U.S. Department of Justice

Prosecutor's Guide to Criminal Fines and Restitution

EXECUTIVE OFFICE FOR
UNITED STATES ATTORNEYS
Washington, D.C. 20530

PROSECUTOR'S GUIDE TO CRIMINAL FINES AND RESTITUTION

Financial Litigation Staff
Executive Office for United States Attorneys
United States Department of Justice

September 1992

Nancy L. Rider
Assistant Director

Franklin T. Shippen
Paralegal Specialist

U.S. Department of Justice

Executive Office for United States Attorneys

Office of the Director

Washington, D.C. 20530

FOREWORD

This is the third edition of the Prosecutor's Guide to Criminal Fines and Restitution, a monograph prepared by Nancy L. Rider, Assistant Director of the Financial Litigation Staff of EOUSA. The Guide is designed to inform and assist you so that the United States can better enforce fines imposed and restitution ordered in criminal cases.

Fines and restitution are a fitting form of punishment for the defendants you convict. The federal courts are imposing criminal fines and restitution in more criminal cases and in greater amounts than ever before. Only if fines and restitution are paid, however, do they serve to punish. When a criminal fine is not paid or restitution is not made, a federal court order is not enforced. A convicted criminal has escaped punishment. The deterrent value of a fine is diluted. And there is less money available to assist crime victims.

As prosecutors and law enforcement officials, our work does not end with a conviction. We must ensure that the court's order of a criminal fine or restitution is carried out and that convicted criminals are punished as directed by the courts.

I urge you to be alert to matters concerning the recovery of assets as you prosecute your cases. Information you may have obtained on the defendant's property during the investigation and prosecution of a case must be forwarded to the financial litigation attorneys in your office. In some cases it may be appropriate to include the financial litigation attorneys as part of the prosecution team on issues pertaining to the recovery of assets. Your cooperation and communication with the financial litigation attorney in your office is essential to effective fine enforcement.

I challenge you to take the measures outlined in this monograph. I trust that I have your continued support as we proceed to work with every component of the criminal justice system to ensure that the orders of our courts are enforced.

Laurence S. McWhorter
Director

September 1992
Washington, DC

TABLE OF CONTENTS

CHECKLIST
FOR CRIMINAL PROSECUTORS

FINANCIAL CONDITION OF THE DEFENDANT:

1. ***Fines and restitution must be related to the defendant's ability to pay***. Provide the court ***correct financial information*** about the defendant at sentencing.

2. Provide the Financial Litigation Unit any information you have on the ***defendant's assets***.

3. ***Report to the probation officer any discrepancies*** between your knowledge of the defendant and what is contained in the presentence investigation report.

4. Retain a copy of ***the presentence investigation report*** after sentencing and forward it to the Financial Litigation Unit. (p. 9)

5. **Quick Sources of Information** (p. 4):

- *The federal investigation team*
- *Credit bureaus*
- *Department of Motor Vehicles*
- *Real estate grantor-grantee records*
- *Divorce records*
- *Banks* (Subject to the Right to Financial Privacy Act of 1978, 12 U.S.C. §§ 3401-3422.)
- *State Department of Taxation*
- *State investigators involved in forfeiture investigations*

6. For ***financial crimes***, check the following sources for assets. (pp. 5-8)

- *Banks and brokers*
- *Department of Motor Vehicles*
- *Real estate records*
- *UCC filings*
- *Friends and associates of the defendant*
- *Mail*
- *Telephone records*
- *Insurance companies*
- *Cashier's checks*

7. ***Recite financial information obtained at grand jury proceedings into the record at sentencing***. (p.7)

RESTITUTION:

8. ***Name the victim*** and state the ***specific amount*** of restitution due ***each one in the plea agreement***. (pp. 20 and 24)

9. Restitution is ***due immediately***, unless the Court provides otherwise. (p. 21)

PLEA AGREEMENTS:

10. Negotiate for ***payment of restitution prior to sentencing***, but state that this in no way restricts civil actions against the defendant.

11. Where the ***Government is the victim***, coordinate with the Civil Division of the U. S. Attorney's office or the Commercial Litigation Branch of the Department's Civil Division, per the Department's regulations, as well as with the aggrieved agency. (p. 24)

12. Determine whether to forgo an order of restitution in favor of pursuing a separate civil fraud action. (p. 24)

13. Push for ***complete disclosure of defendant's assets***. This may motivate the defendant to pay the fine or restitution rather than to disclose assets. (p. 24)

14. ***Do not establish a payment plan or schedule of payments***. Establish a total sum to be paid and let the Financial Litigation Unit arrange a payment schedule, if any. (p. 25)

15. If the defendant has substantial assets, negotiate that he deposit into ***escrow*** the amount of the fine you expect the Court to impose. (p. 25)

16. State that if the ***defendant fails to comply*** with the plea agreement the Government may waive or avoid it. (p. 26)

17. ***Get a check for special assessments before signing any plea agreement***. (p. 26)

SENTENCING:

18. The fine stated in the J&C should be a ***liquidated amount***, which includes the cost element of the fine. (p. 32)

19. Avoid language in the J&C that provides for payment of the fine or restitution after the defendant is on supervised release. Such language prevents the enforcement of ***payment during incarceration***. (p. 33)

20. Get a check for ***special assessments at sentencing***. (p. 29)

21. ***The failure to pay a fine is a crime***. (p. 40)

PROSECUTOR'S ROLE IN OBTAINING FINANCIAL INFORMATION AND IDENTIFYING DEFENDANT'S ASSETS

Criminal fines and restitution are the most difficult debts to collect. Conviction usually is financially disastrous to the defendant. Loss of employment, incarceration and divorce are the rule.

Criminal defendants often conduct business in an underground economy. Unlike civil debtors, street criminals rarely establish savings or invest in real estate. Whatever assets they have tend to be untraceable and disappear quickly. While white collar criminal defendants may control substantial property, they often are adept at hiding assets.

Public sources of information about the defendant, his assets and other factors relating to his ability to pay a fine, however, do exist and should be examined.

The Quick Fix

These quick sources of information are useful for verification of the defendant's assets for a plea agreement or other purposes. They are intended for use with defendants convicted of street crimes or drug offenses, whose assets disappear quickly.

- Consult members of the investigation team for a list of nominees, shell corporations, and business fronts.
- Check credit bureaus for banking information.
- Check with DMV for owners and lien holders of vehicles.
- Check real property grantor-grantee records at town hall and at state and county levels.
- Check divorce records.
- Subpoena banks to find checking accounts and certificates of deposit. (Consult the Right to Financial Privacy Act of 1978, as amended, 12 U.S.C. §§ 3401-3422.)
- Subpoena state income tax returns from the state department of taxation.
- Check loan applications (credit card, mortgage and education loans) and records of particular creditors (American Express, department stores, *etc.*)
- Check applications for employment, real property leases, car leases, college financial aid, *etc.*

State Forfeiture Investigators

State investigators involved in forfeiture investigations may have information on non-forfeitable assets of the defendant that may be available for satisfaction of a fine or restitution.

Financial Crimes

Generally, more information is available on the defendant's finances when the crime itself is of a financial nature, such as money laundering, fraud, or other white collar crimes. Check the following sources in such cases.

General background

Identify the target. Is the target an individual or an organized group? Identify places of residence. Find nominees he may use in order to hide assets; *e.g.*, spouse (may be under maiden name), parents, children, lieutenants, girl/boy friends, shell corporations or businesses, *etc.*

Banks and brokers

- Determine which banks the target uses by checking credit bureaus. Obtain financial data from institutions issuing credit cards and bank cards.

- Subpoena banks and brokers used by target. Information from target's checking accounts may show major purchases or significant associations. Checks may lead to information on corporate shells or business fronts used by target to conceal assets. Investigate any interest received on certificates of deposit to get leads to other financial institutions. Check loan records for information on loan applications, including net-worth statements.

- Request currency transaction reports (CTRs) which report individual and business transactions involving $10,000 or more in cash. These reports are kept by banks and businesses.

- The Treasury Department may have information on any foreign bank accounts of the target.

Motor vehicles

Contact the local Department of Motor Vehicles for vehicles registered to the target and to possible nominees. Request lien holder information on vehicles. Determine which banks financed the purchases. If there is no record of owned vehicles, check the target's driving history for information on the ownership of the vehicles he drives. Drive by the target's residence to

identify vehicles parked there. Get the license plate numbers and check the ownership of the vehicles through the DMV.

Real estate

Check town hall grantor-grantee records in the name of the target and possible nominees to learn if the target or nominees own real estate. Also check state and county real property records. Names of lien holders also should appear in the record. If the lien holder is a bank, check whether the target has other accounts there.

Security interests

Check town hall records for liens or consult the Secretary of State for Uniform Commercial Code financing statements reflecting major purchases by the target.

Friends and associates

Investigate close associates, lieutenants, and girlfriends or boyfriends of the target. Court records of a divorce settlement also may be informative. Ex-spouses or former lovers may be helpful, especially if they have an ax to grind. Ask general questions about the target's lifestyle, spending habits and apparent financial standing, as well as questions that may lead to more specific information.

Mail cover

Establish a mail cover, where appropriate, to discover who sends mail to target. This could lead to information on nominees, bank accounts, insurance companies, brokerage accounts and major credit cards.

Telephone records

Issue grand jury subpoena to telephone company to get long distance records. Group all calls by location, which may be useful in proving conspiracy. These records may give leads on associates or vacation homes.

Insurance

To find insurance companies, use mail cover and subpoenaed checks and loan records. When subpoenaing insurance companies, get all the information on the target's insured property, including personal property (furs, jewelry, silverware), real estate, vehicles, *etc.* Insurance records also will show whether the target purchased insurance registered to a nominee, as owner,

covering property held by the nominee. This may indicate that the target purchased the insured property and transferred it to the nominee. Look for life insurance policies, too, since some criminals purchase whole-life insurance policies or annuities designed to provide beneficiaries with income in case of the target's imprisonment.

Cashier's checks

Determine whether the target has purchased goods with cashier's checks in lieu of cash:

- Go to the place where the target bought goods.
- Request the deposit ticket from the seller to see how the target paid.
- Use the deposit ticket to learn when the check was deposited and in what bank.
- Request a copy of the check from bank.
- Determine the bank issuing the check.
- Question the issuing bank as to the frequency of the target's cashier's check purchases.
- To determine whether the target purchased other checks, request copies of those checks whose serial numbers precede and follow the serial number of the purchased check.

Grand Jury Information

Although grand jury information is not discloseable to the Financial Litigation Unit, the prosecutor can take steps to ensure that such information is available to the those collecting fines or restitution.

- The prosecutor can obtain a court order authorizing release of the information under Rule 6(e) of the Federal Rules of Criminal Procedure. (See USAM 9-11.250, 9-11.251 and 9-11.252 "Disclosure Under Fed. R. Crim. P. 6(e): To Attorneys for the Government, Including for Civil Use"; See also Appendix A for a sample motion and order.)
- At sentencing, the prosecutor can *recite into the record the defendant's net-worth statement*, listing assets and liabilities, and as much other financial information as the court will allow. In the case of a guilty plea, the prosecutor can accomplish this when the Government's evidence is summarized at arraignment.

- The prosecutor can file a sentencing memorandum containing information on the defendant's assets obtained during the grand jury. Such information must be relevant to sentencing. *See* 18 U.S.C. § 3553 for factors to be considered at sentencing.

- The prosecutor, rather than the collection attorney, can *prepare the writs of execution* against the defendant's property and, thus, avoid disclosing the grand jury information.

Exchange of information

The prosecutor or federal investigator may have been involved in the investigation and prosecution of a case over the course of a year and may have uncovered significant information on the identity and location of the defendant's assets and the nature and extent of his ownership interest in them. For example, property may be jointly held with a spouse and not available for satisfaction of a fine. Or the defendant may possess property held in the name of another party, such as a spouse or child. Generally, *such assets cannot be reached through enforced collection.* Collection alternatives (*e.g.*, voluntary sale of assets or fraudulent conveyance action) should be carefully considered prior to the sentencing date.

Information concerning the defendant's assets is critical to the sentencing process. The prosecutor must ensure that information relating to the defendant's assets discovered during the course of the investigation or prosecution is forwarded to the probation officer for use in the presentence investigation report. It is imperative that the presentence investigation report provide the court an accurate picture of the defendant's ability to pay for sentencing purposes.

After a sentence of a fine or restitution is imposed, it is also imperative that prosecutors help ensure that such sentences are enforced by forwarding to the Financial Litigation Unit any information available on the location or identity of the defendant's assets.

THE PRESENTENCE INVESTIGATION REPORT AS A SOURCE OF FINANCIAL INFORMATION

The United States Probation Officer must prepare a presentence investigation report on the defendant for use by the court in determining an appropriate sentence. Fed. R. Crim. P. 32(c). Section E of the report contains information on the defendant's financial condition, including a personal financial statement, on which the court relies in imposing fines and restitution.

In preparing the report, the probation officer will ask the defendant for financial information and will attempt to verify that information through credit bureau reports, income tax returns, property records, *etc.* The probation office, however, has no investigative arm, and the defendant probably will not be entirely forthcoming in his disclosure. Where the sophisticated defendant has concealed assets, the probation office often is unable to uncover such property. If the prosecutor has information that does not correspond to the presentence investigation report, he should inform the probation officer, so any such discrepancy may be resolved.

Probation officers require all defendants to complete a financial disclosure form which states on its face that the defendant is subject to prosecution under 18 U.S.C. § 1001 for filing false statements. Defendants have been successfully prosecuted for false reporting of assets on this form.

Effective December 1, 1989, Rule 32 was revised to permit the defendant, the defendant's counsel and the counsel for the government to retain their copy of the presentence report *for purposes of enforcement*. The criminal prosecutor must ensure that the report is forwarded to the Financial Litigation Unit for use in enforcement of a sentence of a fine or restitution. The entire report--not just section E containing the financial information--should be forwarded to the Financial Litigation Unit. The report may provide information useful for skip-tracing purposes as well as for asset identification.

The presentence report is a confidential document. Procedures must be established in every Financial Litigation Unit to ensure that the report is not disclosed to third parties. Additionally, the presentence report may be used only to *enforce* court orders and *not* as a basis for future criminal prosecutions or civil suits.

APPEARANCE BOND FORFEITURE JUDGMENTS

Pending judicial proceedings, a defendant may be released on personal recognizance, execution of an unsecured appearance bond or execution of a secured appearance bond. 18 U.S.C. § 3142.

Unsecured Appearance Bonds

When a defendant released on an unsecured appearance bond fails to appear, the prosecutor should move for forfeiture of the bond and inform the Financial Litigation Unit of the forfeiture immediately. Financial litigation attorneys should reduce all unsecured bonds to judgment as expeditiously as court rules allow. Once the judgment is obtained, the debt should be aggressively enforced in the manner of a civil judgment.

Conditional Release

Under 18 U.S.C. § 3142(c), a defendant may be released upon deposit of cash or other property with the court or upon execution of an agreement to forfeit cash or other security. This condition of release places a financial burden on the defendant for failure to appear. The Financial Litigation Unit should be advised of any cash or securities deposited in the court registry to secure the defendant's appearance.

Certain precautions should be taken if the deposit consists of anything other than cash. A partial list of precautionary measures is set forth below:

- Make sure the item deposited is *owned* by the individual presenting it. The agency investigator often can provide this information.

- If the item presented is *real property*, make sure the unencumbered value of the property is sufficient to cover the amount to be deposited. If the *property is located in another state*, check with the Financial Litigation Unit in the district where the property is located about any possible homestead exemptions and the filing requirements for execution against the property. If *property located in a foreign country* is offered, check with the Foreign Litigation Units of the Department's Civil or Criminal Divisions to determine whether the property may be executed against to satisfy the judgment *before* accepting it as security.

Bail Bonds Backed by Sureties:

If personal restrictions and specified percentage cash deposits are considered insufficient protection, the judicial officer may require the execution of a bail bond with sufficient solvent sureties.

Personal sureties:

In dealing with personal sureties, remember the distinction between the discretion to grant bail and to accept the bond after bail has been granted. While bail pending trial in non-capital cases is almost a right of the defendant, Fed.R.Crim.P. 46(d) provides that every surety must appear to be qualified. It states:

> Every surety, except a corporate surety which is approved as provided by law, shall justify by affidavit and may be required to describe in the affidavit the property by which the surety proposes to justify and the encumbrances thereon, the number and amount of other bonds and undertakings for bail entered into by the surety and remaining undischarged and all other liabilities of the surety. No bond shall be approved unless the surety thereon appears to be qualified.

In some districts, court employees, such as the clerk of court, are authorized to judge the acceptability of assets pledged to meet the requirements of the appearance bond.

The United States Attorney may wish to seek judicial promulgation of rules governing the property requirements of personal sureties. Such rules could require that the net worth of the surety be at least equal to the amount of the bond.

Suggested guidelines for *real property* offered as surety include the following:

- Secure a certified copy of the deed to all of the surety's real property which is listed as a part of his net worth.
- Obtain a certified copy of the deed showing the surety's residence homestead (if this property is exempt under state law from creditor's process).
- Require presentation of letters from two independent appraisers showing the fair market value of the real property listed on the net worth statement, exclusive of the surety's residence homestead (if exempt under state law from creditor's process).
- Require the defendant to provide a certificate of payment of all taxes due from any taxing authority with power to seize the pledged property for failure to make payment.
- Obtain a statement from the mortgagee of any property in the net worth statement showing the amount of the mortgage.

If *personalty* is presented, especially inventory in a business or accounts receivable, request that the defendant's attorney obtain and record the necessary UCC-1 statements. If the personalty is owned by a corporation, check applicable state corporate law to ensure that a corporate resolution is not required to effect a sale of corporate assets.

Stocks:

Stock in a publicly traded corporation is acceptable, so long as it is accompanied by a written authorization to sell the stock. *Do not* accept the stock of a closely held corporation.

Closely held corporations:

Require the corporation, acting through its responsible officers, to pledge *assets* of the corporation; *e.g.*, real property, inventory, accounts receivable, *etc.* A corporate resolution authorizing such a pledge is generally required when real property is pledged and may be required for other assets under state law. The stock of a closely held corporation has no inherent value and has no readily available market. Thus, the stock of a closely held corporation should *not* be accepted to secure the bond.

Confirm any *letter of credit* with the issuing bank to be certain the funds are readily available.

Each of these documents may be presented by the prospective surety to the judicial officer admitting or setting bail.

If such guidelines are adopted by the court and followed by those accepting bail, the collection of judgments when the defendant fails to appear could be greatly simplified.

If personal sureties are insolvent or unable to meet the conditions of the bond, the United States Attorney should initiate an investigation to determine if the surety falsified assets when justifying ability to serve as surety. Prosecutions for false swearing or perjury under 18 U.S.C. § 1001 should be pursued vigorously against those who have sworn falsely as to their property in order to act as sureties.

Where a personal surety has pledged *realty* as collateral for an appearance bond, the United States Attorney can seek to have the realty forfeited directly to the United States when judgment is sought under Fed.R.Crim.P. 46(e)(3). This is accomplished by moving for a court order to vest title of the pledged realty in the United States pursuant to 18 U.S.C. § 3146(d), which states:

> If a person fails to appear before a court as required, and the person executed an appearance bond pursuant to section 3142(b) . . . or is subject to the release condition set forth in clause (xi) or (xii) of section 3142(c)(1)(B) . . . , the judicial officer may, regardless of whether the person has been charged with an offense under this section, declare any property designated pursuant to that section forfeited to the United States.

The order should also seek the appointment of a receiver to preserve the realty, sell it and deliver the proceeds of the sale, after fees, expenses, *etc.*, to the United States Attorney for application to the appearance bond forfeiture judgment.

This order should further direct the United States Marshal to place the United States in exclusive possession of the pledged realty. This provision of the order often results in the surety doing his or her utmost to persuade the fugitive to surrender in the hope of securing the return of the property under Fed.R.Crim.P. 46(e)(4).

One must refer to state law to determine the type of deed obtained by the United States, since this may vary from state to state.

Individuals serving as professional sureties:

The guidelines for justification of sureties also should be followed for individuals acting as professional, paid sureties. The problem often encountered when dealing with an individual professional surety is that one piece of property is pledged as security for several bonds. In the event of a default or several defaults, the value of the property is insufficient to cover the several amounts.

Payment in full should be demanded promptly and collected from professional sureties.

Corporate sureties:

Federal law governing corporate sureties for Federal bonds is found at 31 U.S.C. §§ 9301-9309. The surety company must appear on the current Department of the Treasury, Fiscal Service, Bureau of Financial Operations Circular 570: "Surety Companies Acceptable on Federal Bonds." The corporations whose names appear in the circular have met the standards of Title 31 and need not justify their ability to meet the financial obligation assumed under the bond. Fed.R.Crim.P. Rule 46(d). A copy of Circular 570 is on file with the clerk of court. The notes at the end of the circular are helpful when preparing to enforce a judgment against a corporate surety.

Treasury-approved surety companies are required to appoint federal process agents in the district where their principal office is located and in the district where the bond is to be performed. The name of the process agent for a particular company may be obtained from the clerk of the district court. Demand letters, with a copy of the judgment enclosed, should be sent to the person the company has designated as federal process agent in your district. Likewise, a writ of execution or other process against the corporation should be served on the process agent. Where a process agent has not been appointed or is absent, service is to be made directly on the clerk of the district court. Fed.R.Crim.P. 46(e)(3).

Section 9305 of title 31, United States Code, provides that a surety corporation may not write additional bonds if it does not pay a final judgment or order against it on the bond and if no appeal or stay of judgment is pending 30 days after the judgment is entered. If a corporate surety fails to pay the judgment after 30 days and does not appeal the case, the United States Attorney should file a motion to show cause why the surety should not be enjoined from writing appearance bonds in the district. If the court grants the order, a copy of it should be sent to the Financial Litigation Staff, Executive Office for United States Attorneys.

Corporate sureties providing federal bonds (appearance, performance, immigration, *etc.*) are insurance companies. The McCarran-Ferguson Act, 15 U.S.C. § 1012, precludes the application of federal law if it would otherwise impair state law regulating the insurance business. This statute must be taken into account when legal action to enforce claims against an insurance company is considered.

Enforcement of Appearance Bond Forfeiture Judgments

All forfeited appearance bonds should be moved to judgment and collected as expeditiously as possible.

Bail bonds are enforced in a two stage procedure involving (1) a declaration of forfeiture of bail for breach of the bond, which the court may later set aside, and (2) the entry of judgment of default upon which execution may issue. Penalty of bail forfeiture is one for damages and is civil, not criminal, in nature.

If the bond is declared forfeited, a motion for judgment should be made as expeditiously as possible under court rules and should be followed by an effort to gain not only any deposit within the registry of the court, but also the balance of the judgment due.

Since civil judgments do not abate with the debtor's death, collection efforts may continue against the estate of a deceased debtor.

The Bankruptcy Reform Act of 1978 (Pub.L. 95-598, 92 Stat. 2549), effective October 1, 1979, eliminated the priority granted appearance bond forfeiture judgments in bankruptcy proceedings. When a surety against which the United States has a judgment files for bankruptcy, the government should file a claim. Money to pay a judgment or claim may sometimes be found in deposit in the insurance commissioner's office. Some states require an insurance company to deposit with the insurance commissioner a certain sum that is kept on deposit in that state's banks.

Closing or Compromising an Appearance Bond Forfeiture Judgment

Unlike criminal fines, appearance bond forfeiture judgments are civil judgments that may be compromised or closed as uncollectible when collectibility is doubtful either in fact or at law. Generally, the judgment should not be compromised or closed while the principal remains a fugitive.

When dealing with professional sureties, appearance bond forfeiture judgments should be compromised or closed as uncollectible only in exceptional situations, *e.g.*, insolvency or bankruptcy of the surety. Furthermore, cases of extended nonpayment, compromise or closing involving professional sureties should require a stipulation that the surety will no longer write bonds in federal court.

Like other civil judgments, the United States Attorneys have the authority to close or compromise appearance bond forfeiture judgments in accordance with Civil Division Directive No. 176-91, "Redelegation of Authority to Compromise and Close Civil Claims," implementing Order No. 1478-91, 56 FR 8923, March 4, 1991, which amended Subpart Y, Part 0, Title 28 of the Code of Federal Regulations to increase settlement and compromise authority.

Payment of Fine With Bond Money

Section 2044 of title 28 provides that on motion of the United States Attorney, the court shall order any money *belonging to and deposited by or on behalf of the defendant* with the court for the purposes of a criminal appearance bail bond to be paid to the United States Attorney for satisfaction of any assessment, fine, restitution or penalty imposed against the defendant. The court shall not release any money deposited for bond purposes prior to sentencing unless a criminal monetary imposition cannot be imposed for the defendant's offense or unless there is a showing that the defendant would suffer undue hardship.

Thus, the Financial Litigation Units should be aware of deposits of cash or securities in the court registries.

Cash or securities deposited *by a third party* as collateral on an appearance bond may *not* be applied in satisfaction of a fine imposed against the defendant who appeared in accordance with the obligation of the bond. *Heine* v. *United States*, 135 F.2d 914 (6th Cir. 1943); *United States* v. *Davis*, 47 F. Supp. 176 (S.D.N.Y. 1942), *aff'd*, 135 F.2d 1013 (2d Cir. 1943).

RESTITUTION

The Victim and Witness Protection Act (VWPA) of 1982 (P.L. 97-271, 96 Stat. 1248-58, effective October 12, 1982) (originally 18 U.S.C. §§ 3579, 3580; renumbered by the Sentencing Reform Act as §§ 3663, 3664) established new, broader restitution provisions for Title 18 and certain air piracy offenses occurring on or after January 1, 1983. These provisions were intended to redress an imbalance within the criminal justice system that was perceived to provide many protections to defendants, while too often ignoring the plight of crime victims.

In enacting the VWPA, Congress sought to ensure that the federal government, through its court system, would do everything possible, within the limits of available resources and without infringing on the constitutional rights of defendants, to restore victims to as whole a position as possible.

Courts are strongly encouraged to order restitution and may impose fines only to the extent that the defendant's ability to pay restitution is not thereby impaired. 18 U.S.C. § 3572(b). Accordingly, in fashioning an order of restitution, the courts are required to obtain information regarding the victim's losses, and the defendant's financial resources and obligations. 18 U.S.C. § 3664(a). If the court does not order restitution, or orders only partial restitution, the court must state its reasons. 18 U.S.C. § 3553(c).

Application

Victims

Besides individuals, victims may be corporations, businesses, organizations or government agencies.

Offenses

Restitution is ordered as a separate penalty under the VWPA for criminal convictions under Title 18 or for certain air piracy or terrorism offenses, under 49 U.S.C. § 1472, to the extent it will not unduly complicate and prolong the sentencing process. Restitution under the VWPA is not available to victims of other federal offenses. For other federal offenses, restitution may be ordered as a condition of probation. 18 U.S.C. § 3563(b)(3). The legislative history of the VWPA suggests, however, that restitution was not intended for offenses where Congress had legislated particular damages, such as antitrust or securities law violations.

Relationship to other penalties

Restitution may be ordered in addition to, or in the case of a misdemeanor, in lieu of any other penalty authorized by law. The current version of section 3663(a) requires that, in the case of a felony, restitution be *in addition to* some other penalty. If the court does not order restitution or orders only partial restitution, the court must state its reasons. 18 U.S.C. § 3553(c). When a defendant is placed on probation, any restitution order is automatically a condition of probation. 18 U.S.C. § 3663(g).

Form of payment

Besides the payment of money, restitution may be made by return of the property, if applicable, or if the victim consents, in service in lieu of money.

Compensable losses

Restitution may be required for damage to or loss or destruction of *property* of a victim or for *bodily injury* to a victim as a result of the offense. In the case of bodily injury, a victim is entitled to restitution for medical or related treatment and lost income. If the victim dies as a result of the offense, funeral and related expenses are included in restitution.

Amount

Substantial judicial discretion

A purpose of the VWPA is to make victims whole. It has been interpreted as giving the courts "broad powers to make victims whole." *United States v. Ferrera*, 746 F.2d 908, 913 (1st Cir. 1984).

May not be greater than the loss resulting from the offense of conviction

The court may order the defendant to make restitution to any victim for losses resulting from the *offense of conviction*. In *Hughey v. United States*, 495 U.S. 411 (1990), the Supreme Court found that restitution is limited to losses resulting from the offense of conviction and may not be ordered for losses resulting from "relevant conduct" or from dismissed counts that had a "significant connection" to offenses of conviction.

The *Hughey* case did not involve a multiple-count offense or a scheme-to-defraud element, only separate offenses and "common scheme" allegations. Nor did the Supreme Court address the "resulting from" or element aspects of the "offense of conviction." The court only said that losses were limited to those *underlying* the offense of conviction. As the Ninth Circuit stated in *United States v. McHenry*, 952 F.2d 328, 329-30, n.1 (9th Cir. 1991), ". . . *Hughey* only held . . . that defendants cannot be ordered to pay restitution for crimes of which they were

not convicted. The Court did not attempt to spell out the method of identifying victims or calculating the loss caused by a particular conviction."

Since the *Hughey* decision, a split has arisen among the circuits concerning such calculation of the loss caused by a particular conviction. The courts have addressed whether a defendant who is convicted of a count underlying a unitary scheme to defraud; *e.g.*, a mail fraud count or overt act, may be ordered to pay restitution to any victim for losses resulting from that entire scheme or conspiracy.

At present the Ninth, Tenth and Eleventh Circuits have interpreted *Hughey* narrowly and not permitted restitution beyond the count of conviction. *See, United States v. Sharp*, 941 U.S. 811 (9th Cir. 1991); *U.S. v. McHenry*, 952 F.2d 289 (9th Cir. 1991), amended (1992); *U.S. v. Sanga*, 967 F.2d 1332 (9th Cir. 1992). *See also, U.S. v. Stone*, 948 F.2d 700 (11th Cir. 1991)(only victim loss of particular mail fraud count, not victim losses for entire scheme element; but did not overturn *U.S. v. Barnette*, 800 F.2d 1558 (11th Cir. 1986), cited in *Hughey* as upholding restitution for all losses resulting from continuing conspiracy); *U.S. v. Cook*, 952 F.2d 1262 (10th Cir. 1991); *U.S. v. Wainwright*, 938 F.2d 1096 (10th Cir. 1991); *U.S. v. Morrison*, 938 F.2d 168 (10th Cir. 1991).

Recently, however, the Ninth Circuit has begun to shift its position that had been based on a very narrow reading of *Hughey*. In *U.S. v. Scarano*, 91-10143 (9th Cir. Sept. 2, 1992), the Ninth Circuit upheld an order of restitution based on losses resulting from two separate mail fraud schemes charged in a superseding information in two counts, multifariously combining an entire scheme in each count, with a single mailing as a jurisdictional basis for the continuing offense in helping to further the entire scheme to defraud as set out in the charge. Also, and more significantly, in *U.S. v. Soderling*, 88-1216 (9th Cir. June 30, 1992), the Ninth Circuit noted that while the new 1990 amendment at 18 U.S.C. § 3663(a)(2) does not overrule *Hughey*, which did not deal with a scheme-to-defraud element offense, it does overrule *Sharp*. In so finding, this Ninth Circuit panel seems to recognize that *Sharp* interpreted *Hughey* much more narrowly than was required by the actual decision.

On the other side of the continuing offense issue in ordering restitution since *Hughey*, the Seventh Circuit found that *Hughey* did not deal with a scheme-to-defraud element or continuing offense and that all elements of the offense of conviction underlie that offense, including the entire scheme to defraud. *U.S. v. Bennett*, 943 F.2d 811 (7th Cir. 1991). The Fourth Circuit has also adopted the view that the *Hughey* decision, while stating that restitution could not be ordered for losses resulting from offenses for which the defendant had not been convicted, should not be read so narrowly as to limit restitution to only what is within the specific count. *U.S. v. Bailey*, 91-5303 (4th Cir. Sept. 16, 1992).

Post Hughey Amendments

Effective November 29, 1990, the VWPA was amended at section 3663(a) by adding new paragraphs (2) and (3). New paragraph (2) defined a victim of an offense involving a scheme, conspiracy, or pattern of criminal activity as any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or

pattern. New paragraph (3) provided that the court could order restitution in any criminal case to the extent agreed to by the parties in a plea agreement.

A Word of Caution

This area of the law is in a state of flux. When drafting or interpreting plea agreements involving these issues, contact the Fraud Section of the Criminal Division on how best to proceed in your circuit.

When the defendant contests the amount

The probation officer's determination of the amount of loss to the victim is not controlling when the defendant contests the amount. *United States v. Durham*, 755 F.2d 511 (6th Cir. 1985). If the defendant fails to object to the probation officer's calculation of loss, he waives his right to challenge the amount. *United States v. Hand*, 863 F.2d 1100 (3rd Cir. 1988). One court has suggested that the amount of loss may be established by affidavits submitted by the victim and emphasized pre-sentence development of the facts as the better course. *Durham*, *supra*. In complicated cases where the probation officer is unable to determine the actual monetary loss or where the defendant disagrees with the probation officer's determination, a hearing is the appropriate vehicle to provide the required factual basis for the court to order restitution. *United States v. Richard*, 738 F.2d 1120, 1122 (10th Cir. 1984).

Indirect losses

A defendant may be liable for indirect losses to a victim. *See United States v. Keith*, 754 F.2d 1388 (9th Cir. 1985), *cert. denied*, 474 U.S. 829 (1985), where a defendant convicted of assault with intent to commit rape was ordered to pay restitution for destruction of personal property, medical bills, lost wages and travel expenses of the victim and her parents, and *United States v. Richard*, *supra*, where a defendant was ordered to restore to a bank-victim the amount taken in a bank robbery and not recovered, even though the unrecovered portion may have been stolen from the robber or a bank teller may have used the event of the robbery to steal money and attribute it to robbery. The government was not required to prove that the defendant was directly responsible for the loss. *But see*, *United States v. Kenney*, 789 F.2d 783 (9th Cir. 1986), *cert. denied*, 479 U.S. 990 (1986), in which the bank-victim was not allowed to recover salaries of employees who testified at the robbery trial, but it could recover the costs of unloading and developing film from the surveillance camera. *See also United States v. Hand*, *supra*, where the court allowed the Government to recover salaries and travel costs of Assistant United States Attorneys and DEA agents involved in a trial where a mistrial was declared because of the defendant's misconduct as a juror which led to a contempt conviction.

Limitations on amount recoverable

Restitution is not allowed for losses for which the victim otherwise has received or is to receive compensation.

Separate proceedings

The victim may institute a separate proceeding to recover additional damages; *e.g.*, punitive damages or for pain and suffering or other injuries not covered by the restitution order. *United States v. Satterfield*, 743 F.2d 827 (11th Cir. 1984), *cert. denied*, 471 U.S. 1117 (1985). Restitution orders frequently provide for less than the full loss to the victim or permit the defendant to pay over time. Nothing prevents a victim from bringing an independent action to recover the full loss immediately. *Teachers Insurance & Annuity Ass'n. v. Green*, 636 F. Supp. 415 (S.D.N.Y. 1986). In such instances, once the defendant is convicted of an offense giving rise to restitution, he is estopped from denying allegations of that offense in any subsequent federal or state civil proceeding.

Specific amount

The amount of restitution must be specifically stated with respect to each victim.

Recipients of Restitution

Under certain circumstances, parties other than the victim may be entitled to receive restitution, including:

Victim's estate

If the victim is deceased, restitution is payable to the victim's estate.

Victim's designate

The victim may designate that restitution be paid to another person or to an organization.

Third parties

Third parties, such as insurers or family members, who provide compensation to the victim based on the loss incurred due to the offense may be eligible for restitution. In *United States v. Durham*, *supra*, the court held that an insurance company, which had insured a car destroyed during a bank robbery, suffered a loss as a result of the robbery and was a "victim" entitled to restitution. Likewise, a family member who has paid the funeral expenses of the victim will be entitled to restitution.

Issuance of Order

Judicial considerations

In determining whether to order restitution and the amount of restitution, the court must consider the amount of loss sustained by the victim, the financial resources of the defendant, and the financial needs and earning ability of the defendant and the defendant's dependents. These considerations are designed to ensure that restitution is ordered only where the court has determined that the defendant has the ability to pay and the amount he can pay.

Nevertheless, the court is not bound to afford controlling weight to these factors and may order an indigent defendant to make full restitution. This is usually done to ensure payment of restitution if the defendant's financial condition improves. *United States v. Fountain*, 768 F.2d 790, 803 (7th Cir. 1985), *cert. denied*, 475 U.S. 1124 (1986).

Role of the probation service

The court may order the probation service to obtain information on the amount of loss sustained by the victim and the financial resources and obligations of the defendant so the court can fashion the restitution order. Such information will be included in the presentence investigation report or in a separate report, as the court directs. It must be disclosed to both the defense and the prosecution.

Burdens of proof

Disputes as to the proper amount or type of restitution are governed by the preponderance of the evidence standard. The prosecution has the burden of demonstrating the amount of loss sustained by the victim. The defendant has the burden of demonstrating his financial resources and needs.

Payment

Condition of Probation

Pursuant to 18 U.S.C. § 3663(g), restitution ordered under the VWPA shall be a condition of probation or supervised release.

Term

Unless otherwise provided by the court, restitution is due immediately.

Section 3663(f) provides that a defendant must make restitution not later than–

(a) the end of the period of probation, if probation is ordered;

(b) five years after the end of the term of imprisonment imposed, if the court does not order probation; and

(c) five years after the date of sentencing in any other case.

Until recently, the Department argued that the legislative history of the VWPA suggested that this language was intended to ensure that victims were compensated for their losses within a reasonable period of time and was not intended to bar the recovery of restitution beyond those time frames. Recent case law, however, holds otherwise. In *United States v. Joseph*, 914 F.2d 780 (6th Cir. 1991), the court held that it could not require the defendant to pay restitution beyond the periods listed in the statute. It stated that "[t]he life of a restitution order is expressly limited by § 3579(f)." (Section 3579(f) is now codified at section 3663(f)). Thus, the liability to pay restitution will expire at the end of the time periods listed above. *See also, United States v. Diamond*, C.A. 10, No. 91-5143 (1992) and *United States v. Bruchey*, 810 F.2d 456 (4th Cir. 1987).

In those cases where the United States Attorney's office is enforcing the order of restitution order (*i.e.*, where the victim is a federal agency or where the United States Attorney's office has decided to enforce the order on behalf of a third party victim) and if probation has been ordered, at least six months prior to the expiration of probation, the United States Attorney's office should contact the probation office to determine whether the defendant will pay the restitution within the period of probation. If not, then prior to the expiration of probation, the United States Attorney's office should obtain a civil judgment on behalf of the victim and enforce the order as a civil judgment.

As provided in section 3663(h) and as noted in *Joseph*, the *victim* may enforce the order of restitution in the same manner as a civil judgment. *See, Teachers Insurance & Annuity Ass'n. v. Green, supra*. If the victim is enforcing the order of restitution and not the United States, then the victim must obtain the civil judgment referred to above.

Manner of payment

Restitution may be paid directly to the victim or through the probation officer to the victim. The court may order that restitution be paid to the U. S. Attorney for delivery to the victim.

Collection

Victim

A victim named in the order may enforce a restitution order in the same manner as a civil action. However, a victim has no standing to appeal a criminal restitution order. *United States v. Serrano*, 637 F. Supp. 12 (D.P.R. 1985).

Government

The United States has the authority, but not the duty, to enforce an order of restitution, even if the victim is not a federal agency. The government may enforce the order of restitution in the manner provided for collection of a fine or in the same manner as a judgment in a civil action.

Effect of an order of bankruptcy

Criminal restitution is not dischargeable in a bankruptcy proceeding under Chapter 7. *See, Kelly v. Robinson*, 479 U.S. 36 (1986). Criminal restitution also is not dischargeable under Chapters 11 or 12. *See, United States v. Vetter*, 895 F.2d 456 (8th Cir. 1990). Titles 7, 11, and 12 each contain an exception to discharge for fines, penalties or forfeitures.

Chapter 13 formerly contained no such exception to discharge. It was amended effective November 15, 1990, to provide that orders of restitution are not dischargeable in a Chapter 13 bankruptcy. 11 U.S.C. § 1328(a). For Chapter 13 bankruptcies filed prior to November 29, 1990, however, restitution is considered a debt and is dischargeable under Chapter 13. *See, Pennsylvania Department of Public Welfare v. Davenport*, 110 S.Ct. 2126 (1990).

Collateral Estoppel

If the defendant is convicted of an offense giving rise to restitution, he is estopped from denying allegations of that offense in any subsequent federal or state civil proceeding.

Note: For more detailed discussions of restitution under the VWPA, see the Criminal Division monograph entitled, *Restitution Pursuant to the Victim and Witness Protection Act*. The reader also may wish to obtain a copy of "Restitution Questions and Answers" by G. Wingate Grant, AUSA, Eastern District of Virginia.

PLEA AGREEMENTS

Rule 32 of the Federal Rules of Criminal Procedure requires the preparation of a presentence investigation report in almost every case. Among other things, the presentence report considers the impact of the plea agreement. It is designed to assist the court in determining whether a plea agreement may be accepted. In the report, the probation officer computes the sentence under the Guidelines as if conviction had been obtained on all counts. The Court must state in the record why it believes the plea agreement should be accepted. It must examine the plea agreement and the presentence investigation report and find that the plea agreement does not undermine the *Sentencing Guidelines*. If the plea agreement departs from the Guidelines, the Court must justify the departure. Under the *Sentencing Guidelines*, the plea agreement is a part of the package sent to the Sentencing Commission.

The suggestions listed below may help to ensure that plea agreements involving fines or restitution are enforceable.

Identify Victims

Include a list of the victims' names and the amount due each. This is critical for enforcement of the judgment, which must be an amount certain, and also for accurate distribution of restitution among the victims.

Payment

If the Government is the victim, coordinate any agreement to pay restitution with the Civil Division of the U.S. Attorney's office or the Commercial Litigation Branch of the Civil Division at the Department, as appropriate under the Department's regulations, as well as the affected agency. The Attorney General's July 16, 1986 memorandum concerning Coordination of Criminal and Civil Fraud, Waste and Abuse Proceedings and the Criminal Division's monograph entitled *Restitution Pursuant to the Victim and Witness Protection Act* (pages 40-43) should be consulted. The government attorney should consider whether to forbear seeking restitution (for instance in a matter that is likely to produce a suit under the False Claims Act for triple damages and penalties) or whether restitution is more appropriate (for example where the defendant probably does not have sufficient assets to repay anything more than restitution). Be sure to recite in any plea agreement that payment of restitution does not restrict the filing of any civil suit.

Disclosure of Assets

If payment under the plea agreement is to be made in the future, get a complete disclosure of the defendant's assets into the plea agreement. This can be accomplished by

including a clause stating that within 36 hours prior to sentencing, the defendant agrees to truthfully execute a DJ Form OBD 500, Financial Statement of Debtor. Sometimes the defendant is motivated to pay the restitution immediately rather than to disclose assets.

Third Party Recipients

Caution is recommended in using plea agreements when restitution to third parties is involved. Let the court assess what it will, and limit your activities to assisting the victim in the collection of restitution to the extent deemed advisable in your office. During the plea colloquy, be sure to remind the court that all victims may not have been located, so the defendant may be advised of the possibility of further restitution.

Consent Judgment

If a consent judgment is obtained, restitution cannot be ordered in a judgment and commitment order. The judge could make payment in accordance with the consent judgment a condition for probation.

Schedule of Payments

Do not establish a payment plan or schedule of payments over time in the plea agreement. If a schedule of payments must be arranged, negotiate the total sum to be paid. Have the Financial Litigation Unit arrange a payment schedule, since the defendant's assets may change.

Fines in Escrow

If the defendant has considerable assets, negotiate a provision in the plea agreement requiring the defendant to deposit, into an escrow account of the defense attorney, an amount equal to the fine and special assessments which you believe the court will impose. This amount will be paid to the Government if a fine is imposed. Any remaining amounts would, of course, be refunded to the defendant.

Bond

If the defendant has posted a cash appearance bond using his own funds, negotiate into the plea agreement that the defendant consents and assigns the bond to the Government for payment of any possible fine. *Caution:* Make sure the money posted belongs to defendant and not to another party who may later claim that he/she agreed only to post a bond and not to pay a fine. *See United States v. Rose*, 791 F.2d 1477 (11th Cir. 1986); *United States v. Wickenhauser*, 710 F.2d 486 (8th Cir. 1983); *United States v. Powell*, 639 F.2d 224 (5th Cir. 1981). *See also* 28 U.S.C. § 2044.

Treble Damages

If the case involves fraud against the Government, take care not to waive the Government's right to treble damages under the False Claims Act as amended by the False Claims Amendments Act of 1986, P.L. No. 99-562, § 2, 100 Stat. 3153 (codified as amended at 31 U.S.C. §§ 3729-33)(1986) or other statutes.

Defendant's Default

Include a clause that if the defendant fails to comply with the terms of the agreement:

- The Government has the right to waive or void the agreement or
- In the alternative, the Court may be informed of the defendant's failure to comply with the terms of the agreement.

Costs

Try to include costs as part of the plea agreement. If a bill of costs is properly filed with the court clerk, costs are collectible in a criminal case.

Special Assessments

The plea agreement should specify that the defendant will pay the special assessment prior to sentencing. Some U.S. Attorneys will not sign a plea agreement unless a check for the special assessments is attached. A firm policy requiring payment of assessments prior to sentencing in cases of guilty pleas will save the United States computer space, clerical time and other resources that otherwise could be devoted to enforcement of fines and restitution.

CRIMINAL FINES

In the last decade, there have been numerous changes in the federal statutes governing criminal fines and restitution. The amount of the criminal fine imposed and the law governing enforcement of the fine depend on *when* the offense was committed.

H.R. 1400

- Offenses committed prior to January 1, 1985.
- Fines are determined by reference to the statute defining the offense for which the defendant is convicted.
- Enforcement is provided by 18 U.S.C. § 3565, as it stood prior to amendment by the Criminal Fine Enforcement Act.

Criminal Fine Enforcement Act (P.L. 98-596)

- Offenses Committed after January 1, 1985 and prior to November 1, 1987.
- 18 U.S.C. § 3623, Alternative fines, provides for significantly increased fines and also provides for imposition of a fine in an amount equal to twice the pecuniary gain to the defendant or twice the loss to the victim.
- Amendments to 18 U.S.C. § 3565 provide for interest on deferred payments, late payment penalties and the filing of tax-type liens.
- At first glance, 18 U.S.C. §§ 3565 and 3623 appear to be repealed. They were repealed, however, only with respect to offenses committed on or after November 1, 1987.

Sentencing Reform Act of 1984 (P.L. 98-473)

- Offenses Committed on or after November 1, 1987.

The Sentencing Reform Act as amended by the Criminal Fines Improvements Act (P.L. 100-185)

- Offenses Committed on or after December 11, 1987.

- Maximum fine levels are found at 18 U.S.C. § 3571, which provides for a fine of not more than $500,000 for a felony committed by an organization and not more than $250,000 for a felony committed by an individual. Section 3571(d) provides for an alternative fine which may equal twice the pecuniary gain to the defendant or twice the loss to the victim, regardless of the maximum fine levels.

Miscellaneous

- If the defendant is convicted of a *continuing offense* such as conspiracy, which was begun prior to the enactment of the sentencing statute but continued after enactment, the date the offense ends is controlling. He will be sentenced under the statute in force at that time. This does not violate the *ex post facto* clause. *United States v. Todd*, 735 F.2d 146, 149-50 (5th Cir. 1984), *cert. denied*, 469 U.S. 1189 (1985).

- Special penalty assessments are imposed on offenses committed on or after November 11, 1984. 18 U.S.C. § 3013.

- Section 5E4.2(i) of the *Sentencing Guidelines* provides for an additional fine amount, beyond that specified for the offense in the Fine Table of § 5E4.2(c), to at least cover the costs to the Government of imprisonment, supervised release, or probation. The *total* fine may not exceed the maximum fine for the offense provided by 18 U.S.C. § 3571. These amounts are fines and are deposited in the Crime Victims Fund or other accounts where fines are deposited. These amounts are not paid to the Bureau of Prisons or the Probation office. Interest accrues to these fines.

- For petty offense fine levels, see the article in *United States Attorneys' Bulletin*, Vol. 37, No. 3, Mar. 15, 1989.

Effect of Bankruptcy

18 U.S.C. § 3613(f) provides that the liability to pay a fine is not dischargeable in bankruptcy.

Special Assessments

Under 18 U.S.C. § 3013, the court must impose a special assessment on any person convicted of an offense against the United States. The amounts raised through special assessments are deposited into the Crime Victims Fund. In *U.S. v. Munoz-Flores*, 495 U.S. 385, (1990), the Supreme Court held that special assessments are constitutional. They are not violative of the Origination Clause of the Constitution, since the revenues generated by them are not a tax but support a particular governmental program.

Special assessments are collected in the same manner as criminal fines. Liability to pay an assessment, however, lasts only for five years from the date of imposition. Since the assessments are often nominal in amount, and they expire in five years, money collected from the defendant should be applied first to the assessment.

Where the defendant has assets, prosecutors should insist that the special assessments be paid at sentencing or as a condition to signing a plea agreement.

Crime Victims Fund

Virtually all criminal fines (and all assessments and bail bond forfeitures) are deposited in the Crime Victims Fund, up to a cap of $150 million per year. This money is returned to the states, on a pro rata by population basis, to fund victims' assistance programs.

The first $2.2 million collected in excess of the Crime Victims Fund goes to the courts for the development of the National Fine Center. Fines collected beyond that amount go into the general Treasury.

SENTENCING HEARING

Disclosure of the Presentence Investigation Report

Rule 32 of the Federal Rules of Criminal Procedure provides that the presentence investigation report will be disclosed to the defendant, the defendant's counsel, and to the prosecutor prior to imposing sentence. At that time the defense or prosecution may allege any inaccuracy in the report, and the Court may resolve any factual disputes concerning the report.

Evidence at Hearing

At the sentencing hearing, the probation officer presents the presentence investigation report which contains the defendant's financial statement prepared by the probation officer. The prosecutor should introduce any other evidence which may be relevant to sentencing.

Ability to Pay

The Court is required to make fact findings on the defendant's ability to pay. In determining whether to impose a fine and the amount, time for payment and method of payment of a fine, the court must determine the defendant's ability to pay. 18 U.S.C. §3572. Thus, an accurate picture of the defendant's financial condition is critical to the sentencing process.

Public Record

All information presented at the hearing is public record. The prosecutor has all of the financial information presented at the hearing, including the agency investigator's findings and other information that may have been excluded from the trial because it was inadmissible evidence. At this time the prosecutor should read into the record any financial information useful for collection purposes which otherwise might not be obtainable by the collection attorneys.

As noted above, the presentence investigation report may be retained by the prosecutor for purposes of enforcing the court's order. The prosecutor must see that the report is forwarded to the Financial Litigation Unit.

Disputed Facts

Judicial resolution

Under the Sentencing Guidelines, the judge need not resolve any disputed facts unless they go to the sentence to be imposed or to the application of the Guidelines, which determine both the term of imprisonment and the amount of the fine.

Burden of proof

- The burden of proof applicable to disputed sentencing facts is by a preponderance of the evidence.
- The party challenging the accuracy of any fact of the presentence report bears burden of production.
- The party supporting the fact bears the burden of persuasion.
- An evidentiary hearing is not always necessary. The Federal Rules of Evidence do not apply, and reliable hearsay or other information may be considered.
- There is *no limitation* on information provided the Court concerning the defendant's background, character, and conduct which is provided for the purpose of imposing an appropriate sentence. 18 U.S.C. § 3661.
- An analysis and discussion of disputed sentencing facts is found in *Prosecutor's Handbook on Sentencing Guidelines*, published by the Criminal Division, pp. 55-64 (November, 1987).

Discrepancies

The prosecutor should notify the probation officer of any discrepancies between the prosecutors knowledge of the defendant and what is contained in the presentence report.

Net Worth Statement

At the hearing, the prosecutor may enter into the record the defendant's net-worth statement, listing assets and liabilities, so that it is available to the Financial Litigation Unit.

Restitution

If restitution is involved, the amounts of restitution and the names of the victims should be available at the sentencing hearing. The victims and the amounts may not be left for future determination. Although the addresses should not appear in the J&C, they should be readily available so restitution maybe distributed.

SENTENCING

The Sentencing Reform Act (SRA) was intended to prevent unwarranted disparities in sentencing. Under that Act, the Sentencing Commission established guidelines to deter crime, punish the defendant, and rehabilitate the defendant. In sentencing, the court is to balance the defendant's actions against the needs of society.

Pitfalls in the Judgment and Commitment Order

The language of the J&C can seriously affect fine collection. Because of the many new sentencing statutes, the court may not always realize the ramifications of the description of monetary impositions in the J&C. Under Federal Rule of Criminal Procedure 35, sentences may be corrected only on appeal. (The Rule 36 motion for correction of a clerical error in a sentence is only available where the clerk of court commits an error in describing the oral sentence imposed by the court.) Thus, it may be necessary for the prosecutor and the probation officer to approach the bench at sentencing and tactfully suggest corrections or changes in the sentence that will ensure enforcement of the court's order.

Some United States Attorneys' offices have met with the court or the clerks of court to discuss how to remedy recurring sentencing problems that hinder fine enforcement.

With the development of the National Fine Center, the courts will utilize the automated J&C. Prosecutors and defense counsel will have an opportunity to review the J&C "on the spot" at sentencing and to correct any errors at that time. Thus, it is imperative that prosecutors be aware of the enforcement implications of the J&C language.

"Concurrent" fines

A problem may arise in interpreting the actual amount of the fine ordered, especially where the court orders the fine on one count to run "concurrently" with the fine on another count. To avoid confusion, tactfully request the court to add the words, "for a total fine of $_."

Liquidated amount

If the court fails to impose a fine as a sum certain, county recorders may refuse to record a lien on the fine judgment. This problem usually arises under § 5E4.2(i) of the *Sentencing Guidelines*, which provides for imposition of an *additional* fine amount to cover the costs of any incarceration, probation or supervised release *ordered*. This amount is added to any fine based on the offense level found in the Fine Table in § 5E4.2(c). The total of the two amounts is the fine imposed against the defendant, which may not exceed the maximum fine for the offense under 18 U.S.C. § 3571. Some judgments are written imposing the two fines separately, but fail

to add "for a total fine of $___." But even more serious, some judgments fail to provide a liquidated amount for the cost element in the fine. For example, if one year of probation is ordered, a poorly worded judgment may state, "In addition, a fine is imposed to cover the costs of probation at the rate of $83.33 per month." Since the judgment does not provide a liquidated amount, a lien on the judgment may not be recorded. Thus, the prosecutor should request that the court bring the cost element of the fine to a liquidated amount by multiplying the monthly cost times the number of months *imposed*. The cost element of the fine should be added to the fine imposed under the Fine Table "for a total fine of $___."

Payment date

Sometimes the Court may not state when the fine or restitution is due. The prosecutor should ask the Court whether the fine or restitution is due immediately and, if not, what is the maximum amount of time allowed for payment. If the defendant has assets, the prosecutor should advise the Court of the defendant's ability to pay immediately based on the presentence investigation report.

Payment during incarceration

The J&C may state that payment of the fine or restitution is not due until the defendant is placed on supervised release. This language prevents collection of the fine while the defendant is in prison. The defendant may have assets that could be executed against immediately. Such language gives the defendant time to dissipate assets and prevents the Bureau of Prisons from collecting the fine from the inmate's prison earnings through the Bureau of Prisons Inmate Financial Responsibility Program.

Get Financial Information in the Record

If financial information obtained during the grand jury proceedings is not recited at the sentencing hearing, the prosecutor should recite it into the record at sentencing so that it is available to the Financial Litigation Unit.

Otherwise, such information may be released only by a court order under Rule 6(e) of the Federal Rules of Criminal Procedure. See Appendix A for a sample Rule 6(e) motion and order.

Order of Payments

- Any amounts received will be applied first to special assessments.

- If both a fine and restitution are ordered, the court shall direct payments to be applied first to restitution and then to the fine. *Sentencing Guidelines* § 5E4.1(b).

- Payments of fines will be credited first to principal, second to costs, third to interest, and finally to late payment penalties. 18 U.S.C. § 3612(i).

- Prosecutors should inform the defendant that interest and late payment penalties accrue to the fine. Interest and penalties are to serve as incentives to pay the fine promptly. Interest will run during any period payment of the fine is deferred, that is, during the pendency of an appeal, while the defendant makes restitution or while the defendant is incarcerated.

Deposition after Sentencing

After sentencing, a court order may be obtained under Federal Rule of Civil Procedure 30 to depose the defendant as to his financial assets. Because the prosecutor has direct knowledge of the defendant's financial situation, he or she may be the best person to conduct the deposition. It may be useful to conduct this deposition immediately after sentencing. Sometimes the mere threat of disclosure of assets is sufficient to prompt immediate payment of the fine. Prosecutors should remember that the more far-reaching civil discovery tools are available for collection purposes.

Cooperation

The probation office and the U.S. Attorney's office should work together to ensure that the fine is paid. If the defendant fails to pay a fine that is a condition of probation, a revocation hearing should be held.

POST-JUDGMENT COLLECTION REMEDIES

Stay of Execution Pending Appeal

Rule 38(a)(3) of the Federal Rules of Criminal Procedure allows a defendant to request a stay of execution of a fine pending appeal.

Security during the stay

The Court may require the defendant to:

- Deposit cash into the court registry;
- Post a bond to guarantee payment;
- Restrain the defendant from dissipating assets; or
- Require an examination of the defendant's assets. 18 U.S.C. § 3572(g), 18 U.S.C. § 3624(repealed).

Examination of defendant's assets

Always request an examination of the defendant's assets. Often the threat of disclosure of financial information provides sufficient incentive for immediate payment of the fine or restitution.

No stay of collection

If the court has not stayed collection, the government should proceed to enforce the judgment, even though the case is on appeal. If there is no stay of collection, the court, having ordered payment of the fine, will not direct the defendant to post security. The government should execute on the defendant's property as soon as possible after sentencing.

Final judgment

Under the Sentencing Reform Act, even if the sentence is modified, corrected or appealed and modified, the judgment is a final judgment for all other purposes. 18 U.S.C. §§ 3562, 3572(c), and 3582(b). Thus, execution against property of the defendant may proceed where the court has imposed a fine unless the court stays execution. Furthermore, a judgment may be registered in any other district under 28 U.S.C. § 1963 when the court that entered the judgment so orders for good cause shown.

Pursuant to 28 U.S.C. § 2413, a writ of execution on a judgment obtained for the use of the United States may be executed by the issuing court or the court of any other State, in any Territory, or in the District of Columbia. In those cases where a criminal fine is to be enforced under state law, the government attorney should carefully consider whether to enforce a judgment under the law where the judgment was obtained or to transfer the judgment to the jurisdiction where the defendant's property may be situated. If the defendant's property is located in a debtor's haven, such as Texas or Florida, but the judgment was obtained in a jurisdiction more favorable to creditors, the judgment probably should not be transferred and should be enforced in accordance with the laws of the state where the judgment was obtained. *See* also pages 38-39, *infra*.

Statutes Concerning Stays of Execution of a Fine

Offenses committed prior to January 1, 1985

- Fed. R. Crim. P. 38(a)(3) applies.
- The Court may stay payment of the fine upon such terms as it deems proper.
- The Court *may* require the defendant to deposit all or any part of the fine and costs in the court registry; to give bond for payment of the fine; to submit to an examination of assets; or to be restrained from dissipating assets.

Offenses committed on or after January 1, 1985, but prior to November 1, 1987

- The Criminal Fine Enforcement Act of 1984 modifies Fed. R. Crim. P. 38(a)(3).
- Absent exceptional circumstances (as determined by the Court), the Court *shall* require the defendant to deposit, in the Court registry, any amount of the fine or to provide a bond or other security to ensure payment of the fine or shall restrain the defendant from transferring or dissipating assets. 18 U.S.C. § 3624(repealed).

Offenses committed on or after November 1, 1987

- The Sentencing Reform Act modifies Fed. R. Crim. P. 38(a)(3).
- Absent exceptional circumstances (as determined by the Court), the Court *shall* require the defendant to deposit, in the Court registry, any amount of the fine or to provide a bond or other security to ensure payment of the fine or shall restrain the defendant from transferring or dissipating assets. 18 U.S.C.§ 3572(g).

Post-Judgment Discovery

The most effective tool is the *judgment debtor examination.*

- *Federal Rule of Civil Procedure 69* permits discovery in aid of execution on the judgment.

- *Federal Rule of Civil Procedure 30* allows taking of depositions. The notice and subpoena for the deposition should be accompanied by a *subpoena duces tecum* for bank statements, tax returns, etc. Under no circumstances should the deposition be concluded until all requested documents have been produced. The best procedure is to continue the deposition for a few days until the documents have been produced.

If the defendant is *out of jail*, prepare the notice of deposition, serve a subpoena, and tell the defendant when and where to appear.

Where the *debtor is incarcerated*, Rule 30 requires a court order permitting the deposition. One Assistant U.S. Attorney recommends that when the defendant is incarcerated at a prison some distance from the office, request that the defendant be transferred to a local prison for the deposition. He notes, "Incarceration in a local jail generally has the effect of making a defendant more cooperative."

In states where there is a *homestead exemption*, ask whether the defendant has filed one, since the property may be exempt.

It may be useful to have the *U.S. Marshal* available with a writ of execution to be served on the debtor to seize any cash the debtor has on hand, his automobile (ask him where he parked, does he have the keys), golf clubs, jewelry, etc.

Federal Rule of Civil Procedure 34 provides for a *subpoena duces tecum* for production of documents, such as bank books, check books, financial records, deeds for real estate, insurance policies, titles to vehicles, income tax returns, *etc.* If the debtor does not bring the requested documents, interrogate the debtor but continue the hearing until the debtor has produced the documents. Go through the checkbook, asking questions about checks drawn for large amounts, sources of deposits, *etc.*

Interrogatories are seldom effective with criminal fine debtors.

28 U.S.C. § 2413 is an important tool. It permits the Government to serve a writ of execution anywhere in the United States. Thus, there is no need to register a judgment in an out of state clerk's office. There is no need to wait until the case has become final on appeal before executing. *See United States v. Palmer*, 609 F. Supp. 544 (D.C. Tenn. 1985).

Fine Enforcement Under The Federal Debt Collection Procedures Act

With the passage of the Federal Debt Collections Procedures Act of 1990 (the "Act") (effective as of May 29, 1991), federal criminal fines imposed since May 29, 1981, may be enforced (1) as a federal civil judgment under the Act[1], (2) as a civil judgment under state law[2] or (3) under any other Federal fine collection law[3], such as the Sentencing Reform Act[4] or Criminal Fine Enforcement Act[5].

Liens Arising Under the Sentencing Reform Act and the Criminal Fine Enforcement Act

Under title 18, a statutory lien arises when a fine is imposed under the Sentencing Reform Act. A statutory lien arises on judgments imposing a fine under the Criminal Fine Enforcement Act once a notice of lien is filed.

The liens that arise under title 18 are liens in favor of the United States on all property and rights to property of the defendant except property or transactions which are exempt from a levy for unpaid taxes under the Internal Revenue Code. The liens that arise under title 18 are more powerful than the lien that is created by a judgment lien arising from a civil action.

Notice of Lien

Notice of the liens arising under title 18 should be filed in the same manner a lien is filed under the Act. Two forms of notice of lien are included as Appendix B. One is for use under the Criminal Fine Enforcement Act and the other for use under the Sentencing Reform Act.

An abstract of judgment should not be filed. If an abstract of judgment has been filed, simply file a notice of lien, as well.

---

[1]28 U.S.C. § 3001(a) and § 3002(3) and (8).

[2]28 U.S.C. § 3003(b).

[3]28 U.S.C. § 3003(b).

[4]18 U.S.C. § 3613(a). The underlying offense must have occurred on or after November 1, 1987. Hereinafter, any reference to the Sentencing Reform Act means as amended by the Criminal Fines Improvements Act.

[5]18 U.S.C. § 3565(a)(2)(Repealed)(Effective with respect to offenses occurring on or after January 1, 1985, and prior to November 1, 1987.

Criminal Fine Enforcement Act

The Criminal Fine Enforcement Act provides:

> A judgment imposing the payment of a fine or penalty shall, upon the filing of a notice of lien in the manner in which a notice of tax lien would be filed under section 6323 of the Internal Revenue Code of 1954, be a lien in favor of the United States upon all property and rights of property belonging to the defendant, except with respect to properties or transactions specified in subsections (b), (c) or (d) of section 6323 of the Internal Revenue Code . . . and except with respect to property that would be exempt from levy for taxes under section 6334(a) of the Code. . . . A writ of execution may be issued with respect to any property or rights to property subject to such lien. 18 U.S.C. § 3565(a)(2).

The Criminal Fine Enforcement Act specifically provides that the lien created thereunder may be enforced by writ of execution. Thus, that lien may be enforced by execution under state law or under the Act, whichever is more favorable.

The Sentencing Reform Act

The Sentencing Reform Act provides that "[a] fine imposed pursuant to the provisions of subchapter C of chapter 227 is a lien in favor of the United States upon all property belonging to the person fined." 18 U.S.C. § 3613(a).

Section 3613(c) of title 18 states that the Internal Revenue Code provisions defining property and transactions exempt from execution or levy (26 U.S.C. §§ 6323 and 6334) apply to the lien which arises under section 3613(a).

The enforcement provisions of the Internal Revenue Code are applicable to the enforcement of this lien. Regulations providing for enforcement of this lien under the Internal Revenue Code have been drafted but not yet published. Enforcement under the Internal Revenue Code should not occur until such regulations are promulgated. Until such promulgation, the imposition may be enforced by a writ of execution as a civil judgment under either state law or the Act, whichever is most advantageous.

Prior to the FDCPA

The Act is available for the enforcement of fines imposed on or after May 29, 1981.

If a fine was imposed prior to that date, it must be enforced under state law. The super liens of Title 18 are not available for such fines, since they apply only to fines imposed under the Criminal Fine Enforcement Act and the Sentencing Reform Act, both of which were enacted later.

In such cases, the super lien of the Criminal Fine Enforcement Act or the Sentencing Reform Act is not available. The fine, however, may be enforced under state law or the Act, depending on which law is more favorable.

If the collections attorney determines that state law is more advantageous, the fine judgment should be registered as a lien under state law.

If enforcement under the Act is more advantageous, an abstract of the fine judgement should be filed in accordance with the terms of the Act.

Failure to Pay a Fine is a Crime

If the defendant *knowingly* refuses to pay a fine, he may be resentenced. *See* 18 U.S.C. § 3614. Or he may be subject to additional fines or imprisonment. *See* 18 U.S.C. §§ 3615 and 3621.

Collection tips

- Record the notice of fine lien in every reasonable place.
- Take depositions and interrogatories; have the court enforce these through contempt powers.
- Set aside fraudulent conveyances.
- Act like a bank loan officer trying to collect a loan.
- Monitor collections.

Bureau of Prisons Inmate Financial Responsibility Program

Under the Bureau of Prisons Inmate Financial Responsibility Program, federal inmates are encouraged to pay their criminal fines, restitution, and other court-ordered obligations, such as child support, from money earned while they are in prison. Good faith efforts to pay are seen as progress toward rehabilitation and financial responsibility. Participation in the program results in institutional privileges, such as preferred work assignments, single cells, furloughs, *etc.* Over 10,500 federal inmates voluntarily participate in this program and approximately $1 million is collected each month.

In order for the system to work, the judgment and commitment order must provide that the fine or restitution is to be paid during the period of incarceration with any unpaid balance to be a condition of supervised release. If payment is deferred until after the defendant is released from prison, the defendant need not make any payments during his incarceration.

Revocation of Parole

Pursuant to the Sentencing Reform Act, the Parole Commission will cease to operate on November 1, 1992. Until that date, however, the Parole Commission's policy is that prisoners are expected to pay court-imposed obligations. The prisoner's payment plan is discussed at all parole hearings, and the Commission is authorized to deny parole if the prisoner refuses to pay a fine or restitution. If payment of the obligation is a court-ordered condition of parole, parole may be revoked if the prisoner willfully refuses to pay.

SUGGESTIONS TO IMPROVE FINE COLLECTION

These are suggestions from both criminal and civil Assistant U.S. Attorneys for more effective fine collection operations in the U.S. Attorneys' offices:

Function of Fine Collection

Both civil and criminal assistants agree that criminal fine and restitution collection should remain a function of the civil assistant. Nevertheless, it is also agreed that the criminal assistants must provide as much information as possible on the defendant's financial background. This information is essential to effective fine collection.

Attention of the U.S. Attorney

There is a consensus that the problem of uncollected fines requires the continued attention of the U.S. Attorney until a fine collection system has been developed and becomes a part of office routine.

Method of Exchanging Information

Collection data sheet

Assistants have recommended the use of a collection data sheet as the best way to exchange financial information about the defendant. The Criminal Section should complete the sheet and transmit it to the Financial Litigation Unit through the docketing section.

How to ensure completion

There are several suggestions from the field on how to ensure completion of the collection data sheet.

- Make the completion of the collection data sheet a critical element in the performance rating of the person charged with completing the sheet.
- Do not allow the docketing section to close a case unless the sheet is completed and attached to the case file.
- Create a system in which the U.S. Attorney is notified if the sheet is not completed. Failure to complete the sheet would mean meeting with the U.S. Attorney. In one office, a former U.S. Attorney withheld pay checks if the sheet

was not completed. The person responsible then had to retrieve his/her check from the U.S. Attorney after completion of the sheet.

Ways to reduce intra-office friction

To reduce any friction that might be induced by the Financial Litigation Section's continual follow up with the Criminal Section for past due collection data sheets, the U.S. Attorney could assign to the Chief of the Criminal Section oversight responsibility for the Financial Litigation Unit's collection of criminal fines and restitution. The Chief of the Civil Section would be responsible for oversight of the Unit's collection of civil judgments.

APPENDIX A

1. Sample ex parte motion - Rule 6(e), Federal Rules of Criminal Procedure

2. Sample order pursuant to Rule 6(e), Federal Rules of Criminal Procedure

3. Sample memorandum in support of ex parte motion

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

IN RE GRAND JURY INVESTIGATION) GRAND JURY NO. 87-1
)

EX PARTE MOTION OF THE UNITED STATES OF AMERICA
FOR DISCLOSURE OF DOCUMENTS AND TESTIMONY
SUBPOENAED BY THE GRAND JURY

The United States, by its undersigned attorneys, requests access to and use of certain grand jury materials and information relating to the grand jury's investigation of [target]. The investigation by the grand jury has now been completed, and no indictments are anticipated.

Through this petition, the government seeks a) disclosure of the documents subpoenaed by the grand jury, b) disclosure of the transcripts of the grand jury testimony, and c) access to and use of the agents of the Defense Criminal Investigative Service (DCIS) and employees of the Defense General Supply Center (DGSC) who participated in the investigation and their work product. Disclosure and use are requested in connection with a civil action which the civil section of the United States Attorneys Office is contemplating filing in federal court under the False Claims Act, 31 U.S.C. §§3729-3731, and at common law against [target] and any other culpable individuals or corporations.

The requested information is essential to enable the civil section to identify accurately both the extent of the fraudulent scheme and its participants and to file timely any appropriate civil action.

In support of this motion, the United States respectfully refers the Court to the accompanying memorandum of law and the affidavit of O. Michael Powell, which has been filed under seal herewith. The contents of agent Powell's affidavit have not been disclosed to the undersigned civil section attorney.

Respectfully submitted,

HENRY E. HUDSON
UNITED STATES ATTORNEY

By: _____

G. Wingate Grant
Assistant United States Attorney
P.O. Box 1257
Richmond, Virginia 23210-1257

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

IN RE GRAND JURY INVESTIGATION) GRAND JURY NO. 87-1
)

ORDER

Upon consideration of the motion, memorandum and supporting affidavit of the United States for disclosure of grand jury material, and deeming it proper so to do, the Court hereby finds that the government has established a particularized need for the materials requested, and it is hereby **ORDERED AND ADJUDGED** pursuant to Rule 6(e)(3)(C) that the motion is **GRANTED**. With respect to the grand jury's investigation of [target], the civil section attorneys in the United States Attorney's Office and the Department of Justice, as well as civil counsel for the Department of Defense shall be permitted 1) disclosure of documents subpoenaed by the grand jury, 2) any transcripts of grand jury testimony, and 3) access to and use of agents of the Defense Criminal Investigative Service and employees of Defense General Supply Center who participated in the investigation and their work product. Such material may be used in connection with any civil proceedings in which the government may be involved.

_____

_____
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

IN RE GRAND JURY INVESTIGATION) GRAND JURY NO. 87-1
)

MEMORANDUM IN SUPPORT OF
EX PARTE MOTION OF THE UNITED STATES OF AMERICA
FOR DISCLOSURE OF DOCUMENTS AND TESTIMONY
SUBPOENAED BY THE GRAND JURY

INTRODUCTION

By the accompanying ex parte [1] petition, made pursuant to Rule 6(e)(3)(C) and (D) of the Federal Rules of Criminal Procedure, the United States, through its undersigned attorney, requests that this Court issue an order permitting the undersigned attorney, and others in the civil section of the United States Attorneys Office, access to and use of certain grand jury materials and information relating to the grand jury's investigation of [target]. The investigation resulted in the preliminary

---

[1] Under Fed. R. Crim. P. 6(e)(3)(D), the United States may seek disclosure of grand jury materials through an ex parte petition:

> (D) A petition for disclosure pursuant to subdivision (e)(3)(C)(i) shall be filed in the district where the grand jury convened. Unless the hearing is ex parte, which it may be when the petitioner is the government, the petitioner shall serve written notice of the petition upon (i) the attorney for the government, (ii) the parties to the judicial proceeding if disclosure is sought in connection with such a proceeding, and (iii) such other persons as the court may direct. The court shall afford those persons a reasonable opportunity to appear and be heard. (emphasis supplied)

See also In re Grand Jury Proceedings, GJ-76-4 & GJ-75-3, 800 F.2d 1293 (4th Cir. 1986)(hereinafter Litton).

decision not to indict [target] for criminal violations, but there is apparently considerable reason to believe that violations of the False Claims Act, 31 U.S.C. §3729-3731, have been committed.

Through this petition, the government seeks a) disclosure of the documents subpoenaed by the grand jury, b) disclosure of the transcripts of the grand jury testimony, and c) access to and use of the agents of the Defense Criminal Investigative Service (DCIS) and employees of the Defense General Supply Center (DGSC) who participated in the investigation and their work product. Disclosure and use are requested in connection with a civil action which the civil section of the United States Attorneys Office is contemplating filing in federal court under the False Claims Act, 31 U.S.C. §§3729-3731, and at common law against [target] and any other culpable individuals or corporations.

The requested information is essential to enable the civil section to identify accurately both the extent of the fraudulent scheme and its participants and to file timely any appropriate civil action. At this point, the criminal proceedings have concluded, and the continued need for grand jury secrecy is greatly diminished or perhaps even extinguished in light of the fact that no criminal prosecution is contemplated.

BACKGROUND

The civil section attorneys are responsible for the initiation of legal action to recover damages arising out of fraud against the United States. The undersigned has reviewed non-grand jury information concerning the investigation and has spoken with DGSC employees familiar with the contracts between [target] and the government who have not had access to grand jury material. This information indicates that the grand jury investigation uncovered fraudulent activity related to at least 12 contracts which appears to have caused significant damage to the United States. Specifically, it appears that [target] was engaged in selling chemical products to the government which did not comply with DOD specifications.

Time is of the essence as there exists a very real possibility that the statute of limitations may act to bar some of the claims against [target] in the near future. The requested material is therefore necessary to allow prompt review of potential civil claims and, if appropriate, to file suit in a timely fashion.

ARGUMENT

I. Grand Jury Material Should be Disclosed to the United States Pursuant to Rule 6(e)(3)(C) of the Federal Rules of Criminal Procedure.

To the extent the petition of the government requests material within the scope of Rule 6(e), *e.g.* grand jury transcripts, the United States requests a court order authorizing access under Rule 6(e)(3(C)(i) which permits disclosure of matters occurring before a grand jury "when so directed by a court preliminarily to or in

connection with a judicial proceeding." As noted above, the government requests this material preliminarily to and in connection with a civil action.

Applicants seeking disclosure pursuant to subsection (e)(3(C)(i) must demonstrate a "particularized need" for the grand jury material. In Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211 (1979), the Supreme Court set forth three factors to be considered in determining "particularized need."

> Parties seeking grand jury transcripts under Rule 6(e) must show that the material they seek is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that their request is structured to cover only material so needed.

441 U.S. at 212. See also United States v. Sells Engineering, Inc., 463 U.S. 418, 443 (1983)(hereinafter Sells).

The court is "infused with substantial discretion" [2] in balancing the competing needs to determine whether disclosure of grand jury material is appropriate. As stated by the Supreme Court in Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 399 (1959):

> In fact, the federal trial courts as well as the Courts of Appeal have been nearly unanimous in regarding disclosure as committed to the discretion of the trial judge. Our cases announce the same principle, and Rule 6(e) is but declaratory of it.

The particularized need standard is especially flexible when the request for disclosure is made by the government. In that case, the public interest in disclosure

---

[2] Douglas Oil Co., supra. at 223.

also is considered.

> Nothing in Douglas Oil . . . requires a district court to pretend that there are no differences between governmental bodies and private parties. The Douglas Oil standard is a highly flexible one, adaptable to different circumstances and sensitive to the fact that the requirements of secrecy are greater in some situations than in others . . . [T]he standard itself accommodates any relevant considerations, peculiar to government movants, that weigh for or against disclosure in a given case. For example, a district court might reasonably consider that disclosure to Justice Department attorneys poses less risk of further leakage or improper use than would disclosure to private parties or the general public. Similarly, we are informed that it is the usual policy of the Justice Department not to seek civil use of grand jury materials until the criminal aspect of the matter is closed . . . And "under the particularized need standard, the district court may weigh the public interest, if any, served by disclosure to a governmental body . . ."

Sells, at 445.

Similarly, in Illinois v. Abbott & Associates, Inc., 460 U.S. 557 (1983), the Court recognized the necessity of considering whether the public was served better by disclosure to government attorneys or by continued secrecy.

> "We stress that under the particularized need standard, the district court may weigh the public interest, if any, served by disclosure to a governmental body -- along with the requisite particularized need -- in determining 'whether the need for disclosure is greater than the need for continued secrecy'."

460 U.S. 568 n.15 (quoting Douglas Oil, 441 U.S. at 211).

The requested access to and use of grand jury material, including transcripts of grand jury testimony, weighs heavily in favor of disclosure in this case because: 1) disclosure is necessary to avoid injustice in allowing a fraud perpetrated upon the taxpayers to go unredressed; and 2) the need for disclosure is greater than the need for

continued secrecy;

1. Disclosure is Necessary to Avoid Injustice

The Civil Division attorneys are unable to determine from the information presently available the scope of liability of the potential defendants or the extent of damages caused by the acts of these persons. Although the United States would have the ability to request information through civil discovery, the process would be time-consuming and not likely to lead to information that is as accurate as that which has been presented to the grand jury because the grand jury evidence would presumably have been obtained closer to the time that the operative events occurred. Since the time of the criminal investigation, memories would probably have faded. Access to the most accurate information will lead to a fair and just result of whether to file suit. In summary, the litigative disadvantage of denial of access to the grand jury material could likely result in the kind of "possible injustice in another proceeding" envisioned by the Court in Douglas Oil.

2. The Need for Disclosure Outweighs the Need for Continued Secrecy

The need for disclosure far outweighs any concerns regarding secrecy in this case. In United States v. Procter & Gamble Co., 356 U.S. 677, 681 n.6 (1958), the Court noted the policies underlying grand jury secrecy:

> 1) [t]o prevent the escape of those whose indictment may be contemplated; 2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; 3) to prevent subordination of perjury or tampering with the witnesses who may testify before [the] grand jury

> and later appear at the trial of those indicted by it; 4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; 5) to protect the innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.

When the factors involved in grand jury secrecy are considered in the context of this petition, they do not present a bar to disclosure. The grand jury has concluded its investigation, and no indictment was returned. Therefore, the first three factors do not weigh against disclosure. [3] The fourth policy, "to encourage free . . . disclosures," is intended to assure that targets of the grand jury will not seek retribution against those who testified. Here it is the government who seeks disclosure of the grand jury testimony and other material. It is clear that "the concerns that underlie the policy of grand jury secrecy are implicated to a much lesser extent when the disclosure merely involves Government attorneys." See United States v. John Doe, Inc. I., 481 U.S. 102 (1987). Finally, the fifth factor is not particularly relevant because the grand jury has apparently concluded not to indict. Because it is the government seeking disclosure, the material sought is not likely to be made public. Because full disclosure to the civil division attorneys will result in a more accurate assessment of the facts, release is likely to assure that only those who actually participated in the alleged fraud will be named in a civil action.

---

[3] This factor may be a moot point if, in fact, no witnesses actually testified before the grand jury.

Recently the Supreme Court reviewed for the first time a concrete application of the "particularized need" standard to a request for disclosure to government attorneys in United States v. John Doe, Inc., I., supra. The determinative question for the Court was "whether the public benefit of disclosure outweighs the dangers created by the limited disclosure requested." In that case, as here, the grand jury had been discharged without returning an indictment. The Court held that efficient, "effective and even-handed enforcement of federal statutes" is a valid public purpose supporting disclosure. In so holding, the Court affirmed the district court decision which found that:

> . . . the Government's interest in coordinating fair and efficient enforcement of the False Claims Act . . . constituted particularized need for the requested disclosure.

The Court reasoned that disclosure might save the government, the potential defendants, and witnesses the severe expense of protracted discovery, if the government, with prior disclosure, may have decided not to file suit in the first place. [4]

Finally, it is clear that "[i]f the reasons for secrecy, measured by an assessment of relevant factors, are weakened or become minimal, the justification [required] for disclosure will be diminished." Litton, supra. at 1299; see John Doe, 481 U.S. 102 at 115, citing Douglas Oil, 441 U.S. at 223. Given this lesser burden, the government's need, in addition to the significant public benefit, outweighs the minimal potential

---

[4] Without disclosure in order to make an informed decision whether to file a civil suit, there is a strong inclination to file suit based on the minimum evidence of wrongdoing in order to take advantage of the discovery process to further evaluate the government's claim.

adverse effects of its disclosure.

II. Rule 6(e)(2) Does Not Apply to Disclosure of Certain Documents and Investigative Materials

The government's petition addresses the disclosure of material that does not fall within the secrecy requirements of Rule 6 only out of an abundance of caution. The government does not know what material is identified in the attached affidavit as: 1) documents subpoenaed by the grand jury or 2) material prepared or obtained as part of the investigation. To the extent this material is identified in the affidavit, it should be released to the government because it is not covered by the secrecy requirement of Rule 6. Ordinary business records and other documents which may have been subpoenaed and presented to the grand jury do not constitute grand jury material.

> [I]t is not the purpose of the Rule to foreclose from all future revelation to proper authorities the same information or documents which were presented to the grand jury. Thus, when testimony or data is sought for its own sake -- for its intrinsic value in furtherance of a lawful investigation -- rather than to learn what took place before the grand jury, it is not a valid defense to disclosure that the same information was revealed to a grand jury or that the same documents had been, or were presently being, examined by a grand jury. [Citations omitted.]

United States v. Interstate Dress Carriers, Inc., 280 F.2d 52, 54 (2nd Cir. 1960)(en banc). As in that case, the government does not seek to learn what use the grand jury made of the records, but only to inspect them in connection with the civil investigation. Other courts have come to similar conclusions. United States ex rel. Woodard v. Tynan, 757 F.2d 1085, 1087 (10th Cir. 1985)(the rule of secrecy is intended to protect only disclosures "of what is said or what takes place in the grand jury room" and not to

bar disclosure of ordinary business records "merely because those records were at some time submitted to a grand jury investigating criminal culpability.") [5]; see also United States v. Weinstein, 511 F.2d 622 (2nd Cir), cert. denied sub nom. Austin v. United States, 422 U.S. 1042 (1972); United States v. Stanford, 589 F.2d 285, 291 (7th Cir. 1978), cert. denied, 440 U.S. 983 (1979).

Similarly, the rule does not bar disclosure of investigative reports and analyses of documents, witness interview notes, statements and summaries taken after the grand jury was convened. Reports summarizing documents that are not considered "matters occurring before the grand jury" are likewise not within the scope of the rule. See e.g., Cumis Insurance Society v. South-Coast Bank, 610 F.Supp. 193, 198-99 (N.D. Ind. 1985)(FBI investigative reports derived from records obtained in response to grand jury subpoena not within the scope of Rule 6(e)); United States v. DiBona, 610 F.Supp. 449, 451-52 (E.D.Pa. 1985).

CONCLUSION

For the reasons stated herein, the motion of the United States for disclosure of grand jury material should be granted.

---

[5] While Tynan involved records submitted to a state grand jury, the court held that they could be disclosed for use in a civil action under the False Claims Act.

APPENDIX B

1. Notice of Lien for Fine or Penalty Imposed Pursuant to the Sentencing Reform Act of 1984.

2. Notice of Lien for Fine or Penalty Imposed Pursuant to the Criminal Fine Enforcement Act of 1984

For Optional Use By Recording Office

DEPARTMENT OF JUSTICE

NOTICE OF LIEN FOR FINE
IMPOSED PURSUANT TO
THE SENTENCING REFORM ACT OF 1984

United States Attorneys Office for _____

Serial Number _____

Notice is hereby given of a lien against the property of the defendant named below. Pursuant to Title 18, United States Code, Section 3613(a), a fine imposed pursuant to the provisions of subchapter C of chapter 227 is a lien in favor of the United States upon all property belonging to the person fined. Pursuant to §3613(d) a notice of lien shall be considered a notice of lien for taxes for the purposes of any State or local law providing for the filing of a tax lien. The lien arises at the time of the entry of judgment and continues until the liability is satisfied, remitted, or set aside, or until it becomes unenforceable pursuant to §3613(b).

Name of Defendant

Residence

Amount of Fine

Court Imposing Judgment

Court Number

Date of Judgment

Date of Entry of the Judgment

Rate of Interest When Payment is Deferred by Court

If payment becomes past due, possible penalties totaling 25 percent of the principal amount past due may arise. 18 U.S.C. §3612(g).

IMPORTANT RELEASE INFORMATION--With respect to the lien listed above, this notice shall operate as a certificate of release pursuant to 18 U.S.C. §3613(b) on _____.

Place of Filing

This notice was prepared and signed at _____

on this, the _____ day of _____, 19_____.

Signature _____ Title _____

For Optional Use By Recording Office

DEPARTMENT OF JUSTICE

NOTICE OF LIEN FOR FINE OR PENALTY
IMPOSED PURSUANT TO THE
CRIMINAL FINE ENFORCEMENT ACT OF 1984

United States Attorneys Office for _____ Serial Number _____

NOTICE is hereby given of a lien arising under the Criminal Fine Enforcement Act of 1984 (18 U.S.C. §3565, Repealed Nov. 1, 1987 but applicable to offenses committed on or after Jan. 1, 1985 and prior to Nov. 1, 1987) against the property of the defendant named below in favor of the United States. A judgment imposing the payment of a fine or penalty shall, upon the filing of a notice of lien in the manner in which a notice of tax lien would be filed under section 6323(f) of the Internal Revenue Code of 1954, be a lien in favor of the United States upon all property and rights of property belonging to the defendant for the amount of the fine or penalty, interest, costs, special assessments, and additional penalties that may accrue. For the purposes of any State or local law, a notice of lien for a judgment imposing a fine or penalty shall be considered a lien for taxes payable to the United States.

Name of Defendant

Residence

Amount of Fine or Penalty

Court Imposing Judgment

Court Number

Date of the Entry of the Judgment

Rate of interest during period when payment is deferred by the Court: 18 % per year. This fine or penalty is subject to additional interest at the rate of 1.5 % per month of any amount past due, and to possible penalties equal to 25 % of the amount past due, as provided by 18 U.S.C. §3565(c)(1) and (c)(2), respectively.

IMPORTANT RELEASE INFORMATION--With respect to the lien listed above, this notice shall operate as a certificate of release pursuant to 18 U.S.C. §3565(h) on _____.

Place of Filing

This notice was prepared and signed at _____
on this, the _____ day of _____, 19_____.

Signature _____ Title _____

☆ U.S. GOVERNMENT PRINTING OFFICE: 1992—342-497/74266