



Victim Restitution: Attorneys' Fees for Internal Investigations?

Updated June 5, 2018

UPDATE, 6/5/2018: On May 29, 2018, the Supreme Court unanimously held that the Mandatory Victims Restitution Act does not authorize restitution to cover the costs of a victim's private investigation conducted before the government's investigation and prosecution of the defendant.

The original post from February 6, 2018, is below.

Does a [statute](#) that requires victim reimbursement for “other expenses incurred during participation in the investigation or prosecution of the [victimizing] offense” cover “costs that were neither required nor requested by the government, including costs incurred for the victim’s own purposes and unprompted by any official action?” That is the question that has bedeviled the lower federal courts and that the Supreme Court has agreed to consider in a [case](#) styled *Lagos v. United States*.

The case began when Lagos executed a [scheme](#) that involved inflating the value of his company’s assets in order to maintain and increase a line of credit with General Electric Capital Corporation (GECC). GECC sued, and the parties settled for \$33.55 million and interest. Lagos was subsequently charged and convicted of wire fraud for the scheme. In addition to restitution for the \$11 million of GECC’s remaining unrecovered loan losses, the U.S. District Court for the Southern District of Texas ordered Lagos to pay restitution in amount of almost \$5 million to cover the cost of GECC’s internal investigation – forensic experts, attorneys, consultants – and to cover the costs of attorneys’ fees for representing GECC in bankruptcy proceedings initiated by Lagos’s company. Lagos appealed to the U.S. Court of Appeals for the Fifth Circuit (Fifth Circuit). There, he argued that the order exceeded the trial court’s authority under the federal statute’s “other expenses” section that compelled restitution to “reimburse the victim for lost income and necessary child care, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense.”

The Fifth Circuit panel [affirmed](#) relying on circuit case law that reads the other-expenses section broadly to encompass reimbursement of victims for the costs of their internal investigations, including attorneys’ fees, and perhaps for “consequential damages” as well. One member of the panel [concurred](#) on the basis of precedent, but argued for a narrower interpretation of the other-expenses section. He found more compelling the opinion of the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) in *United States v. Papagno* that held that the other-expenses section does not “embrace an internal

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LSB10071

investigation, at least one that has not been required or requested by [government] criminal investigators or prosecutors.”

The D.C. Circuit [acknowledged](#) at the time that several other circuits had construed the other-expenses section more broadly. That division of opinion continues to exist. For example, the U.S. Court of Appeals for the Second Circuit (Second Circuit) pointed out that “our Circuit takes a broad view of what expenses are ‘necessary’” under the other-expenses section and [held](#) that “the victim expenses that are recoverable as restitution ... are expenses the victim was required to incur to advance the investigation ... of the offense ...”

In the same vein, the U.S. Court of Appeals for the Eighth Circuit rejected the reasoning of *Papagno* and [observed](#) that it has “taken a somewhat broader view ... and ha[s] specifically approved of the inclusion of attorney’s fees and investigative costs in a restitution award when these losses were caused by the fraudulent conduct.”

And, the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) [held](#) that “[w]ith respect to investigation costs and attorneys’ fees, our rule is clear: restitution for such losses may be recoverable where the harm was the direct and foreseeable result of the defendant’s wrongful conduct.” In doing so, the Ninth Circuit has pointed out that it espouses a broader reading of the other-expenses section than either the D.C. or the Second Circuits. (An [earlier](#) sidebar discusses the split between the D.C. and Ninth Circuits.)

The Ninth Circuit decision included a [dissent](#) that voiced concern that a broad reading of the section could encourage large corporate victims to stimulate a prosecution: “In total, [the corporate victim] sought almost a million dollars in attorneys’ fees from [the defendant] to compensate it for work [the corporation’s attorney] did to ‘assist’ with the criminal prosecution.” In the mind of the dissent, “private assistance of such magnitude blurs the line between criminal and civil law... Prosecutors cannot help but be influenced by knowing that they can count on an interested private party to perform and finance much of the work required to convict a business rival.”

Whether the concern is relevant in the case before the Supreme Court remains to be seen. Lagos was guilty of fraud of a magnitude no prosecutor would likely ignore regardless of the victim’s level of assistance. Moreover, the issue before the Court is the extent of restitution that Congress intended when it crafted the other-expenses provision. Regardless of the Court’s decision, the issue is a matter of statutory construction over which Congress has the ultimate say.

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