

# SCOTUS SAYS COSTS OF INTERNAL INVESTIGATIONS ARE NOT REIMBURSABLE UNDER MANDATORY VICTIMS RESTITUTION ACT

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## U.S. Investigations, Enforcement and White Collar Alert

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On May 29, 2018, the U.S. Supreme Court decided *Lagos v. United States* [1] and held that legal fees and other costs associated with a victim company's independent investigation of misconduct ultimately resulting in criminal convictions are not recoverable expenses under the Mandatory Victims Restitution Act of 1996 (the "MVRA"), and thus should not be reimbursed. In doing so, the Court made clear that the MVRA reimburses costs incurred for participating in government investigations and prosecutions, not internal investigations or civil proceedings. The Lagos decision resolves a circuit split, in which the First, Second, Fifth, Sixth, Seventh, Eighth, and Ninth Circuits generally adopted a broader interpretation of the MVRA [2], while the D.C. Circuit maintained a minority and more narrow interpretation. [3] The crux of the Lagos decision centers on MVRA § 3663A(b)(4), which requires restitution for "expenses incurred during participation in the *investigation* or prosecution of the offense or attendance at *proceedings* related to the offense." [4] The Court held that the terms "investigation" and "proceedings" only apply to government investigations. Therefore, a victim's legal fees are recoverable under the MVRA only where they are tied directly to the government investigation or prosecution.

## THE MVRA

The MVRA requires a sentencing judge to award full restitution to victims of crimes against property falling under Title 18 of the United States Code, including wire fraud, mail fraud, and most financial crimes. [5] Further, courts may not consider whether "a victim has received or is entitled to receive compensation with respect to a loss from insurance or any other source . . . in determining the amount of restitution." [6] Instead, the MVRA applies provided the individual or company suffering the loss simply qualifies as a "victim," i.e., they were "directly and proximately harmed as a result of the commission of [the] offense" [7] and did not take part in it (e.g., as a coconspirator). [8] Once this threshold criterion is met, the government bears the burden of proving the amount of restitution owed to the victim with specificity, but only by a preponderance of the evidence. [9]

## LOWER COURTS' RULINGS

The U.S. District Court for the Southern District of Texas sentenced Sergio Fernando Lagos to 97 months' imprisonment and ordered that he pay restitution pursuant to the MVRA — an amount of almost \$5 million. [10] This amount included forensic expert fees, legal fees, and consulting fees, [11] all of which were incurred during an internal investigation General Electric Capital Corporation ("GE") conducted into Lagos' crimes,

independent of the government's investigation. [12] Lagos entered a guilty plea for conspiracy to commit wire fraud, as well as five substantive counts of wire fraud. [13] For two years, Lagos falsified accounts receivable for GE, in order to "provide him and his co-defendants with uncollateralized funds." [14] After learning this, GE launched an internal investigation to determine the full extent of Lagos' — and perhaps others' — misconduct. [15] Lagos appealed to the Fifth Circuit, arguing that the MVRA only applies to necessary expenses incurred by a party participating in an official government investigation. [16] The Fifth Circuit disagreed with Lagos and affirmed the lower court's restitution award. [17]

## THE SUPREME COURT'S OPINION

In a unanimous opinion, the Supreme Court reversed the Fifth Circuit and adopted Lagos' position. In doing so, the Court embraced the D.C. Circuit's minority and more narrow interpretation of the MVRA, reasoning that "to interpret the statute broadly is to invite controversy." [18] Specifically, the Court held that "investigations" and "proceedings" under the MVRA only apply to government investigations and criminal proceedings, not internal investigations conducted by corporations even where those investigations run parallel to a government investigation. [19] The Court's analysis was purely textual — the Court simply looked at the structure of the sentences and the interplay of words in the MVRA, and held that "[t]he words suggest (though they do not demand) our limited interpretation. The word 'investigation' is directly linked by the word 'or' to the word 'prosecution,' with which it shares the article 'the.'" [20] The Court reasoned further that "[t]his suggests that the 'investigation[s]' and 'prosecution[s]' that the statute refers to are of the same general type. And the word 'prosecution' must refer to a government's criminal prosecution, which suggests that the word 'investigation' may refer to a government's criminal investigation." [21] The Court also compared the MVRA to other restitution statutes, noting that the MVRA explicitly lists the types of "losses and expenses that it covers," [22] whereas other "[restitution] statutes specifically require restitution for the full amount of the victim's losses" without such limitations. [23] The Court also pointed out that "this interpretation does not leave a victim such as GE totally without remedy" because GE and other victims could bring a civil lawsuit to recover costs of such internal investigations. [25]

## WHY IT MATTERS

Post *Lagos*, it is important for corporate victims from the initial stages of an internal investigation to consider which expenses may be reimbursable under the MVRA — and work with counsel to guide the government's investigative requests to ensure the broadest possible scope of recovery.

*Lagos* makes clear that legal fees and other expenses incurred during a company's internal investigation are not recoverable as restitution under the MVRA, even where the internal investigation is prompted by the government's investigation. Nonetheless, internal investigations prompted by a government inquiry will almost certainly involve overlapping costs, and thus such expenses may be deemed "expenses incurred while participating in the government's case" under the MVRA, e.g., identifying relevant information and documents in response to an informal request from the government. If so, the government is likely to recover these expenses for the company under the MVRA. If not, these costs may only be recoverable if a successful civil lawsuit is brought against the defendants, which obviously shifts litigation costs from the government to the corporate victim.

The line between the two is blurry. When in doubt, savvy corporate victims should work with counsel to insist on tailored information requests from the government before undertaking investigative efforts that may also be relevant to the government's case — this best positions a corporate victim to argue that legal fees and other expenses associated with its internal investigation are reimbursable under the MVRA and have the government bear the burden of litigating on the company's behalf.

#### Notes:

- [1] *Lagos v. United States*, No. 16-1519, 2018 WL 2402570 (U.S. May 29, 2018).
- [2] See, e.g., *United States v. Janosko*, 642 F.3d 40, 42 (1st Cir. 2011); *United States v. Amato*, 540 F.3d 153, 159–60 (2d Cir. 2008); *United States v. Lagos*, 864 F.3d 320, 321–22 (5th Cir. 2017); *United States v. Elson*, 577 F.3d 713, 727–28 (6th Cir. 2009); *United States v. Hosking*, 567 F.3d 329, 332 (7th Cir. 2009); *United States v. Stennis-Williams*, 557 F.3d 927, 930 (8th Cir. 2009); *United States v. Nosal*, 844 F.3d 1024, 1046–47 (9th Cir. 2016).
- [3] See *United States v. Papagno*, 639 F.3d 1093 (D.C. Cir. 2011).
- [4] MVRA § 3663A(b)(4) (emphasis added).
- [5] 18 U.S.C. § 3663A.
- [6] 18 U.S.C. § 3664(f)(1)(B).
- [7] 18 U.S.C. § 3663A(a)(2).
- [8] See generally *United States v. Ojeikere*, 545 F.3d 220 (2d Cir. 2008).
- [9] 18 U.S.C. § 3664(e) (providing procedural framework for the MVRA).
- [10] *Lagos v. United States*, No. 16-1519, 2018 WL 1393730, at \*16–19 (U.S. Feb. 26, 2018).
- [11] *Id.*
- [12] *Id.*
- [13] *United States v. Lagos*, 864 F.3d 320, 321–22 (5th Cir. 2017), *cert. granted*, 138 S. Ct. 734 (2018), and *rev'd and remanded*, No. 16-1519, 2018 WL 2402570 (U.S. May 29, 2018).
- [14] *Id.* at 322.
- [15] *Id.* at 323.
- [16] See *id.*
- [17] *Id.* at 325.
- [18] *Lagos v. United States*, No. 16-1519, 2018 WL 2402570 (U.S. May 29, 2018).
- [19] *Id.* at \*1.
- [20] *Id.* at \*3
- [21] *Id.*
- [22] *Id.* at \*5.
- [23] *Id.*
- [24] *Id.* at \*5.
- [25] *Id.*

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