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Navigating Voluntary Disclosure in the Wake of the Government's Assault on Undisclosed Foreign Accounts

BY DOUGLAS E. WHITNEY & THOMAS D. SYKES

A rash of recent events makes clear that the Department of Justice (DOJ) and Internal Revenue Service (IRS) are targeting, like never before, business and individuals engaged in sheltering assets and income in undisclosed foreign bank accounts. In the past year, the DOJ has brought criminal charges against individuals who allegedly recruited and facilitated the establishment of undisclosed foreign bank accounts for the purpose of evading U.S. tax obligations. It has also recently sought to expand the scope of the money laundering statute to encompass tax evasion and thus significantly increase the tools and leverage at its disposal in pursuing offshore tax evaders.

Most notably, on February 19, 2009—the day after announcing a deferred prosecution agreement with UBS that included a $780 million payment by UBS to settle the investigation into its role in facilitating offshore evasion[1]—the DOJ filed a summons enforcement action in federal district court in Miami seeking the disclosure of the identities of the owners of 52,000 Swiss-based UBS accounts holding an estimated $15 billion in cash and securities. The DOJ has threatened to bring criminal charges against individual account holders who are uncovered during these summons enforcement proceedings, and it is only a matter of time before the government pursues similar strategies against other tax havens in the Caribbean and elsewhere, as IRS Commissioner Doug Shulman has promised to make offshore tax evasion a centerpiece of the IRS's enforcement efforts.

These recent developments make clear that the thousands of U.S. citizens holding foreign accounts are at risk of significant civil and criminal liability. John DiCicco, acting assistant attorney general for the DOJ Tax Division, recently warned that

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Managing the Fallout: What to Do When You Learn That Your Employee Has Been Talking to the Government

BY JOHN T. GRAFF & JOHN T. MCINNES

Among the growing concerns for smaller and medium-sized companies is the federal investigation. Rapidly evolving statutes and regulations are among the many issues all businesses encounter as they attempt to reduce costs and enhance profits in an increasingly competitive global economy. However, standing at the intersection of competition and compliance are the enforcement arms of government agencies, including the Department of Justice (DOJ), ready to investigate and charge companies with criminal wrongdoing at a time when corporate transparency and accountability are the order of the day. These investigations often involve employee cooperation, with or without notice to the company.

The DOJ's Principles of Federal Prosecution of Business Organizations (the Prosecution Manual), which have been incorporated into the U.S. Attorneys' Manual, regulate the conduct of a DOJ investigation.[1] Corporate counsel must recognize that, although the Prosecution Manual repeatedly refers to the "corporation" when describing DOJ investigative procedures, it expressly applies to "all types of business organizations, including partnerships, sole proprietorships, government entities, and unincorporated organizations."[2] White collar defense counsel should be intimately familiar with the Prosecution Manual because it provides valuable insight into factors considered by the government when determining the course of an investigation. More importantly, it reveals ways in which a company might mitigate potential fallout.

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ABA Defending Liberty Pursuing Justice

Restitution for the Corporate Victim

BY JOSEPH W. MARTINI & JAMES I. GLASSER

Recent headlines report tales of corporate greed and avarice. Today, the corporation is typically the villain. In fact, in the current economic climate, it is difficult to imagine a corporation as a victim, especially a corporation in the financial services sector. But corporations and other business entities, in all sectors and industries, are sometimes victimized by crimes committed by employees and third parties. These crimes range from trade secret theft and schemes to defraud, to insider trading and embezzlement. As victims, corporations may be entitled to victim compensation, just like natural persons. For this reason, it is imperative that counsel representing a corporate victim be familiar with the law governing victim rights.

Frequently, when criminal conduct is discovered within an organization, an internal investigation ensues. Depending on the wrongdoing, considerable sums can be expended on fees for attorneys, accountants, and other experts hired to uncover the criminal conduct. These sometimes considerable expenses are, of course, over and above the losses suffered from the criminal activity itself.

One way to deal with these expenses is to treat such losses as a cost of doing business. However, given the often exorbitant costs associated with ferreting out and responding to criminal acts, companies are now seeking reimbursement for these costs from the responsible wrongdoers. Recently, courts have responded favorably, ordering wrongdoers to pay restitution to their corporate victims. Following are avenues open to a corporation seeking to recover victim compensation.

Mandatory Victim's Restitution Act

Congress enacted the Victim and Witness Protection Act (VWPA) to remedy what it described as the "unfortunate situation" of how "restitution [had] lost its priority status in the sentencing procedures of our federal courts."[1] The VWPA was followed by the Violence Against Women Act (VAWA), which expanded restitution rights in criminal sentencing. In part, the VAWA amended the language of the VWPA to include restitution for "lost income and necessary child care, transportation, and *other expenses related to participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense.*"[2]

The above-quoted portion of the VAWA is central to a corporate victim's right to seek restitution for the costs associated with its victimization. This language was incorporated into the Mandatory Victim's Restitution Act (MVRA),[3] which was enacted to "improve the administration of justice in Federal criminal cases by requiring Federal criminal defendants to pay full restitution to the identifiable victims of their crimes" and by making restitution mandatory for certain offenses.[4]

The MVRA's even more robust requirement that defendants "reimburse the victim for . . . *other expenses* incurred [by the victim] during [its] participation in the investigation or prosecution of the offense" has been held by some courts to include attorney fees and accounting costs associated with the corporate victim's investigation into and assistance with the prosecution of the offense.[5] As a result, defendants are being ordered to pay restitution to corporations for both the economic damages caused by their wrongdoing and the expenses incurred by their victims in uncovering and detailing the extent of their crimes.

Courts Rely on the MVRA to Compensate Corporate Victims

In *United States v. Gordon*, Cisco Systems was served with "five grand jury subpoenas and a number of government requests requiring Cisco to analyze vast amounts of documentation and electronic information."[6] The subpoenas were served in connection with the government's investigation of wire fraud and insider trading by a former employee accused of embezzling millions of dollars in cash and stock from Cisco. In response to the government's request, Cisco retrieved "every item regarding its investments in 20 companies that were the subject of possible insider trading" and voluminous additional information and documentation. Cisco's resulting internal investigation and response came at a considerable cost. Following the conviction of the former Cisco employee, the district court ordered the defendant to pay restitution for the expense of Cisco's investigation, which exceeded $1 million. On appeal, the defendant challenged the district court's inclusion of Cisco's expenses in its restitution order. The Ninth Circuit, relying on the MVRA, held that the district court "reasonably concluded that Cisco's investigation costs, including attorneys' fees, were necessarily incurred by Cisco in aid of the proceedings."

More recently, in *United States v. Amato*,[7] the Second Circuit affirmed a restitution order of almost $13 million, of which $3 million was attributable to attorney fees and accounting costs incurred by the defendant's employer during its internal investigation. The Second Circuit concluded that under the MVRA, "'other expenses' incurred during the victim's participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense may include attorney fees and accounting costs."

In *Amato*, the Second Circuit confronted head-on the issue of whether attorney fees and accounting costs fall within the meaning of "other expenses" under the MVRA. The defendants claimed that the canon of *ejusdem generis* prohibited an expansive interpretation of "other expenses." Under this interpretive canon, "general terms that follow specific ones are interpreted to embrace only objects of the same kind or class as the specific ones." The defendants argued that the term "other expenses" should be read in congruence with the rest of the expenses listed under the MVRA—that is, lost income and child care and travel expenses—thus limiting reimbursable expenses to ancillary expenses associated with having to attend court proceedings (such as expenses for meals, parking, accommodations, and proper courtroom attire) or with supplying the government with information detailing

the victim's loss (such as the costs associated with copying and faxing relevant documents, or long-distance charges for phone calls made to government officials). The Second Circuit swiftly rejected this argument, finding that the drafters of the MVRA likely feared that courts would "overlook" expenses pertaining to child care and transportation expenses but would consider expenses pertaining to attorney fees and accounting costs "obviously associated with [the] investigation and prosecution [of an offense under the MVRA]." The defendant also argued that "other expenses" could not encompass attorney fees and accounting costs because restitution could not be provided for indirect or consequential damages. Relying on *Gordon*, the court concluded that the MVRA focuses "more on the link between these expenses and the victim's participation in the investigation and prosecution than on the offense itself." To the Second Circuit, a victim of an offense under the MVRA was already deemed to have been "directly and proximately harmed as a result of the commission" of an offense under the MVRA, and those losses were severable from the "other expenses" described in the section.[8] But instead of recognizing this distinction outright, the Second Circuit found it unnecessary for the facts presented in *Amato*, saying instead: "There is no doubt that [the victim's] attorney fees and auditing costs were a direct and foreseeable result of defendants' offenses."

Other courts have reached similar conclusions, upholding restitution awards that included, among other things:

- the cost of audits that uncovered the defendant's wrongdoing
- costs incurred in conducting a computer damage and systems evaluation
- costs associated with contacting individuals whose biographical information and Social Security numbers were stolen
- accounting and legal expenses incurred to investigate the scope of the defendant's theft
- attorney fees and litigation expenses associated with the assistance to the FBI in the investigation of the defendant's offense
- investigative costs and fees associated with the defendant's fraudulent scheme.[9]

The MVRA and cases interpreting the act have now squarely held that third parties have the right to recoup not only the losses suffered as a result of the wrongdoing, but also the costs associated with uncovering the offense.

Working with the MVRA

To qualify for restitution under the MVRA, the company first must be a "victim," which is defined as "a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered."[10] The offenses compensable under the act include (i) crimes of violence; (ii) offenses against property, including any offense committed by fraud or deceit; and (iii) offenses relating to tampering with consumer products. Restitution for these enumerated offenses is limited to circumstances "in which an identifiable victim or victims has suffered a physical injury or pecuniary loss."[11]

The method for calculating loss varies depending on whether the crime is (i) "an offense resulting in damage to or loss or destruction of property of a victim of the offense;" (ii) "an offense resulting in bodily injury to a victim;" or (iii) "an offense resulting in bodily injury that results in the death of the victim." The statute also provides that "in any case" the victim may be reimbursed "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."[12] What the statute does not make clear is whether a victim can still be reimbursed for "other expenses" if it does not otherwise suffer a pecuniary loss. Put differently, if the only financial harm suffered by the company is the cost of its internal investigation, can it still be reimbursed for those expenses under subsection (b)(4), without having suffered the type of harm set forth in subsections (b)(1) through (b)(3)? For example, if a company employee pays a bribe that only adds to the company's bottom line, but the company is then compelled to respond to government subpoenas in connection with the criminal investigation of that bribe, can the company still claim to be a victim and be reimbursed for the costs of responding to those subpoenas?

Unlike the clear pecuniary losses suffered by the corporate victims in *Amato* and *Gordon*, the recent prosecution of former National Basketball Association (NBA) referee Tim Donaghy presented a more attenuated connection between the harm suffered and the costs of internal investigation. In *United States v. Donaghy*, the defendant was convicted of conspiracy to commit wire fraud and transmitting wagering information "with other individuals to use . . . non-public information in order to pick NBA teams that [he] predicted would win particular games and also cover the point spreads set by professional bookmakers." Donaghy's position as a referee gave him access to "confidential [information] . . . not available to the general public" that put him "in a unique position to predict the outcome of NBA games," especially as it related to "the point spreads set by professional bookmakers."[13]

In that case, the NBA was arguably not "directly and proximately" harmed by Donaghy's crime. The court, however, found that the NBA suffered a loss equivalent to Donaghy's salary as a referee for the games he both worked and wagered on. To the court, this loss was sufficient to award restitution for "attorneys' fees incurred pursuant to [the NBA's] effort to assist the government in the investigation and prosecution" of Donaghy and his co-conspirators as well as for the "costs of having NBA employees review video of games that Donaghy refereed."[14] The classification of Donaghy's salary as a loss under subsections (b)(1) through (b)(3) may be a stretch, but it is a seemingly necessary finding to permit the NBA to recover the investigation expenses, under subsection (b)(4), associated with its role in assisting the government.

It is also unclear how liberally courts will interpret the language of the MVRA relating to internal investigation costs. These costs are considered "other expenses" and are only recoverable when "necessar[ily] . . . incurred during participation in the investigation or prosecution of

the offense."[15] In most situations, it will be relatively easy to consider costs of an internal investigation as "necessary" and having been "incurred during participation in the investigation or prosecution of the offense." In other cases, however, such costs may not be so readily classified.

Take, for instance, the circumstances involving Cisco's investigation of its rogue employee in *Gordon*. The costs of Cisco's investigation were in direct response to subpoenas and document demands issued by the government. The investigation and document production expenses were incurred during Cisco's participation in the government's investigation of the offense. And because the investigation was at the government's request, the expenses were also necessary.

But what happens when a company independently and proactively initiates an investigation into a suspicion of wrongdoing within its ranks? If the internal investigation uncovers an offense under the MVRA, and the company produces the "fruits of its investigation" to the U.S. Attorney's Office, which then leads to the conviction of the wrongdoer, are the expenses incurred during that investigation still properly classified as "during" the government's investigation of the offense?

This very question was presented to the Fifth Circuit in *United States v. Dwyer*.[16] In *Dwyer*, the defendant was found guilty of stealing money from her employer, for whom she worked as a bookkeeper. When Dwyer's employer became aware of her offenses, she was fired, and the employer immediately hired a law firm and accountants to determine the extent of the damage caused by its former employee. The employer then turned the "fruits of their investigation" over to the FBI and the U.S. Attorney's Office. Without directly answering the question posed above, the Fifth Circuit held that "[g]iven that there is no precedent resolving the question whether expenses incurred before the government's investigation were incurred 'during' the investigation for purposes of § 3663A(b)(4), it is not plain that the court's inclusion of those fees [in its restitution order was reversible error]."[17]

And at what point will courts stop considering a victim's expenses as necessary to the government's investigation? For instance, while costs related to a victim's internal investigation must be reimbursed, costs related to ameliorating the reputational damage caused by the defendant's crime should not. The Second Circuit's analysis in *Amato* did not squarely address this distinction and allowed the victim to be reimbursed for attorney fees incurred remediating the damage caused to its clients.[18] In *Donaghy*, however, the district court prohibited the NBA from being reimbursed for expenses "regarding its public response to Donaghy's guilty plea," concluding that those expenses "are not recoverable as an 'investigation cost' pursuant to subsection (b)(4)."[19]

At what point will courts stop considering a victim's expenses as necessary to the government's investigation?

Another question that has arisen under the MVRA is whether the district court must consider that the victim's internal investigation expenses were "a direct and foreseeable result of the defendant's wrongful conduct."[20] In *Gordon*, the Ninth Circuit imposed this foreseeability requirement on claimants. The Second Circuit, on the other hand, did not read the same requirement into the statute, observing: "We question whether the Ninth Circuit's formulation is appropriate when analyzing investigation and prosecution expenses under § 3663A(b)(4). Subsection (b)(4) seems to focus more on the link between these expenses and the victim's participation in the investigation and prosecution than on the offense itself." However, the Second Circuit refrained from answering its own question, saying instead that under the facts in *Amato*, it was "not surprising" that the defendant's fraud "would force the corporation to expend large sums of money on its own internal investigation."[21] Therefore, while the location of the claim may determine whether a foreseeability requirement exists, such a requirement may not prove dispositive in most instances.

Finally, companies wishing to be reimbursed for investigative costs should specifically account for the expenses of its internal investigation, regardless of whether the investigation was prompted by a government request or on its own volition. In *United States v. Waknine*,[22] the Ninth Circuit vacated a district court's restitution order under the MVRA, and remanded, in part, for a recalculation and explanation of proper restitution payments. The Ninth Circuit said that it was unable to determine whether the district court abused its discretion because there was a "lack of detailed documentation to support the restitution claims." Specifically, the court said it needed "more detailed evidence as to the type of attorneys' and investigator's fees incurred and the extent that these fees were incurred to aid in the prosecution of [the defendant]."[23] As a result, corporate victims seeking reimbursement under the MVRA should keep "detailed documentation" of the expenses they incur in aid of the government's investigation.[24] Furthermore, other commentators have rightly advised that victims obtain agreements with the government specifying when its investigation expenses are "necessary."[25]

The Government's Role

During any investigation, the government is often naturally inclined to focus on the pursuit of the criminal rather than the harm suffered by victims along the way. Companies must be mindful that the government owes them a duty as victims of wrongdoing and as collaborators in the government's investigation, to seek restitution from the defendant on behalf of the company for the costs associated with its collaboration. Likewise, a "victim" under the MVRA is protected by the Crime Victims' Rights Act of 2004 (CVRA),[26] and prosecutors have a duty to "make their best efforts to see that

crime victims are notified of, and accorded" their rights under the CVRA.[27]

For the most part, the MVRA contemplates the requirements of the CVRA, and, when seeking to impose restitution, prosecutors must follow the procedures that are set forth in 18 U.S.C. § 3664.[28] Prosecutors must notify victims of the opportunity to submit documentation of the losses it suffered as a result of the defendant's crime (including "other expenses" necessarily incurred during its participation in the investigation or prosecution of the offense).[29] While this does not require the government to get the "victim's seal of approval," the government still must "gather from victims and others the information needed to list the amounts subject to restitution."[30] The prosecutors should then verify these losses, which may require their office to "make an independent determination regarding the amount of losses that can be proved."[31]

Companies must be mindful that the government owes them a duty to seek restitution from the defendant for the costs associated with its collaboration.

Moreover, prosecutors should also ensure that the victim be given "reasonable, accurate, and timely notice" of the proceedings so that victims can be afforded "[t]he right to be reasonably heard" during "any public proceeding" involving a plea agreement or sentencing.[32] This victim's right is especially important in situations where the offense charged was subject to the restitution mandate of the MVRA and where a plea agreement involves an offense not subject to the MVRA. Prosecutors must be aware that U.S. sentencing guidelines "generally require the imposition of restitution when it is authorized by the law" and should also "give careful consideration" about whether to require a plea to a mandatory restitution charge or to require that the defendant acknowledge that a mandatory restitution charge gave rise to the plea agreement.[33] The drafters of the MVRA anticipated this, noting that "[i]n the case of a plea agreement that does not result in a conviction for an offense [under the MVRA]," restitution is only required under the MVRA when "the plea specifically states that an offense [under the MVRA] gave rise to the plea agreement."[34] Therefore, corporate victims have a right during sentencing to object to a plea arrangement that does not specifically acknowledge that an offense under MVRA gave rise to a plea not subject to the mandatory restitution prescription of the MVRA.

Finally, when devising the payment schedule for the restitution order, the prosecutor should first, advocate for immediate payment or second, request a payment schedule that requires repayment to the full extent of the defendant's financial ability.[35] Also, because of the important role restitution has in criminal sentencing, "[o]rders of restitution imposed under the MVRA must be enforced to the fullest extent of the law."[36] As such, a defendant who defaults on a restitution order "should be aggressively pursued for collection of the debt," and victims should be given notice of any "postjudgment public court enforcement proceeding."[37]

Conclusion

Given these important developments, counsel must now be mindful of the rights afforded to corporate victims under the MVRA. While the costs of performing internal investigations are often considerable, the burden for those expenses may be ordered borne by the individual or individuals responsible for the criminal conduct under the MVRA. ■

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Endnotes

1. S. Rep. No. 104-179, at 13 (1996), *reprinted in* 1996 U.S.C.C.A.N. 924, 926 (quoting S. Rep. No. 97-532, at 30 (1982) (internal ellipsis removed)); *see* Victim and Witness Protection Act of 1982, Pub. L. 97-291, § 5, 96 Stat. 1248, 1253–55.
2. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322, § 40504, 108 Stat. 1796, 1947 (emphasis added).
3. Mandatory Victim's Restitution Act of 1996, Pub. L. No. 104-132, § 204, 110 Stat. 1214, 1227–41 (Title II, Subtitle A of the Antiterrorism and Effective Death Penalty Act of 1996).
4. S. Rep. No. 104-179, at 12, *reprinted in* 1996 U.S.C.C.A.N. at 925; *see also id.* at 18, *reprinted in* 1996 U.S.C.C.A.N. at 931 (discussing how criticism of a mandatory order of restitution "underestimates the benefits that even nominal restitution payments have for the victim of crime, as well as the potential penalogical benefits of requiring the offender to be accountable for the harm caused to the victim").
5. 18 U.S.C. § 3663A(b)(4) (emphasis added).
6. 393 F.3d 1044, 1057 (9th Cir. 2004).
7. 540 F.3d 153, 159–62 (2d Cir. 2008).
8. *Id.* at 162 (internal quotation marks omitted).
9. *See, e.g.*, United States v. Adcock, 534 F.3d 635, 643 (7th Cir. 2008); United States v. Phillips, 477 F.3d 215, 224–25 (5th Cir. 2007), *cert. denied*, 128 S. Ct. 119 (2007); United States v. Henrie, 177 Fed. Appx. 677, 678 (9th Cir. Apr. 19, 2006); United States v. Beaird, 145 Fed. Appx. 853, 854–55 (5th Cir. July 27, 2005), *cert. denied*, 546 U.S. 1193 (2006); United States v. Fogel, 494 F. Supp. 2d 136, 140 (D. Conn. 2007).
10. 18 U.S.C. § 3663A(a)(2).
11. *Id.* § 3663A(c)(1).
12. *Id.* § 3663A(b).
13. 570 F. Supp. 2d 411, 416 (E.D.N.Y 2008) (internal quotation marks omitted).
14. *Id.* at 433, 430.
15. 18 U.S.C. § 3663A(b)(4).
16. 275 Fed. Appx. 269 (5th Cir. Jan. 9, 2008).
17. *Id.* at 272; *cf.* United States v. Kurschner, 224 Fed. Appx. 520, 522 (7th Cir. Apr. 11, 2007) ("Section 3663A(b)(4) arguably refers to the cost of the *official* investigation and prosecution of a crime, and we are aware of no case using that section to justify restitution for the costs of a victim's private investigation.").
18. *See Amato*, 540 F.3d at 162 ("It also explains how the law firm worked with the EDS clients and the states impacted by defendants' escheatment fraud and brought in the forensic accounting firms to perform the analysis necessary to uncover the extent of this fraud and ensure that the clients and states were made whole."); *see also Phillips*, 477 F.3d at 224 (awarding restitution for costs incurred "contacting individuals whose biographical information and Social Security numbers were stolen").
19. *Donaghy*, 570 F. Supp. 2d at 432.
20. *Gordon*, 393 F.3d at 1057 (internal quotation marks omitted).
21. *Amato*, 540 F.3d at 162.
22. 543 F.3d 546 (9th Cir. 2008).

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privilege, it need only be evident from the implications of the question, in the setting in which it was asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. The trial judge in appraising the claim must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence.").

16. *See, e.g.*, McCoy v. C.I.R., 696 F.2d 1234, 1236 (9th Cir. 1983).

17. Keeting v. OTS, 45 F.3d 322, 324 (9th Cir. 1995); *see also In re* Ramu Corp., 903 F.2d 312, 318 (5th Cir. 1990) ("The stay of a pending matter is ordinarily within the trial court's wide discretion to control the course of litigation, which includes authority to control the scope and pace of discovery.").

18. *See, e.g.*, Am. Express Bus. Fin. Corp. v. R.W. Prof. Leasing Servs. Corp., 225 F. Supp.2d 263, 264–65 (E.D.N.Y. 2002).

19. *See, e.g.*, *id.* at 265; SEC v. Dresser Indus., Inc., 628 F.2d 1368, 1375–76 (D.C. Cir. 1980); Wehling v. Columbia Broad. Sys., 608 F.2d 1084 (5th Cir. 1980) (Where plaintiff in libel case invoked privilege, appellate court found trial court abused discretion in not granting a stay until the statute of limitations had run); United States v. Gieger Transfer Serv., Inc., 174 F.R.D. 382, 385 (S.D. Miss. 1997).

20. *See, e.g.*, Walsh Sec. Inc. v. Cristo Prop. Mgmt., Ltd., 7 F.Supp.2d 523, 527 (D.N.J. 1998) (stay granted in absence of indictment where government had executed search warrants, issued subpoenas to several defendants, and defendants were informed they were targets of criminal investigation); SEC v. HealthSouth Corp., 261 F. Supp. 2d 1298, 1326–27 (N.D. Ala. 2003); Brumfield v. Shelton, 727 F. Supp. 282, 284 (E.D.La. 1989).

21. *HealthSouth*, 261 F. Supp. 2d at 1316.

22. *See* Baxter v. Palmigiano, 425 U.S. 308 (1976).

23. *See, e.g.*, SEC v. Dresser Indus., Inc., 628 F.2d 1368, 1375 (D.C.Cir. 1980).

24. *See, e.g.*, SEC v. Benson, 657 F. Supp. 1122, 1129 (S.D.N.Y. 1987); *see also* Gutierrez-Rodriguez v. Cartagena, 882 F.2d 553, 576 (1st Cir. 1989) (defendant who invoked during deposition prevented from testifying at trial; "The court would not tolerate nor indulge a practice whereby a defendant by asserting the privilege against self-incrimination during pre-trial examination and then voluntarily waiving the privilege at the main trial surprised or prejudiced the opposing party.").

25. *See, e.g.*, United States v. 901 N.E. Lakewood Drive, 780 F. Supp. 715, 722 (D. Or. 1991).

26. *See* United States v. 4003–4005 5th Ave., Brooklyn, N.Y., 55 F.3d 78 (2d Cir. 1995) (court can consider permitting withdrawal of privilege invocation if opposing party has not suffered undue prejudice); SEC v. Graystone Nash Inc., 25 F.3d 187 (3rd Cir. 1994).

27. *See Baxter*, 425 U.S. at 318 ("[T]he Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them.").

28. *See, e.g.*, United States v. Rosario Fuentez, 231 F.3d 700, 706–07 (10th Cir 2000).

29. 54 F.3d 387 (7th Cir. 1995); *see also* Harrison v. Wille, 132 F.3d 679, 682–83 (11th Cir. 1998) (a public employee cannot be terminated solely for exercising Fifth Amendment rights but adverse inference may be drawn from invocation of rights).

30. *See, e.g.*, RAD Servs., Inc. v. Aetna Cas. & Surety Co., 808 F.2d 271, 274–75 (3d Cir. 1986) (authorizing inference where former employee invoked privilege); Brink's Inc. v. City of New York, 717 F.2d 700, 710 (2d Cir. 1983) (same); Data Gen. Corp. v. Grumman Sys. Support Corp., 825 F. Supp. 340, 352–53 (D. Mass. 1993) (same); Putnam Res. v. Pateman, 757 F. Supp. 157, 168 (D.R.I. 1991) (same).

31. *See, e.g.*, Emerson v. Wembley USA Inc., 433 F. Supp. 2d 1200, 1214 (D. Colo. 2006).

32. *Data Gen. Corp.*, 825 F. Supp. at 352.

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23. *Id.* at 559.

24. *See* 18 U.S.C. § 3664(e) ("The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the attorney for the Government."); *see also Donaghy*, 570 F. Supp. 2d at 430 ("The government need only establish these amounts by a preponderance of the evidence.").

25. *See, e.g.*, Daniel M Gitner & Brian A. Jacobs, *Seeking Restitution for the Costs of Internal Investigations*, N.Y. L.J., Sept. 29, 2008, at 4, 7.

26. *See* Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gilhis, and Nila Lynn Crime Victims' Rights Act, Pub. L. 108-405, § 102, 118 Stat. 2261 (2004) (codified as amended at 18 U.S.C. § 3771).

27. 18 U.S.C. § 3771(c)(1); *see also* United States v. Rubin, 558 F. Supp. 2d 411, 417 (E.D.N.Y. 2008) (noting also that the "statute charges the district court with ensuring that the victims of crime are afforded theses rights").

28. *See* Office for Victims of Crime, U.S. Dep't of Justice, Attorney General Guidelines for Victim and Witness Assistance 40 (May 2005) (hereinafter "Guidelines"); 18 U.S.C. § 3663A(d) ("An order of restitution under this section shall be issued and enforced in accordance with section 3664."); *id.* § 3664 (setting forth the procedure for issuance and enforcement of an order of restitution).

29. *See* Guidelines, *supra* note 28, at 41 (stating that "officials should contact victims directly whenever practicable" and, in cases involving large numbers of victims, "may publish a notice in a manner designed to reach as many victims as possible").

30. *Rubin*, 558 F. Supp. 2d at 426.

31. Guidelines, *supra* note 28, at 41.

32. *See* 18 U.S.C. §§ 3771(a)(2), (a)(4); *see also* Guidelines, *supra* note 28, at 44.

33. U.S. Dep't of Justice, U.S. Attorneys' Manual § 9-16.320, *available at* www.usdoj.gov/usao/eousa/foia_reading_room/usam.

34. 18 U.S.C. § 3663A(c)(2).

35. Guidelines, *supra* note 29, at 43.

36. *Id.* at 43, 44 (noting how restitution "is a critical part of the criminal judgment").

37. *Id.* at 45.