Chapter 12: Forfeiture and Compensation for Victims of Crime

Forfeiture has become a critical tool in the recovery of illicit gains arising from financial crimes such as fraud, embezzlement, and theft. Prior to the enactment of the Civil Asset Forfeiture Reform Act (CAFRA) of 2000, Pub. L. No. 106-185, 114 Stat. 202 (2000), non-owner victims of crime could recover through remission only in criminal forfeitures and civil bank fraud forfeitures. In other civil forfeitures, victims could be compensated only where they were named in a criminal restitution order arising from the prosecution of a related offense. In 2000, CAFRA amended 18 U.S.C. § 981(e) to broaden the Attorney General's authority to restore forfeited assets to the victims of any offense that gave rise to the forfeiture. Accordingly, remission authority now exists for all offenses for which a related civil or criminal forfeiture order is obtained.

In concert with this expanded remission authority, the Criminal Division initiated a procedure in 2002 called "restoration." This procedure enables the Attorney General to transfer forfeited funds to a court for satisfaction of a criminal restitution order, provided that the victim named in the order otherwise qualifies for remission under the applicable regulations. While remission and criminal restitution are not directly related, they may serve similar functions. Remission is discretionary relief intended to reduce the hardship that may arise from forfeiture for persons who have incurred a monetary loss from the offense underlying the forfeiture. Restitution is an equitable remedy that is intended to make crime victims whole and prevent unjust enrichment to the perpetrator. In many cases, restoration—the use of forfeited funds to pay restitution—is desirable, since the defendant may be left without assets to satisfy his or her restitution obligation following forfeiture.

The Treasury Forfeiture Fund (TFF) has a similar procedure for remission and restoration. Please consult the *Guidelines for Treasury Forfeiture Fund Agencies on Refunds Pursuant to Court Orders, Petitions for Remission, or Restoration Requests* ("Treasury Blue Book"), available at http://www.treasury.gov/resource-center/terrorist-illicit-finance/Asset-Forfeiture/Documents/bluebook.pd f.¹

This chapter discusses the principal policies and procedures governing the return of forfeited assets to crime victims. Section I covers the basics of remission and restoration; section II discusses remission for insurers of victims; and section III discusses strategies for compensating victims of large fraud offenses within the Ninth and Eleventh Circuits.

I. Returning Forfeited Assets to Victims

A. Remission

Once assets have been judicially forfeited, the authority to distribute them to victims rests solely with the Attorney General, pursuant to the regulations governing the remission of forfeitures at 28 C.F.R. Part 9. Potential victims must be notified of the opportunity to file a petition for remission. In judicial forfeitures,

¹ Treasury Forfeiture Fund member agencies include the Internal Revenue Service (IRS), U.S. Immigration and Customs Enforcement (ICE), U.S. Customs and Border Protection (CBP), U.S. Secret Service (USSS), and U.S. Coast Guard.

notification is the responsibility of the U.S. Attorney's Office (USAO). Known victims should be notified by mail, and potential unknown victims may be notified by publication. In appropriate cases, the USAO may modify the standard notice of the Victim Notification System (VNS) to incorporate notice of the forfeiture and a model petition for remission. The notice should instruct the victims to file petitions with the USAO district that handled the civil or criminal forfeiture.

The authority to decide petitions for remission in judicial cases has been delegated to the Chief of AFMLS. 28 C.F.R. § 9.1(b)(2). Petitions are decided on the basis of written documentation; there is no right to a hearing on the petition. 28 C.F.R. § 9.4(g). Unsuccessful petitioners are entitled to one request for reconsideration, which is reviewed and decided by a different ruling official within AFMLS. 28 C.F.R. § 9.4(k)(3). Judicial review of a denial of remission is not available. *See United States v. One 1970 Buick Riviera Bearing Serial No. 494870H910774*, 463 F.2d 1168, 1170 (5th Cir.), *cert. denied*, 409 U.S. 980 (1972) (Attorney General has unreviewable discretion over remission or mitigation of forfeitures).

The determination of whether a victim is entitled to remission is governed by regulation. The breadth of options available for transfer of forfeited property to victims depends on the statute under which the property is forfeited. The options are broadest in criminal forfeiture, where the Attorney General has statutory authority not only to grant petitions for remission to victims of a violation of the offense that is the basis for the forfeiture, but also to "*take any other action to protect the rights of innocent persons which is in the interests of justice* and which is not inconsistent with the provisions of [the applicable chapter or section]." 21 U.S.C. § 853(i)(1), incorporated by reference in 18 U.S.C. § 982 for money laundering and other offenses (emphasis added). In civil forfeitures, the statutory authority is less broadly stated, and the Attorney General's authority to remit forfeited assets to victims does not appear to extend to other "innocent persons." *See*, e.g., 18 U.S.C. § 981(d); 21 U.S.C. § 881(d).

In administrative forfeitures, the authority to decide petitions for remission or mitigation rests with the seizing agency.² It is the responsibility of the agency to notify potential victims of the opportunity to file a petition for remission. The remission decision is at the discretion of the forfeiting agency and not reviewable in court. Questions regarding administrative forfeiture policies and procedures should be directed to the forfeiting agency. When petitions have been filed for both administratively and judicially forfeited assets in the same case, the seizing agency must coordinate with the forfeiture Assistant United States Attorney (AUSA) assigned to the case.

A.1 28 C.F.R. Part 9, Standards for Victims

The factual basis and legal theory underlying the forfeiture will determine the victims under 28 C.F.R. Part 9. "The term victim means a person who has incurred a pecuniary loss as *a direct result of the commission of the offense underlying a forfeiture.*" 28 C.F.R. § 9.2(v) (emphasis added). A *person* is "an individual, partnership, corporation, joint business enterprise, estate, or other legal entity capable of owning property." 28 C.F.R. § 9.2(m). Victims may also recover losses caused by a related offense. 28 C.F.R. § 9.8(a)(1). *Related offense* means: "(1) Any predicate offense charged in a Federal Racketeer Influenced and Corrupt Organizations Act (RICO) count for which forfeiture was ordered; or (2) An offense committed as

² See, e.g., 19 C.F.R. Parts 171 and 172.2; 26 C.F.R. Part 403, Subpart D; 28 C.F.R. § 9.1(b)(1).

part of the same scheme or design, or pursuant to the same conspiracy, as was involved in the offense for which forfeiture was ordered." 28 C.F.R. § 9.2(s).

A.2 Qualification to File

A victim may be granted remission of the forfeiture of property if the victim satisfactorily demonstrates that:

(1) a pecuniary loss of a specific amount has been directly caused by the criminal offense, or related offense, that was the underlying basis for the forfeiture, and the loss is supported by documentary evidence including invoices and receipts; (2) the pecuniary loss is the direct result of the illegal acts and is not the result of otherwise lawful acts that were committed in the course of the criminal offense; (3) the victim did not knowingly contribute to, participate in, benefit from, or act in a willfully blind manner towards the commission of the offense, or related offense, that was the underlying basis for the forfeiture; (4) the victim has not in fact been compensated for the wrongful loss of the property by the perpetrator or others; and (5) the victim does not have recourse reasonably available to other assets from which to obtain compensation for the wrongful loss of the property.

28 C.F.R. § 9.8(a).

"The amount of the pecuniary loss suffered by a victim for which remission may be granted is limited to the fair market value of the property of which the victim was deprived as of the date of the occurrence of the loss." 28 C.F.R. § 9.8(b). This provision presents three issues to be determined in connection with calculating a victim's loss: (1) What property did the victim lose as a direct result of the illegal activity?; (2) When was the victim deprived of it?; and (3) What was the fair market value of that property at that time? The term "fair market value" is not defined in 28 C.F.R. Part 9. When the loss is property other than money, the date of the victim's loss and the fair market value of the property on that date must be decided in order to determine the victim's recoverable loss.

A victim's pecuniary loss must be supported by documentary evidence. 28 C.F.R. § 9.8(a)(1) and (2). Losses that are secondary to the principal loss, such as "interest foregone or for collateral expenses incurred to recover lost property or to seek other recompense," are not eligible for remission. 28 C.F.R. § 9.8(b). Nor are losses from property damage or physical injuries, or from a tort, unless the tort is the illegal activity underlying the forfeiture. 28 C.F.R. § 9.8(c). Victims who "knowingly contribute to, participate in, benefit from, or act in a willfully blind manner towards the commission of the offense, or related offense, that was the underlying basis for the forfeiture" are ineligible for remission. 28 C.F.R. § 9.8(a)(3).

A victim need not show that his or her funds are among the funds that have been forfeited in order to establish eligibility for remission. Similarly, the tracing of a particular victim's funds into a forfeited account does not give that victim priority over other victims whose funds cannot be traced.

A.3 Priority of Payment

Priority in the distribution of forfeited assets is given to valid owners, lienholders, federal financial regulatory agencies, and victims (in that order), who in turn have priority over official use requests and equitable sharing requests.

A.4 Trustees

With the consultation and approval of AFMLS, the USAO may employ a trustee in large, multiple-victim cases to assist in notifying potential victims of the opportunity to seek remission, in processing the petitions, and in making decision recommendations. 28 C.F.R. § 9.9(c). The USAO must also consult with the lead seizing agency in the selection of the trustee.

A.5 Additional Grounds for Denial of Remission to Victims

Remission to victims may be denied: (1) if determination of the pecuniary loss to be paid to individual victims is too difficult; (2) if the amount to be paid to victims is small compared to the expense incurred by the Government in deciding the victims' claims; or (3) if the total number of victims is large and the amount available for payment to victims is so small as to make granting payments to victims impractical. 28 C.F.R. § 9.8(d).

A.6 Timeliness

Victims generally must file petitions for judicially forfeited assets within 30 days after receiving notice. However, when a victim fails to submit a valid petition within 30 days, exceptions may be allowed for good cause based on the particular circumstances of the case.

B. Restoration

In 2002, the Criminal Division issued new procedures designed to simplify and accelerate the return of forfeited property to victims, known as the "Restoration Procedures." The new procedures apply where: (1) both restitution to compensate victims and a related forfeiture (either civil, criminal, or administrative) have been ordered, (2) the victims and amounts listed in the restitution order essentially conform to the victims and amounts that would have been paid through the forfeiture remission process, and (3) other property is not available to satisfy the order of restitution.

The Restoration Procedures enable the United States to complete the forfeiture and recover costs. This permits victims to obtain fair compensation from the forfeited assets, in accordance with the court's restitution order, without having to file petitions for remission with the Government and await decisions. This is a standardized alternative procedure to petitions for remission, designed to accommodate victims and the courts to the furthest extent possible, while still meeting statutory requirements.

B.1 Background

Because forfeited assets are property of the United States, courts and defendants lack authority to use them to satisfy a defendant's criminal debts, including fines or restitution obligations. *See United States v. Trotter*, 912 F.2d 964 (8th Cir. 1990). In many cases, defendants are left with little or no property after the forfeiture is completed. Thus, prior to the issuance of the Restoration Procedures, the Government often seized property, and then made it available to satisfy court-ordered restitution rather than complete the forfeiture. This process, while cumbersome, worked where the seized assets were cash or bank accounts, and where there were no competing claims for the property. However, where assets needed to be maintained and sold, or where third parties claimed an interest in the property, completion of the forfeiture was necessary, and victims were generally required to take the additional step of filing petitions for remission in order to recover any part of the forfeited assets. Under the Restoration Procedures, the Government may now forfeit a defendant's property and transfer the proceeds to the court in satisfaction of an order of restitution. The Attorney General's restoration authority has been delegated to the Chief of AFMLS, pursuant to Attorney General Order No. 2088-97 (June 14, 1997).

B.2 How the Restoration Process Works

The Restoration Procedures require both a court order of restitution *and* an order of forfeiture. The Restoration Procedures also allow, when requested by the USAO, preliminary review of the expected restitution and forfeiture order by AFMLS so that AUSAs may advise the court of the Department's intended distribution of the property.

To use the Restoration Procedures, the USAO must send the Chief of AFMLS a copy of the Judgment in a Criminal Case containing the order of restitution and a copy of the forfeiture order, along with a written request signed by the U.S. Attorney, or his or her designee, that includes the representations set forth at section I.B.3. Once the Chief of AFMLS has approved the request for restoration, AFMLS notifies both the USAO and the custodian of the property. The custodian then transfers the net proceeds of the forfeiture to the clerk of court for distribution pursuant to the order of restitution.

Restoration is appropriate only when the distribution pursuant to the restitution order is essentially the same as the distribution that would be obtained through the remission process. Prosecutors wishing to use the Restoration Procedures must work with the probation officer and the court to make sure that the court's restitution order lists the names of all victims and the amount of restitution due to each. Prosecutors also should be cognizant that restitution is generally available for a much broader category of harms than may be satisfied through remission, which is allowed only for pecuniary losses caused by the offense underlying the forfeiture or a related offense. Moreover, 28 C.F.R. § 9.8(b) provides that the victim's loss is limited to the fair market value of the property of which the victim was deprived, as of the date of the loss. No allowance is made for interest forgone, lost profits, or collateral expenses incurred to recover lost property or to seek other recompense. Thus, restoration may not be used where a significant portion of the losses covered by the restitution order relate to bodily harm, injuries in tort or contract that may relate to the crime of conviction, and collateral expenses such as legal, accounting, or security expenditures incurred in trying

to correct the harm caused by the crime. If the restitution order is not amenable to the restoration process, the USAO will be advised and assets may be distributed through the remission process.

B.3 Representations

The Restoration Procedures are designed to accomplish results that are consistent with the standards that apply to the remission of forfeited assets at 28 C.F.R. § 9.8. In order to ensure that such standards are met, the U.S. Attorney, or his or her designee, must inform AFMLS of the following, in writing and accompanied by a signature, as part of the request for restoration:

- all known victims have been properly notified of the restitution proceedings and are properly accounted for in the restitution order. This representation is intended to ensure that no victims have been left out of the restitution order and that all are treated fairly in the order.
- to the best of the U.S. Attorney's, or designee's, knowledge and belief after consultation with the seizing agency, the losses described in the restitution order have been verified and reflect all sources of compensation received by the victims, including returns on investments, interest payments, insurance proceeds, refunds, settlement payments, lawsuit awards, and any other sources of compensation for their losses. This is to avoid double recovery by victims who may already have been compensated for part of their losses.
- to the best of the U.S. Attorney's, or designee's, knowledge and belief after consultation with the seizing agency, reasonable efforts to locate additional assets establish that the victims do not have recourse reasonably available to obtain compensation for their losses from other assets, including those owned or controlled by the defendants.
- there is no evidence to suggest that any of the victims knowingly contributed to, participated in, benefitted from, or acted in a willfully blind manner, toward the commission of the offenses underlying the forfeiture or a related offense. This is to prevent the return of forfeited property to those who essentially took part in the conduct that led to the forfeiture.

Because restitution and forfeiture are mandatory and independent parts of a criminal sentence, the defendant may not use forfeited assets to satisfy the restitution order if other assets are available for that purpose. Typical examples of this situation might involve corporations that have extensive holdings that are not subject to forfeiture, or individuals who have property that exceeds the amount subject to forfeiture. The statutes governing restitution permit the Government to enforce the restitution order as a final judgment against almost all of the defendant's property, not just facilitating property or fraud proceeds that may be subject to forfeiture.

B.4 Timing

Civil and administrative forfeiture actions can proceed faster than the parallel criminal case. Consequently, assets might be forfeited, equitably shared, placed into official use, or remitted to victims who file petitions long before restitution is ordered, and would not be available for application to the restitution order. To avoid this outcome, the USAO must coordinate with the seizing agency to secure retention of property for restoration. In addition, the USAO should place a "hold" on the distribution of seized assets in the Consolidated Assets Tracking System (CATS). If the forfeited property has already been transferred, placed into official use, or equitably shared, CATS will not accept the hold request and will transmit an error message to the CATS user. Where appropriate, such transfers that erroneously occur before victims have received compensation may be reversed at the discretion of the Chief of AFMLS or the Director of TEOAF (for seizures by TFF member agencies) to make the property available for restoration.

Because CATS is not the TFF system of record, the USAO must request that the TFF preserve the asset in cases where restitution may be ordered or where remission or restoration may occur. To ensure the preservation of the forfeited property in judicial cases involving TFF agencies, the USAO must also notify and send a copy of the restoration request to the TFF seizing agency. *See Guidelines for Treasury Forfeiture Fund Agencies on Refunds Pursuant to Court Orders, Petitions for Remission, or Restoration Requests*, section VI.B.2.a.i.³ In administrative forfeitures involving TFF member agencies, the USAO must obtain the written concurrence of the local and/or Headquarters TFF seizing agency before AFMLS may approve restoration of forfeited funds for purposes of criminal restitution. *See id.* at sections VI.B.2.a.ii; VI.B.3.b. TEOAF policy does not permit the release of administratively forfeited funds to crime victims without the prior approval of the TFF seizing agency. *See id.* at section VI.B.2.a.ii.2.

B.5 Payment

Payment will be made *only* in accordance with the court's restitution order. If the forfeited assets are not sufficient to fully satisfy the order, payment is made on a pro-rata basis, according to the losses listed in the restitution order. If the assets are to be restored to the victims listed in the restitution order, AFMLS will notify the USAO and property custodian in writing. The custodian will then transfer the net forfeited proceeds to the clerk of court for distribution per the restitution order.

B.6 Benefits

The Restoration Procedures are intended to assist AUSAs in their use of forfeited assets to compensate victims and to assist victims in their pursuit of compensation. Victims will not need to file petitions for remission, and the review process will be faster. The forfeiture will be completed so that costs can be recovered and third-party rights extinguished. Proceeds from civil, criminal, and DOJ administrative forfeitures can be handled together and applied to restitution. Forfeiture AUSAs and agents will get credit for their work, and assets will be distributed primarily as they would have been under the remission regulations.

C. Termination of Forfeiture and Direct Payment of Assets to Victims

In some situations, it may be preferable to move to vacate the forfeiture proceeding and request that the court direct that the property be turned over directly to the victim to be applied to restitution pursuant to 18 U.S.C. \$3663A(b)(1)(A), or be transferred to the clerk of court to be paid to the victim. This approach may

³ Available at http://www.treasury.gov/resource-center/terrorist-illicit-finance/Asset-Forfeiture/Documents/bluebook.pdf.

be preferable to remission or restoration when the victim is entitled to restitution for non-pecuniary harm or other collateral costs that are not compensable under the remission regulations. In addition, termination of forfeiture may be desirable in multiple-victim fraud cases arising in jurisdictions with unfavorable case law concerning constructive trusts. *See* "Litigation of Multiple-Victim Fraud Cases in the Ninth and Eleventh Circuits," section III. Further, victims may receive compensation faster under this approach than awaiting a final order of forfeiture and a decision from the Attorney General regarding remission or restoration. Termination of forfeiture is appropriate only if no final order of forfeiture has been entered, as once property is forfeited to the Government, the Attorney General is solely responsible for its disposition. 18 U.S.C. § 982(b)(1) (incorporating 21 U.S. C. § 853(i)). If payment is to be made to the victim through the clerk of court, the property subject to forfeiture must be liquid, as the clerk cannot liquidate real or personal property.⁴

Petition for Remission	Restoration
There is no need for a criminal conviction of person from whom property is forfeited. Judicial forfeiture orders may be criminal or civil. Seizing agencies decide petition for remission of administratively forfeited assets.	Restoration requires a criminal conviction, an Order of Restitution, and a criminal, civil, or administrative forfeiture which is related to the victim's loss.
The USAO, in cooperation with the investigative agency, sends notice to all known victims of the offense underlying the forfeiture.	The USAO works with the investigative agency and probation office to identify victims and determine their losses.
In judicial forfeitures, the victim files petition for remission with the USAO.	The victim is not required to file a petition but may be required to submit information to the investigative agency or probation office.
The USAO requests the investigative agency to prepare a report and recommendation. The USAO makes a recommendation and forwards the petition package to AFMLS.	The USAO submits a restoration request, including the four required representations, to AFMLS. <i>See</i> section I.B.3
The Attorney General, through AFMLS, reviews the petition and may grant remission to eligible victims.	The Attorney General, through AFMLS, reviews the restoration request and may restore forfeited property to victims identified in the restitution order.
The victim must file a petition in order to receive compensation.	The victim must be named in restitution order. "Hybrid" cases with both remission and restoration are not acceptable. All forfeited proceeds are turned over to the court for distribution to victims.
The custodian of forfeited asset distributes the net proceeds directly to victims.	The custodian of the forfeited asset transfers the net proceeds directly to the clerk of the court.

D. Comparison of Judicial Remission and Restoration

⁴ See also chapter 11, section II of this Manual, "Is a Prosecutor Bound, Ethically or Otherwise, to Forego Forfeiture in Favor of Restitution?"

II. Remission for Insurers of Victims

AFMLS has proposed a revision to the regulatory definition of *victim* at 28 C.F.R. § 9.2(v) to include insurers of victims. Remission may be granted directly to the insurer up to the amount of the victim's pecuniary loss that was compensated. This approach recognizes an insurer's traditional right of subrogation and recovery for claims paid to victims, while preventing profits or windfalls to parties who may acquire an interest in the forfeited property from the victim *after* the loss occurred (usually for less than the full value of the victim's loss). Accordingly, remission may be granted if the insurance agreement with the victim was entered into before the offense that gave rise to the forfeiture, or before the victim's knowledge of the offense. In rare cases where the victim and the insurer both request remission, or are both named in the restitution order, the victim shall be given priority to the extent of any loss that was not compensated by the insurer (e.g., a deductible).⁵

III. Constructive Trusts in Multiple-Victim Fraud Cases

While the courts generally agree that fraud victims do not retain legal title in money paid voluntarily into a fraud scheme, the courts are increasingly recognizing constructive trusts in favor of victims. Under this equitable remedy, the perpetrator of the fraud holds title to the victim's funds in trust for the benefit of the victim. This legal theory is troublesome in forfeiture cases involving multiple victims, because it can transform the forfeiture case into a cumbersome liquidation proceeding in which all victims compete against each other and against the Government for the seized funds. The Government should generally oppose a claim of constructive trust in such cases, so that the Attorney General can return the funds to the victims through the orderly remission process.

In *United States v.* \$4,224,958.57 ("*Boylan*"), 392 F.3d 1002 (9th Cir. 2004), the Ninth Circuit held that victims of a large fraudulent investment scheme had established a sufficient legal interest in the seized proceeds through a constructive trust to confer upon them standing to contest the forfeiture. Under this holding, government attorneys litigating forfeiture cases may be required to identify all potential victims of the fraud, notify them of the forfeiture action, and afford them an opportunity to file claims in the judicial proceeding. A related difficulty is that a constructive trust generally requires a victim to trace his or her money to the seized funds, which may warrant extensive discovery and evidentiary hearings. Some judicial circuits have followed the holding of *Boylan* in forfeiture cases. Government attorneys should therefore consult their circuit's case law in responding to constructive trust claims in their district.

In litigating forfeiture cases in circuits that recognize constructive trusts, Government attorneys may elect to oppose victims' individual claims of constructive trust on the merits, and further argue that recognition of the trust would result in unfair priority to the claimant, contrary to the equitable principles underlying the trust. The courts should also be advised that forfeiture will enable all victims to have the opportunity to recover the funds on the *pro-rata* basis through the Attorney General's remission authority. *See* 28 C.F.R. § 9.8(a)(1), (e).

⁵ See generally 18 U.S.C. § 3664(j)(1).