securities fraud, the government continues to prefer parallel SEC-civil actions as a means of restraining assets and addressing the victim restitution, perhaps because no effective alternative exists.

3.4 Lack of centralized program responsibility for restitution within the department of justice

The GAO has reported that the Department of Justice lacks a strategic plan for improving restitution collections. In its 2001 report, the GAO noted as a contributing factor to the explosion of reported uncollected criminal debt, the Department of Justice's inadequate policies and procedures for collecting criminal debt, lack of adherence to established criminal debt collection procedures in certain judicial districts, and the department of justice's insufficient coordination with other entities involved in the collection of criminal debt[72] . When it returned in 2004 to examine the problem, the GAO observed that the department of justice had not implemented many of its recommendations[73] . When the GAO returned yet again to the subject in 2005, it commented that its review of five cases:

... strongly support[ed] the need for Justice, as the agency primarily responsible for collecting criminal debt, to take
the lead in promptly addressing and implementing our 2001 recommendations... to develop a strategic plan that would improve interagency process and coordination with regard to criminal debt collection activities, as well as address managing, accounting for, and reporting criminal debt[74].

Congress has similarly called for the department of justice to take the lead in a coordinated effort to improve restitution[75].

No agency within the criminal division of the department of justice has program responsibility for restitution. This is surprising given that within the criminal division of the department of justice there are numerous sections, each devoted to a particular subject area or areas of criminal law. Thus, there is the AFMLS, the fraud section, the organized crime and racketeering section, the computer crime and intellectual property section, the child exploitation and obscenity section, and so forth. To one degree or another the subject area(s) of many of these sections touch upon or relate to restitution. The existing responsibilities of the AFMLS’s overlap with restitution matters because forfeited assets are frequently used to provide restitution, and the authority to use forfeited assets for restitution has been delegated to the chief of that section. Similarly, the Fraud Section’s responsibilities overlap with restitution because there is seldom a fraud-type crime that does not have a victim. Yet despite the fact (or perhaps because of the fact) that restitution crosses over so many sections of the criminal division, it remains orphaned.

Restitution’s status as an orphan within the criminal division means that no section of the criminal division organizes restitution training, provides policy or legal guidance to prosecutors handling restitution matters, or advances policy and legislation that relates to restitution[76]. In contrast, consider how program responsibilities for forfeiture are handled. AFMLS has responsibility for forfeiture on a program basis. It conducts numerous training seminars each year devoted to forfeiture; it distributes to US Attorney’s Offices policy manuals, case outlines, and monthly summaries of recently decided cases that relate to forfeiture, and it provides advice to Assistant US Attorneys handling forfeiture cases. It also has organized an asset forfeiture working group consisting of forfeiture experts throughout the department of justice who meet twice a year to draft forms, and make policy recommendations relating to forfeiture. AFMLS also maintains an intranet site providing prosecutors in the field with extensive forfeiture research materials and sample pleadings. Nothing like this kind of support exists for prosecutors handling restitution matters.

Part of the reason training and other programs flourish within asset forfeiture is funding. The Assets Forfeiture Fund pays for forfeiture training. In fiscal year 2005, for example, the Assets Forfeiture Fund paid more than $9 million to train government lawyers and agents in forfeiture (www.usdoj.gov/jmd/afp/02fundreport/2005affr/report2a.htm). I cite these figures not to begrudge the forfeiture program for the funding it receives, or to pit restitution against forfeiture in a contest for funding. The money spent for forfeiture is well spent, and, as noted above, the money spent to support forfeiture directly benefits crime victims through the government’s use of forfeiture as a tool to compensate crime victims. The point is that no comparable source of money exists to train and support government lawyers and agents in restitution.

At the field level a similar problem exists. The most experienced and skilled prosecutors at restraining and seizing assets, are in the forfeiture unit of a US Attorney’s Office. US Attorney’s Offices have contract resources paid for with forfeited funds to assist prosecutors in forfeiture matters. US Attorney’s Offices also have sophisticated computer programs to manage, account for, to track assets subject to forfeiture and report on the status of forfeiture matters. However, in many US Attorney’s Offices, criminal debt owed to the USA, including restitution, is handled by the Financial Litigation Unit (FLU). Often these two units, the forfeiture unit and the FLU, function independently and without sufficient coordination in cases involving crime victims[77]. With a few exceptions, few US Attorney’s Offices bring a forfeiture AUSA’s skills to bear in enforcing restitution orders. Moreover, the FLU does not have access to the kind of contractor and case management tools that are available to their forfeiture counterparts.

4 The use of forfeiture as a tool for restitution has limits

4.1 Forfeiture and restitution

The use of forfeiture as a tool for restitution traces back to the enactment of the first forfeiture provisions for money laundering. While those early provisions primarily targeted the laundering of narcotics proceeds, they also criminalized the laundering of the proceeds of traditional white-collar crimes such as mail fraud and wire fraud[78]. Beginning in the late 1980s, the government began forfeiting assets involved in money laundering crimes in cases where the laundered property was the proceeds of white-collar crimes such as mail and wire fraud. With the enactment of the Civil Asset Forfeiture Reform Act of 2000, Congress authorized the civil forfeiture of the direct proceeds of certain specified unlawful activities, including mail and wire fraud, without regard to whether the government proved a money laundering violation[79].
Thus, the government has the statutory authority to seize and forfeit the proceeds of fraud-type crimes either directly or by proving a money laundering offense. For such cases, Congress has authorized the attorney general to restore forfeited property to crime victims. Congress first authorized the attorney general to restore property to crime victims that had been forfeited in criminal cases, and more recently in civil forfeiture cases[80]. The attorney general restores property to victims through one of two means. First, in his sole discretion he may grant a petition for remission filed by a victim of the offense of conviction or of a related offense[81].

Second, in his sole discretion he may direct that forfeited assets be turned over to the court for distribution in accordance with a valid restitution order ([36] United States v. Bright, [2004])[82].

4.2 Crime victims and forfeiture

4.2.1 By design, victims and other creditors are excluded from the forfeiture case

Forfeiture proceedings in the USA are not liquidation proceedings; they are designed to create a forum in which the government establishes the forfeitability of the property and in which persons with an ownership interest in that property can contest the forfeiture on certain statutorily-defined grounds[83]. Thus, forfeiture proceedings are not designed to deal with large numbers of victim-type creditors until after a forfeiture judgment is obtained.

Accordingly, unlike federal bankruptcy law, or even state laws governing the insolvency or liquidation of insurance companies, forfeiture law purposefully excludes victim and creditor-type claims. If a forfeiture proceeding included such claims, scarce prosecutorial resources would become tied up in administering what would amount to a liquidation proceeding as the victims engaged in a mad scramble to see which of them would recover the lion's share of forfeited property. Thus, the government and the courts - and the vast majority of victims - have a strong interest in allowing forfeiture proceedings to conclude before the government attempts to address the legitimate interest of the victims in receiving a pro rata distribution of the assets subject to forfeiture ([35] United States v. BCCI Holdings (Luxembourg) S.A. (Final Order of Forfeiture and Disbursement), [1999])[84].

Some courts, however, have become skeptical of the government's ability to deal with the competing claims of victims and creditors following the conclusion of a forfeiture proceeding. Most notable among these cases is a March 2004 decision by the court of appeals in [42] United States v. Frykholm [2004]. Frykholm was an investment fraud scheme similar to many that proliferated in the late 1990s and early 2000s. Frykholm persuaded people to invest $5 million in an investment scheme that promised 100 percent a month return ([42] United States v. Frykholm [2004], 414). In fact, she operated a Ponzi scheme in which the first generation of investors received huge returns on their investment with money being raised from the next generation of investors ([42] United States v. Frykholm [2004], 414). Early generations of investors who received these profits (wittingly or unwittingly) helped promote the scheme with testimonials touting their investment success ([42] United States v. Frykholm [2004], 414). When Frykholm’s scheme collapsed she had net receipts of about $10 million (having taken in $15 million and paid out $5 million) ([42] United States v. Frykholm [2004], 415). Prosecutors were able to locate and restrain (using forfeiture tools) about $4 million; “the rest either was devoted to living the high life or has been hidden somewhere from which Frykholm hopes to retrieve it after her release” ([42] United States v. Frykholm [2004], 415). The government’s plan was to forfeit the assets, and use them to make restitution to the crime victims amounting to about 30 cents on every dollar they had invested ([42] United States v. Frykholm [2004], 415).

One of the victims pursued Frykholm more aggressively than the other victims. Cotswold Trading Company invested a total of $1.1 million in the scheme ([42] United States v. Frykholm [2004], 415). Frykholm initially promised to turn this into $2 million, but when she failed to fulfill that promise, Cotswold agreed to “reinvest” the $2 million in exchange for Frykholm’s promise to pay $4 million ([42] United States v. Frykholm [2004], 415). When the $4 million failed to materialize, Cotswold hectored Frykholm with threats and protests until Frykholm eventually agreed to give Cotswold a promissory note for $2.2 million secured by Frykholm’s investment in valuable real estate worth approximately $2.3 million ([42] United States v. Frykholm [2004], 415). Shortly after entering into this deal with Cotswold, Frykholm was indicted, and the USA filed a lis pendens against the property ([42] United States v. Frykholm [2004], 415-16). This set up a conflict between Cotswold (a creditor and victim of Frykholm who wanted its money back), the government (which sought to forfeit the property because it was acquired with fraud proceeds), and the other Frykholm victims (who sided with the government because the government ultimately sought to distribute the proceeds from the sale of the property pro rata among all the victims) ([42] United States v. Frykholm [2004], 416).

The Frykholm Court perceived that forfeiture law lacked procedures to address the problem of victims and creditors competing for limited assets. The ancillary proceeding of a criminal forfeiture action is akin to a quiet title action; it was never meant to resolve bankruptcy-type disputes between competing creditors ([45] United States v. McHan, [2003]) [85]. When framed within the confines of forfeiture law, the issue was whether Cotswold had an interest that defeated

http://proquest.umi.com/pqdweb?vinst=PROD&fmt=3&startpage=-1&clientid=8631&v...
the government's interest in forfeiting the property, i.e. was Cotswold a bona fide purchaser for value without knowledge that the property was subject to forfeiture when it acquired its secured interest in Frykholm's property. This question, the court of appeals observed, cannot be summarily adjudicated because it depends on a factual question of whether Cotswold buried its head in the sand, i.e. was willfully blind to the possibility that Frykholm had acquired the property with proceeds from the same fraud that took in Cotswold ([45] United States v. McHan, [2003]).

The Frykholm court observed that bankruptcy law has tools better suited to resolving this issue and the others raised by the case. If Frykholm had been thrown into bankruptcy, the court noted, her transaction with Cotswold could have been unremedied as a fraudulent transfer ([49] United States v. Real Property Located at 5208 Los Franciscos Way, [2004]) [66]. Moreover, the Frykholm court perceived that bankruptcy law provided a superior way to marshal Frykholm's assets and distribute them to her creditors. Although the pertinent forfeiture law:

... allows the Attorney General to use forfeited assets for restitution, it does not create a comprehensive means of collecting and distributing assets. Bankruptcy would have made it lucid that Cotswold cannot enjoy any priority over the other victims and cannot reap a profit while Frykholm's other creditors go begging. Moreover, bankruptcy would have enabled the trustee to recoup the sums distributed to the first generation of investors, who received $5 million or so against $2.5 million paid in. Those payments could have been reclaimed under the trustee's avoiding powers and made available to all of the bilked investors. It is too late to pursue the profits that Frykholm distributed to the first wave of investors in order to set up the later waves, but it is not too late to prevent the preferential distribution of any further assets to favored investors. Cotswold must stand in line with the rest ([42] United States v. Frykholm, [2004], 417).

The Frykholm decision points out a key vulnerability of forfeiture law: It can be exploited by the "greedy victim" who improves his or her position vis-á-vis other victims by resort to self-help remedies. Cotswold began the case as a victim of Frykholm's scheme like any other victim.

But, by resort to self-help remedies, Cotswold attempted to pass itself off in the ancillary proceeding of the forfeiture case as a bona fide lienholder entitled to preferential treatment. As will be seen below, the problem of the "greedy victim" continues to plague the government's attempts to use forfeiture as a tool for collecting money for victims of fraud.

4.2.2 Court decisions have undermined the use of forfeiture in victim cases

As discussed above, the attorney general has used forfeited property to provide restitution to crime victims. However, the discretion to do so in judicial forfeiture cases belongs exclusively to the attorney general. A court may not compel the attorney general to apply forfeited assets to restitution, anymore than a defendant may demand that he receive credit against his restitution obligation equal to the value of the assets he forfeits. Moreover, courts have consistently turned away victims and other general creditors who tried to force the government's hand by appearing in the forfeiture case and contesting the forfeiture itself ([46] United States v. One-Sixth Share, [2003]) [87]. For victims and creditors, it is axiomatic under federal forfeiture law that if they have no specific interest in the asset the government seeks to forfeit, they have no standing to appear in the forfeiture case. As discussed earlier, a contrary rule would allow the victims to turn the forfeiture case into a liquidation proceeding, delaying or completely frustrating the government's efforts to distribute the property to the victims after a forfeiture judgment is entered ([34] United States v. BCCI Holdings (Luxembourg), [1995]) [68].

The "forfeit first, address victim claims later" scheme makes it possible for the government efficiently to strip the asset from the wrongdoer and obtain clear title to the property before having to address the competing claims of unsecured victims and creditors. But the scheme has the collateral effect of deferring victim compensation until after the government successfully forfeits the asset. Victims in a case called United States v. $4,224,958.57 (Boylan) challenged this scheme and won, thereby casting considerable doubt on the government's continued ability to use the forfeiture laws to serve the interests of victims.

In Boylan, the government filed a civil forfeiture action against $4,224,958.57, proceeds of a fraud scheme perpetrated against 78 victims [89]. The government's purpose in bringing the action was to use the forfeiture laws to obtain title to the property from the fraudster, so that the attorney general could disburse the money to the victims pursuant to regulations governing the remission of forfeited funds [90]. The district court entered a default judgment for the USA, and subsequently denied a motion filed by 25 of the 78 victims to set aside that judgment [91]. Consistent with settled law, the court held that the victims were "unsecured creditors without the requisite ownership interest for standing" and that the facts of the case did not warrant the imposition of a constructive trust in their favor [92]. On appeal, a unanimous panel reversed the district court, holding that the victims were the beneficiaries of a constructive trust and therefore had standing to contest the forfeiture [93]. Moreover, the panel held that on remand
the district court was to administer a trust proceeding, making sure that no victim received more than his or her fair share of the assets the government had secured through its forfeiture authority[94]. The government's future role in the case is unclear.

At a superficial level, the *Boylan* court reached a victim-friendly result. The decision allows fraud victims to appear in the forfeiture case and battle with one another over the assets. But, beneath the surface, the *Boylan* decision does disservice to the interests of crime victims. In contrast to the *Frykholm* court - which correctly grasped the implications that arise when crime victims try to step ahead of one another - the *Boylan* court missed this point. Victims of fraud often lack the wit and the resources to use the judicial process to recover the proceeds of the crimes perpetrated upon them. Those that have the sophistication and resources to intervene in a civil forfeiture case will want a larger than pro rata share of the recovery for their effort, and thus may square off against one another to defeat or reduce the amount of a competing victim’s claim[95]. The *Boylan* decision creates a scheme in which those victims wealthy (and sophisticated) enough to navigate a forfeiture/liquidation proceeding will receive restitution at the expense of less sophisticated and well-heeled victims.

The *Boylan* decision also means that the government can never complete the forfeiture action it set out to complete, thus raising the spectacle of an in rem forfeiture case in which the victims will do battle for the assets not just with one another, but with the fraudster who may not give up easily. If the government cannot complete the forfeiture action, two additional problems emerge. First, the government and the court become cut off from the coherent statutory scheme Congress set up to allow the government to turn over forfeited assets to the crime victims through either restitution or remission[96]. Second, and more importantly, if *Boylan* controls it becomes doubtful whether the government should even intervene in the first instance ([39] United States v. Caulder, [2006])[97]. Each of the victims in a *Boylan*-type case is potentially a prevailing party entitled to attorney's fees under civil forfeiture's liberal fee-shifting provisions. In an ironic twist, the prosecutor who uses forfeiture laws to intervene on behalf of victims exposes the public fisc to significant liability[98].

More fundamentally, the *Boylan* decision results in the co-optimizing of government's extraordinary pretrial and restraint authority. Under *Boylan*, a case that begins as a forfeiture case converts into a trust proceeding on behalf of private litigants - albeit victim litigants. It is doubtful in the extreme whether Congress intended the government's forfeiture authority to be used as a high-powered writ of attachment statute for victims wealthy and sophisticated enough to piggyback onto it ([31] United States v. Approximately, [2005])[99].

In the face of these developments, the government has been forced to counsel federal prosecutors in the Ninth Circuit against using civil seizure and forfeiture authority in fraud cases with large numbers of victims[100]. Instead, to avoid *Boylan*, the government has begun to resort to alternatives to forfeiture. Following the suggestion in *Frykholm*, in one case the government has resorted to bankruptcy procedures[101]. The unintended consequences of the *Boylan* decision are now plain enough for perhaps even for the *Boylan* court to see: if litigated today, the government might never use its extraordinary forfeiture authority to secure the very funds that make any form of restitution to the *Boylan*-type victims possible.

### 4.2.3 The restraint of assets for forfeiture is limited to traceable assets

Generally speaking, US forfeiture law does not permit the pretrial restraint of substitute or "equivalent value" assets ([55] United States v. Wingerter, [2005])[102]. The reasons for this are complex, and to some degree bound up in history. Since, the eighteenth century, civil in rem forfeiture in the USA has rested on the so-called "guilty property" fiction ([22] Pelham v. Rose, [1869]; [62] Various Items of Pers. Prop. v. United States, [1931])[103]. Under this fiction the government can only seize and forfeit for civil forfeiture "guilty" property, i.e. property that bears a nexus to the offense. And, traditionally Congress forbade in personam property forfeitures ([33] United States v. Bajakajian, [1998])[104]. When Congress broke with this tradition, and first authorized in personam criminal forfeitures in the 1970s, it tempered the reach of in personam forfeitures by importing the "guilty property" fiction from civil forfeiture law [105]. Congress later expanded the government's forfeiture authority in a criminal case to include so-called "substitute assets", i.e. assets that substitute for the assets that bear the requisite nexus but cannot be recovered because the defendant has dissipated or secreted them. However, except in the Fourth Circuit and a handful of district courts, the government cannot restrain substitute assets for forfeiture. It must demonstrate a nexus between particular property and the commission of the crime[106]. Efforts to amend forfeiture law to permit the pretrial restraint of so-called "substitute assets" have thus far not succeeded.

The pretrial restraint or seizure provision for restitution need not rest on the "guilty property" fiction, and thus does not carry with it this limitation that has historically existed in forfeiture law. If the government can make a pretrial probable cause showing that a defendant, if convicted, will be ordered to pay an approximate amount of restitution for an offense greater than or equal to the amount the government seeks to restrain, then the government should be able to restrain or seize the equivalent amount of defendant's assets sufficient to satisfy such a restitution order[107].
Whether the restrained or seized assets trace in any way to the defendant's crime, should not matter because restitution, once imposed, is like a civil judgment and may be collected from any assets of the defendant. Thus, the pretrial restraint of assets for restitution may do that which current forfeiture law outside the Fourth Circuit and a few district courts does not authorize: the restraint of assets on an equivalent value-basis, as opposed to a nexus basis.

4.2.4 Decisions to use forfeited assets are centralized and discretionary

In a forfeiture case, the government makes the decisions. Thus, the decision to compromise a forfeiture case - even one involving fraud proceeds - belongs to the government[108]. And the decision to use forfeited assets to benefit victims belongs to the attorney general. The attorney general may distribute assets to victims in one of two ways. The attorney general may "restore" the forfeited assets to the victims by turning them over to the court and allowing the court to distribute them in accordance with a valid restitution order. However, in cases where no restitution order has been entered, or the restitution order contains mistakes that cannot be correct, the attorney general frequently distributes assets to victims through a separate process called a "remission" process[109].

In judicial forfeiture cases the attorney general has delegated his power to distribute forfeited assets through the remission process to the chief of AFMLS, upon the recommendation of the seizing agency and the United States Attorney's Office responsible for the forfeiture[110]. If a victim is unhappy with the chief of AFMLS's decision, then he or she may seek reconsideration[111]. There is no further recourse if, after reconsideration, the victim remains dissatisfied. There is no appeal to a higher executive authority, and judicial review is very limited ([20] Marshal Leasing, Inc. v. United States, [1990]).

This highly centralized (and somewhat regal) remission process makes sense when viewed from the perspective of the government's interest in protecting the integrity of the forfeiture program. The government's use of forfeited assets is carefully circumscribed by statute, and the department of justice necessarily must ensure that forfeited assets are not wasted or misspent[112]. However, this process is not as victim-friendly as it might be. Victims have no legal right to forfeited funds for restitution (either by remission or restoration), and possess only limited remedies if they are dissatisfied with the ruling official's decision. A more victim-friendly scheme would be one that more closely tracks the procedural protections that now exist in restitution law. Under current restitution law, victims have a right to restitution, and decisions concerning restitution are made by a district judge, in the community where the crime occurred, and in proceedings where victims have a right to participate, and even have limited rights of appeal.

5 Proposals for reform

5.1 The preservation of assets for restitution

5.1.1 Pretrial seizure and restraint

Congress should authorize the pretrial seizure and restraint of assets for restitution. It should model such provisions after the seizure and restraint provisions that exist in criminal forfeiture cases.

The pretrial restraint of assets for restitution has precedents both in the USA and abroad. California - which has consistently been a leader in this area - enacted legislation in 1996 allowing courts to preserve a defendant's assets for victim restitution prior to conviction. California law authorizes such preservation orders for victim restitution in fraud and embezzlement cases involving more than $100,000 where the prosecution charges multiple felony counts ([23] People v. Pollard, [2001]) [113].

Abroad, the United Kingdom has taken a tough stance on restraining crime proceeds, and has done so in a way that unifies the objectives of forfeiture and restitution. Since, 1995, UK law has authorized the *ex parte* seizure to satisfy confiscation orders[114]. The confiscation orders permit confiscation in an amount equal to the amount by which the defendant has benefited from the crime. Once restrained for confiscation, the assets are available to satisfy "compensation orders" imposed for the victims of crime. The objective of victim compensation takes priority over the objective of confiscation, but if funds remain after the victims are made whole then the crown confiscates the remaining funds ([4] Candler, 1997).

Title II of S. 3561 would amend the MVRA to bring US law into closer alignment with the laws of California and the United Kingdom and provide for the preservation of assets for restitution[115]. Title II, which bears the short title: Preservation of assets for restitution, would authorize the government to apply *ex parte* for an order restraining assets traceable to the offense[116]. It also provides the government with the authority to restrain certain nonexempt assets, i.e. assets not otherwise needed for basic living necessities, up to the value of a likely restitution order, if the court
determines that it is in the interests of justice to do so[117]. The proposed legislation addresses the potential property interests of third-parties by using an ancillary proceeding scheme nearly identical to that used in criminal forfeiture [118].

Because S. 3561 moves beyond restraining or seizing so-called "nexus" property, and will allow for the pretrial restraint of any non-exempt property, the provision places a greater strain on a defendant's Sixth Amendment right to counsel of choice. In the case of crime proceeds, the defendant has no Sixth Amendment right to counsel to spend crime proceeds on counsel of choice ([6] Caplin & Drysdale, Chartered v. United States, [1989]). However, to the extent that the government seeks to restrain property for restitution beyond direct crime proceeds, the analysis becomes more difficult. If probable cause exists to believe that the defendant has committed a crime, should equivalent value assets necessary to pay any probable restitution order be restrained, or should the defendant be allowed to use them to hire counsel of choice in the absence of any other available assets ([43] United States v. Gonzales-Lopez, [2006][119])?

S. 3561 fineses this issue in two ways. First, it requires the court to enter a protective order only if the court concludes, among other things, that it is in the interests of justice to do so. This provision might be construed to allow the district court to consider (and presumably reconsider) the comparative equities of the case. Second, the bill allows the defendant to challenge a preservation order by showing by a preponderance of the evidence that the assets subject to the preservation order are needed to retain counsel or pay basic subsistence expenses, and by making a prima facie showing that the court may have erred in entering the preservation order. If the defendant makes such a showing, the burden would shift to the government to demonstrate that sufficient cause exists to justify the restraint of the funds. If the government cannot make that showing, then the defendant would be entitled to the release of the funds.

5.1.2 Repatriation and international assistance in restitution matters

The [14] GAO's (2005) January report observed that there were "minimal if any apparent negative consequences to the offenders for not paying their restitution debts". Moreover, it is not a crime to fail to pay a restitution debt, although it may be a grounds for revocation of supervised release ([14] GAO, 2005). And, because of the long delay between the initiation of the criminal prosecution and the imposition of restitution, offenders have ample time to conceal assets by many means, including concealing them in foreign bank accounts ([14] GAO, 2005).

Congress should address the problem of the defendant who secretes assets overseas. It could do so by enacting two separate repatriation provisions. It should model one repatriation provision after Section 853(e)(4) of title 21, and authorize the court to compel a defendant to repatriate assets for restitution prior to the imposition of restitution[120]. It should model a second repatriation provision after Section 853(p)(3), and authorize the court to order the defendant to repatriate assets at the time it imposes restitution[121]. In the case of a defendant who will fully failed to comply with a repatriation order issued under either provision the court would have the power to punish the defendant ([2] Bearden v. Georgia, [1983][122].

The government should also have the ability both to transmit US restitution orders to foreign jurisdictions, as well as to assist foreign governments seeking to restrain assets in the USA for restitution or seeking to enforce foreign restitution orders. Legislation has been drafted that would address these concerns. Congress could incorporate such authority into the statute that already exists for enforcing foreign forfeiture orders[123].

5.2 Flexible procedures for managing assets and victim claims

5.2.1 Authorization to appoint trustees and receivers

Courts handling large restitution matters also need the authority to appoint trustees and receivers. In some cases, such as those involving offenses with exceedingly numerous victims or defendants with numerous or especially difficult assets to manage and liquidate, specialized assistance may be needed to administer restitution. These receivers and trustees should function much in the way a bankruptcy trustee might function. The trustee can help manage assets that are subject to restitution, process the restitution-type claims of victims, creditors, and insurance companies, and help the district court provide a fair, timely and orderly restitution process.

To meet such needs when they arise, Congress should amend Section 3664 to provide authority for the appointment of a trustee or receiver, on the government's motion, at any time after the filing of the related indictment or information. The court may assign the trustee or receiver the following tasks:
- identifying and notifying victims and calculating their individual losses;

- collecting, liquidating, and accounting for available assets, including property seized or restrained for restitution pursuant to subsection (q), using the powers provided for court-appointed receivers under 28 U.S.C. § 3103(b);

- taking custody of property transferred by the government pursuant to statutes authorizing the government to restore forfeited property to victims;

- petitioning the government on behalf of victims under the regulations in 28 CFR § 9 for remission of forfeited property;

- distributing property to victims as the court may authorize; and

- making recommendations to the court on any restitution-related issues.

As is common practice in cases brought by the SEC, FTC and CFTC, the court should be given broad latitude to fashion an appointment order that fits the unique requirements of the particular case.

The manner of paying the expenses of the receiver should be determined on a case-by-case basis. In some instances, the defendant's assets may provide a source of funding, in other cases, the funding may come from forfeited assets that the attorney general agrees to restore or remit to victims.

Grand jury investigations frequently yield information that is valuable for restitution, such as the amount and location of the defendant's assets or amounts the defendant obtained from specific victims. Because matters occurring before the grand jury are secret, and Fed. R. Crim. P. 6(e) limits their disclosure, Congress may consider permitting courts, upon its appointment of the receiver, to authorize the government to disclose grand jury material to the receiver for use in executing the receiver's court-appointed duties. The legislation should also provide that other potentially relevant materials, including presentence investigation reports or financial affidavits prepared by the defendant, will also be made available to the court-appointed receiver, on such terms as the district court may direct.

5.2.2 Delayed restitution orders

Reform legislation should include a provision allowing the court, for good cause shown, to defer orders of restitution, and amend them when it makes a mistake. In large victim cases in particular, the court should have the flexibility to defer the imposition of a restitution order until up to one year after sentencing. Current law, which provides only 90 days, is insufficient. As a result, courts faced with complex restitution matters frequently declare the matter too complex, and do not impose any restitution at all.

Alternatively, reform legislation should permit the court to impose the total amount of restitution, when it is known by sentencing, but to defer the identification of victims and determination of the loss to be paid to each victim (which are often the most problematic aspects of the restitution determination), in order to allow collection to begin in such cases. Deferred restitution orders should be the exception, not the rule.

Greater flexibility would allow courts to enter accurate restitution orders and, when inaccuracies cropped up, to amend them. Accurate restitution orders (even if the cost of accuracy means a reasonable delay in entering the order) would greatly enhance the existing restitution process. Among other things, accurate restitution orders allow the government to distribute forfeited property to victims according to restitution orders - as opposed to through the less victim-friendly remission process. A more flexible restitution process would allow courts (perhaps with the assistance of a receiver or trustee) to manage the larger more complex victim cases.

5.3 Centralize and coordinate program responsibility for restitution

The department should assign program responsibility for restitution to a section of the criminal division. Particularly if Congress enacts pretrial restraint provisions for restitution, it would make sense for that program responsibility to fall to AFMLS. AFMLS already has pretrial restraint expertise that has developed through its oversight of the forfeiture program, and has the training, policy and program support functions in place to manage the restitution program.

Giving AFMLS program responsibility for restitution would be a good first step towards coordinating the use of
forfeiture and restitution tools. In time, such coordination might allow the government to make more effective use of pretrial restraint asset authority in cases involving victims, and eliminate some of the problems that have emerged in the case law in instances where the government attempts to use forfeiture tools to achieve restitution-type objectives. Similarly reforms should occur at the US Attorney's Office level of the department of justice. There, US Attorney's Office's should be encouraged to bring the asset forfeiture and financial litigation units together and develop coordinated strategies for restraining and recovering assets for restitution.

Moreover, the department should ensure that the functions of FLU and asset forfeiture units within US Attorney's Offices are closely coordinated, particularly if Congress grants the government the authority to preserve assets for restitution. If the government has the ability to preserve assets both for forfeiture and restitution, it will need to make strategic decisions about which authority to use. In some cases, restitution law may provide the best means of securing assets for victims, but in some cases forfeiture law may provide the best means. For example, a defendant may attempt to shield high-value assets from the claims of victims by using provisions of state law, such as a state homestead exemption. A restitution order may not take precedence over such provisions ([37] United States v. Brosseau , [2006]; [51] United States v. Rostoff , [1999])[127]. For example, a defendant may attempt to shield high-value assets from victims and creditors by using provisions of state law, such as a state homestead exemption. A restitution order may not take precedence over such provisions ([37] United States v. Brosseau , [2006]; [51] United States v. Rostoff , [1999]). Forfeiture orders, however, do take precedence ([30] United States v. 817 N.E. 29th Drive, Wilton Manors, Florida , [1999])[128].

6 Conclusion

I set out to explain what policymakers serious about providing crime victims with an effective restitution remedy can learn from the government's experience with forfeiture. Existing restitution law is ineffective. For some time now prosecutors have used forfeiture laws as an indirect mean of providing compensation for crime victims, but we have come to see that forfeiture law has its limits. The better approach would be for Congress to authorize the pretrial restraint asset authority in cases involving victims, and eliminate some of the problems that have emerged in current forfeiture law. To address situations where a defendant places money overseas to avoid restitution, Congress should enact international restitution laws comparable to those that exist in forfeiture to facilitate the recovery of those assets. Without these kinds of reforms, the government will continue to struggle to collect restitution.

Congress should also reform restitution laws to provide for the appointment of trustees and receivers, and to give the courts greater flexibility in determining victim losses. Current restitution law is ill-equipped to deal with large victim cases, much less with cases in which the services of a trustee or receiver are needed to marshal and liquidate assets for restitution.

If the government is granted the authority to restrain assets for restitution, then it falls to the government to make effective use of this authority. Within the department of justice, the use of restitution and forfeiture should be more closely coordinated. The objectives of forfeiture compliment those of restitution, and the expertise agents and prosecutors have gained in the area of forfeiture, readily translates to restitution.

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[Footnote]
1. A recently released book provides an insider's account of how internet auction fraud works. See www.kennethwalton.com
2. Discussing the globalization of fraud, and the difficulties prosecutors and trustees face in tracing assets across different jurisdictions.


7. In a 2001 report, the GAO reported that it had reviewed a sampling of large debt cases and determined that only about 4 percent of the total debt had been collected. See US Gov. Accountability Office, Criminal debt: oversight and actions needed to address deficiencies in collection processes, GAO-01-664 at 11 (July 2001). In a 2004 report, the GAO reported that criminal debt collection averaged about 4 percent for 2000, 2001, and 2002. US Gov. Accountability Office, Debt - actions still needed to address deficiencies in justice's collection processes, GAO Report, 04-338 at 10 (March 2004). In a 2005 sampling of selected cases, the GAO found about a 7 percent debt collection rate. See US Gov. Accountability Office, Criminal debt: court-ordered restitution amounts far exceed likely collections for the crime victims in selected financial fraud cases, GAO-05-80 (January 2005).


9. See 18 USC § 981(e)(6) (permitting civilly forfeited funds to be used to pay restitution to crime victims); 18 USC § 1963(g); 21 USC § 853(i)(1). [35] United States v. BCCI Holdings (Luxembourg) S.A. (Final Order of Forfeiture and Disbursement) [1999] Explaining that Section 1963(g) of Title 18 gives the Attorney General power to remit property forfeited in a RICO case to crime victims.

10. US Gov. Accountability Office, Criminal debt: court-ordered restitution amounts far exceed likely collections for the crime victims in selected financial fraud cases, GAO-05-80 at 3 (January 2005). In its study, the GAO selected five corporate fraud cases for which restitution was ordered in a total amount of $568 million. The victims of the crimes included corporate shareholders, large lending institutions and small investors - many of whom were elderly and had been harmed financially. As of June 2004, only $40 million (or about 7 percent) of the total restitution for the selected cases had been paid. Of that amount, $24 million resulted from asset forfeiture actions ([35] United States v. BCCI Holdings (Luxembourg) S.A. (Final Order of Forfeiture and Disbursement) [1999]).

11. $1.2 billion restrained pre-trial and disbursed to victims following completion of the criminal case. In re W.R. Huff Asset Management Co., LLC., 409 F.3d 555, 558 (2nd Cir. 2005) (in which the government used forfeiture to forfeit approximately $715 million in assets for distribution to victims of corporate fraud involving Adelphia Communications Corporation).


13. The trend towards using forfeiture as a means of collecting money for restitution has gone virtually unnoticed by scholars and commentators. [19] Linn (2004)What seems to have escaped the attention of forfeiture critics is that in recent years the government has used forfeited property, not merely as a source of law enforcement funding, but as a means of providing restitution to victims of the offense or related offense that gave rise to the forfeiture). To the extent commentators have noticed the linkage between forfeiture and restitution, they have been skeptical of the government's use of forfeiture to compensate crime victims. [1] Beale (2003) "Victims' rights programs are also direct beneficiaries of the current 'tough on crime' policies because a large share of their funding comes from fines levied against those convicted of federal crimes and their forfeited assets. [26] Saler (1999) Attorneys representing victims of a financial crime should not assume that their work is over if the government seizes the proceeds of the crime from the perpetrator and then initiates forfeiture proceedings against the seized property. Unless an attorney fully understands the available procedures for recovering seized property, the attorney's client could be victimized once again- this time by the forfeiture process. See also Houston Chronicle Editorial, Prosecutors Take the Low Road in their Grab for the Assets of the Late Ken Lay's Estate (September 9, 2006) (criticizing the Department of Justice for proposing legislation that would expand its ability to use civil forfeiture as a means of recovering for victims assets of the late Kenneth Lay).

14. See US Gov. Accountability Office, Criminal debt: court-ordered restitution amounts far exceed likely collections for the crime victims in selected financial fraud cases, GAO-05-80 at 12 (January 2005); see also Criminal debt-actions still needed to address deficiencies in justice's collection processes, March, 2004, at p. 5 noted (A significant amount of time may pass between offenders' arrest and sentencing, thus affording opportunities for offenders to hide fraudulently obtained assets in offshore accounts, shell corporations, family members' names and accounts, or other ways).

15. Functionally, the MVRA is a tort statute, though one that casts back to a much earlier era of Anglo-American law, when criminal and tort proceedings were not clearly distinguished. The Act enables the tort victim to recover his damages in a summary proceeding ancillary to a criminal prosecution.

16. See also Wayne R. LaFave et al., 1 Criminal Procedure §1.4(k) (West 2d ed. 2004) (discussing the evolution of 'victims'
17. See also Wayne R. LaFave et al., 1 Criminal Procedure §1.4(k) (West 2d ed. 2004) (discussing the evolution of "victims' rights" legislation).


21. According to a 2000 Department of Justice report, publicly-financed counsel represented about 66 percent of federal felony defendants in 1998 as well as 82 percent of felony defendants in the 75 most populous counties in 1996. See www.ojp.usdoj.gov/bjs/pub/press/iddc.pr

22. Some appellate courts interpreted the VWPA to require a sentencing court to "make clear findings of fact on the defendant's resources, and the financial needs and earning ability of the defendant and the defendant's dependents" keyed to the specific amount of restitution ordered. Some 14 years after enactment of the VWPA, Congress would specifically prohibit judges from considering the defendant's ability to pay in determining whether to award restitution.

23. In one case, for example, in the Middle District of Florida, the defendant was ordered to pay a total $12,532,540.00 in restitution, but his monthly restitution obligation was only $200.00 per month. United States v. Jerome P. Jacobson, et al., Case No. 3:01-cr-251-J-25MCR.


27. The Federal Debt Collection Procedures Act (FDCPA) is the vehicle by which the government often seeks to collect money to satisfy a restitution order, and the FDCPA has powerful prejudgment remedies. See 28 U.S.C. § 3001-3308. However, the FDCPA's prejudgment remedies (§§3101-3105) do not come into play except in civil cases filed by the USA to collect a "debt". Restitution is not a "debt" until it is ordered at the end of the criminal case. 18 U.S.C. § 3613(a) and (f). In other words, under existing law there must first be an order of restitution before the government may bring a civil action under the FDCPA and seek to restrain an asset for restitution.


33. See US Gov. Accountability Office, Criminal debt: court-ordered restitution amounts far exceed likely collections for the crime victims in selected financial fraud cases, GAO-05-80 at 4 (January 2005) (for the selected cases, we also found that there were minimal, if any, apparent negative consequences to the offenders for not paying their restitution debts).

34. See Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act, Pub. L. No. 108-405, §§ 101-104, 118 Stat. 2260, 2261-65 (2004) (codified at 18 U.S.C. § 3771). Section 3771(a) declares that crime victims have certain rights. These rights include the right not to be excluded from certain proceeding, the reasonable right to be heard, the right to confer with the attorney for the government, the right to full and timely restitution, and the right to proceedings free from unreasonable delay, and the right to be treated with fairness and dignity. Among other things, the CVRA, 18 U.S.C. § 3771, gives crime victims the right to be present at and even to participate in some court proceedings. Its enforcement mechanism requires a district court to take up "forthwith" victims' complaints that their rights are not being honored. If the victim is not satisfied with the district court's response, they can petition the Court of Appeals for a writ of mandamus which that court must decide within 72 hours. If the court does not grant the writ, it must explain its reasons in a written opinion.
35. U.S.C. § 3771(a)(6), (b) & (c)(1).

36. For example, in In re Kenna, 453 F.3d 1136 (9th Cir. 2006), a victim of fraud sought a copy of a presentence report that the district court used in imposing sentence. The district court was only willing to give the fraud victim an edited version. On a petition for a writ of mandate, the court of appeals held that the act does not give a victim an absolute right to view the entire presentence report. Because the victim had failed to show that is inestimable seeing the entire presentence report outweighed the reasons for keeping the report confidential, the court of appeals affirmed the district court's decision to give the victim only an edited version of the report. Id. at 1137.

37. In re W.R. Huff Asset Management Co., LLC, 409 F.3d 555, 558 (2nd Cir. 2005) (CVRA does not grant crime victims right to contest government's settlement of restitution matters, but does grant them right to comment on the settlement).

38. Section 1345(a) of Title 18 authorizes the attorney general to commence a civil action to seek injunctive relief in cases involving fraud, but the authority is circumscribed. The attorney general may only seek injunctive relief in cases involving ongoing crimes such as mail or wire fraud, and in the case of completed crimes may only seek assets restraints in cases involving health care fraud and banking law violations. See 18 U.S.C. § 1345; (under § 1345(a)(1), therefore, the attorney general could not seek a property restraint if the mail or wire fraud scheme was completed regardless how egregious the crime was or how bold the asset dissipation may be. Immediate resort to criminal prosecution and asset forfeiture laws would be required).

39. US Gov. Accountability Office, Court-ordered restitution amounts far exceed likely collections for the crime victims in selected financial fraud cases, GAO-05-80 (summary of findings) (January 2005); see also US Gov. Accountability Office, Oversight and actions needed to address deficiencies in collection processes, GAO-01-664 at 45 (July 2001) (citing the government's failure to promptly identify "whether an offender has assets" as a factor that increases the risk that the offender may have time to hide or liquidate assets that could have been available to pay toward the debt).

40. As stated elsewhere, in its 2004 report, the GAO noted that in 2000, 2001, and 2002, the percentage of recovery had declined to about 4 percent of the total amount of restitution ordered. US Gov. Accountability Office, Actions still needed to address deficiencies in justice's collections processes, 04-338 (March 2004) (summary of findings).

41. In securities and marketing fraud-type cases, the recovery of money for victim restitution is far more likely to come through enforcement proceedings brought by the SEC or FTC, respectively, than it is through the enforcement of a restitution order imposed in any criminal case. In the past three years for example, the SEC has brought more than 90 civil cases involving market timing and late trading abuses and has collected more than $3 billion that will be returned to investors. [64] Washington Post (2006); see also US Gov. Accountability Office, Continued progress made in collection efforts, but greater sec management attention needed, GAO 05-670 (August 2005) (discussing SEC's efforts to collect money for harmed securities investors). Here again, however, the distinguishing feature of many of these SEC and FTC civil enforcement actions is that the governmental agencies involved in them aggressively pursue the pretrial restraint of assets [10] FTC v. Assail, Inc. [2005] (in a telemarketing fraud case, the day the civil complaint was filed, the FTC obtained an ex parte temporary restraining order freezing the defendants assets, and appointing a trustee as a receiver).

42. US Gov. Accountability Office, Court-ordered restitution amounts far exceed likely collections for the crime victims in selected financial fraud cases, GAO-05-80 at 3 (January 2005).

43. A robbery suspect, for example, has no Sixth Amendment right to use funds he has stolen from a bank to retain an attorney to defend him if he is apprehended. The money, though in his possession, is not rightfully his; the government does not violate the Sixth Amendment if it seizes the robbery proceeds and refuses to permit the defendant to use them to pay for his defense.

44. US Gov. Accountability Office, Court-ordered restitution amounts far exceed likely collections for the crime victims in selected financial fraud cases, GAO-05-80 at 12 (According to Justice, criminals with any degree of sophistication, especially those engaged in fraudulent criminal enterprises, commonly dissipate their criminal gains quickly and in an untraceable manner. Assets acquired illegally are often rapidly depleted on intangible and excess "lifestyle" expenses). "A recent case handled by the Federal Trade Commission illustrates the conflict that quickly arises between the lawyers retained to represent a client accused of fraud, and the interests of crime victims in receiving restitution [10] FTC v. Assail, Inc. [2005] (an attorney has a duty to inquire as to the source of his fee when he is put on notice that his fee may derive from a pool of frozen assets" and an attorney must 'audit' a client sufficiently so as to avoid becoming part of a criminal scheme that includes disposing of ill-gotten gains")

45. Estimating that the total price tab for Skilling's defense may have topped $65 million.

46. US Gov. Accountability Office, Court-ordered restitution amounts far exceed likely collections for the crime victims in selected financial fraud cases, GAO-05-80 at 4 (January 2005) (A court may revoke or modify the terms and conditions of probation or supervised release for an offender's failure to pay restitution, however, these are of little consequence once an offender has successfully completed the term of supervised release, because, at that point, the offender cannot be sent to prison for failure to pay a restitution debt).

48. See 18 U.S.C. § 981(b)(4)(authorizing pretrial seizure of property in cases where a person is arrested in a foreign country in connection with an offense that would give rise to the forfeiture of property in the USA) and 28 U.S.C. § 2467 (authorizing the enforcement of foreign forfeiture and confiscation orders).


50. US Gov. Accountability Office, Court-ordered restitution amounts far exceed likely collections for the crime victims in selected financial fraud cases, court-ordered restitution amounts far exceed likely collections for the crime victims in selected financial fraud cases, GAO-05-80 at 15 (January 2005).

51. US Gov. Accountability Office, Court-ordered restitution amounts far exceed likely collections for the crime victims in selected financial fraud cases, court-ordered restitution amounts far exceed likely collections for the crime victims in selected financial fraud cases, GAO-05-80 at 15 (January 2005).

52. A table summarizing by country the forfeiture and restitution provisions contained in US MLAT Treaties is attached as the Appendix to this paper.

53. Whereas government agencies can only do what the law explicitly permits, those outside government can do all they want, except what is explicitly prohibited by law. Criminal networks do both: that which is not explicitly banned, and activities that are explicitly prohibited as well.


56. See 28 U.S.C. § 2467 (authorizing the enforcement of foreign forfeiture orders); 18 U.S.C. § 981(b)(4)(authorizing the US Government to restrain US assets if any person is arrested or charged in a foreign country in connection with an offense that would give rise to the forfeiture of property in the USA).


59. Congress took a step toward recognizing these practical problems when it allowed courts to better determine the “full amount of the victim's losses” as required in (new) 18 U.S.C. § 3664(f)(1)(A). MVRA provision § 3664(d)(5) gave the court the option, in appropriate cases (i.e. where the “victim's losses are not ascertainable by … ten days prior to sentencing”) to defer the determination and imposition of restitution for up to 90 days. It also allows the court, upon proper petition and showing, to increase the restitution at some later date if “the victim subsequently discovers further losses.”

60. Some courts have observed that the sentencing court may actually lose jurisdiction to impose any restitution at all outside of 90 days after the sentencing date. [59] US v. Kapelushnik [2002] (court loses jurisdiction for imposing restitution at 90 days; advises courts to not enter written judgment until determine restitution). [60] US v. Maung , [2001] (court might lose jurisdiction after 90 days).

61. A restitution amount imposed can only be changed post-sentencing under limited situations. It can be reduced, pursuant to § 3664(j)(2), by a payment to a victim (by the defendant) for the same loss for which restitution is imposed in a federal or state civil proceeding; or it may be increased, upon proper showing, for a victim's newly discovered losses, pursuant to § 3664(d)(5). It might also be changed on appeal, pursuant to § 3742.

62. Section 3664(d)(6) of title 18 authorizes the court to refer any issue arising in connection with a proposed order of restitution to a magistrate judge or special master for proposed findings of fact and recommendations as to disposition, subject to de novo by the court. There is, however, no provision of law authorizing the court to expend government funds to retain such a special master. Not surprisingly, there are only a handful of reported cases in which a court has appointed an outside person as a special master under this provision. [52] United States v. Salim [2003] (court appoints outside expert to assist it in determining restitution).

63. In a fraud and money laundering case in the Eastern District of California involving approximately 15,000 potential victims, the district court declined to impose any restitution because the victims and their losses could not be calculated within the deadlines provided for by statute. United States v. Keith Andrew Nordick , 2:04-CR-209-EJG.; United States v. Alyn Richard Waage , 2:03-CR-005 EJG.


65. See 18 U.S.C. § 3663A(c)(3). Financial crime cases are particularly likely to be too complex for the court to order
restitution.

66. Most courts have interpreted this provision to be victim-friendly, i.e. that Congress intended the 90-day provision to benefit victims, that courts are mandated to use it where appropriate (the court "shall"), and that it should not provide a procedural obstacle that might deprive a court of jurisdiction to impose restitution (and allow a defendant to escape liability to pay restitution) if the 90-day period is exceeded. [40] United States v. Cienfuegos [2006]; [56] United States v. Zakhary [2004] (harmless error even if defendant does not contribute or consent to further delay); [61] US v. Terlingo [2003] (any contributing cause by the defendant is sufficient, even if in good faith); [57] US v. Catoggio [2003] (court can re-impose restitution even if 90-day rule violated, because the statute was not intended to permit defendant to avoid restitution; hints courts may be able to "creatively" extend the 90 days); [50] United States v. Reano [2002] (defendant's appeal tolled 90-day period); [53] United States v. Stevens [2000] (tolling if defendant consents/contributes to delay; harmless error unless defendant can show prejudice from further delay), [44] United States v. Grimes [1999] The first case to analyze the provision.

67. See supra, Note 73.


69. C.F.R. § 9.9(c).

70. There have been a few cases in which the government has made effective use of a receiver to manage assets subject to forfeiture, and to assist the government in the restitution process. In United States v. Wilcoxson, 99-0359 DFL (E.D. Cal.) a court-appointed trustee recovered all of the $7.2 million in assets forfeited in connection with a fraud case, and distributed those funds to approximately 718 victims whose claims for remission were granted by the Department of Justice based on the trustee's recommendation. See www.robbevans.com

71. The FTC and SEC regularly seek the appointment of receivers to marshal assets in fraud cases. See 15 U.S.C. Sections 45(a) and 53(b); see also www.robbevans.com (listing numerous matters in which Mr Evans has been employed as a trustee or receiver by the SEC, FTC, and CFTC).


73. US Gov. Accountability Office, Actions still needed to address deficiencies in justice's collections processes, 04-338 (May 2004) (summary of findings) (Until justice takes action to full implement [the 2001 recommendations], justice's management processes and procedures will not provide adequate assurance that offenders are not afforded their ill-gotten gains ...).

74. US Gov. Accountability Office, Court-ordered restitution amounts far exceed likely collections for the crime victims in selected financial fraud cases, GAO-05-80 at 5 (January 2005).


76. The Executive Office for United States Attorneys (EOUSA) provides some restitution training. However, most of its training is aimed at support staff handling restitution matters.

77. The GAO cited a need for coordination between FLUs and other components as a weakness in the current restitution collection scheme. GAO Report 05-80 (Justice emphasized that the initial efforts by criminal law enforcement investigators, federal prosecutors, and the probation office promise the greatest opportunity for meaningful recovery of illegally obtained assets. Therefore, in our view, coordination among the FLUs and other entities involved in criminal debt collection is critical). And the department of justice emphasized the need for FLU to coordinate with asset forfeiture units at the outset of the case. Id. at 12.

78. The principal federal money laundering statutes are found at title 18, United States Code, Sections 1956 and 1957. These were enacted in 1986 as the Money Laundering Control Act of 1986, Pub. L. 99-570, and have been amended several times over the intervening years. These statutes criminalize, among other things, certain transactions involving the proceeds of "specified unlawful activity." Section 1956(c)(7) defines "specified unlawful activity" to mean a laundry list of federal crimes, including most RICO predicates set forth in 18 U.S.C. § 1961(1). Mail fraud (18 U.S.C. § 1341) and wire fraud (18 U.S.C. § 1343) are RICO predicates.


81. See 28 C.F.R. § 9.9. The regulation authorizing the use of forfeited assets to grant remission to crime victims took effect February 3, 1997. Prior to the effective date of the regulations, the government could only grant remission or mitigation of a forfeiture to property owners and lienholders.
82. The discretion rests entirely with the attorney general. A court may not compel the attorney general to restore forfeited assets to crime victims. [36] United States v. Bright [2004] (District court may urge the government to apply forfeited funds to restitution, but ordering the government to do so would conflict with Section 981(e)(6), which gives the government the discretion to apply forfeited funds in that fashion) In re W.R. Huff Asset Management Co., LLC, 409 F.3d 555, 564 (2nd Cir. 2005) (Section 853(i)(2) gives the government the power to compromise a criminal forfeiture with the defendant and third parties; victims no right under the Crimes Victim Rights Act to object to the forfeiture agreement on the grounds that it leaves the defendant with no funds to pay as restitution).

83. See 18 U.S.C. § 983(d) (providing for an innocent owner defense).

84. By way of example, if victims and other general creditors had been allowed to maintain claims in the BCCI case, the ancillary proceeding would have quickly disintegrated into something resembling a lawless and formless kind of liquidation proceeding. As it was, over 170 claimants held up the remission of $1.2 billion in forfeited funds for seven years as they attempted to litigate claims in the district court rather than accepting a pro rata share of the funds.

85. There is no Seventh Amendment right to a jury trial in the ancillary proceeding; the ancillary proceeding is part of a sentencing where there is no jury right, and is really an equitable action to quiet title for which no right to jury trial exists.

86. The Frykholm court underestimated forfeiture law's ability to deal with the claims of fraudulent transferees [49] United States v. Real Property Located at 5208 Los Franciscos Way [2004] (fraudulent transferee lacks Article III standing to contest forfeiture action).

87. Family of murder victim has no standing to contest forfeiture of defendant's property; "Congress has provided for justice a different way; it has provided that the government, which stands for all citizens, make the criminal's property by forfeiture, and it has limited those may assert competing claims"; but victims may petition the Attorney General for remission.

88. We think the government is correct that a general creditor can never have an interest in specific forfeited property, no matter what the relative size of his claim vis-à-vis the value of the defendant's post-forfeiture estate. Were it otherwise, the court litigating the forfeiture issue would be converted into a bankruptcy court and would not be able to grant forfeiture to the government until it determined that no general creditor would be unable to satisfy its claim against the defendant. That result appears patently at odds with the statutory scheme, which directs parties without an interest in specific property to seek relief from the attorney general, not the court adjudging the forfeiture.

89. F.3d 1146, 1147 (9th Cir. 2004).

90. F.3d 1147 (9th Cir. 2004).

91. F.3d 1148 (9th Cir. 2004).

92. F.3d 1148 (9th Cir. 2004).

93. F.3d 1149-50 (9th Cir. 2004).

94. F.3d 1149 (9th Cir. 2004). How precisely the district court is supposed to administer a trust within the confines of an in rem forfeiture action is unclear. On remand, the government in Boylan gave notice to all of the victims, but only some came forward and filed claims, presumably because not all of the victims could afford to hire counsel. This raises the spectacle that those victims who did not file claims will be left out of any distribution of assets.

95. This has now occurred in the Boylan proceeding itself. On remand, the victims have demanded the opportunity to conduct discovery of one another in an effort to discredit one another's claims.

96. See 21 U.S.C. § 853(i). The authority to do so in civil forfeiture cases was made clear by CAFRA, which amended 18 U.S.C. § 981(e)(6) to read as follows: "Notwithstanding any other provision of law ... the Attorney General ... is authorized ... to transfer [forfeited property] as restoration to any victim of the offense giving rise to the forfeiture".

97. In one case, a district simply terminated the forfeiture action in favor of taking the funds from that case and applying them directly to a defendant's restitution obligation [39] United States v. Caulder [2006] (N.D. Cal. 2006) (Ordering, over the government's objection, that assets that had not yet been forfeited in a parallel civil forfeiture action be applied towards defendant's restitution obligation).


99. Already we have begun to see sophisticated creditors attempt to use Boylan as a way to piggy-back off of the government's extraordinary seizure authority [31] United States v. Approximately [2005] 385 F. Supp. 2d 1057, 1062 (E.D. Cal. 2005) [Financial intermediary's] reliance on Boylan and the constructive trust theory is misplaced. Its argument is premised on its assertion that it was the victim of Red Rock's fraudulent or illegal cable descrambler scheme. This characterization is not a fair representation of the situation. Unlike the plaintiffs in Boylan, [the financial intermediary] was not the target of the fraudulent scheme and did not part with money on the basis of false representations by a fraudster. To the
contrary, [it] was simply a financial intermediary that agreed to indemnify Global against potential chargeback losses.

100. Asset Forfeiture Policy Manual (2006), Chapter 4, Sec. IV at 90-101 (The Boylan decision makes administrative and civil forfeiture of fraud proceeds impractical in cases that involve large numbers of victims and that must be filed in the Ninth Circuit. Accordingly, until Congress has an opportunity to enact remedial legislation, AFMLS strongly urges prosecutors in the ninth Circuit to employ alternatives to civil forfeiture when seeking to recover fraud proceeds for the benefit of large numbers of victims).

101. See In re Tri-Continental, Case No. 06-22652, ___ B.R ___ 2006 WL 2671336 (E. D. Cal. September 11, 2006) (reciting how the government agreed to turn over assets subject to civil forfeiture to a liquidator in a Chapter 15 proceeding brought against an insurance company that sold approximately 5,800 fraudulent insurance policies).

102. The majority view is that the government may only restrain directly forfeitable assets before trial.

103. It is the property which is proceeded against, and, by resort to a legal fiction, held guilty and condemned as though it were conscious instead of inanimate and insentient.

104. Explaining how until fairly recently the law forbade in personam forfeitures.


106. The only instance where Congress has authorized akin to a pure in personam forfeiture is in cases involving terrorism. A provision of the USA Patriot Act authorizes the forfeiture of all of assets of any individual, entity, or organization engaged in planning or perpetrating crimes of terrorism against the USA or its citizens or residents. See 18 U.S.C. § 981(a)(1)(G)(i).

107. The pretrial restraint of so-called "equivalent value" assets are authorized by Section 1345(a)(2) of title 18. However, that provision authorizes such restraints in a narrow category of cases involving health care fraud, bank fraud, and other banking violations. The authority does not extend to garden variety mail and wire fraud cases prosecuted under 18 U.S.C. §§ 1341 and 1343.

108. See In re Huff Asset Management Co., LLC, 409 F.3d 555 (2nd Cir. 2005) (Section 853(i)(2) gives the government the authority to compromise a criminal forfeiture with the defendant and third parties; victims have no right under the Crime Victims Rights Act to object to the forfeiture agreement on that ground that it leaves the defendant with no funds to pay restitution).


110. C.F.R. §§ 9.1(b) & 9.4(f) & (g).

111. C.F.R. § 9.4(k).

112. See 28 U.S.C. § 524(c) (Creating the Assets Forfeiture Fund and circumscribing the uses to which it can be put).

113. See Cal. Penal Code § 186.11 (West 2004). The legislation has withstood a constitutional challenge brought by a bail bondsman who complained that he had been deprived of constitutional rights when property belonging to his client, who had been charged with embezzlement over $726,000 from her employer, had been restrained for victim restitution.

114. The application is ex parte, but with a twist: the affidavit in support of the restraint order must be served upon the defendant who then has a right of appeal. Since, 2003, the restraint order can be made prior to conviction or the filing of a formal charge against the defendant.

115. S. 3561, 109th Cong. (2nd Sess. 2006) (available at http://thomas.loc.gov/cgi-bin/thomas). A restitution bill was introduced in the house on the same day as S. 3561. HR. 5673 (available at http://thomas.loc.gov/cgi-bin/query/D? c109:1./temp/~c1098lfRmb::). Currently, the house bill does not include any provisions allowing for the pretrial preservation of assets.


117. See Statement of Senator Dorgan Upon Introduction of S. 3561, http://thomas.loc.gov/cgi-bin/query/D?r109:3./temp/~r109CI5fVw:: (June 23, 2006) (Our bill would help ensure better recovery of restitution by requiring a court to enter a pre-conviction restraining order or injunction, require a satisfactory performance bond, or take other action necessary to preserve property that is traceable to the commission of a charged offense or to preserve other nonexempt assets if the court determines that it is in the interest of justice to do so).

118. S.3561, 18 U.S.C. § 3664A(a)(1)(B); see also Statement of Senator Dorgan Upon Introduction of S. 3561, http://thomas.loc.gov/cgi-bin/query/D?r109:3./temp/~r109IC5fW:: (June 23, 2006) (This legislation will also address a major problem identified by the GAO for officials in charge of criminal debt collection; that is, many years can pass between the date a crime occurs and the date a court orders restitution. This gives criminal defendants ample opportunity to spend or hide their
ill-gotten gains. Our bill sets up pre-conviction procedures for preserving assets for victims’ restitution. These tools will help ensure that financial assets traceable to a crime are available when a court imposes a final restitution order on behalf of a victim. These tools are similar to those already used by Federal officials in some asset forfeiture cases and upheld by courts).

119. If Congress strikes an unconstitutional balance between the rights of victims, and the right of the defendant to counsel of choice, the consequence will be dramatic. This past term the Supreme Court held that an erroneous deprivation of a defendant’s Sixth Amendment right to counsel of choice is structural error that requires automatic reversal of the conviction.


121. S. 3561 includes such a provision. In ordering restitution, the court may direct the defendant to [] repatriate any property that constitutes proceeds of the offense of conviction, or property traceable to such proceeds[.] S. 3561, 18 U.S.C. § 3664(f) (1)(C)(6)(D)(i).

122. A defendant may not be imprisoned for failure to pay a fine or restitution unless the defendant willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay. See 18 U.S.C. § 3613A(a)(2).


124. For examples of appointment orders used in these contexts see www.heath-receiver.com/heath_stateorder01.pdf; www.heath-receiver.com/heath_usorder01.pdf; www.heath-receiver.com/heath_statefiling01.pdf

125. Other duties, powers and compensation provisions can be formulated by reference to 28 U.S.C. §§ 3103(d)-(g).

126. In any case involving a deferred restitution order it will be necessary to provide the defendant an opportunity to object, but the court may be able to determine the restitution amount without having to have an evidentiary hearing.

127. [51] United States v. Rostoff, [1999]164 F.3d 63, 72 n.13 (1st Cir. 1999) (Indicating that the issue whether a restitution order trumps a homestead exemption remains open - at least under Florida law. citing Florida cases going both ways).

128. Federal forfeiture law preempts the Florida homestead exemption.

[Reference]


10. FTC v. Assail, Inc. (2005), 410 F.3d 256, 259-60 (5th Cir.).


18. Kenna v. United States District Court for the Central District of California (2006), 435 F.3d 1011, 1013 (9th Cir.).


20. Marshal Leasing, Inc. v. United States (1990), 893 F.3d 1093, 1101 n.4 (9th Cir.).


22. Pelham v. Rose (1869), 76 US 103, 106.


28. SEC v. Keller Corp. (1963), 323 F.2d 397, 403 (7th Cir.).


30. United States v. 817 N.E. 29th Drive, Wilton Manors, Florida (1999), 175 F.3d 1304, 1311-12 n.14 (11th Cir.).


32. United States v. Bach (1999), 172 F.3d 520, 522-23 (7th Cir.).


36. United States v. Bright (2004), 353 F.3d 1114, 1124-26 (9th Cir.).


42. United States v. Frykholm (2004), 362 F.3d 413, 417 (7th Cir.).


44. United States v. Grimes (1999), 173 F.3d 634 (7th Cir.).
45. United States v. McHan (2003), 345 F.3d 262, 272-76 (4th Cir.).
46. United States v. One-Sixth Share (2003), 326 F.3d 36 (1st Cir.).
48. United States v. Peterson (2001), 268 F.3d 533, 535 (7th Cir.).
49. United States v. Real Property Located at 5208 Los Franciscos Way (2004), 385 F.3d 1187, 1192 (9th Cir.).
50. United States v. Reano (2002), 298 F.3d 1208, 1212 (10th Cir.).
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61. US v. Terlingo (2003), 327 F.3d 216, 222-23 (3d Cir.).

[Appendix]

Appendix
Table AI [Figure omitted. See Article Image.]

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[Illustration]
Table AI: US MLAT - summary of forfeiture and restitution provisions
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