

Victims With “Dirty Hands” Cannot Recover Under the Mandatory Victims Restitution Act in Second and Eleventh Circuits

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The [Mandatory Victims Restitution Act](#) requires sentencing courts to order defendants to make restitution to the victim of the offense or the victim’s estate.[1] In addition to violent crimes, crimes relating to consumer and medical products, and crimes in which victims suffered physical injuries or pecuniary loss, restitution is ordered in cases involving offenses against property, including any offense committed by fraud or deceit.[2] The act considers money to be “property” with respect to offenses against property.[3] Courts, however, do not order restitution in every case. To obtain a restitution order, the government must first show that (1) the alleged victim satisfies the act’s definition of a victim and (2) the victim was directly and proximately harmed by the offense.

Victim Defined

The government bears the burden of establishing the act’s definition of a victim. The government must show that the person or entity suffered harm and that the defendant proximately caused that harm.[4] The government also has the burden of demonstrating the amount of the loss sustained by the victim as a result of the offense.[5]

The Mandatory Victims Restitution Act defines a “victim” as “a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered.”[6] To determine whether a person qualifies as a victim under the act, the court must engage in a two-prong analysis: (1) identify the nature and scope of the offense on which restitution is based and (2)

evaluate cause in fact and proximate cause.[7] To show cause in fact, the defendant's conduct must have been a necessary factor in bringing about the victim's harm.[8] This is the traditional "but for" analysis. With respect to proximate cause, the act requires the government to demonstrate a sufficiently close connection to the conduct, which courts evaluate based on whether that harm was foreseeable to a defendant.

Offenses Involving Schemes, Conspiracies, or Patterns of Criminal Activity

A unique issue comes up in cases that involve as an element a scheme, conspiracy, or pattern of criminal activity.[9] In such cases, a victim means any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern. The government will routinely argue that the defendant is liable for restitution to everyone injured because of the acts of any of the co-conspirators. In *United States v. Reifler*, however, the court noted that cause in fact and proximate cause serve to narrow and reduce the otherwise more expansive reach of conspiracy. Indeed, courts "view the requirement that the harm have been 'proximately' caused as a reflection of Congress's interest in maintaining efficiency in the sentencing process." [10]

Courts in the Second Circuit have held that co-conspirators are not victims entitled to restitution under the Mandatory Victims Restitution Act.[11] To that end, courts order restitution only when the victim did not participate in the scheme or conspiracy.[12]

Similarly, courts in the Eleventh Circuit have held that the Mandatory Victims Restitution Act precludes a request for restitution based on a purported victim's participation in the conspiracy.[13] Stated differently, a "perpetrator cannot be his own victim," and when a person or entity participates in the illegal fraud, for example, he or she cannot be a victim of that fraud for purposes of the Mandatory Victims Restitution Act. To ensure that a victim is compensated only for actual loss, Eleventh Circuit courts deduct, as an offset, any value that the victim may have derived from the fraudulent scheme; otherwise, the victim will receive a windfall.[14]

When Victim's Hands Are "Too Dirty" to Merit Restitution in the Second Circuit

There are times when a person or entity not charged in the underlying conspiracy seeks restitution. In such instances, the government may be unable to satisfy the Mandatory Victims Restitution Act's definition of a victim. In the cryptocurrency context, which continues to garner attention, if a promoter in a crypto conspiracy matter seeks to claim victim status, the court should deny restitution if the promoter received commissions for the sale of cryptocurrency, even if the promoter invested his or her own money or was one level removed in a multilevel marketing structure. Such commissions are ill-gotten gains.[15] Indeed, the Second Circuit Court of Appeals appears to have acknowledged that it may deny restitution where an alleged victim's hands are "too dirty" to claim restitution. Relatedly, the government may be unable to demonstrate the act's definition of a victim if

a restitution order has the effect of treating persons as victims who were in effect co-conspirators.
[16]

The court should similarly deny restitution in cases in which persons could be deemed aiders and abettors in the criminal context,[17] as well as in SEC enforcement actions.[18] To be sure, if the Securities and Exchange Commission could bring a case for aiding and abetting a violation of Section 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934, the government may be unable to demonstrate the person's victim status. Indeed, although there is some disagreement in the district courts about whether securities fraud is a covered offense under the Mandatory Victims Restitution Act, the Second Circuit has acknowledged that district courts have held that the act applies to defendants convicted of a listed range of offenses, including securities fraud.[19]

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[1] 18 U.S.C. § 3663A.

[2] 18 U.S.C. § 3663(c)(1)(A)(i)-(B).

[3] *United States v. Razzouk*, 984 F.3d 181, 188–89 (2d Cir. 2020); *compare United States v. Collins*, 854 F.3d 1324, 1335 (11th Cir. 2017).

[4] *United States v. Martin*, 803 F.3d 581, 593 (11th Cir. 2015).

[5] 18 U.S.C. § 3664(e).

[6] 18 U.S.C. § 3663A(2).

[7] *United States v. Goodrich*, 12 F.4th 219, 228–29 (2d Cir. 2021); *compare United States v. Stein*, 846 F.3d 1135, 1152 (11th Cir. 2017).

[8] *Goodrich*, 12 F.4th at 229.

[9] 18 U.S.C. § 3663A(2).

[10] 446 F.3d 65, 135 (2d Cir. 2006).

[11] *United States v. Agate*, 613 F. Supp. 2d 315, 321 (E.D.N.Y. 2009).

[12] See *United States v. Quatrella*, 722 F. App'x 64, 69 (2d Cir. 2018); *United States v. Benton*, 765 F. App'x 477, 482 (2d Cir. 2019); *Fed. Ins. Co. v. United States*, 882 F.3d 348, 366 (2d Cir. 2018).

[13] *In re Wellcare Health Plans, Inc.*, 754 F.3d 1234, 1239 (11th Cir. 2014).

[14] *United States v. Cavallo*, 790 F.3d 1202, 1239 (11th Cir. 2015).

[15] See *United States v. Ojeikere*, 545 F.3d 220, 223 (2d Cir. 2008).

[16] *Reifler*, 446 F.3d at 120–28.

[17] 18 U.S.C. § 2(a).

[18] 15 U.S.C. § 78t(e).

[19] *United States v. Afriyie*, 27 F.4th 161, 166 n.1 (2d Cir. 2022).

Authored By



Thomas V. Sjoblom

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