

Supreme Court Holds Mandatory Federal Restitution Statute Does Not Cover Certain Professional Costs Incurred by Corporate Victims

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On May 29, 2018, the U.S. Supreme Court issued an unanimous opinion in *Lagos v. United States*. *Lagos* presented the issue of whether costs incurred during and as a result of a corporate victim’s investigation (rather than a governmental investigation) must be reimbursed by a criminal defendant under the Mandatory Victims Restitution Act (“MVRA”).¹ Resolving a circuit split, the Court narrowly held that restitution under the MVRA “does not cover the costs of a private investigation” commenced by a corporate victim on its own initiative and not at the Government’s invitation or request.²

The Court’s decision is notable for rejecting the Government’s broad interpretation of the MVRA and for recognizing the “practical fact” that such a broad interpretation would invite “significant administrative burdens.”³ But the opinion is also notable for what it does not decide. The Court’s opinion expressly leaves unaddressed the question of whether professional costs incurred during a private investigation performed at the Government’s request would be covered by the MVRA.⁴

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¹ *Lagos v. United States*, No. 16-1519, 2018 WL 2402570, at 1, 8, available at https://www.supremecourt.gov/opinions/17pdf/16-1519_o7jp.pdf (hereinafter “Supreme Court Decision”).

² *Id.* at 1.

³ *Id.* at 5.

⁴ *Id.* at 8.



Background⁵

The MVRA

Under the MVRA, a sentencing court “shall order . . . that the defendant make restitution to the victim” where that defendant is convicted of certain qualifying offenses.⁶ As relevant here, a defendant convicted of certain qualifying offenses must “reimburse the victim for lost income and necessary child care, transportation, *and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense.*”⁷ In *Lagos*, the Supreme Court set out to decide “whether the words ‘investigation’ and ‘proceedings’ are limited to government investigations and criminal proceedings, or whether they include private investigations and civil proceedings.”⁸

Factual Background and Procedural History

Petitioner Sergio Fernando Lagos (“Lagos”) controlled a trucking company,⁹ which had a revolving loan financing agreement with General Electric Capital Corporation (“GECC”).¹⁰ Lagos and his co-defendants defrauded GECC by using false invoices to overstate the value of the company’s accounts receivables.¹¹ That misrepresentation caused GECC to provide Lagos and his co-defendants with millions of dollars of uncollateralized funds.¹² Ultimately, the fraudulent scheme caused the company to file for bankruptcy.¹³ When GECC learned of the scheme, it took steps to “investigate the fraud and mitigate its effects.”¹⁴ GECC incurred nearly \$5 million in professional costs—from four law firms, a computer

forensics and e-discovery firm, and a financial consulting firm—in order “to investigate the full extent and magnitude of the fraud and to provide legal advice relating to the fraud”¹⁵ in connection with the trucking company’s bankruptcy proceedings and liquidation. Importantly, the Government did not request that GECC conduct its corporate investigation.¹⁶

The Government indicted Lagos, who pled guilty to one count of conspiracy to commit wire fraud and five counts of wire fraud.¹⁷ The District Court entered a broad order of restitution requiring Lagos to pay restitution under the MVRA, including approximately \$5 million for the professional costs incurred by GECC during its investigation and in connection with the bankruptcy proceedings.¹⁸

On appeal, Lagos challenged the restitution order. The Fifth Circuit affirmed,¹⁹ holding that “under the MVRA the restitution order properly included the costs of [the] internal investigation and bankruptcy-related expenses.”²⁰ Applying existing circuit precedent, the court “gave a broad reading” to the MVRA provision at issue.²¹ One of the judges on the panel concurred, joining in the court’s opinion, but also “wr[ote] separately only to suggest that [the Fifth Circuit] may be interpreting Section 3663A(b)(4) too broadly.”²² Specifically, the concurring opinion found persuasive the D.C. Circuit’s narrow interpretation of the MVRA, which held that “‘participating’ in a government investigation does not embrace an internal investigation, ‘at least one that has not been required

⁵ Our discussion of the background material draws in part from our prior memorandum on *Lagos v. United States*. Please [click here](#) to read the prior memorandum in full.

⁶ 18 U.S.C. § 3663(A)(a)(1).

⁷ 18 U.S.C. § 3663A(b)(4) (emphasis added).

⁸ Supreme Court Decision at 1.

⁹ Joint Appendix at 33-34 ¶¶ 6-7.

¹⁰ *Id.* at 34 ¶ 12.

¹¹ *Id.* at 36 ¶ 16; Lagos’s Br. at 10; Government’s Br. at 2-4.

¹² Joint Appendix at 36 ¶ 16; Lagos’s Br. at 10; Government’s Br. at 2.

¹³ Joint Appendix at 16; Lagos’s Br. at 10; Government’s Br. at 5.

¹⁴ Government’s Br. at 5.

¹⁵ *United States v. Lagos*, 864 F.3d. 320, 322 (5th Cir. 2017), *rev’d and remanded*, *Lagos v. United States*, No. 16-1519 (May 29, 2018); Lagos’s Br. at 10; Government’s Br. at 6-7.

¹⁶ Lagos’s Br. at 12.

¹⁷ Joint Appendix at 32-33.

¹⁸ Lagos’s Br. at 10-11.

¹⁹ *See Lagos*, 864 F.3d at 321.

²⁰ Lagos’s Br. at 11 (citing *Lagos*, 864 F.3d at 322-23).

²¹ *Lagos*, 864 F.3d at 322; *see also* Lagos’s Br. at 11.

²² *Lagos*, 864 F.3d at 324 (Higginson, J., concurring); *see also* Lagos’s Br. at 12.

or requested by criminal investigators or prosecutors.”²³

Lagos filed a petition for writ of certiorari and the Supreme Court granted his petition on January 12, 2018.²⁴ On April 18, 2018, the Supreme Court heard oral argument in this case.²⁵ For a detailed description of the parties’ arguments in their briefs and at oral argument, please see our prior memorandum available [here](#).

The Supreme Court’s Decision

In an unanimous decision authored by Justice Breyer, the Supreme Court narrowly concluded that the language “investigation” and “proceedings” with respect to “expenses incurred during participation in the *investigation* or prosecution of the offense or attendance at *proceedings* related to the offense” does not “include private investigations and civil proceedings.”²⁶ Rather, the Court held that the investigations and proceedings to which Congress referred were “limited to government investigations and criminal proceedings.”²⁷

Justice Breyer stated the Court’s holding “rests in large part” upon a textual analysis of the statute, both in regards to the MVRA’s “individual words and the text taken as a whole.”²⁸ The Court found that because the statutory text’s reference to “prosecution” must necessarily mean the government’s criminal prosecution, “investigation” must also refer to a government’s criminal investigation.²⁹ Drawing on similar logic, the court also concluded that “proceedings” refers to criminal proceedings rather than civil or bankruptcy proceedings.³⁰ Moreover, the Court applied a natural reading of “participation” and “attendance” to determine that they referred to a victim’s participation in the Government’s

investigation or attendance in proceedings related to the offense, rather than the more “awkward[.]” use of those words to refer to a victim’s role in its own investigation or attendance at civil or bankruptcy proceedings.³¹

With respect to the statute’s text taken as a whole, the Court applied the interpretive principle of *noscitur a sociis*—“statutory words are often known by the company they keep”—for further support that the MVRA does not cover professional costs incurred at a victim’s own choosing and not during a criminal investigation or at the government’s request.³² The Court identified that the provision in question listed “three specific items that must be reimbursed, namely, lost income, child care, and transportation,” which are “precisely the kind of expenses that a victim would be likely to incur when he or she . . . misses work and travels to talk to government investigators, to participate in a government criminal investigation, or to testify before a grand jury or attend a criminal trial.”³³ The MVRA, by contrast, “says nothing about the kinds of expenses a victim would often incur when private investigations, or . . . bankruptcy proceedings are at issue[.]”³⁴

Additionally, the court identified a “practical fact: [a] broad reading [of the MVRA provision at issue] would create significant administrative burdens.”³⁵ The statute requires restitution for “*necessary* . . . other expenses” and “if the statute is broadly interpreted, [there would be] disputes as to whether particular expenses ‘incurred during’ participation in a private investigation or attendance at . . . a bankruptcy proceeding, were in fact ‘necessary.’”³⁶ These “disputes may become burdensome in cases involving multimillion dollar investigation expenses for teams of lawyers and accountants.”³⁷ The Court also noted that

²³ *Lagos*, 864 F.3d at 324 (Higginson, J., concurring) (quoting *Papagno*, 639 F.3d at 1098-99).

²⁴ Lagos’s Br. at (1); <https://www.supremecourt.gov/>, Docket for 16-1519, *Lagos v. United States*.

²⁵ Supreme Court Decision at 1.

²⁶ *Id.* (citing 18 U.S.C. § 3663A(b)(4) (emphasis in original)).

²⁷ *Id.*

²⁸ *Id.* at 3.

²⁹ *Id.* at 4.

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 4-5.

³³ *Id.*

³⁴ *Id.* at 5.

³⁵ *Id.*

³⁶ *Id.* (citing § 3663A(b)(4)).

³⁷ *Id.*

there could be disputes as to what constitutes “attendance at *proceedings related to the offense*” in the determination of what costs are “eligible for restitution.”³⁸ The Court expressed “doubt whether Congress intended, in making this restitution mandatory, to require courts to resolve these potentially time-consuming controversies as part of criminal sentencing...”³⁹ The Court’s “narrower construction” of the MVRA avoids such controversies.⁴⁰

The Court then addressed the Government’s “arguments favoring a broad interpretation” of the MVRA provision at issue.⁴¹ The Court considered the Government’s argument that “the broad purpose of the [MVRA]” was “to ensure that victims of a crime receive full restitution;” and that a narrow interpretation threatens to leave crime victim’s without restitution for expenses incurred as a result of the offense.⁴² But the Court said this type of “broad” purpose “does not always require us to interpret a restitution statute in a way that favors an award.”⁴³

To support that conclusion, the Court distinguished other federal restitution statutes (that, for example, “specifically require restitution for the ‘full amount of the victim’s losses,’ defined to include ‘any . . . losses suffered by the victim as a proximate result of the offense’⁴⁴) from the MVRA, which does not include such broad language but instead “specifically lists the kinds of losses and expenses that it covers.”⁴⁵ The Court added that its narrow interpretation of the MVRA does not leave corporate victims without recourse; they may, for example, file civil suits against the defendants and obtain judgments against them—as GECC did here.⁴⁶ Although the Court acknowledged that corporate victims may not be able to enforce such civil judgments against an insolvent defendant, the

Court (somewhat unrealistically) stated that “there is no reason to think that collection efforts related to a criminal restitution award would prove any more successful.”⁴⁷

Notably, the Court did not address one of the most important questions raised by the MVRA: whether expenses incurred by a corporate victim in cooperating with a Government investigation can be the subject of a restitution order.⁴⁸ The Court noted that the Government had made the argument that “GE shared with the Government the information that its private investigation uncovered . . . [and accordingly] should bring the expenses of that investigation within the terms of the statute[,] even if the ‘investigation’ referred to by the statute is a government’s criminal investigation.”⁴⁹ However, the Court declined to address that question. It noted that the statute refers to “expenses incurred *during* participation in the investigation”⁵⁰ and not to “expenses incurred *before* the victim’s participation in a government’s investigation began.”⁵¹ Importantly, because the instant case challenged whether the MVRA covered “preparticipation expenses—the expenses of conducting [GECC]’s investigation, not those of sharing the results from it[,]”⁵² the Court stopped short of addressing “whether this part of the [MVRA] would cover similar expenses incurred during a private investigation that was pursued at a government’s invitation or request.”⁵³ Rather, the Court merely “h[e]ld that [the MVRA] does not cover the costs of a private investigation that the victim chooses on its own to conduct” and not at the Government’s request.⁵⁴

As a result, the Court reversed the Fifth Circuit’s determination to the contrary, and decided that Lagos was not required to pay the part of the restitution award comprised of GECC’s professional expenses

³⁸ *Id.* (citing § 3663A(b)(4)).

³⁹ *Id.* at 6.

⁴⁰ *Id.* at 5-6.

⁴¹ *Id.* at 6.

⁴² *Id.* (citing *Dolan v. United States*, 560 U.S. 605, 612 (2010)).

⁴³ *Id.*

⁴⁴ *Id.* (internal citations omitted).

⁴⁵ *Id.*

⁴⁶ *Id.* at 7.

⁴⁷ *Id.*

⁴⁸ *Id.* at 8.

⁴⁹ *Id.* at 7.

⁵⁰ *Id.* (quoting § 3663A(b)(4)).

⁵¹ *Id.*

⁵² *Id.* at 7-8.

⁵³ *Id.* at 8.

⁵⁴ *Id.*

“incurred during its own investigation of the fraud and during its participation in [the] bankruptcy proceedings.”⁵⁵ But it did not address the more important question of whether the costs of cooperating at the Government’s request can be the subject of a restitution order under the MVRA.⁵⁶

Key Impacts

Lagos imparts several lessons.

First, because of the issues that the Supreme Court did *and did not* decide, this decision is likely to have only a marginal impact on corporate investigations. Confronted with evidence of wrongdoing, many companies will choose to conduct an investigation regardless of whether there is a promise of restitution at the end of the day—should the investigation reveal evidence that leads to a criminal conviction. They will do so because management believes that it is the right thing, because their reading of corporate law suggests that an investigation should be conducted in the discharge of the directors’ and officers’ fiduciary duties, and/or because federal law and regulation already provide numerous incentives for a corporation to conduct investigations. Indeed, it is likely a rare corporation that will conduct an investigation in the hope that it will lead to discovery of wrongdoing that, in turn, will lead to a conviction, that, in turn, will result in reimbursement of expenses. At most, and at the margin, the Court’s decision might affect whether and how a corporate victim reports the results of its internal investigation to the Government.

Second, the opinion is notable for what it leaves open. As noted above, the Court expressly declined to address whether this provision of the MVRA covers expenses incurred during a corporate victim’s “private investigation that was pursued at a government’s

invitation or request.”⁵⁷ Ultimately, this may be the more important question. Many companies incur expenses in investigating at the Government’s invitation or request—whether it be to forestall a more intrusive criminal investigation, to obtain some form of leniency, or simply to answer a government request for information. As before, corporate victims are well-advised to keep records of these expenses, and their necessity, and—in an appropriate case—to approach the Government to inquire about restitution or seek relief directly from a court.

Third, the Court acknowledged, its decision in *Lagos* “does not leave a victim . . . totally without a remedy for additional losses not covered by the [MVRA].”⁵⁸ Even though convicted defendants may not be *required* to pay restitution under this provision of the MVRA, the Court cited several other, more-broadly-worded federal restitution statutes under which a corporate victim may still obtain restitution.⁵⁹ Moreover, while the Court may be mistaken in its assumption that a judgment in a lawsuit is as valuable as recovery through a restitution order (which is enforceable by a criminal court and enjoys priority), the Court did recognize that corporate victims may still, for example, bring civil lawsuits against the defendants that victimized them.⁶⁰

Finally, this opinion reflects an intention of the Roberts Court to read criminal (and, more generally, regulatory) statutes narrowly.⁶¹ Although Congress in enacting the MVRA may well have desired “to ensure that victims of a crime receive full restitution,”⁶² this Court will carefully scrutinize the statutory text and require Congress to draft legislation expansively if it aims to accomplish that broad purpose.

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⁵⁵ *Id.* at 2, 8.

⁵⁶ *Id.* at 8.

⁵⁷ *Id.*

⁵⁸ *Id.* at 7.

⁵⁹ *Id.* at 6-7.

⁶⁰ *Id.* at 7.

⁶¹ *See, e.g., Marinello v. United States*, 138 S. Ct. 1101 (Mar. 21, 2018); *Sessions v. Dimaya*, 138 S. Ct. 1204 (Apr. 17, 2018); *Yates v. United States*, 574 U.S. 135 S. Ct. 1074 (Feb. 25, 2015); *Bond v. United States*, 134 S. Ct. 2077 (June 2, 2014).

⁶² Supreme Court Decision at 6 (citing *Dolan*, 560 U.S. at 612).