

THE DOUBLE WHAMMY: PAYING A FORFEITURE JUDGEMENT AND A RESTITUTION JUDGEMENT IN A SINGLE CRIMINAL CASE

Scott Gilbert¹

Over the last several years, Federal criminal practitioners have become increasingly familiar with the notion that a defendant in a fraud case will likely be ordered to forfeit the proceeds of her offense and to pay restitution to the victims. The vast majority of Circuit Courts of Appeal have held that forfeiture and restitution are separate and distinct parts of a defendant's sentence, that they are both mandatory, and that they each serve a different purpose. *See United States v. Taylor*, 582 F.3d 558, 566 (5th Cir. 2009)(collecting cases); *see also United States v. Torres*, 703 F.3d 194, 204 (2d Cir. 2012)(collecting cases). In many white collar cases, the defendant will be ordered to forfeit the same amount of money she is ordered to pay in restitution. Despite the prevailing law, the notion that a defendant must pay the same money back twice seems unfair and overly punitive. Luckily, in some cases, there is a way for a defendant to avoid paying both a forfeiture and restitution judgment, despite the mandatory order of the court imposing both obligations. This can occur through two processes, remission and restoration.

Remission and Restoration

The Department of Justice ("DOJ") is permitted to transfer forfeited property to victims named in a restitution order in the same case the forfeiture was ordered, so long as certain requirements are met. *See* 21 U.S.C. § 853(i)(1); *see also* 28 C.F.R. Part 9. This process is called remission or restoration, depending on which internal mechanism DOJ chooses to use. *Asset Forfeiture Policy Manual* (2016), Chapt. 12, Sec. I.A & B. When forfeited money is paid by the DOJ to a victim named in a restitution order, a defendant's restitution obligation is reduced by the amount of forfeited money the victim receives. *Taylor*, 582 F.3d at 567-68. If the amount forfeited to the government is equal to or greater than the amount of restitution ordered, then a

¹ Scott Gilbert practices with Watkins & Eager, PLLC in Jackson, Mississippi. Mr. Gilbert is a member of the firm's Health Care and White Collar Defense and Corporate Investigations Groups. Mr. Gilbert practices primarily in the areas of Healthcare Litigation, White Collar Criminal Defense, Governmental and Corporate Investigations, and Asset Forfeiture Litigation. Prior to joining the firm, he served as an Assistant United States Attorney in the Criminal Division of the Southern District of Mississippi. Scott also served as the Asset Forfeiture and Money Laundering Program Coordinator for the Executive Office of United States Attorneys. He may be reached at 601-965-1922 or sgilbert@watkinseager.com.

defendant can satisfy both his forfeiture order and restitution order by paying only the forfeiture order, if DOJ decides to use forfeited money to pay the victim.

The Court Cannot Order the Government to Apply forfeited money to restitution.

An important principle that defense counsel must understand is that the government cannot be compelled by the court to pay forfeited money to a victim in lieu of restitution. *See United States v. Cohan*, 988 F.Supp. 2d 323, 329 (E.D.N.Y. 2013). The authority to remit or restore forfeited money to a victim is vested solely in the discretion of the Executive Branch. *Id.* This notion makes sense when you consider the temporal relationship of the final order of forfeiture, which must come first, and the act of actually paying the victim, which can only occur after the property is forfeited to the United States. Once an asset is ordered forfeited by the court, it becomes the property of the United States. Once the forfeiture is perfected the court no longer has jurisdiction over the asset. Ordering the government to give its property to a crime victim would be tantamount to the court ordering a private citizen to give his neighbor money to buy a new car. The court simply does not have the authority to determine how the government will dispose of its property. *Id.* The law, however, gives the Attorney General the ability to use forfeited assets to pay certain crime victims for their losses. *Id.*; *see also* 21 U.S.C. § 853(i)(1).

A Federal Prosecutor Cannot Obligate the Government to Apply Forfeited Money to a Restitution Order

The first, and most common, mistake made by federal prosecutors and defense counsel in negotiating forfeiture and restitution settlements is failing to understand this hard and fast rule. Assistant United States Attorney's do not have the authority to represent to a court, victim or defendant that a petition for remission or a request for restoration will be granted. *Asset Forfeiture Policy Manual* (2016), Chapt. 12, Sec. I.A. Pursuant to federal statute and regulation, only the Attorney General or his designee may authorize the remission or restoration of forfeited funds to the victim of a crime. *See United States v. Pescatore*, 637 F.3d 128, 131 (2d Cir. 2011); *see also Asset Forfeiture Policy Manual* (2016), Chapt. 3, Sec. V. The Attorney General has delegated his authority in that regard to the Chief of the Money Laundering and Asset Recovery Section ("MLARS") of the Department of Justice. 28 C.F.R. § 9.1(b)(2). Assistant United States Attorneys are not authorized to enter into plea agreements wherein they promise to apply the proceeds of forfeiture to the restitution expected to be ordered by the court, unless first authorized to do so by the MLARS. *Asset Forfeiture Policy Manual* (2016), Chapt. 3, Sec. V. Such representations will not be upheld by courts. *See United States v. Cohan*, 988 F.Supp. 2d 323, 327-28 (E.D.N.Y. 2013).

How Can You Make it Happen for Your Client?

The MLARS has an internal unit that adjudicates requests to have forfeited money remitted or restored to crime victims in lieu of restitution. A request can be submitted in two ways. If a request is submitted by the victim named in the restitution order, it is called a Petition

for Remission. *Asset Forfeiture Policy Manual* (2016), Chapt. 12, Sec. I.A. In many U.S. Attorneys offices, the asset forfeiture staff will assist a victim in drafting a petition for remission. *Id.* The U.S. Attorney's Office handling the prosecution can also submit the request themselves, without consulting the victim. That process is known as a Request for Restoration. *Asset Forfeiture Policy Manual* (2016), Chapt. 12, Sec. I.B. Petitions for Remission are processed pursuant to federal regulations and DOJ policy. *Asset Forfeiture Policy Manual* (2016), Chapt. 12, Sec. I.A. Requests for Restoration are a creation of DOJ policy, and are subject to many of the same regulations as Petitions for Remission. *Asset Forfeiture Policy Manual* (2016), Chapt. 12, Sec. I.B. Only after the MLARS has approved a petition or request can a federal prosecutor represent to a defendant, her counsel, and the Court that the funds paid to satisfy the forfeiture order will be paid to a victim of the offense, in lieu of a restitution payment from the defendant. Final approval is given only after the court has entered a final order of forfeiture, and in the case of restoration, included a restitution order in the Judgment & Commitment Order, both of which occur after sentencing. *Asset Forfeiture Policy Manual* (2016), Chapt. 12, Sec. I.B.2.

Provisional Approval Can Be Obtained at the Plea Negotiation Stage

Waiting until after sentencing to get approval to apply forfeited money to a restitution debt makes it impossible to address the issue at the plea negotiation stage. The good news is, despite the regulations and policies that preclude final approval until after the respective forfeiture and restitution orders have been entered, DOJ does have a process that will allow defense counsel and prosecutors to acquire a sense of certainty in this regard during the plea negotiation process. Upon request of the U.S. Attorney's Office, MLARS will consider a Request for Restoration give a conditional decision to the request prior to the entry of the respective final orders. *Asset Forfeiture Policy Manual* (2016), Chapt. 12, Sec. I.B.2. This conditional approval can be obtained before a guilty plea is entered, and as such, can be conditionally made part of the plea agreement. Such conditional approval is valid as long as the factual representations that were relied upon to grant the approval do not change before the final order of forfeiture and the Judgment and Commitment order with restitution included is entered.

The approval process is fact intensive and will depend on whether a particular victim can satisfy the requirements for remission established in the regulations. Unfortunately, defendants have no control over this part of the process, as it is the victim and the U.S. Attorney's office that are required to prepare and submit the request to MLARS. One key piece of information a defendant can provide to aid in the preparation of the request is his ability to pay both a forfeiture and restitution judgment. A defendant's inability to pay both is one of the most significant factors MLARS will consider in making the determination of whether to grant or deny a petition for Remission or a request for Restoration. *See* 28 C.F.R. § 9.8(b)(5); *see also* *Asset Forfeiture Policy Manual* (2016), Chapt. 12, Sec. I.B.3. Even if plea negotiations prove to be unsuccessful nothing in the regulations or policy prevent a victim from receiving forfeited property through the remission or restoration processes, even if the defendant elects to go to trial.

The following checklist contains tips that will help defense counsel enhance the chances that the government will ultimately decide to apply forfeited money to a restitution order.

Checklist for Practitioners Addressing Forfeiture and Restitution

- Many, if not most, line AUSA's are unfamiliar with this process. Get the Asset Forfeiture Chief or Coordinator in the U.S. Attorney's Office involved in the plea negotiations early on. Every U.S. Attorney's Office should have at least one AUSA that is familiar with this process. The Remission/Restoration unit at MLARS is efficient, but it is still a part of the federal government bureaucracy. Getting the request for provisional approval to MLARS as early as possible is vital.
- The U.S. Attorney's Office is required by DOJ policy to notify all victims of their ability to submit a petition for remission. *Asset Forfeiture Policy Manual* (2016), Chapt. 12, Sec. I.A. Ask if this has been done early in the process of plea negotiations.
- The remission/restoration process only works in one direction, from forfeited funds to restitution. Do not allow your client to pay the restitution prior to sentencing in cases with both a forfeiture and restitution order. If the restitution order is paid first, the forfeiture order cannot be satisfied with money paid directly to restitution. *See United States v. Browne*, 505 F.3d 1229, 1281 (11th Cir. 2007). Have your client pay the forfeiture judgment, and wait for final approval of the Remission or Restoration request.
- Stay persistent on this point in plea negotiations. Line AUSA's that understand this process do not generally like to pursue it, because it inures to the benefit of the defendant by preventing them from paying both a forfeiture and a restitution judgment. It is unlikely, however, that a line AUSA will choose to go to trial over this issue.
- Do not plan to try and get the court to offset the amount of forfeiture by the amount of restitution it orders. The law in most circuits expressly prohibits this practice and the government will win a remand for resentencing on this issue if it chooses to appeal.
- Having the agreement to apply forfeited property to restitution in the plea agreement is worthless without the pre-approval letter from MLARS.
- The most frequent reason remission and restoration requests are denied by MLARS is because a defendant is deemed to have sufficient assets to pay both orders.
- When Restoration is the process used by the government, the names of the victims and the amounts due in restitution must be correctly listed in the Judgment and Commitment order. MLARS will only make payments to victims identified in the order and only to the payment addresses specified in the order. Defense counsel must coordinate with the AUSA and review the Judgment & Commitment order when it is entered to ensure all of the restitution information is accurate.