

White-Collar Crime

Expert Analysis

Victims' Rights And White-Collar Defense

In recent years, policy makers have sought to give victims a greater voice in the criminal justice system. On the federal level, victims have been given the right to notice about key developments in criminal cases, consultation about a prosecutor's plea and sentencing decisions, and compensation in the case of financial injury. In 2004, Congress passed the Crime Victim Rights Act (CVRA), which specified eight rights of victims, some of which were already part of federal law. Unlike earlier legislation, the CVRA imposed on federal courts the obligation to "ensure" that victims are "afforded" these rights and established procedures for victims to assert their rights in the district court and appeal denials by petitioning for writs of mandamus.

In this article, we discuss the basic provisions of the CVRA and court decisions interpreting its reach. We

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then consider application of the CVRA in white-collar cases. To be sure, advocacy by putative victims can exert influence on prosecutors and courts in a manner that complicates defense of a white-collar case. At the same time, the rights of putative victims may, on occasion, give rise to disclosures that assist the defense, as we discuss further below.

The CVRA

According to its legislative history, the CVRA was intended to address a perceived imbalance in the criminal justice system between the rights of defendants and victims. 150 Cong. Rec. S4260-01, S4262 (April 22, 2004). The CVRA confers on "crime victims" the following rights: (1) to be "reasonably protected from the accused"; (2) to "reasonable,

accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused"; (3) not to be excluded from any public court proceedings, unless a victim's testimony would be materially altered by hearing other testimony at the proceeding; (4) to "be reasonably heard at any

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public proceeding in the district court involving release, plea, sentencing, or any parole proceeding"; (5) to reasonably confer with the government's attorney; (6) to "full and timely restitution as provided in law"; (7) to "proceedings free from unreasonable delay"; and (8) to "be treated with fairness and with

respect for the victim's dignity and privacy." Codified at 18 U.S.C. §3771.

In 2015, the Justice for Victims of Trafficking Act amended the CVRA to give victims additional rights, including the right to be informed in a timely manner of a plea bargain or a deferred prosecution agreement before a formal charge was filed. Pub. L. 114-22, title I, §113(a), (c)(1), 129 Stat. 240, 241 (May 29, 2015).¹ The 2015 law also resolved a circuit court split over the standard of review applicable to victims' petitions for writs of mandamus to enforce CVRA rights.

Judicial Interpretation

The CVRA defines "crime victim" as "a person directly and proximately harmed" by the "commission of a Federal offense," but the law does not address whether courts should apply a presumption of innocence. 18 U.S.C. §3771(e); see also Attorney General Guidelines for Victim and Witness Assistance (2011 Ed. (Rev. May 2012)) (Attorney General Guidelines). In 2005, shortly after the law was enacted, Eastern District Magistrate Judge James Orenstein examined sua sponte the CVRA's notice requirements in *United States v. Turner*, a mail fraud case before the court for an initial appearance and bail determination based upon a criminal complaint. Judge Orenstein construed "crime victim" to mean

"any person who would be considered a 'crime victim' if the government were to establish the truth of the factual allegations in its charging instrument." 367 F. Supp. 2d 319, 326 (E.D.N.Y. 2005); accord *United States v. Rubin*, 558 F. Supp. 2d 411, 418-19 (E.D.N.Y. 2008) (Vitaliano, J.).

The court also determined that while the CVRA does not mandate protection for victims of uncharged conduct, it does not prevent a court from extending its "notice and participatory opportunities." Judge Orenstein took an "inclusive" approach to identifying and notifying victims, "presum[ing] that any person whom the government

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asserts was harmed by conduct attributed to a defendant, as well as any person who self-identifies as such, enjoys all of the procedural and substantive rights set forth in §3771." 367 F. Supp. 2d at 327.

The CVRA requires that victims receive "timely notice" of public court proceedings, and Judge Orenstein found that the statute obligates courts "to assure that each victim is afforded his statutory rights." To fulfill this responsibility, the court directed the government

to "file with the court a list setting forth the name of (and contact information for) each individual it has identified as a victim ... including any person whom it characterizes as the victim of uncharged conduct," or show cause why a victim would fear public disclosure or has knowingly waived CVRA rights. *Id.* at 328.

Turner contemplates direct notice to each victim, which the CVRA recognizes is "impracticable" in some cases involving multiple victims. The CVRA permits courts the flexibility to "fashion a reasonable procedure ... that does not unduly complicate or prolong the proceedings" in cases in which the "number of crime victims makes it impracticable to accord" all of the rights set forth in the CVRA. 18 U.S.C. §3771(d) (2). Such procedures must still "give effect" to the CVRA. For example, when contacting victims individually is impracticable, courts have authorized alternative means. In one such case, *United States v. Saltsman*, Eastern District of New York District Judge Nicholas Garaufis found that publishing notice to a class of tens of thousands of potential victims satisfied the CVRA. 2007 WL 4232985, at * 2 (E.D.N.Y. Nov. 27, 2007).

In addition to requiring that information about developments in the case be given to victims, the CVRA gives victims a voice in decision-making through the "reasonable"

rights to be heard at certain public proceedings and to confer with the government. The right to be heard “does not give the victims of crime veto power over any prosecutorial decision, strategy or tactic” nor does the right to confer “authorize an unbridled gallop to any and all information in the government’s file.” *Rubin*, 558 F. Supp. 2d at 424-25. A victim’s right to gather information is “circumscribed” by the relationship between the material sought and its relevance to a right set forth in the CVRA. *Id.* at 425. For example, a victim may be entitled to information relating directly to restitution (a right protected by the CVRA) but not to a pre-sentence report or all criminal discovery. *Id.* (citing *United States v. Ingrassia*, 2005 WL 2875220 at *17 (E.D.N.Y. Sept. 7, 2005)). In a recent case, Southern District of New York District Judge Ronnie Abrams rejected a victim’s claim that she was entitled to multiple meetings with the government, holding that S.D.N.Y. prosecutors had fulfilled their obligation to confer by receiving and reviewing documents submitted by the victim and attending an hour-long meeting with the victim’s attorney. *Jordan v. Department of Justice*, 173 F. Supp. 3d 44, 53 (S.D.N.Y. 2016).

Impact on White-Collar Defense

In the white-collar context, defense counsel often seek to persuade

prosecutors to exercise their discretion not to charge their client (or not to charge certain crimes) on various grounds, including that their clients did not commit a crime, or had a minimal role in the charged scheme, or that any wrong that took place was civil in nature and should be resolved through private or government civil enforcement. The CVRA and other laws that empower victims obviously complicate such arguments.

These laws encourage criminal proceedings to be seen as a vehicle for satisfying financial claims and generally reduce the force of the criminal/civil distinction counsel often seeks to draw. Further, especially in close cases, prosecutors concerned about the claims of putative victims may be led to exercise discretion differently, perhaps favoring charges, or a tougher position in plea negotiations or sentencing, than might otherwise be the case absent one or more vocal and assertive putative victims. Even plea or non-prosecution agreements with prosecutors may be challenged and reopened if a putative victim convinces a court that he or she has been denied sufficient opportunity to confer with prosecutors in advance. 18 U.S.C. §3771(d)(5); see also *Doe v. United States*, 950 F. Supp. 2d 1262, 1267 (S.D. Fla. 2013).

While the CVRA and similar laws may present challenges to defense counsel, such laws might also potentially assist counsel in the defense of a white-collar prosecution, in at least two respects.

First, the CVRA may require the government to provide information about victims that might not otherwise be provided to the defense, or might not be provided in as clear and accessible a fashion. The CVRA has been interpreted to require the government to file a list of victims with the court. The government’s determination of who is or who is not a victim can sometimes give defense counsel added insight into the government’s theories beyond what can be gleaned from an indictment. Identifying information for victims might also help defendants investigate allegations, craft discovery requests, and ultimately formulate a defense. When privacy concerns arise, the government might be permitted to withhold some information from the public record upon a showing of good cause, but such information should still be provided to the defense, subject to a protective order to prevent public dissemination. The government may also seek to withhold victim-related information from the defense, but that should ordinarily be limited to cases in which the information is irrelevant to the proceedings. See

Attorney General Guidelines at 3-4 (“Department personnel should seek protective orders or employ other means when necessary to safeguard private information from becoming public or from being used in proceedings if the information is not relevant.”).

In a recent example of a court ordering victim information be provided to the defense, Judge Orenstein again interpreted and applied the CVRA—in this instance, in a civil case with implications for criminal cases. In *United States v. Barclays Capital*, the government filed charges against a global bank under FIRREA that allege a fraudulent scheme to sell residential mortgage-backed securities on the bases of false and misleading representations and omissions to investors. Relying on the criminal fraud violations underlying the civil charges, Judge Orenstein instructed the government to identify the victims “directly and proximately” harmed by the commission of the offenses set forth in the complaint and to notify them of any future court proceedings. The court also instructed the government to disclose the list of victims to the defendants stating, “you have a pre-existing obligation to provide notice to those [victims] ... [and] I don’t see why you wouldn’t just turn [a list] over to the defendants but in any event,

please do so.” *United States v. Barclays Capital*, No. 16-CV-7057, Transcript of Initial Conference at 17-19 (E.D.N.Y. June 8, 2017).

Second, the position taken by the government as to the number of victims, and feasibility of individual notice, early in a case could have implications for the ordering of restitution later in the case at sentencing. The CVRA contemplates individualized notice being given to putative victims but allows the government flexibility, including permitting notice through publication if individualized notice is “impracticable,” for example, due to the large number of victims. 18 U.S.C. §3771(d)(2) (“In a case where the court finds that the number of crime victims makes it impracticable to accord all of the crime victims the rights described in subsection (a), the court shall fashion as reasonable procedure to give effect to this chapter that does not unduly complicate or prolong the proceedings.”). Similarly, the Mandatory Victim Restitution Act of 1996 (MVRA) made restitution mandatory for many white-collar criminal offenses, but the law includes an exception when a court finds “from facts on the record” that “the number of identifiable victims is so large as to make restitution impracticable.” 18 U.S.C. §3663A(c) (3). The government’s position taken at the outset concerning the

feasibility of identifying and giving notice to victims pursuant to the CVRA might later bear on similar issues concerning the feasibility of computing and ordering restitution to a large number of victims pursuant to the MVRA. *W.R. Huff Asset Mgmt. Co. v. Rigas*, 409 F.3d 555, 563 (2d Cir. 2005).

Conclusion

In criminal cases, the adversarial system is premised on zealous defense counsel contesting charges brought by prosecutors before judges and juries. In recent years, putative victims have been given increased voice in the criminal justice system. They are not formal parties to a case, but under the CVRA and similar laws, victims have rights, and victims can influence the course of a criminal case. White-collar defense counsel would be well advised to keep these rights in mind when advocating for their clients.



1. The amendments are codified at 18 U.S.C. §3771(a)(9)-(10). See generally H.R. 1144, 114th Cong. (2015) (discussing the proposed amendments to the CVRA that were set forth in H.R. 181 and later were enacted as part of the Justice for Victims of Trafficking Act of 2015).