

FOR THE TRAFFICKING VICTIM, WINNING IS COLLECTING*

JERRY SCHREIBER**

I. The Problem

All too often, restitution orders go uncollected. Why? The answer is painfully simple. By the time the restitution order is obtained or the forfeiture of the trafficking defendant's property occurs, the defendant has either dissipated or disposed of his assets leaving little or nothing for the victim.

Before discussing the solution to this problem, relevant matters should be discussed. This paper will only consider the applicable federal law. State law varies; but if restitution is mandatory under state law, this same approach to collecting restitution for the trafficking victim can be applied to cases involving State prosecution of criminal trafficking defendants.

In solving the problem, this paper will proceed this way:

* True story: Years ago, a new associate attorney ran into his boss's office and said, "I won! I won! I won my first Summary Judgment!" To which his boss replied, "Schmuck, winning is collecting."

** Jerry Schreiber is a retired attorney with more than 30 years of trial and appellate experience. He has served as a consultant with the Human Trafficking Academy at St. Thomas University since 2010. He has received a B.S. from the U.S. Naval Academy, a M.B.A. from the University of Pittsburgh, and a J.D. from the University of Miami.

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The topics and statutes, noted above, will enable the reader to consider collectable remedies available to the victim of trafficking. Obtaining a judgment for restitution is one thing; collecting a judgment for restitution is another.

II. Background of the Law

A. Restitution Orders

Restitution serves to pay victims for the losses they have suffered. Pursuant to 18 U.S.C. § 3612(b)(1), specific information about the defendant *shall* be included in the judgment or order of restitution as well as information about the victim in order to aid in the identification of each victim to whom restitution is to be made.¹

How does the myriad of statutes, noted above, help the victim? As we will see below, they do so by making restitution mandatory and enforceable. They also allow forfeitures to assist the victim.

To understand how to collect restitution orders or judgments based on a restitution order, it is necessary to understand Congress' intent in providing for, and enforcing restitution. For victims of trafficking, there are three major statutes to consider: 18 U.S.C. § 3663A, 18 U.S.C. § 3664, and 18 U.S.C. § 3613. We will now turn to consider the trafficking victim's damages.

1. 18 U.S.C. § 3663A—Mandatory Restitution to Victims Act (MRVA)

While originally optional in 1982, court-ordered restitution orders in criminal cases became *mandatory* in 1996 through the enactment of 18 U.S.C. § 3663A, the Mandatory Restitution to

¹ 18 U.S.C. § 3612(b)(1)(G) makes it mandatory for the victim to advise the Attorney General or the court of any change in the victim's mailing address while restitution is still owed the victim.

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Victims Act (MRVA). This act mandates that the court order the “defendant to make restitution to the victim of the offense or, if the victim is deceased, to the victim’s estate.”² 18 U.S.C. § 3663A makes restitution *mandatory* and excludes from consideration, the value of the assets of the defendant or his ability to pay court ordered restitution, in the court’s determination of the amount of restitution.

The purpose of these restitution provisions is to restore restitution to the proper place in federal criminal law. This is accomplished by expanding the scope of the federal restitution sanction, encouraging increased imposition, and fostering improved monitoring and enforcement procedures. One further purpose of this act is to compensate the victims for any losses suffered as a result of a defendant’s criminal activity.³

Congress enacted this law to specifically ensure that the loss to crime victims is recognized. It established that, in addition to other penalties authorized by law, the offender makes restitution to the victim. To that end, the MRVA requires district courts to order restitution to identifiable victims in cases involving physical injury or pecuniary loss.⁴ Restitution under the MRVA is limited to the loss *caused by the crimes* of which the defendant stands convicted. It is part of a criminal sentence, and is criminal rather than civil in nature. “The order shall require that the defendant . . . make restitution to the victim of the offense or, if the victim is deceased, to the victim’s estate.”⁵

These statutes go on to define a “victim” as “a person directly and proximately harmed as a result of the commission of an offense . . . that involves as an element, a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant’s criminal conduct in the course of the scheme, conspiracy, or pattern.”⁶

The MRVA states that it shall apply in all sentencing

² 18 U.S.C. § 3663A(a)(1).

³ *United States v. O’Connor*, 321 F. Supp. 2d 722 (E.D. Va. 2004).

⁴ 18 U.S.C. § 3663A(c)(1)(B).

⁵ 18 U.S.C. § 3663A(a)(1).

⁶ 18 U.S.C. § 3663A(a)(2).

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proceedings for conviction of, or plea agreements relating to charges for, any offense that is, among other things, a crime of violence, as defined in 18 U.S.C. § 16,⁷ and “in which an identifiable victim or victims (sic) has a physical injury or pecuniary loss.”⁸

As stated in the MRVA, damages for *bodily injury* are recoverable through court ordered restitution. The elements of damage for bodily injury, as defined by the statutes, are

an amount equal to the cost of necessary medical and related professional services and devices relating to *physical, psychiatric, and psychological care*, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment; reimbursement for lost income; . . . and if the bodily injury also results in death, necessary funeral and related services.⁹

Having established restitution and the basis for the victim’s damages in the MRVA, the next step is to consider the enforcement of court-ordered restitution. For that, we proceed to the provisions of 18 U.S.C. § 3664.

⁷ 18 U.S.C. § 3663A (c)(1)(A)(i). A crime of violence is defined in 18 U.S.C. § 16 as:

an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or any offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

Id.

⁸ 18 U.S.C. § 3663A(c)(1)(B).

⁹ 18 U.S.C. §§ 3663(b)(2); (3) (*emphasis added*). *See also* 18 U.S.C. §§ 3663(b)(4)-(6) and 18 U.S.C. §§ 3663A(b)(2)-(4) for recoverable damages. It is worth noting that damages are specifically recoverable in cases violating parts 109 and 110 of Title 18 relating to sexual abuse and sexual abuse and exploitation of children.

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2. 18 U.S.C. § 3664—*Procedures for Issuance and Enforcement of Restitution*

Procedure for the Issuance of a Restitution Order

The probation officer assigned to a particular judge shall include in the presentence report, or separate report, sufficient information for the court to prepare a restitution order. The report shall contain, if possible, a complete accounting of the losses to each victim.¹⁰ Prior to sentencing (at which time the restitution amount will be determined and the appropriate order entered), the probation officer will notify all identifiable victims of the amounts of restitution to be considered on their behalf and provide the victims with the opportunity to demonstrate, by affidavit, a different amount of victim's losses which would be subject to restitution.¹¹ This statute specifically states that "In each order of restitution, the court shall order restitution to each victim *in the full amount of each victim's losses* as determined by the court and *without* consideration of the economic circumstances of the defendant." The statute goes on to state that "*in no case* shall the fact that the victim has received or is entitled to receive compensation with respect to a loss from insurance or any other source be considered in determining the amount of restitution."¹²

Up to this point, the Government is the victim's attorney and representative. However, the time the victim's private counsel spent *prior to conviction* assisting the Government and the victim in the preparation of the criminal case, including attending hearings, may be compensable under the theory of "other expenses" under the MRVA.¹³ The only damages permitted under the Federal statutes are

¹⁰ 18 U.S.C. § 3664(a).

¹¹ 18 U.S.C. § 3664(d).

¹² 18 U.S.C. § 3664 (f)(1).

¹³ *Mandatory Victim's Restitution Act – Measure and Elements of Restitution to Which Victim is Entitled*, 51 A.L.R. F.2d 169 § 23 (2010). See also *U.S. v Batista*, 575 F.3d 226, 233 (2d Cir. 2009) in which the court determined that attendance at proceedings related to the offense may include attorney's fees as

damages directly related to or incurred by the victim as a result of the defendant's criminal conduct, prior to conviction.

Obtaining the Restitution Order in the Victim's Name

A key sub-section of 18 U.S.C. 3664 is 18 U.S.C. 3664 (m)(1)(B) which provides:

*At the request of a victim named in a restitution order, the clerk of the court shall issue an abstract of judgment certifying that a judgment has been entered in favor of such victim in the amount specified in the restitution order. Upon registering, recording, docketing, or indexing such abstract, in accordance with the rules and requirements relating to judgments of the court of the State where the district court is located, the abstract of judgment shall be a lien on the property of the defendant located in such State in the same manner and to the same extent and under the same conditions as a judgment of a court of general jurisdiction in that State.*¹⁴

With a federal judgment in the victim's name, the victim can now proceed to collect his or her restitution.

Thus far we have discussed mandatory restitution, the trafficking victim's damages, and the general enforcement of restitution orders. However, all too often, defendants were invoking various exemptions to avoid payment of their restitution orders. In

expenses as "necessary" and an "other expense" and incurred during the participation of the investigation or prosecution of the offense. *See also* U.S. v Elson, 577 F.3d 713 (6th Cir. 2009).

¹⁴ 18 U.S.C. § 3664(m)(1)(B) (*emphasis added*). *See also* § 18 U.S.C. 3664(o) which states: "A sentence that imposes an order of restitution is a *final judgment*." (*emphasis added*).

the next section, we will see how Congress eliminated this problem.

3. *18 U.S.C. § 3613 and Related Statutes to Collect Unpaid Restitution*

18 U.S.C. § 3613 is a powerful section. It came into being because of frustration that, prior to its enactment in 1996, defendants could raise state statutory exemptions in order to avoid paying restitution. Congress and the courts believed that payment of restitution to the identifiable victims of crimes of violence should not be avoided. For this reason, *Congress gave the courts the same power to collect restitution orders from the defendant as the Internal Revenue Service has under the Internal Revenue Code, Title 26.*¹⁵

18 U.S.C. § 3613(c), provides that “an order of restitution is a lien in favor of the United States on all property and rights to property of the person fined *as if the liability of the person fined were a liability for a tax assessed under the Internal Revenue Code of 1986. The lien arises on the entry of judgment and continues for 20*¹⁶ *years or until the liability is satisfied, remitted, set aside, or is terminated.*”¹⁷

We have examined mandatory restitution, the computation of damages to be considered in human trafficking cases, enforcement of mandatory restitution in general, and the enforcement of restitution with the power of a tax lien against the defendant’s property. In the following section, we shall consider mandatory restitution as it relates to specific crimes of peonage, slavery and trafficking in persons, in addition to sexual abuse and sexual abuse against

¹⁵ The only exemptions for the criminal debtor owing restitution are set out in 26 U.S.C. §§ 6323(b)-(d), which govern property exempt from levy. *See also* 26 U.S.C. § 6334 which lists property exempt from levy by the Internal Revenue Service. *See also* U.S. v. Citigroup Global Markets, Inc., 569 F. Supp. 2d 708 (E.D. Tex. 2007) in which the garnishment of the criminal debtor’s IRA was permitted.

¹⁶ 18 U.S.C. § 3613(b) (“The liability to pay . . . shall terminate *the later of* 20 years from the entry of the judgment [at sentencing] or 20 years after the release from imprisonment . . . or upon the death [of the defendant]”) (*emphasis added*).

¹⁷ 18 U.S.C. § 3613(c). The lien is terminated per 18 U.S.C. § 3613(b).

children.

4. *Peonage, Slavery and Trafficking in Persons*

For victims of peonage, slavery and trafficking in persons, 18 U.S.C. § 1593 similarly states that restitution is mandatory. This section provides that restitution shall be the full amount of the losses the victims have suffered as defined in section 2259(b)(3), “and shall, in addition, include the greater of the gross income or value to the defendant of the victim’s services or labor or value of the victim’s labor as guaranteed under the minimum wage and overtime guarantees of the Fair Labor Standards Act (29 U.S.C §§ 201 *et seq.*).”¹⁸ Furthermore, Section 1593 also provides that forfeiture of property shall be obtained through criminal forfeiture proceedings.

5. *Sexual Abuse, Sexual Exploitation and Other Abuse of Children*

Victims of sexual abuse, sexual exploitation and other abuse of children had specific statutes enacted in 1996 to offer them a measure of protection and compensation in the form of mandatory, statute specific restitution.¹⁹

18 U.S.C. § 2248—Sexual Abuse: Mandatory Restitution

This section of the law starts out by stating that “in addition

¹⁸ 18 U.S.C. § 1593(b)(3). The losses defined in section 2259(b)(3) are: “medical services relating to physical, psychiatric, or psychological care; physical and occupational therapy or rehabilitation; necessary transportation, temporary housing, and child care expenses; lost income; attorney’s fees, as well as other costs incurred; and any other losses suffered by the victim as a proximate result of the offense.” 18 U.S.C. § 2259(b)(3).

¹⁹ 18 U.S.C. §§ 2248 (Mandatory Restitution for Sexually Abuse of adults and children); 2259 (Mandatory Restitution for Sexual Exploitation and Other Abuse of Children).

to any other criminal or civil penalty,”²⁰ the court shall order restitution for any offense involving sexual abuse. The order of restitution is mandatory and shall require the defendant pay to the victim the *full amount* of the victim’s losses and enforced in accordance with 18 U.S.C. § 3664, “in the same manner as an order under section 3663A,”²¹ and therefore, without regard to the defendant’s ability to pay.²² To avoid ambiguities, this statute in subsection (3) goes on to define the elements of damages included in the “full amount of the victim’s losses.”²³

As with other orders of restitution, attorney’s fees are limited. In this statute, attorney’s fees and costs are limited to those expenses incurred in “obtaining a civil protection order.”²⁴ However, since this statute is to be enforced in the same manner as the MRVA, then attorney’s fees could be recoverable for the time and effort the victim’s private attorney spent in assisting in the criminal prosecution of the defendant (but not in collecting the restitution due the victim).

Since this statute supplements existing restitution statutes, it goes on to define a “victim” as the person harmed, or the legal guardian or personal representative of victim’s estate, for purposes of mandatory restitution, as long as that individual is not the named defendant.²⁵

²⁰ 18 U.S.C. § 2248(a).

²¹ 18 U.S.C. § 2248(b)(2).

²² *Id.* See also 18 U.S.C. § 3663A

²³ 18 U.S.C. § 2248(b)(3). This sub-section defines victim’s losses as: “medical services relating to physical, psychiatric, or psychological care; physical or occupational therapy; necessary transportation, temporary housing, and child care expenses; lost income; attorney’s fees plus any costs in obtaining a civil protection order; and any other losses suffered by the victim as a proximate result of the offense.”

²⁴ 18 U.S.C. § 2248(b)(3)(E).

²⁵ 18 U.S.C. § 2248(c).

18 U.S.C. § 2259—*Sexual Exploitation and Other Abuse of Children:
Mandatory Restitution*

A virtual mirror image of 18 U.S.C. § 2248 is this section of the law. The only difference between this section and 18 U.S.C. § 2248 are the wrongs suffered by the victims and the computation of attorney's fees. All other definitions and elements of the victim's damages are the same.²⁶

In this section of the law, attorney's fees and "other costs incurred" are just listed without the limiting restrictions found in §2248.²⁷

Federal law gives the responsibility for the collection of restitution orders to the Attorney General or his designee (victim's attorney, as well); the applicable criminal statute also establishes the priority for which payments shall be made. Other than a nominal fine of \$100.00 payable to the Victim's Crime Fund, the victim has top priority for recovery of restitution.²⁸ Should the defendant default in any court ordered restitution payment, he risks modification or revocation of probation or supervised release, resentencing, or being held in contempt of court, among other sanctions.²⁹

We have examined mandatory restitution, the computation of damages to be considered in human trafficking cases, enforcement of mandatory restitution in general, the enforcement of restitution with the power of a tax lien against the defendant's property, and restitution for children and slavery. In the next section, we'll look at how Forfeiture orders can assist the victim of trafficking.

B. Forfeiture Orders

Forfeitures serve as a disincentive or deterrent to the offender to commit the crime by taking the fruits and instrumentalities of his

²⁶ 18 U.S.C. § 2259(b)(3).

²⁷ 18 U.S.C. § 2259 (b)(3)(E).

²⁸ 18 U.S.C. § 3612(c).

²⁹ 18 U.S.C.A §§ 3613A; 3614.

crime. 18 U.S.C. 982 and Federal Rules of Criminal Procedure Rule 32.2 govern criminal forfeitures. Notably, Rule 32.2 provides that “A court must *not* enter a judgment of forfeiture in a criminal proceeding unless the indictment or information contains notice that the government will seek the forfeiture of property as part of any sentence in accordance with the applicable statute.”³⁰

1. *18 U.S.C. §§ 1593 and 2253—Criminal Forfeiture of Assets*

Two situations regarding human trafficking provide for Criminal Forfeiture of property:³¹ Peonage, Slavery, and Trafficking in Persons, 18 U.S.C. § 1593; and Sexual Exploitation and Other Abuse of Children, 18 U.S.C. § 2253. Should the United States not elect to pursue a criminal forfeiture in the indictment, or if forfeiture is not specifically authorized by statute, the Government may proceed with a civil forfeiture.

2. *18 U.S.C. § 981—Civil Forfeiture*

Civil forfeitures are covered are covered by 18 U.S.C. §§ 981, 983 and 984. The appropriate criminal statute will clarify whether or not criminal or civil forfeiture applies, and how the property or proceeds from the sale of forfeited property is disbursed.

It is worth observing that Congress wanted utmost flexibility when dealing with defendants involved in Peonage, Slavery, and Trafficking in Persons; and Sexual Exploitation and Other Abuse of Children. For each of these crimes, Congress passed companion legislation, sections 1594 and 2254 respectively, providing for civil forfeiture, as well. This gives the government the flexibility to obtain the property or proceeds used or gained from in these crimes, whether or not known at the time of the indictment and arrest.³²

³⁰ F.R. Crim. P. Rule 32.2(a) (emphasis added).

³¹ *See also* 18 U.S.C. § 982; 21 U.S.C. § 853.

³² If property is not identified at the time of the indictment, it cannot be included in the indictment to permit its criminal forfeiture; however, while the case

18 U.S.C. § 1594, a companion statute to 18 U.S.C. § 1593 (Mandatory Restitution for Peonage, Slavery, and Trafficking in Persons) also provides for *civil forfeiture* of “[a]ny property, real or personal, which constitutes or is derived from proceeds traceable to any violation of [Chapter 77. Peonage, Slavery, and Trafficking in Persons].”³³ Section 1594 does go on to specifically state that the Government “shall transfer assets forfeited . . . or the proceeds derived from the sale thereof, to satisfy victim restitution orders arising from violations of [Title 18 Chapter 77].”³⁴

Similarly, 18 U.S.C. § 2254 is a companion statute to 18 U.S.C. § 2253 (Sexual Exploitation and other Abuse of Children). It provides for *civil forfeiture* of any property subject to forfeiture in section 2253. By reference, this statute also provides that any assets forfeited or proceeds derived from the sale *may* be used to *satisfy restitution* orders benefiting victims of sexual exploitation and abuse of children.³⁵

We have reviewed the general guidelines covering restitution and forfeiture. Next we will look at what actions the victim’s attorney may take to protect the victim.

C. *Civil Litigation Remedy for Victims of Abuse*

Any victim of either peonage and slavery and sexual abuse or sexual exploitation of children, as described above, also has an additional remedy available to him: the filing of a civil action against the abuser or abusers.³⁶ *But do not consider this remedy until*, after a

is pending, the Government can later seek a *civil forfeiture* of these later known or identified properties or assets gained from and/or used in the commission of these felonies. See 18 U.S.C. §§ 1594, 2254.

³³ 18 U.S.C. § 1594(e)(1).

³⁴ 18 U.S.C. § 1594(f)(1) (*emphasis added*). This section makes use of forfeited assets to satisfy restitution *mandatory*.

³⁵ 18 U.S.C. § 981(e)(6). Using civil forfeiture under this section to satisfy restitution is an *optional decision* of the Attorney General (or his designee).

³⁶ “Any person . . . who suffers personal injury . . . regardless of whether the injury occurred while such person was a minor, may sue in any appropriate United States District Court and shall recover the actual damages such person sustains and

thorough investigation, it is determined that the civil judgment obtained by the victim would be collectable.³⁷ While this remedy sounds good, it probably is impracticable. Use this remedy as a last resort, and expect little from it.

This remedy has its own specifically stated *statute of limitations*. The complaint must be filed within *six (6) years after the right of action first accrues*, or in the case of a person under a legal disability, *no later than three (3) years after the disability*.³⁸

Having discussed restitution, forfeitures, and civil actions in the preceding sections, we will now turn to recovering damages for the victim of the crime. Congress and the justice system have both required a recovery of compensation for the victim of a crime. In the following section, we will discuss how to accomplish this, as a practical matter.

D. *Collecting the Money*

In the real world, even though the United States represents the victim in matters of restitution, the effort placed on collecting restitution varies. Though an order for restitution serves primarily to compensate victims for any losses suffered as a result of the defendant's criminal activity, often because of limited resources available to the United States, enforcement is often lacking.

As noted earlier, Congress took a large step to help the victim obtain a measure of justice by providing sub-section 18 U.S.C. §

the costs of the suit, including a reasonable attorney's fee. *Any person described in the preceding sentence shall be deemed to have sustained damages of no less than \$150,000 in value.*" 18 U.S.C. § 2255 (*emphasis added*).

³⁷ While this section seems powerful and beneficial to the victim, it should be remembered that most likely the civil action will occur after the abuser or abusers have been convicted of their crimes of violence, exploitation and abuse. Remember that forfeiture orders have already been put in place or will be shortly. After the criminal trial court finishes with the abusing defendant(s), there probably will be little available assets left from which a recovery of money could be obtained. Winning is not just obtaining a judgment for the victim; winning is collecting the judgment!

³⁸ 18 U.S.C. § 2255(b).

3664(m)(1)(B) which states:

*At the request of the victim named in a restitution order, the clerk of the court shall issue an abstract of judgment certifying that a judgment has been entered in favor of such victim in the amount specified in the restitution order. Upon registering, recording, docketing, or indexing such abstract in accordance with the rules or requirements relating to judgments of the court of the State where the district court is located, the abstract of judgment shall be a lien on the property of the defendant located in such State in the same manner and to the same extent and under the same conditions as a judgment of a court of general jurisdiction in that State.*³⁹

Once the judgment is in the name of the victim, and not the United States, then the victim can proceed to collect his or her own judgment. Below we will discuss how this can be accomplished.

1. The Federal Judgment

A certified copy of a federal judgment, or an abstract of judgment, is recognized in all fifty States. However, to be recognized *outside* of the original federal district where the case was filed, the following *must* be done before a judgment can become a lien in favor of the victim.

If the federal judgment is from a federal district *different* from where the defendant's property is located, a certified copy of that judgment must first be registered (filed) with the clerk of the court in a federal courthouse located in the same district as the

³⁹ 18 U.S.C. § 3664(m)(1)(B) (emphasis added). *See also* 18 U.S.C. § 3664(o) which states: "A sentence that imposes an order of restitution is a *final judgment*" (emphasis added).

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property.⁴⁰ Each time you find property outside of the original federal district, you must re-register that judgment in the new district where the property is found.

After a federal judgment from outside the original federal district is registered, it can now be perfected as any other judgment.⁴¹ If the defendant's property is found within the same federal district where the case was filed, it does not have to be registered.

2. *Perfecting the Judgment to Make an Enforceable Lien*

To be a lien on the defendant's real property, the judgment must be perfected, that is recorded in the public records of the State where the defendant is the owner of real property.⁴² Don't be lulled into false security. Whether you receive a judgment of a state court or a federal court, that indicates that it has been recorded (without any affirmative action by you or without you paying a recording fee), it has been recorded *only* in the court's record book and *not the public records*. The "recorded" judgment from the court *is not a lien on any property*.⁴³

Perfecting a Judgment Lien on Real Property

To perfect judgment liens on real property, a certified copy of judgment *must be recorded in the clerk's office of county where the*

⁴⁰ 28 U.S.C. § 1963 provides that "A judgment in an action for the recovery of money or property entered in any court . . . may be registered by filing a certified copy of the judgment in any other district . . . when the judgment has become final . . . A judgment so registered shall have the same effect as a judgment of the district court of the district where registered and may be enforced in like manner."

⁴¹ The reason for registering a foreign federal judgment is that if any objections or disputes regarding enforcement arise, they will be handled by a *local* Federal District judge.

⁴² 28 U.S.C. § 3201(a). Sub-section (b) indicates that priorities of federal liens will be determined in a Race-Notice manner.

⁴³ To be a valid, perfected lien on real property, a judgment *must* be recorded in the local *public records*.

real property is located (in the same office where deeds and mortgages are recorded).⁴⁴ This judgment lien will have priority over all transactions that occur with the defendant's real property *after* the date and time the judgment is recorded.⁴⁵ The recording office will return a copy of the certified copy showing the date and time the judgment lien was recorded. The perfected judgment lien is valid, and superior, to any recordable action that occurs on the property after the date, and time, the judgment lien is recorded.

Perfecting a Judgment Lien on Personal Property

To perfect judgment liens on personal property, whether tangible or intangible, a certified copy of the judgment *must be docketed in the Docket Book in the office of the sheriff of the county of the last known residence of the defendant, and the county where personal property, both tangible and intangible property, is located* (prior to incarceration if different from the defendant's residence).⁴⁶ It is also advisable that a certified copy of the judgment also be delivered to the United States Marshall of the district where the property is situated, *for docketing*, in addition to the district of the last known residence of the defendant, for docketing in Sheriff's and Marshall's Docket Books. These actions make the judgment lien superior to any other claim or security interest that occurs after the date the Judgment lien is docketed with the Sheriff and Marshall.

Perfecting the victim's judgment against both the real and personal property of the defendant protects the victim's position and enables him or her to attempt collection of the restitution.

⁴⁴ 26 U.S.C. § 6323(f).

⁴⁵ 26 U.S.C. § 6323(a).

⁴⁶ 26 U.S.C. § 6323(f)(1)(A)(ii). If it is known that the convicted offender has personal property that is located in another county (other than the one where his last known residence is located), it is advisable to deliver a certified copy of the judgment to the office of the sheriff and U.S. Marshall where the property is known to be located for docketing, as well. This could avoid any objection or defense to the lien that might be raised at a later date.

3. *Enforcement of Your Judgment Lien – Getting the Money*

Either the victim or the government can seek enforcement of an order (or judgment) by filing appropriate papers⁴⁷ in the federal court in which the defendant was originally convicted or where the federal judgment is registered.⁴⁸ Once manner of enforcement is determined, the appropriate writ is delivered to the United States Marshall's office for action.⁴⁹

Since the enactment of 18 U.S.C. § 3613 in 1996, property exempt from levy by garnishment or levy has been drastically limited. Again, state exemptions do not apply because the federal judgment has the same enforcement ability as an IRS tax lien.⁵⁰

As a practical matter, the best and easiest way to collect a judgment is through a writ of garnishment.⁵¹ This is a preferred means of enforcement because of procedural ease and minimal expenditure of costs as long as you know who is indebted to the defendant⁵² (bank, financial institutions, individuals, etc.).⁵³ However, there are certain restrictions (exemptions) on garnishments.⁵⁴

The writ of execution on real property would be the next preferred, but it is costlier because of the required notice of publication, and potential expense of the Marshall's office which

⁴⁷ Writ of garnishment, execution, etc.

⁴⁸ *U.S. v. Scarboro*, 352 F.Supp.2d 714 (E.D. Va. 2005)

⁴⁹ 28 U.S.C. § 3004(a). Writs shall be served in accordance with the Federal Rules of Civil Procedure.

⁵⁰ See 26 U.S.C. § 6334. For a listing on property exempt from levy.

⁵¹ See 28 U.S.C. § 3205; 9 FEDPROF (Federal Procedure Forms) §§ 28.111 *et seq.* for details of garnishment procedures, including issuance and service of process of the writ, answer of the garnishee, notice to the defendant and defenses to the writ.

⁵² For due process considerations, the defendant is entitled to notice. 28 U.S.C. § 3202 (b); 9 FEDPROF 28:208.

⁵³ If the defendant's creditors are paying periodic installments to the defendant, it is advisable to obtain a Continuing Writ of Garnishment which will continue to be effective for an extended period of time.

⁵⁴ For a listing of these restrictions and exemptions, see 15 U.S.C. § 1673.

must be borne by the victim. Also, any lien or mortgage existing and recorded prior to the victim's judgment has priority and a buyer at the Marshall's sale will take subject to existing, perfected liens. This means, that potential buyers must do their homework prior to the Marshall's sale. If the property has enough equity in it, the sale might occur and all funds received will go to the victim.⁵⁵

A writ of execution on personal property is probably the least favorable because once the United States Marshall takes actual or constructive possession⁵⁶ of the property, it must be kept in storage until the Marshall's sale.⁵⁷ The sale must be advertised in a public newspaper. Advertising costs and storage costs add up quickly and must be paid first from any funds recovered in the sale. Also, whoever purchases the item takes subject to all pre-existing liens on the property.⁵⁸ There is a good chance the property might not sell—but all costs must be paid by the victim regardless.

E. Getting the Victim Money From a Forfeiture

For the benefit of the victim, one additional point should be raised. Consider the situation where the United States was able to obtain some assets and therefore funds in its forfeiture efforts, and the victim is not able to recover the full amount of ordered restitution. Can the victim recover some or all of the funds recovered from the successful forfeiture? The answer is “yes” under sections of the law providing for criminal forfeiture, and possibly under civil forfeiture statutes which make it discretionary for the Attorney General or his designee.⁵⁹

Remember that forfeiture and restitution serve separate and

⁵⁵ Because of this, there might not be a buyer at the Marshall's sale.

⁵⁶ The victim can arrange for safe storage of the property levied upon in order to minimize the expense of storage prior to its sale by the U.S. Marshall.

⁵⁷ At least a 30 day storage requirement depending on the date of the sale and the date of the levy on the property.

⁵⁸ See 28 U.S.C. § 3203. See also local state recording statutes.

⁵⁹ See 21 U.S.C. § 853(g) (criminal forfeitures); 18 U.S.C. § 981(c)(6) (civil forfeitures).

distinct goals. Forfeiture serves to remove from an offender the fruits and instrumentalities of his crime, serving as a powerful disincentive to commit the crime,⁶⁰ while an order for restitution serves primarily to compensate victims for any losses suffered as a result of the defendant's criminal activity.⁶¹ Regardless of the reason for the forfeiture, the *O'Connor* court specifically found that in appropriate cases, the government could *agree to assign the forfeited proceeds to the victim's restitution*.⁶² To accomplish this requires both determination and initiative of the victim's counsel. Fight for your client and get just, collectable compensation for his or her suffering.

F. Presently—No Attorney's Fees for Collection Efforts

At the present time, it is doubtful that attorney's fees are recoverable for effort, time and expertise expended on a victim's behalf. At least, there is no reported case supporting this proposition. However, that doesn't mean that it can't be done.

Consider the following:

18 U.S.C. § 3664(f)(1)(A) provides that "the court shall order restitution to each victim *in the full amount* of each victim's losses."⁶³

18 U.S.C. § 3664(m)(1)(B) provides that at a victim's request, the clerk shall order an abstract of judgment in the name of the victim for the amount of the victim's losses. The abstract shall be a lien of the defendant's property, real and personal.⁶⁴

In addition to obtaining an abstract, a victim's attorney has to ensure that the abstract is properly filed in the correct offices to

⁶⁰ Once the Government wins a judgment of forfeiture, the relation-back doctrine provides that the right, title, and interest in the forfeited property vests in the United States, at the time the defendant committed the offense that gives rise to the forfeiture. *United States v O'Connor*, 321 F.Supp.2d 722, 729-30. (E.D. Va. 2004).

⁶¹ *Id.*

⁶² *Id.*

⁶³ 18 U.S.C. § 3664(f)(1)(A).

⁶⁴ 18 U.S.C. § 3664(m)(1)(B).

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perfect the victim's liens against both real and personal property, locate property to attempt to satisfy the restitution amount if the defendant(s) are not willing to pay the restitution ordered for the victim, pursue fraudulent conveyances, possibly overcome an innocent spouse defense, locate the asset or assets and levy on same. Obviously, this all takes time and expertise and tenacity of the victim's counsel.

Now, the victim's attorney *could* seek to amend the original Restitution order, before garnishment, levy and sale, by using 18 U.S.C. § 3664(d)(5). This would be done to reflect the reasonable attorney's fees expended to locate and levy upon, or garnish, the defendant's property. The basis for the amendment is: (1) the defendant is not voluntarily paying the restitution that he had the ability to pay; and (2) counsel was needed to locate the defendant's assets.

If the victim is required to pay an attorney a reasonable fee to collect the funds that the recalcitrant defendant is withholding from the victim, it would leave him with an amount *less than the full amount of his losses*, without an amendment to the restitution order (amendments relate back in time to the date of the original restitution order).

The argument can be made that the amount of restitution due the victim should be increased to cover additional expenses caused by the defendant's refusal to voluntarily pay the full amount of the restitution. The defendant and not the victim should bear this expense. Succeed in your request for attorney's fees by amending the restitution order and make new law!⁶⁵

⁶⁵ *But see* U.S. v. Tabaja, 273 F.Supp.2d 916 (E.D. Mich. 2003) ("There must be a close connection between the restitution ordered and the injury sustained as a result of criminal behavior. Therefore, a restitution order must be based on losses directly resulting from the defendant's criminal conduct."). *See also* U.S. v. Scott, 405 F.3d 615, 620 (7th Cir. 2005) ("most (though not all) cases classify attorneys' fees incurred by a crime victim . . . as 'consequential damages' that are therefore ineligible for criminal restitution").

G. *The Innocent Person Defense to Collection*

This defense to collection only occurs with real and personal property most often held by a husband and wife as tenants by the entirety, or where the crime occurs on property not owned by the defendant. The “innocent person” or spouse cannot maintain a willful blindness to the crime.⁶⁶ Where an innocent person neither knew of the crime or offense, nor in any way encouraged or promoted it, property in which he or she has an undivided interest will *not* be subject to forfeiture.⁶⁷ But, if a husband and wife are logically part of the conspiracy or crime, urge the government to indict both. As a named defendant, the innocent person defense evaporates.

Previously, we discussed applicable human trafficking statutes, restitution, forfeiture, federal judgments, perfection and collection of judgments, and writs to enforce collection. In the opening paragraph, we posed the problem that restitution orders often go uncollected. In the next section, the reader will learn of a vehicle that is available today that can help to overcome the hurdle of collecting restitution for the victim of human trafficking.

III. *The Solution*

A. *28 U.S.C. § 1651—All Writs Act and the Use of the Restraining Order*

28 U.S.C. § 1651 provides: “The Supreme Court and all courts established by Act of Congress may issue all writs necessary and appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.” The all-writs authority of the

⁶⁶ United States v. Collado, 348 F.3d 323 (2d Cir. 2003). *See also* United States v. Milbrand, 58 F.3d 841 (2d Cir. 1995) (forfeiture of mother’s interest in farm on which son conducted marijuana trafficking was not excessive because evidence demonstrated that she must have known of criminal conduct taking place there). *See also* United States v. Sabhnani, 599 F.3d 215 (2d Cir. 2010).

⁶⁷ Von Hofe v. United States, 492 F.3d 175, 181-82 (2d Cir. 2007).

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federal courts enables these courts to issue restraining orders as may be necessary to preserve the *status quo* between parties until final disposition.⁶⁸

In the trial court, *before* the indictment or other charging document is filed, the government *could seek*, and obtain, a Temporary Restraining Order, pursuant to 21 U.S.C. § 853(e)(2) without notice or hearing,⁶⁹ or after the charging document is filed⁷⁰ to temporarily restrain the criminal defendant from transferring, dissipating, conveying, or disposing of real and/or personal property pending further order of the court.⁷¹ However, with the concurrent criminal proceeding pending, the time for the initial hearing on the Temporary Restraining Order may be extended until the criminal proceeding is concluded.⁷² After the hearing, the Temporary Restraining Order will then be converted to a Restraining order.

The victim's attorney must take the lead on insisting that the government obtain the Temporary Restraining Order. The government's attorney, as a prosecutor, will most likely be reluctant to do so. He is thinking about convicting the defendant and not about remedies available to the victim. This is the time to be assertive to protect your client's right to collectable restitution. The statutes give you the means and authority to act. Do so to protect the victim.

⁶⁸ *Vuitton Et. Fils S.A. v. J. Young Enterprises, Inc.*, 644 F.2d 769 (9th Cir. 1981).

⁶⁹ The United States must demonstrate that there is probable cause to believe the property sought would be subject to forfeiture upon conviction, and that notice will jeopardize the availability of the forfeiture.

⁷⁰ The Government must allege and prove, after notice and hearing, that the property sought would be subject to forfeiture. The Government may use inadmissible evidence in this hearing. 21 U.S.C. § 853(e)(3).

⁷¹ The restraining order is appropriate to prevent defendants from diverting or concealing assets to avoid paying restitution. *U.S. v. Runnells*, 335 F.Supp.2d (E.D. Va. 2004); *U.S. v. Catoggio*, 698 F.3d 64 (2d Cir., NY 2012).

⁷² In appropriate circumstances, a federal criminal court has the power to enjoin concurrent civil proceedings in order to prevent unfairness in the criminal trial. *U.S. v. Birrell*, 276 F.Supp. 798 (S.D.N.Y. 1967).

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1. Applies to Criminal Forfeitures Mandating Payment of Restitution

This practical basis for this request is the requirement of mandatory restitution found in *all* the applicable trafficking statutes. It is the *power* of these mandatory provisions that is the key. These mandatory provisions⁷³ along with the criminal forfeiture statute justify the trial court's actions to issue a Temporary Restraining Order, even without notice or hearing, before or at the inception of the criminal case.

2. Use Assets Found in the Criminal Investigation

The underlying criminal investigation prior to indictment will likely disclose both the real property and personal property owned, used, or involved in, the trafficking case. This property could be—should be—the subject of forfeiture and the Temporary Restraining Order.⁷⁴ Obviously, the sooner the restraining order is issued, the better the chances are of seizing all of the defendant's property.⁷⁵

For real property, the ownership and its legal description can be readily obtained once the street address is known. For bank accounts, the underlying criminal investigation should be able to develop that information as well. If the operating bank account only keeps a minimal balance, the investigation can lead to other account(s) to which the funds are transferred. The location and ownership of other valuable items of personal property can also be identified.

Needless to say, the Government will be reluctant to release this information, as well. That is why the request for a Temporary

⁷³ 18 U.S.C. § 3663A states, in part: “the court *shall order*, in addition to . . . any other penalty authorized by law, that the defendant make restitution to the victim.” *See also* specific trafficking statutes.

⁷⁴ 21 U.S.C. § 853, the Criminal Forfeiture Statute, is incorporated into both 18 U.S.C. §§ 1593 and 2253.

⁷⁵ Of course, the restraining order can be sought and obtained after the defendant's arrest, as well.

Restraining Order should be filed either before or *immediately* after the indictment or information is filed, in order to catch the defendant off guard and secure his property.

B. Service of Restraining Orders

With the restraining order in hand, the victim's attorney can then proceed to preserve the defendant's property in the same manner as described previously in this paper on perfecting a lien; *i.e.*, for personal property, by delivering a certified copy of the restraining order to the U.S. Marshall of the federal district in which the personal property is located. The U.S. Marshall will then serve a certified copy of the restraining order on the financial institution(s) listed in the restraining order.⁷⁶ For real property, a *lis pendens* and a certified copy of the restraining order should be recorded in the public records of the county where the real property is located.

C. The Restraining Order's Practical Effect

With the restraining order obtained and appropriately served or recorded, the transfer of the property is prevented, and the property is secured. Now the victim will have assets available at the end of the criminal proceedings in order to successfully collect the restitution ordered by the court at sentencing.

⁷⁶ If the timing of the civil proceeding (the hearing for the restraining order) is extended to the end of the criminal case, serve the Temporary Restraining Order.

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Conclusion

This paper has discussed the remedies available to the victim, and how they can be collected. For victims of trafficking, not only is the full measure of just compensation mandated, but it is also required in the real world to help these victims move forward to the next chapter of their lives.

The use of a restraining order in order to preserve the defendant's assets will require coordination between the victim's attorney and the federal prosecutor. Initially, this coordinated attack with the prosecutor against the defendant may not be easy to achieve, especially for victims of sex trafficking.⁷⁷ But a willing U.S. Attorney, an enlightened judge, and persistence can pay off. With a combined approach to achieve meaningful justice, the victim will benefit if he or she can *collect* the ordered restitution. And that's what this is all about.

The job of the victim's attorney is to not only protect the victim through the enforcement of Constitutional rights, but it is also to ensure that the victim actually *receives* his or her full measure of justice in the form of restitution. The statutes give you the weapons—use them.

Remember, for the victim, “Winning is Collecting.”

⁷⁷ Some prosecutors still believe that the victim had a choice and is at least partially to blame for his or her situation. Overcome that perceived bias against the victim!