

Court Has Broad Authority Over Assets To Satisfy Restitution

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In a very recent decision, the Second Circuit affirmed the government's broad authority over a defendant's assets in the face of unpaid restitution obligations. This authority includes the power to restrain assets prior to the entry of a restitution order. And, as exemplified by the orders entered by the district court and affirmed by the Second Circuit recently in *United States v. Bengis*, this authority extends to assets held overseas.[1]

As a result of *Bengis*, defendants with unpaid restitution orders should take note of a federal court's authority over assets that could be used to make victims whole, even if they have hold those assets overseas or in structures that are nominally controlled by others. In the face of a criminal conviction and presented with compelling evidence that the structures are just a front for a defendant with a significant restitution obligation, a U.S. court may sweep aside the corporate formalities in favor of the practical reality of ensuring that victims are made whole. Additionally, the orders affirmed in *Bengis* were formulated to apply to those in "active concert" with the defendants. As such, those who might assist criminal defendants with their overseas assets — such as banks, bankers, financial advisers, trustees and attorneys — would be well advised to heed the decision in *Bengis*.



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Background

Bengis arises out of the prosecution of Arnold Maurice Bengis, Jeffrey Noll, David Bengis and others for engaging in a lengthy scheme to illegally harvest large quantities of South African rock lobster, in violation of the law of South Africa, and import the illegally taken seafood into the United States. In 2004, Arnold Bengis and Noll pled guilty to substantive violations of the Lacey Act and conspiracy to violate the Lacey Act and to commit smuggling. The Lacey Act generally prohibits the importation into the United States of fish, wildlife, or plants taken in violation of state or foreign law.[2] Arnold Bengis' son, David Bengis, pled guilty to a misdemeanor conspiracy to violate the Lacey Act.

In 2004, the district court sentenced Arnold Bengis, the undisputed leader of the scheme, to 46 months' imprisonment, Noll to 30 months' imprisonment, and David Bengis to 12 months' imprisonment.

Before the district court, the government sought restitution, claiming that under both the Mandatory

Victim Restitution Act (MVRA) and the Victim and Witness Protection Act,[3] the government of the Republic of South Africa was a victim and should be made financially whole. In a series of opinions, the district court denied the government's application under both statutes.[4]

In early 2011, more than two years after the case was argued, the Second Circuit overruled the district court's denial of restitution, holding, among other things that: (1) South Africa had suffered the type of harm for which the mandatory restitution statute required restitution; and (2) South Africa was a victim eligible for restitution. The court of appeals remanded the matter to the district court to calculate the proper amount of restitution.[5]

On remand, a United States magistrate judge initially recommended that South Africa be awarded restitution in the amount of \$54.9 million.[6]

The District Court's Freeze Order

While the district court was considering whether to adopt the magistrate judge's report and recommendation regarding the amount of restitution, the government identified substantial assets held overseas by the defendants through various structures. The assets were located in the Jersey branch of an international bank and were nominally held by a collection of trusts and corporations formed under the laws of various countries, including the British Virgin Islands, Panama, Jersey and Cyprus.

As the government demonstrated, all of the assets were ultimately controlled by Arnold and David Bengis. The government also demonstrated that, after the court of appeals' decision that restitution was mandatory, Arnold and David Bengis had proposed to restructure their holdings so that all of the entities previously identified would be newly owned by an entity formed under the law of Belize. The government also learned that the beneficiary of the Bengis family trusts and the protector of the trusts had been modified in an attempt to limit Arnold and David Bengis' apparent control of the trusts' management.

On the basis of what it had learned, the government moved both to restrain the defendants from transferring or disposing of the assets and to have the district court direct them to deposit the recommended amount of restitution with the registry of the district court.

The government's motion was predicated on the Second Circuit's decision in *United States v. Catoggio*, a 2012 opinion that held, among other things, that the All Writs Act "enables a court to restrain a convicted defendant's property in anticipation of ordering restitution" in order to prevent a defendant from frustrating collection of restitution debt. *Catoggio* teaches also that a sentencing court may enter such an order prior to a determination of the precise amount of restitution.[7]

The district court granted the government's motion in part and restrained the defendants from transferring or disposing of any assets held in the Jersey bank except amounts above the recommended restitution of \$54.9 million.[8]

Several months later, in June 2013, the district court partially adopted the magistrate judge's report and recommendation concerning the amount of restitution. The district court reduced the amount of restitution to which South Africa was entitled to \$22.4 million. Although the amount awarded was less than the magistrate judge had initially recommended, \$22.4 million was still the largest ever award of restitution in a Lacey Act case.[9] At the same time, the district court continued the restraint on the transfer of assets held in the Jersey bank up to the final restitution amount.[10]

As a result of the lengthy period between the defendants' sentencings (in 2004) and the final determination of the restitution amount (in 2013), all three of the defendants subject to the restitution order had completed their prison sentences and their terms of supervised release by the time of the restitution order. As an additional complication in the government's effort to obtain restitution, the two defendants whose control over the overseas assets had formed the basis of the district court's freeze order were no longer in the United States.

The District Court's Deposit Order

After the defendants filed notices of appeal of the district court's restitution order, the government moved, under Rule 38(e)(2) of the Federal Rules of Criminal Procedure, to require the defendants to deposit the full amount of restitution with the district court's registry or to post a bond for the full restitution amount.

Rule 38(e)(2) permits a district court to "issue any order reasonably necessary to ensure compliance with a restitution order," including entering a restraining order, an injunction, an order requiring the deposit of restitution into the court's registry, or an order requiring a bond.[11]

At the time that it filed its motion in August 2013, the government informed the district court that, among other things, the trustees of three of the Bengis family trusts had directed the transfer of assets from the Jersey bank to an account held in the name of yet another entity at a bank in Switzerland. When the Jersey bank refused to execute the transfers in view of the district court's various orders, the trustees commenced litigation, and obtained an injunction, against the Jersey bank to prevent the bank from transferring the assets to the United States and from even submitting to the jurisdiction of a U.S. court.

In October 2013, the district court granted the government's motion and directed the defendants and "all persons in active concert or participation with any of them who get actual notice of this Order" to transfer the restitution amount to the district court's registry. The district court also enjoined the same set of people from encumbering or transferring to anyone other than the district court any property "in which any defendant has a legal, beneficial, or other interest" up to the restitution amount.[12]

The extension of the deposit order to those "in active concert or participation" with any of the defendants derived from the standard for granting an injunction or restraining order against nonparties to civil cases. Specifically, Rule 65(d) of the Federal Rules of Civil Procedure permits a district court to enjoin or restrain those who receive actual notice of an injunction or restraining and who "are in active concert or participation with" the parties to a civil case and their officers, agents, and attorneys.[13]

The Second Circuit's Decision and Its Implications for Financial Institutions

In an opinion and summary order issued on April 16, 2015, the Second Circuit rejected the government's effort to have the defendants' appeal dismissed because of their efforts to evade the district court's power to execute its mandate. Although the Bengis court was troubled by the defendants' "apparent effort to place their assets beyond the court's reach rather than comply with the deposit order," the Second Circuit reasoned that the Bengis defendants' efforts were not as egregious as those encountered in *Stern v. United States*, a case in which the appeal was dismissed. In *Stern*, the defendants had successfully liquidated their assets, abandoned their U.S. citizenship, and fled to Czechoslovakia.[14]

Although it refused to dismiss the appeal, the Second Circuit quickly swept aside the defendants' challenges to the district court's order that they deposit the entire amount of the restitution with the court's registry. Noting that the MVRA permits a district court to enforce a restitution order by "all ... available and reasonable means" and that the All Writs Act is available to prevent the frustration of a district court's orders, the Second Circuit had little trouble affirming the order that the defendants deposit the restitution amount with the court prior to the disposition of their appeal of the restitution award.[15]

The circuit also conclusively rejected the defendants' challenges to the breadth of the deposit order. In doing so, the circuit pointed to the evidence adduced by the government that the defendants were enlisting the help of third parties to shield the assets held at the Jersey bank.[16]

The Second Circuit's decision to bless the measures that the government employed in Bengis is significant in several respects.

First, the inclusion within the scope of the injunction of those "in active concert or participation" with criminal defendants could subject banks, bankers, financial advisers, trustees and attorneys to the wrath of a U.S. court. If circumstances demonstrate a bank's extensive knowledge of a client's financial and legal affairs, such that it can be deemed to be in "active concert" with a criminal defendant, the contention that a bank was merely following the instructions of a client with respect to his or her assets may prove unpersuasive.

Second, the fact that the district court and the Second Circuit quickly disregarded the formalities behind the structures through which, based on the substantial evidence amassed by the government, the defendants held their overseas assets demonstrates that the lengths to which defendants may go to secrete or protect assets may not extend behind the long arm of a U.S. court.

Third, as in Bengis, overseas financial institutions may find themselves caught between the orders of a local court and a U.S. court. A U.S. court seeking to enforce a restitution order against assets that have been secreted overseas may not always defer, in the name of international comity, to an overseas court that may be more inclined to respect locally imposed corporate formalities.

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[1] *United States v. Bengis*, Nos. 13-2543, 13-4268, 2015 U.S. App. LEXIS 6187 (2d Cir. N.Y. Apr. 16, 2015); *United States v. Bengis*, Nos. 13-2543, 13-4268, 2015 U.S. App. LEXIS 6386 (2d Cir. N.Y. Apr. 16, 2015). The Second Circuit also rejected the defendants' challenges to the amount of the restitution, but remanded case for a further determination on the foreseeability of the loss to one specific defendant. 2015 U.S. App. LEXIS 6187, *8-10, 14.

[2] 16 U.S.C. § 3372(a)(2).

[3] 18 U.S.C. §§ 3663, 3663A.

[4] *United States v. Bengis*, (S.D.N.Y. Jan. 29, 2007); *United States v. Bengis*, (S.D.N.Y. Sept. 12, 2007).

[5] *United States v. Bengis*, 631 F.3d 33 (2d Cir. 2011).

[6] *United States v. Bengis*, (S.D.N.Y. Aug. 16, 2013).

[7] 698 F.3d 64, 67-68 (2d Cir. 2012). The All Writs Act, 28 U.S.C. § 1651(a), provides that “the Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.”

[8] *United States v. Bengis*, No. 03 Cr. 308, Orders (dated Mar. 25, 2013, Apr. 8, 2013, Apr. 23, 2013, May 31, 2013).

[9] See U.S. Attorney’s Office, Southern District of New York, Press Release, dated June 14, 2013, located at <<www.justice.gov/usao/nys/pressreleases/June13/BengisArnoldetalRestitutionPR.php>>. Prior restitution orders in Lacey Act cases were typically \$1 million or less. See, e.g., *United States v. McNab*, 2003 WL 21233535 (11th Cir. 2003) (awarding restitution in the amount of \$1 million arising out of smuggling, money laundering, and Lacey Act convictions); Department of Justice Press Release, dated Aug. 6, 2012, located at <<<http://www.justice.gov/opa/pr/gibson-guitar-corp-agrees-resolve-investigation-lacey-act-violations>>> (discussing agreement by guitar manufacturing company to pay penalty of \$300,000 and withdraw claims to wood harvested in Madagascar valued at \$262,000).

[10] *United States v. Bengis*, (S.D.N.Y. June 14, 2013).

[11] Fed. R. Cr. P. 38(e)(2).

[12] *United States v. Bengis*, No. 03 Cr. 308, Order (dated Oct. 17, 2013).

[13] Fed. R. Civ. P. 65(d)(2)(C).

[14] *Bengis*, 2015 U.S. App. LEXIS 6187, *6 (citing *Stern v. United States*, 249 F.2d 720 (2d Cir. 1957)).

[15] *Bengis*, 2015 U.S. App. LEXIS 6386, *5 (citing 18 U.S.C. § 3664(m)(1)(A)(ii)).

[16] *Id.*