Opening the Door to Court-Ordered Restitution for Corporate Criminal Liability: A Cautionary Tale

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ABSTRACT

On August 29, 2019, the Eastern District of New York, in a memorandum penned by Judge Garaufis, marshaled in a period of new-found uncertainty for corporate actors seeking to resolve criminal investigations through plea negotiations. In the ruling, the federal court found, for the first time, that the Mandatory Victims Restitution Act (MVRA) could be used to resolve victims' claims against a corporate defendant that pleaded guilty. The MVRA serves as a legal mechanism for victims requesting court-ordered restitution. But before this ruling, its expansive provisions had yet to extend to corporate criminal liability.

In the case at hand, the plaintiffs sought to remedy harms that resulted from criminal conduct covered by a 2016 Plea Agreement, in which OZ Africa Management Group, LLC (OZ Africa) pleaded guilty to one count of violating the Foreign Corrupt Practices Act (FCPA). The conduct, as the plaintiffs allege, resulted in over $1.8 billion in damages. The MVRA restitution claim, then, exposes OZ Africa to a financial penalty of an amount that far exceeds the $414 million in sanctions levied against the company and its parent by the SEC and DOJ in 2016—a worrying sign that a plea agreement may do little to set the upper limit of potential financial losses associated with illicit conduct. This unpredictability could spell problems for future plea negotiations and place victims at odds with the prosecutors tasked with addressing the alleged criminal conduct.

This piece offers an in-depth discussion of the unconventional, high-profile MVRA claim that threatens to upend future corporate plea agreements. It further discusses how the MVRA, as a legal mechanism, could even be used to supplement agency disgorgement penalties. Because the first step in alleviating the uncertainty of MVRA claims that can arise in the aftermath of a plea deal requires

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understanding its newly emergent role in the field of corporate criminal liability, this piece offers a deep dive into the oft-overlooked use of corporate criminal restitution. The principal aim thereof is to provide a foundation for resolving the vexing issue at hand and to highlight the importance of deferred prosecution agreements and non-prosecution agreements.

INTRODUCTION

Court-ordered restitution, a judicial remedy ordinarily reserved for victims of individual criminal conduct, may soon gain a foothold in the field of corporate criminal liability.[1] Its imminent arrival spells the introduction of a new, possibly unpredictable, variable to future plea negotiations between corporations and prosecutors, and it deserves a closer look.

In August 2019, a federal judge in Brooklyn, New York, ruled that a group of shareholders of a Canadian mining company qualified as 'victims' under the Mandatory Victims Restitution Act (MVRA).[2] In so ruling, the judge's declaration on the shareholders' victim status itself was not unusual, as corporations had been classified as victims under the Act before.[3] Likewise, voluntary restitution in plea agreements between corporations and prosecutors appears with some regularity.[4]

The application of the MVRA, a judicial mechanism for court-ordered restitution, to address the victim impact of the illicit conduct of a corporation proved novel, however. It appears to be the first time a federal court has found that the MVRA could be used to resolve a claim against a legal person rather than a natural one, and it is certainly the highest-profile case to date.[5]

A 2016 Plea Agreement between OZ Africa Management Group, LLC (OZ Africa) and the Department of Justice provided the foundation for the restitution claim.[6] The company pleaded guilty in 2016 to one count of violating the Foreign Corrupt Practices Act (FCPA) and its parent company, Och-Ziff Capital Management Group Inc. (Och-Ziff), agreed to monetary penalties of $213 million and $199

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1. Dylan Tokar, *Restitution Battle Throws Three-Year-Old Och-Ziff Settlement Into Limbo*, WALL ST. J., (Sept. 7, 2019), https://www.wsj.com/articles/restitution-battle-throws-three-year-old-och-ziff-settlement-into-limbo-11567810832?mod=djemRiskCompliance.

2. United States v. OZ Afr. Mgmt. GP, LLC, No. 16-CR-515, 2019 WL 4199904, at *10 (E.D.N.Y. Aug. 29, 2019).

3. *See, e.g.*, Lagos v. United States, 138 S. Ct. 1684, 1687 (2018) (noting that General Electric Capital Corporation had filed the underlying MVRA claim).

4. *See, e.g.*, Nick Carey & David Shepardson, *Volkswagen Pleads Guilty in U.S. Court in Diesel Emissions Scandal*, REUTERS (Mar. 10, 2017), https://www.reuters.com/article/us-volkswagen-emissions-idUSKBN16H1W4 (describing an instance of voluntary restitution).

5. The author conducted a thorough search for cases fitting this description and was unable to find one.

6. *OZ Afr. Mgmt. GP, LLC*, 2019 WL 4199904, at *2.

million to be paid to the Department of Justice and the Securities and Exchange Commission, respectively.[7] This was, at the time, the fourth largest (combined) FCPA sanction in U.S.-enforcement history.[8] Not to be outdone, mere weeks before the court was to accept the Plea Agreement and dole out the relevant sentence, the shareholders-plaintiffs filed a "Confirmation of Victim Status" motion for a restitution claim against OZ Africa in excess of $1.8 billion.[9]

Then, in August 2019, over the protests of both OZ Africa and the federal government, the judge found that the shareholders qualified as "victims" under the Mandatory Victims Restitution Act.[10] This finding effectively restricted the court's analysis to the question of damages—with the August 2019 ruling, OZ Africa's liability to the plaintiffs had been conclusively established.[11] The decision leaves OZ Africa, whose parent company had negotiated vigorously for its Deferred Prosecution Agreement (DPA) over the course of a six-year investigation, exposed to a restitution claim that could rise to over four times the amount of the original monetary penalty assessed for the illicit conduct.[12]

Significantly, Och-Ziff's DPA was silent on the issue of restitution. While OZ Africa's accompanying Plea Agreement provided a small section that stated, "any fine or restitution imposed by the Court will be due and payable within ten (10) business days of sentencing,"[13] such boilerplate language was common in recent agreements with the Department of Justice and raised few eyebrows.[14] Needless to say, the

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7. Press Release, U.S. Dep't of Justice, *Och-Ziff Capital Management Admits to Role in Africa Bribery Conspiracies and Agrees to Pay $213 Million Criminal Fine* (Sept. 29, 2016), https://www.justice.gov/opa/pr/och-ziff-capital-management-admits-role-africa-bribery-conspiracies-and-agrees-pay-213.

8. STANFORD LAW SCHOOL, *Foreign Corrupt Practices Act Clearinghouse: Total and Average Sanctions*, http://fcpa.stanford.edu/chart-penalties.html (last visited Sept. 14, 2019).

9. *OZ Afr. Mgmt. GP, LLC*, 2019 WL 4199904, at *3, *9.

10. *Id.* at *10.

11. *Id.*

12. *Id.* at *9; *see also* STANFORD LAW SCHOOL, *Foreign Corrupt Practices Act Clearinghouse: FCPA Entities Dataset*, http://fcpa.stanford.edu/entity.html?id=326 (last visited Sept. 17, 2019).

13. Deferred Prosecution Agreement, United States v. Och-Ziff Capital Mgmt. Group Inc., Cr. No. 16-516 (NGG) (E.D.N.Y. Sept. 29, 2016) [hereinafter Och-Ziff DPA]; *see also* Plea Agreement at 8, United States v. OZ Africa Mgmt. GP, LLC, Cr. No. 16-515 (NGG) (E.D.N.Y. Sept. 29, 2016).

14. *See, e.g.*, Plea Agreement at 10, United States v. WMT Brasilia, Cr. No. 19-192 (E.D. Va. June 20, 2019) (Walmart's recent FCPA plea); Plea Agreement at 5, United States v. UBS, Cr. No. 15-00076 (D. Conn. May 20, 2015) (UBS's

ruling surprised the company; its most recent 10-Q quarterly filing with the SEC noted, "[t]he Company is unable to reasonably estimate an amount, if any, of loss or range of loss possible for this matter."[15] At this stage, the management and the legal teams may well have rethought the 2016 guilty plea that failed to address the potential for court-ordered restitution. But one cannot fault them for failing to take into account a previously unused remedy in corporate criminal law.

This legal development may further complicate a corporation's decision to plead guilty in a plea agreement and may place victims at odds with the prosecuting authorities seeking to protect their side of the agreement.[16] It can, if well accounted for over the course of plea negotiations, serve as an effective means of preserving victims' rights. But the bottom line is simple: restitution as a judicial remedy can no longer be ignored over the course of plea negotiations aimed at resolving corporate criminal liability.

This piece proceeds in four parts. The first section discusses the legal framework of criminal restitution in the United States and its merits. Second, the article examines the role of disgorgement in agency enforcement and then explains how the potential unconstitutionality of the remedy may be redressed by turning instead to court-ordered restitution under the MVRA. In the third section, it examines the novel relationship between court-ordered restitution and corporate criminal law. Finally, it provides an initial reaction to the vexing question of how to deal with potential restitution claims and urges proper recognition of the remedy over the course of plea negotiations. Notably, the final section briefly addresses the potential of voluntary restitution to preempt such restitution claims but advises strongly against its use here. This piece concludes by highlighting the invaluable role of deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs) in corporate criminal law as an effective means of avoiding the unpredictable restitution claims now associated with guilty pleas.

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interstate fraud plea); Plea Agreement at 6, United States v. RBS Securities Japan Ltd., Cr. No. 13-00073 (D. Conn. Apr. 12, 2013) (RBS wire fraud plea).

15. Och-Ziff Capital Mgmt. Group Inc., Quarterly Report (Form 10-Q) at 41 (June 30, 2019), available at https://s24.q4cdn.com/332865517/files/doc_financials/quarterly/2019/Q2/OZM-10-Q-2q2019.pdf [hereinafter Och-Ziff Q2 2019 Report].

16. *OZ Afr. Mgmt. GP, LLC*, 2019 WL 4199904, at *10.

I. RESTITUTION IN U.S. CRIMINAL LAW: THE MANDATORY VICTIMS RESTITUTION ACT

In 1996, Congress passed the Mandatory Victims Restitution Act (MVRA)[17] to provide a judicial mechanism for restitution claims against defendants convicted of a certain category of crimes. Largely aimed at deterring violent crime, the Act requires, as its name suggests, that courts issue mandatory orders for victim compensation if a set of criteria is met.[18]

A. The Legal Framework for Court-Ordered Restitution Under the MVRA

1. Conviction of Specific Offenses

The first criterion specifies that the defendant must be convicted—at trial or in a plea agreement—of any of the following offenses:

> (i) a crime of violence ...
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> (ii) an offense against property ... including any offense committed by fraud or deceit;
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> (iii) an offense ... relating to tampering with consumer products; or
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> (iv) an offense ... relating to theft of medical products."[19]

The first two categories are undefined and leave ample room for legal maneuvering. Courts may look at whether a particular offense qualifies as a "crime of violence" or an "offense against property" by employing a categorical approach, which looks to the elements of the offense charged rather than the conduct in a defendant's case.[20]

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17. Mandatory Victims Restitution Act of 1996, Pub. L. 104-132, 110 Stat. 1214 (amended by the Strengthening and Focusing Enforcement to Deter Organized Stealing and Enhance Safety Act of 2012, Pub. L. 112-186, 126 Stat. 1427).

18. S. REP. NO. 104–179, at 1 (1996).

19. 18 U.S.C. § 3663A(c)(1)(A) (2018).

20. *See* Taylor v. United States, 495 U.S. 575, 602 (1990) (holding that courts ought to look to the elements of the offense charged, not the facts of a defendant's

However, this approach has proven difficult for courts to apply on the margins and has generated several significant Supreme Court cases clarifying its proper scope.[21]

2. Identifiable Victim Status

The second criterion provides an important limitation on mandatory-restitution orders—there must be an identifiable victim that has suffered a physical injury or pecuniary loss.[22] The Act sets out a succinct definition of who qualifies as a victim: "person[s] *directly and proximately harmed* as a result of the commission of an offense for which restitution may be ordered."[23] Notably, corporations qualify as a "person" for purposes of the Act.[24] Coconspirators, on the other hand, cannot qualify as victims.[25]

There must be a clear "causal nexus" between the offense and the harm that resulted: a link that is not "too attenuated."[26] This simply requires proving that the harm has a sufficiently close connection to the conduct.[27] This harm can even extend to unwitting third-parties that the defendant did not interact with, as long as the third-party's involvement was a reasonably foreseeable result of the illicit conduct.[28] That said, there is nothing unusual about the fact-heavy analysis involved in proving causation and damages in an MVRA claim;

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case, in determining whether his conviction falls within the definition of "generic burglary").

21. *See* Sessions v. Dimaya, 138 S. Ct. 1204 (2018) (holding that the residual clause in the Immigration and Nationality Act's definition of a "crime of violence" was unconstitutionally vague); see also United States v. Johnson, 135 S. Ct. 2551 (2015) (holding the same for the residual clause in the Armed Career Criminal Act's definition of a "crime of violence").

22. 18 U.S.C. § 3663A(c)(1)(B).

23. *Id.* § 3663A(a)(2) (emphasis added).

24. *See* United States v. Benedict 855 F.3d 880, 886–87 (8th Cir. 2017) (holding corporations eligible to be victims under the MVRA).

25. *See* United States v. Reifler, 446 F.3d 65, 127 (2d Cir. 2006) (holding that co-conspirators are not victims for purposes of the MVRA).

26. United States v. Swor, 728 F.3d 971, 974 (9th Cir. 2013) (holding that liability for restitution is cut off by independent intervening events).

27. Robers v. United States, 572 U.S. 639, 645 (2014).

28. United States v. Hymas, 780 F.3d 1285, 1293 (9th Cir. 2015) (holding those successor lenders who purchased a loan without an awareness of its true value due to fraud were directly and proximately harmed as a result of the offense); *but see* United States v. Farano, 749 F.3d 658 (7th Cir. 2014) (holding that refinancing lenders were not victims in the absence of evidence of reliance on the fraudulent scheme).

similar elements exist in many corners of the legal world, from tort law to criminal law.

Additionally, here, a distinction must be drawn between 1) convictions of schemes, conspiracies, or patterns of criminal activity and 2) other criminal convictions. For the former, the victim status can be based on conduct for which the defendant is acquitted, as long as the defendant is ultimately convicted of playing a role in the broader scheme or conspiracy.[29] This means that any person directly and proximately harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern qualifies as a victim.[30]

On the other hand, "[w]hen the count of conviction does not require proof of a scheme, conspiracy, or pattern, . . . the defendant is only responsible to pay restitution for the conduct underlying the offense for which he has been convicted."[31] This means that the specific counts to which a defendant pleads guilty in a plea agreement matter a great deal. If the counts include conspiracy or a common fraudulent scheme, damages tied to any conduct specified in the plea agreement as part of the common scheme can serve as a basis for court-ordered restitution.[32] This demonstrates the importance of negotiating vigorously which counts to plead guilty to, as those can determine the extent of the potential exposure.[33] Particularly in the corporate criminal context, where plea bargaining, rather than criminal trials, serves as the

29. *See* United States v. Tull-Abreu, 921 F.3d 294, 305 (1st Cir. 2019) ("Indeed, restitution can be based in part on acquitted conduct, as it requires the less stringent preponderance of the evidence standard.") (internal citation omitted); *see also* United States v. Cornelsen, 893 F.3d 1086, 1091 (8th Cir. 2018) (holding that "restitution may be ordered for criminal conduct that is part of a broad scheme to defraud, even if the defendant is not convicted for each fraudulent act in the scheme") (citation omitted); *see also* United States v. Johnson, 875 F.3d 422, 426 (9th Cir. 2017) (noting that the trial court below could properly order restitution for all victims harmed by the defendant's scheme, even those harmed by conduct beyond the count of conviction).

30. 18 U.S.C. § 3663A(a)(2).

31. United States v. Mathew, 916 F.3d 510, 516 (5th Cir. 2019) (internal citation omitted).

32. *Cornelsen*, 893 F.3d at 1090–91.

33. *See In re* Local # 46 Metallic Lathers Union, 568 F.3d 81 (2d Cir. 2009) (noting that the Union was not a victim of the defendant's actions because the defendant only pleaded guilty to one count of conspiracy to launder money and not a second count of defrauding the union). As the conspiracy was completed as soon as the defendant received the cash, the analysis in Section II(A)(1) above is not relevant.

principal means of assessing guilt,[34] negotiating what specific counts to plead guilty to becomes vitally important.

Provided the criteria above are met, the court shall, in the absence of the discretionary considerations discussed next, order the payment of restitution by the defendant.[35]

3. The Role of Judicial Discretion

Several considerations provide courts with some flexibility in an otherwise inflexible restitution process. Where the defendant has independently compensated the victims fully, the courts are not required to grant a restitution order.[36] Additionally, the burden to the judiciary can be taken into account in two circumstances: where the number of identifiable victims is so large as to make the restitution impracticable,[37] or where complex fact-finding would delay the sentencing process such that the burden would outweigh the value of restitution.[38] In those circumstances, the court is not required to issue the restitution order.

A "burdensome, complicated, or speculative calculation provides a good reason for the district court to decline to exercise its discretion," avoiding intricate issues of proof that would needlessly delay sentencing.[39] Case law provides limited guidance here, however. In one instance, tracking down damages related to fifty different properties proved too burdensome,[40] whereas in another case, the analysis of

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34. *See, e.g.*, Mike Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J. INT'L L. 907, 927 (2010) ("[I]t is not surprising that every company subject to an FCPA inquiry during the facade of enforcement era has opted to resolve such matters through an NPA, DPA, or plea regardless of the DOJ's legal theories, ambiguous facts, or the existence of valid and legitimate defenses. Simply put, challenging the DOJ is too risky. No company has challenged the DOJ in an FCPA enforcement action in the last twenty years.").

35. 18 U.S.C. § 3663A(a)(1).

36. Bailey Wendzel, Matthew Angelo, Mariana Jantz & Alexis Peterson, *Corporate Criminal Liability*, 56 AM. CRIM. L. REV. 671, 695 (2019) (citing Federal Sentencing Guidelines Manual § 8B1.1(b)(1) (U.S. SENTENCING COMM'N 2018) [hereinafter Sentencing Guidelines Manual 2018]. Section 8B1.1(b)(1) of the Sentencing Guidelines provides that the MVRA does not apply "when full restitution has been made.").

37. 18 U.S.C. § 3663A(c)(3)(A).

38. *Id.* § 3663A(c)(3)(B).

39. United States v. Martinez, 690 F.3d 1083, 1089 (8th Cir. 2012) (citing United States v. Oslund, 453 F.3d 1048, 1063 (8th Cir. 2006)).

40. United States v. Dharia, 284 F. Supp. 3d 262, 274 (E.D.N.Y. 2018) (holding that a restitution claim that "would require the investigation of upwards of fifty

a 1,700-page victim restitution report detailing damages to 10,000 victims did not prove complex enough to overburden the court.[41]

4. Required Notice in Plea Agreements

As a primary matter, the Federal Rules require courts to warn the defendant of a possibility of restitution as it rules on a plea agreement and the defendant's acceptance of guilt.[42] When the defendant becomes aware of the possibility of restitution before sentencing and chooses not to withdraw the plea, however, the choice to enter the plea serves as an adequate warning.[43] Ultimately, the requirement is not particularly onerous: even the boilerplate language in Och-Ziff's Plea Agreement[44] was sufficient.[45]

5. Constitutional Concerns

There are several constitutional protections central to the enforcement of the MVRA. Defendants can rely on the Fifth Amendment's Due Process Clause to rebut evidence of the victim's losses for MVRA restitution claims.[46] They must be afforded an adequate opportunity to rebut the government's restitution evidence.[47] Additionally, final determinations of restitution awards are considered critical stages of criminal proceedings during which a defendant is entitled to the assistance of counsel under the Sixth Amendment.[48] Not all

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different properties . . . would not be practicable for the government or the Court to accomplish without seriously impeding the sentencing process") (citation omitted); *see also* United States v. Ferguson, 584 F. Supp. 2d 447, 458 (D. Conn. 2008) (holding that, in a securities fraud case, restitution would be "sufficiently complicated to make the MVRA inapplicable" because the parties could not track down the identities of all or most of the persons that were shareholders of a particular company).

41. United States v. Catoggio, 326 F.3d 323, 328 (2d Cir. 2003) (noting that even though there was approximately $192 million in losses to approximately 10,000 victims, the complexity of the case did not necessitate dismissal of the claim).

42. FED. R. CRIM. P. 11(b)(1)(K).

43. United States v. OZ Afr. Mgmt., No. 16-CR-515, 2019 WL 4199904, at *5 (E.D.N.Y. Aug. 29, 2019).

44. *See supra* note 13 and accompanying text.

45. *OZ Afr. Mgmt.*, 2019 WL 4199904, at *5.

46. *See* United States v. Gushlak, 728 F.3d 184, 193 (2d Cir. 2013) (noting that defendants have a due process right to pay restitution only for victims' actual losses) (citation omitted).

47. *Id.*

48. United States v. Pleitez, 876 F.3d 150, 159–60 (5th Cir. 2017) ("An order of restitution is part of the sentencing process; a defendant has a constitutional right

constitutional protections for MVRA defendants prove that straightforward, however.

A complex circuit split muddies the role restitution plays in criminal law. It is a debate that has many parallels to the discussion of disgorgement in Section III below. Complicating matters, some circuits have held that restitution orders under the MVRA qualify as "criminal penalt[ies],"[49] whereas other circuits have held that the "non-punitive character of restitution" warrant the status of a civil penalty.[50] The latter argument is that the Act serves to compensate victims, rather than to punish the criminal offender.[51] But dicta in the Supreme Court case of *Pasquantino v. United States* suggests otherwise. Justice Thomas wrote for the majority: "[t]he purpose of awarding restitution" under the MVRA is "to mete out appropriate criminal punishment for that conduct."[52] That said, the official status remains unsettled.[53]

Ultimately, whether restitution under the MVRA qualifies as a criminal penalty determines what constitutional rights are afforded to criminal defendants. One issue that has seen considerable litigation is how the Sixth Amendment right to trial by jury applies to restitution orders.[54]

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at the final sentencing to respond to a definitive decision of the judge.") (internal citation omitted).

49. United States v. Edwards, 162 F.3d 87, 92 (3rd Cir. 1998); United States v. Siegel, 153 F.3d 1256, 1260 (11th Cir. 1998); United States v. Williams, 128 F.3d 1239, 1241 (8th Cir. 1997); United States v. Baggett, 125 F.3d 1319, 1322 (9th Cir. 1997); United States v. Sosebee, 419 F.3d 451, 461 (6th Cir. 2005).

50. United States v. Newman, 144 F.3d 531, 540 (7th Cir. 1998); United States v. Kieffer, 596 Fed. Appx. 653, 664 (10th Cir. 2014).

51. Cortney E. Lollar, *What Is Criminal Restitution?*, 100 IOWA L. REV. 93, 116–17 (2014) (outlining the argument that criminal-restitution statutes are not intended to punish before providing that the punitive effects of restitution set its status firmly as a criminal punishment).

52. Pasquantino v. United States, 544 U.S. 349, 365 (2005).

53. *See* Brian Kleinhaus, *Serving Two Masters: Evaluating the Criminal or Civil Nature of the VWPA and MVRA Through the Lens of the Ex Post Facto Clause, the Abatement Doctrine and the Sixth Amendment*, 73 FORDHAM L. REV. 2711 (2005) (describing the circuit split as to whether restitution orders are criminal punishment).

54. *See* United States v. Burns, 800 F.3d 1261 (10th Cir. 2015) (holding that a jury did not need to find the facts underlying a restitution order beyond a reasonable doubt); *see also* United States v. Bonner, 522 F.3d 804, 808 (7th Cir. 2008) (holding that even if the MVRA restitution order was a criminal punishment, the defendants were not entitled to a jury trial on the facts underlying the restitution order); United States v. Churn, 800 F.3d 768, 781 (6th Cir. 2015) (noting that there is both a circuit

Significantly, findings of fact by a judge (instead of a jury) can increase the defendant's criminal restitution beyond the scope of conduct presented to a jury at trial.[55] In 2012, the Supreme Court extended the rights of defendants facing criminal penalties to have "any fact that increases the penalty for a crime *beyond the prescribed statutory maximum* . . . submitted to a jury, and proved beyond a reasonable doubt."[56] Nevertheless, the statutory-maximum language proved fatal for most MVRA Sixth Amendment cases, as the MVRA does not set a statutory maximum.[57] Therefore, the constitutionality of the Act concerning the jury trial right is not in serious jeopardy, and no other constitutional concerns threaten the core functions of the MVRA.

With this legal framework in mind, the next section discusses the statutory guidelines that direct the court's calculation of restitution.

B. The Mechanics of Calculating Court-Ordered Restitution

Calculations of court-ordered restitution under the MVRA, during the stage of the litigation in which OZ Africa finds itself in now,[58] are largely governed by 18 U.S.C. § 3664. As a primary matter, the court will order that the probation officer collect information to provide a complete accounting of the losses to each victim, any restitution owed under a plea agreement, or, if doing so would be impractical, to inform the court thereof.[59] After reviewing the report, the court can require additional documentation or hear testimony.[60] Per Section 3664(e), the United States must prove the amount of loss sustained by the victim by a preponderance of the evidence.[61] Notably, the court will not offset the amount of restitution ordered based on any

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split and an intra-circuit (Sixth Circuit) split on the issue of whether the MVRA orders must be subject to jury findings of fact).

55. Kleinhaus, *supra* note 53, at 2756; *see also* Judge William M. Acker, Jr., *The Mandatory Victims Restitution Act is Unconstitutional. Will Courts Say so After Southern Union v. United States?*, 64 ALA. L. REV. 803, 809-10 (2013) (arguing that judicial fact-finding as a part of criminal sentencing is unconstitutional).

56. Southern Union Co. v. United States, 567 U.S. 343, 348 (2012) (citing Apprendi v. New Jersey, 530 U.S. 466, 490 (2000)) (emphasis added).

57. Kleinhaus, *supra* note 53, at 2758 ("The vast majority of federal judges that have heard Sixth Amendment challenges to federal restitution orders have used the 'statutory maximum' language from the *Apprendi* decision as one method of striking down the challenges.").

58. Def.'s Notice of Mot. for Disc., United States v. OZ Afr. Mgmt. GP, LLC, No. 16-CR-515 (E.D.N.Y. December 9, 2019), ECF No. 71.

59. 18 U.S.C. § 3664(a).

60. *Id.* § 3664(d)(4).

61. *Id.* § 3664(e).

consideration of the defendant's economic circumstances,[62] but will offset any damages associated with a recovery or replacement of the property affected.[63] Thus, the total restitution that must be ordered by the court is not offset by the defendant's ability to pay.[64] The economic circumstances of the defendant only become relevant for purposes of setting a payment schedule for the full amount of restitution due, leaving the computation of damages wholly separate from the amount of money the defendant may be able to pay.[65] This is not without consequence. As discussed in the next section, the defendants' inability to pay causes a significant amount of ordered restitution to remain uncollected.

Difficulty in determining an exact loss is not fatal for an MVRA claim—even if it can provide the court with the discretion to block recovery, as discussed in Section II(A)(3). A *reasonably accurate* measure of a victim's actual losses can serve as a foundation for an MVRA order.[66] The Supreme Court held that where "it is impossible to trace a particular amount" of a victim's losses, courts "should order restitution in an amount that comports with the defendant's relative role in the causal process that underlies the victim's general losses."[67] The determination must, of course, be tied to the actual quantifiable losses suffered by actual victims and cannot be based on mere speculation.[68] But the preponderance-of-the-evidence standard provides some evidentiary leeway here.

Significantly, the required connection between actual losses and the restitution order means that the court cannot base its order solely on an agreed settlement amount between the victims and the

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62. *Id.* § 3664(f)(1)(A).

63. Robers v. United States, 572 U.S. 639, 642–43 (2014) (citing 18 U.S.C. § 3663A(B)(1)).

64. 18 U.S.C. § 3664(f)(1)(A) ("In each order of restitution, the court shall order restitution to each victim in the full amount of each victim's losses as determined by the court and without consideration of the economic circumstances of the defendant.").

65. United States v. Moeser, 758 F.3d 793, 799–800 (7th Cir. 2014) (holding that although consideration of a defendant's economic circumstances may affect how the restitution is paid, it has no impact on the amount of restitution due).

66. United States v. González-Calderón, 920 F.3d 83, 86 (1st Cir. 2019) (affirming district court determination of restitution amount because the record indicates the damages are a reasonably accurate measure of the actual losses).

67. Lollar, *supra* note 51, at 104 (citing Paroline v. United States, 572 U.S 434, 458 (2014)).

68. United States v. Frazier, 651 F.3d 899, 909 (8th Cir. 2011) (holding that the restitution should not "be based on a speculative and hypothetical scenario, which is not a proper basis of valuing loss").

defendant if it does not fully reflect actual losses.[69] This, unfortunately, limits the agency of victims to settle the claim by means other than the MVRA.[70]

With this in mind, the next section discusses the importance and limitations of court-ordered restitution in the criminal justice system.

C. The Merits of Court-Ordered Restitution

At its core, restitution aims to redress the harms to a victim's underlying interest and "to achieve personal restorations" in response to the detrimental conduct of a criminal defendant.[71] Criminal law in the United States, particularly in the corporate-defendant context, has had predominantly punitive rather than restorative objectives, with sanctions in many cases paid in their entirety to various federal investigative agencies, including the Department of Justice and the Securities and Exchange Commission.[72] Restitution, in theory, combines both objectives: monetary restoration for victims and punitive-disciplinary sanctions against the guilty party.

The MVRA is simply the legal framework for a court to order restitution as an element of a criminal sentence.[73] It makes available a streamlined mechanism for resolving a restitution claim against a criminal defendant, allowing for court intervention in the process and thus providing legal recourse for victims to be made whole.

There are some limitations to the effectiveness of court-ordered restitution, however. Notably, nearly 85% of criminal defendants are indigent at the time of sentencing, leaving a significant portion of restitution orders unsettled.[74] And this financial restraint would likely not be unique to individual defendants. After all, the restitution amount requested from OZ Africa, as discussed above, would eclipse

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69. United States v. Hankins, 858 F.3d 1273, 1276–77 (9th Cir. 2017) (noting that a restitution order could not be modified through a private settlement with the victim).

70. *See* David Peters, *Unsettled: Victim Discretion in the Administration and Enforcement of Criminal Restitution Orders*, 166 U. PA. L. REV. 1293, 1320 (2018) (arguing there should be lower barriers to a settlement outside of the MVRA for victims).

71. Omri Ben-Shahar & Ariel Porat, *The Restoration Remedy in Private Law*, 118 COLUM. L. REV. 1901, 1940–41 (2018).

72. *See, e.g.*, Och-Ziff DPA, *supra* note 13.

73. 18 U.S.C. § 3663A(c)(1) (noting that the MVRA applies "in all sentencing proceedings" for convictions of the offenses listed above).

74. *See* Peters, *supra* note 70, at 1312.

the owners' remaining equity stake in its parent company by nearly eleven times.[75] This would almost certainly force the subsidiary into bankruptcy, leaving the victims with minimal recourse. The existence of such financial limitations ultimately means that the MVRA can serve as an important but imperfect means of achieving victim redress in an otherwise-punitive criminal system.

Now, after this brief introduction of the MVRA legal framework and its merits, the following section will address the implications of a possible ruling on the constitutionality of disgorgement as a remedy to claw back ill-gained funds from corporate entities.

II. THE POSSIBLE EXPANSION OF COURT-ORDERED RESTITUTION AS AGENCY DISGORGEMENT FACES LEGAL CONCERNS

Disgorgement is simply "[t]he act of giving up something (such as profits illegally obtained) on-demand or by legal compulsion."[76] Particularly for purposes of addressing corporate misconduct, disgorgement serves to deprive wrongdoers of the gains from their wrongful conduct.[77] The remedy of disgorgement has become an agency favorite at the Securities and Exchanges Commission (SEC) for recouping ill-gotten gains from legal entities charged with securities violations, with nearly 75 cents of every dollar in sanctions assessed in enforcement actions in Fiscal Year 2019 (FY '19) coming from disgorgement orders.[78]

After receiving these sanctions, the SEC then seeks to return the money to harmed investors. The Sarbanes-Oxley Act of 2002 first permitted the distribution of these disgorgement sanctions to investors injured by securities fraud, which led to the establishment of Fair Funds and other disgorgement funds aimed at assuring victim redress.[79] The distribution of this money lies entirely within the

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75. *See* Och-Ziff Q2 2019 Report, *supra* note 15, at 4.

76. *Disgorgement*, BLACK'S LAW DICTIONARY (11th ed. 2019).

77. SEC v. Tex. Gulf Sulphur Co., 446 F.2d 1301, 1308 (2d Cir. 1971); *see also* Patrick L. Butler, *Saving Disgorgement from Itself: SEC Enforcement after Kokesh v. SEC*, 68 DUKE L.J. 333, 335 (2018) (noting Texas Gulf Sulphur Co. was the first instance in which a federal court authorized disgorgement).

78. SEC, DIV. OF ENF'T, 2019 ANNUAL REPORT 16 (Nov. 6, 2019), https://www.sec.gov/files/enforcement-annual-report-2019.pdf [hereinafter 2019 SEC Enforcement Report].

79. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745; 15 U.S.C. § 7246(a) ("[T]he amount of such civil penalty shall, on the motion or at the direction of the Commission, be added to and become part of a disgorgement fund or other fund established for the benefit of the victims of such violation."). *See also,*

discretion of the SEC; and although the SEC redistributed only about a quarter of the sanctions money ordered in FY '19,[80] the use of Fair Funds has been remarkably successful to date.[81]

The constitutionality of such disgorgement orders has come under attack, however. The dilemma for SEC enforcers began in 2017 when a footnote in the Supreme Court's unanimous opinion in *Kokesh* stated:

> Nothing in this opinion should be interpreted as an opinion on whether courts possess authority to order disgorgement in SEC enforcement proceedings or on whether courts have properly applied disgorgement principles in this context. The sole question presented in this case is whether disgorgement, as applied in SEC enforcement actions, is subject to § 2462's limitations period.[82]

The ruling sparked a great deal of speculation as to what the Court intended by including the footnote.[83] Presumably to address the question left unanswered in the *Kokesh* opinion, the Supreme Court granted certiorari in November 2019 to the petitioner in *Liu v. SEC*, an individual alleged to have swindled Chinese investors out of nearly $27 million with the promise of U.S. visas.[84] As part of the SEC's civil-enforcement action, the district court below ordered that the defendant disgorge over $26.7 million, which took into account the amount of money (around $234,000) returned to investors.[85] In

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e.g., 2019 SEC Enforcement Report, *supra* note 78, at 17 (indicating that a sizable portion of profits disgorged in Fiscal Year 2019 was returned to investors).

80. 2019 SEC Enforcement Report, *supra* note 78, at 17.

81. *See* Urska Velikonja, *Public Compensation for Private Harm: Evidence from the SEC's Fair Fund Distributions*, 67 STAN. L. REV. 331, 342, 394 (2015) (noting that the SEC is effectively compensating defrauded investors through the use of Fair Funds in cases where private litigation is not serving its compensatory function).

82. Kokesh v. SEC, 137 S. Ct. 1635, 1642 n.3 (2017).

83. Butler, *supra* note 77, at 353 (noting "[i]n one footnote, the Supreme Court seemingly opened up Pandora's box.").

84. SEC v. Liu, 754 F. App'x 505, 506 (9th Cir. 2018), *cert. granted*, 2019 WL 5659111 (Nov. 1, 2019); *see also* Jennifer Klass, Amy Greer, Peter Chan, A. Valerie Mirko & Jerome Tomas, *SCOTUS to Review SEC Disgorgement Power*, GLOB. COMPLIANCE NEWS (Nov. 18, 2019), https://globalcompliancenews.com/scotus-to-review-sec-disgorgement-power-20191106/ (noting the new uncertainties for SEC enforcement resulting from the grant of certiorari).

85. *Liu*, 754 F. App'x at 509.

challenging this order, Liu argues that disgorgement as a remedy in federal court actions lacks statutory authority, and it could spell trouble for the SEC if the Justices agree.[86]

The Court in *Kokesh* held that disgorgement operates as a penalty—a sanction assessed to punish and to deter others from offending in like manner.[87] In the days of the equity/law split, the jurisdiction to recover penalties rested exclusively in the federal district courts—not the courts of equity.[88] However, the SEC has long qualified disgorgement as a legal remedy falling within the federal courts' equitable powers.[89] Significantly, the capability to order "equitable relief" currently serves as the sole source of statutory authority for the remedy,[90] which means the declaration in *Kokesh* of the punitive nature of disgorgement could endanger its legality.[91] The Court's decision in *Liu v. SEC* will thus be closely watched by securities litigators around the nation.

Should the Court declare disgorgement unconstitutional, restitution may serve as an imperfect substitute until a replacement SEC remedy is configured. Restitution, as discussed above, serves the same principal objective as disgorgement: to provide a legal mechanism to make victims of illicit acts whole.[92] There are some notable differences between the two remedies, of course. Restitution is perhaps less punitive in that it does not tie the damages to the ill-gotten gains, but rather to the damages suffered by the victims to remedy that wrong.[93] A significant difference also rests in the payment mechanics of the two remedies. The defendant pays the MVRA restitution directly to the victims rather than to the SEC.[94] Furthermore, restitution under the

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86. *Id.*; Pet'rs' Br. at 2, Liu v. SEC, No. 18-1501 (U.S. Dec. 16, 2019).

87. *Kokesh*, 137 S. Ct. at 1638.

88. *Id.* at 1642.

89. 15 U.S.C. § 78u(d)(1), (5) (noting that the Commission is authorized to bring civil enforcement actions seeking injunctive and equitable relief); *see also* SEC's Br. at 51, SEC v. Liu, 754 F. App'x 505 (9th Cir. 2018) (No. 17-55849), ECF No. 24. ("[F]ederal courts have broad equity powers to issue ancillary relief, including disgorgement of proceeds obtained in violation of the securities laws.") (internal citation omitted); *see also* SEC v. Tex. Gulf Sulphur Co. 446 F.2d 1301, 1307 (2d Cir. 1971) (noting the SEC's disgorgement efforts fell under the general equity powers of the district court).

90. 15 U.S.C. § 78u(d)(5).

91. Pet'rs' Br. at 2, Liu v. SEC, No. 18-1501 (U.S. June 3, 2019).

92. *See supra* Section I(C).

93. 18 U.S.C. § 3663A(b)(1).

94. *Id.* § 3664(f)(1)(A) (noting that the court shall order payment of restitution directly to each victim in the full amount of each victim's losses).

MVRA can only be ordered by a court after a criminal conviction,[95] whereas disgorgement serves as a sanction ordered in civil-enforcement cases by the SEC.[96] Disgorgement does not have to be court-enforced.[97]

These differences aside, if the use of disgorgement is threatened, the SEC may be able to turn instead to the MVRA for remedying harm to victims. In cases where violations of securities laws amount to criminal conduct, the SEC has the authority to refer the case to prosecutors at the DOJ to bring criminal charges.[98] Then, the door opens to the use of court-ordered restitution for addressing the impact of corporate criminal conduct on victims.

That said, the constitutionality question could be moot by the next Congressional legislative session. Explicitly granting the SEC the power to request disgorgement as a matter of statutory authority presents a simple solution to the central issue raised by *Liu v. SEC*.[99] The House of Representatives has done exactly that and is awaiting Senate response.[100] But the conclusion remains: restitution could serve as a meaningful way of replacing (or supplementing) agency disgorgement as a remedy to directly reimburse victims for harms suffered at the hands of corporations.

Returning to the discussion of the role of court-ordered restitution in the corporate-liability framework, the following section will

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95. *Id.* § 3663A(a)(1).

96. 15 U.S.C. § 78u(d).

97. *See, e.g.*, Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Microsoft Corporation with FCPA Violations (July 22, 2019), https://www.sec.gov/enforce/34-86421-s-0 (noting that Microsoft agreed as part of a non-prosecution agreement, which is an out-of-court settlement, to pay disgorgement of over $13 million for violating the FCPA's books and records provisions).

98. 15 U.S.C. § 78u(d)(1) (noting that the Commission may transmit any necessary evidence to the Attorney General to institute the necessary criminal proceedings under the Securities Exchange Act).

99. Pet'rs' Br. at i, Liu v. SEC, No. 18-1501 (U.S. June 3, 2019) (noting the question presented to the Supreme Court is whether the SEC may seek disgorgement as "equitable relief").

100. H.R. 4344, 116th Cong. (1st Sess. 2019) (seeking to amend the Securities Exchange Act of 1934 to state "the Commission may seek, and any Federal court may grant the following additional relief: (i) Disgorgement in the amount of any unjust enrichment obtained as a result of the act or practice with respect to which the Commission is bringing such an action or proceeding"). This enactment will not resolve all issues, however. There will be major concerns raised by the application of this new law to conduct that occurred before its enactment. The Ex Post Facto Clause of the Constitution would, generally speaking, prevent the use of this statutory remedy for past harms. U.S. CONST. art. I, § 9, cl. 3 ("No ... ex post facto Law shall be passed.").

address how the elements of a restitution claim map onto a claim seeking redress for corporate criminal conduct.

III. COURT ORDERED RESTITUTION IN THE FIELD OF CORPORATE CRIMINAL LIABILITY

As discussed in this section, there are no elements inherent to the MVRA framework that prevent its use against corporate defendants that have pleaded guilty, which makes it perhaps surprising that it has not been more commonly requested or ordered. After all, the United States Sentencing Guidelines Manual even dedicates a specific section to the application of criminal restitution to organizations and legal persons.[101]

As outlined above, the requirements for an MVRA claim are, broadly speaking, 1) a convicted defendant, 2) a specific category of crimes, and 3) a victim directly or proximately harmed with a physical injury or pecuniary loss as a result of the commission of a crime that falls within the categories.

First, the statute requires a conviction. Importantly, guilty pleas in plea agreements between prosecutors and corporations, when entered by a judge, qualify as a conviction for these purposes.[102]

Second, many of the potential crimes associated with corporate misconduct,[103] including fraud,[104] theft,[105] tax evasion,[106] bribery,[107] kickbacks,[108] and money laundering[109] fall squarely in the category of

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101. Sentencing Guidelines Manual 2018, *supra* note 36, § 8B1.1.

102. *See* Boykin v. Alabama, 395 U.S. 238, 242 (1969) ("A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction.").

103. Wendzel, Angelo, Jantz & Peterson, *supra* note 36, at 698.

104. *See* United States v. Ritchie, 858 F.3d 201, 209 (4th Cir. 2017) (holding that the MVRA applies to conviction for making a false statement under 18 U.S.C. § 1001).

105. *See* United States v. Donaby, 349 F.3d 1046, 1052 (7th Cir. 2003) (holding that the MVRA applies to conviction for bank robbery).

106. *See* United States v. Turner, 718 F.3d 226, 236 (3d Cir. 2013) (holding that the MVRA applies to conviction for conspiring to defraud the Internal Revenue Service).

107. *See* United States v. OZ Afr. Mgmt., No. 16-CR-515, 2019 WL 4199904, at *4 (E.D.N.Y. Aug. 29, 2019) (holding that the MVRA applies to FCPA violation).

108. *See* United States v. Collins, 854 F.3d 1324, 1329 (11th Cir. 2017) (holding that the MVRA applies to conspiracy to accept kickbacks in a bank fraud scheme).

109. United States v. Lazarenko, 624 F.3d 1247, 1249–50 (9th Cir. 2010) (holding that the MVRA applies to conspiracy to commit money laundering).

offenses against property, satisfying that specific requirement of the MVRA.[110] Particularly relevant for corporate misconduct, this definition of property includes offenses against intangible property.[111]

Third, victim status can present a hurdle for claimants, particularly for corporate crimes like bribery, where broader societal harm tends to overshadow direct losses suffered.[112] That said, the MVRA defines "victim" broadly.[113] It requires, as relevant for most corporate-restitution claims, that the person, legal or natural, be directly and proximately harmed as a result of the offense.[114] As discussed in Section II(A)(2), there is nothing unusual about proving causation and damages in an MVRA claim, particularly for claims against corporations.

Finally, as discussed above, there are, important statutory limitations that can curb court-ordered restitution, and these limitations are particularly relevant in the field of corporate criminal liability. For instance, where there would be a large number of identifiable victims, or where complex fact-finding would burden the judicial system and outweigh the value of restitution, the court can exercise restraint.[115] Although ill-defined, these limitations provide ample opportunity for shrewd litigating but offer little predictability for the risk-averse. As discussed in the next section, this may complicate the plea-negotiation process.

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110. 18 U.S.C. § 3663A(c)(1)(A)(ii).

111. United States v. OZ Afr. Mgmt., No. 16-CR-515, 2019 WL 4199904, at *6 (E.D.N.Y. Aug. 29, 2019) (holding the MVRA applied to equity dilution proximately caused by the corporation's illicit conduct).

112. *See* David Bastian, Note, *A 'Victimless' Crime? How the Interplay of the Demand Requirement and the Government's Fight Against Corruption is Injuring Shareholders*, 19 SUFFOLK J. TRIAL & APP. ADVOC. 200, 200–01 (2013-2014) (noting that although the noticeable impact of corruption is largely focused on "damage that is done to a local economy and the public trust in the jurisdiction where the bribe is made," there are other victims of corruption—including shareholders of companies that are investigated).

113. *OZ Afr. Mgmt.*, 2019 WL 4199904, at *6; *see also supra*, Section I(a)(2).

114. 18 U.S.C. § 3663A(a)(2).

115. *Id.* § 3663A(c)(3)(B).

IV. UNPREDICTABILITY IN PLEA NEGOTIATIONS & FIRST STEPS FORWARD

A. The Unforeseeable Impact of Court-Ordered Restitution

There are myriad factors that drive corporate plea bargaining, largely aimed at securing a deal that offers the best financial and reputational outcome for the company. The predictability of a plea agreement is its most important attribute, and it motivates corporations to seek them in favor of taking a criminal indictment to trial. The negotiated plea agreements help corporations "avoid the distraction, risk, and often devastating consequences of an indictment, trial, and conviction. The board of directors cleans house, pays money, and the company stays in business; though not without (sometimes a good bit of) pain."[116]

MVRA restitution claims complicate the situation. As a corporation weighs accepting a plea agreement, it likely seeks to set the upper bounds of its financial losses. Court-ordered restitution exposes the corporation to additional monetary penalties that can far exceed the agreed-upon sanction[117] and can deter the guilty pleas that expose it to such claims—lengthening and complicating negotiations between the company and its investigators.

B. Proactive Steps: Understanding Court-Ordered Restitution & the Dangers of Voluntary Restitution

The first step in alleviating the inevitable uncertainty of MVRA claims in the aftermath of a guilty plea involves understanding its newly emergent role in corporate criminal liability. To that end, the passages above seek to provide a primer—an introduction—of the complex legal framework. Corporate defendants must now factor an additional variable into their already difficult plea negotiations, but being alert to possible liability under the MVRA is certainly preferable to the situation OZ Africa now finds itself in; the company has been blindsided by a court-ordered restitution claim that can rise to over four times the agreed-upon criminal sanctions.[118] Familiarity with the Act is therefore vital. To be proactive, corporate actors must take the

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116. Eugene Illovsky, *Corporate Deferred Prosecution Agreements: The Brewing Debate*, CRIM. JUST. 36 (2006).

117. *See supra* note 12 and accompanying text.

118. *OZ Afr. Mgmt.*, 2019 WL 4199904, at *2, *9.

restitution claims into account when determining the content of a plea agreement and potential offers to plead guilty.

That said, knowledge alone does little to defend the corporation from unanticipated MVRA claims. To prepare a defense against a court-ordered restitution claim, company actors should work together with the prosecutors to find a solution. After all, in the OZ Africa case, the DOJ initially sided with the company against the MVRA claim—likely demonstrating that it seeks to uphold its side of the bargain.[119]

Notably, the Act itself provides several avenues for relief, chief among which is the opportunity to proactively offer victims financial redress for damages suffered.[120] It requires full payment of the restitution, however.[121] "Victims cannot settle restitution before the issuance of a restitution order because § 3664 provides victims with neither a grant of discretion nor the ability to absolve the defendant from paying restitution."[122] This means that voluntary restitution similar to that offered in the Volkswagen diesel-emissions settlement[123] would not provide the basis for independent compensation of victims and would not preempt a future MVRA claim for the full amount of damages suffered.[124]

The difficulty, then, in addressing MVRA restitution claims for corporate entities that have pleaded guilty underscores the importance of deferred-prosecution agreements and non-prosecution agreements in the context of corporate criminal liability, as discussed in the next section.

C. Deferred-Prosecution Agreements and Non-Prosecution Agreements as a Means of Avoiding the Morass of an MVRA Claim

Deferred-prosecution agreements (DPAs) and non-prosecution agreements (NPAs) operate somewhat differently, but at their core, they can both serve as legal instruments to finalize plea

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119. *Id.* at *10.

120. *See supra* note 69 and accompanying text.

121. Sentencing Guidelines Manual 2018, *supra* note 36, § 8B1.1(b)(1) (providing that the MVRA does not apply "when full restitution has been made").

122. Peters, *supra* note 70, at 1303.

123. VW Settlement, *supra* note 4, at 6.

124. Wendzel, Angelo, Jantz & Peterson, *supra* note 36, at 695.

negotiations for corporate misconduct.[125] Recently, DPAs and NPAs have been central to some of the largest corporate prosecutions in the United States.[126] Both DPAs and NPAs include 1) an assumption of responsibility for illicit conduct alleged and 2) an agreement by an agency or the DOJ to defer prosecution of the corporation for a set period or provided certain circumstances are met.[127] The agreements serve as public admissions of responsibility and can include significant fines as part of the settlement.[128]

For this analysis, the most important characteristic of the DPAs and NPAs is simple: these agreements do not operate as criminal convictions.[129] This renders the MVRA inapplicable, obviating the worrying effects of court-ordered restitution if the corporation can secure either a DPA or an NPA.[130] However, the same cannot be said for plea agreements.

Ultimately, this article serves more as a descriptive, rather than a prescriptive, piece for cases where guilty pleas are required as a part of the plea negotiations. At its core, the article stands as a foundation for resolving the difficult question of what to do about the newly discovered remedy of court-ordered restitution for corporate criminal cases.

CONCLUSION

Perhaps unsurprisingly, given the potential impact of the August 2019 Och-Ziff ruling, the defendant has submitted the case for reconsideration.[131] Nevertheless, the movant does not rest its argument on the legality of court-ordered restitution; rather, the company claims

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125. Brandon L. Garrett, *The Public Interest in Corporate Settlements*, 58 B.C. L. REV. 1483, 1499 (2017).

126. *Id.* at 1499–1500 (listing AIG, America Online, Barclays, Boeing, Bristol-Myers Squibb, CVS Pharmacy, General Electric, GlaxoSmithKline, HealthSouth, JPMorgan, Johnson & Johnson, Merrill Lynch & Co., Monsanto, and Sears).

127. Koehler, *supra* note 34, at 934.

128. *See* Garrett, *supra* note 125, at 1486 (noting that "[t]he penalties have reached new records, with annual total penalties in the tens of billions of dollars affecting entire industries and economies").

129. *Id.* at 1499 ("Unlike a plea agreement, which results in a criminal conviction, deferred and non-prosecution do not create any criminal record for the corporate defendant.").

130. 18 U.S.C. § 3663A(a)(1) (requiring a conviction).

131. Mem. of Law in Supp. of OZ Afr. Mgmt. GP, LLC's Mot. for Recons., United States v. OZ Afr. Mgmt. GP, LLC, No. 16-CR-515 (E.D.N.Y. Sept. 6, 2019), ECF No. 55.

the victim-status determination was founded on an error of fact.[132] It further seeks discovery to minimize the MVRA compensation requested by the victims.[133] Thus, court-ordered restitution for corporate criminal liability is likely here to stay.

With no substantive case law yet illuminating the path for corporations preparing future court-ordered restitution defenses, spreading awareness of the MVRA's new role as the first step is undoubtedly incomplete and imperfect without a solution. Voluntary restitution provides a poor alternative to court-ordered restitution that may prove more costly than the MVRA claim would have been. Additionally, offering it before more judges have had the opportunity to examine the MVRA in claims against other corporations may prove risky. The core takeaway, then, is simply that the MVRA can no longer be ignored over the course of plea negotiations. Before offering a plea of guilty in a prosecution agreement, corporate actors should stay apprised of the rapidly evolving legal framework for such claims and, of course, focus the bulk of one's negotiating leverage on settling with a DPA or an NPA to avoid the issue altogether.

132. *Id.* at 2.

133. Def.'s Notice of Mot. for Disc., United States v. OZ Afr. Mgmt. GP, LLC, No. 16-CR-515 (E.D.N.Y. December 9, 2019), ECF No. 71.