

**HANDOUT: KEY RESTITUTION CASES**  
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■ Recent restitution cases (2011 & 2012)

Importance of objection at sentencing:

When a defendant objects to the restitution at sentencing, there is a much more favorable standard of review on appeal for the defendant: Cf. related cases of U.S. v. Innarelli, 524 F.3d 286, 293 (1<sup>st</sup> Cir. 2008) (remand), and U.S. v. Matos, 611 F.3d 31 (1<sup>st</sup> Cir. 2010) (no remand).

Pre-MVRA authority for MVRA procedures:

In addressing older, pre-MVRA cases, courts find pre-MVRA authority for non-substantive changes to a payment order, and for entering a delayed restitution order: U.S. v. Kyles, 601 F.3d 78 (2d Cir. 2010).

Authorization of CVRA v. MVRA:

Slightly different in restitution authorization (In re McNulty, 597 F.3d 344 (6<sup>th</sup> Cir. 2010); virtually identical (In re Doe, 264 Fed.Appx. 260, 262 n.2 (4<sup>th</sup> Cir. 2007) and U.S. v. Speakman, 594 F.3d 1165, 1171 n.3 (10<sup>th</sup> Cir. 2010) and U.S. v. Atlantic States Cast Iron Pipe Co., 612 F.Supp.2d 453 (D.N.J. 2009). But no resulting difference in analysis and results, so far.

CVRA mandamus petitions:

- a) Circuit split continues on the standard of review: 6<sup>th</sup> Cir uses high standard to deny petitions (In re Acker, 596 F.3d 370 (6<sup>th</sup> Cir. 2010) and In re McNulty, 597 F.3d 344 (6<sup>th</sup> Cir. 2010)) and to grant petition (In re Simons, 567 F.3d 800, 801 (6<sup>th</sup> Cir. 2010)); DC Cir adopts high standard in partially granting petition (U.S. v. Monzel, 641 F.3d 528 (D.C. Cir. 2011)).
- b) District court's 3-month lag in ruling on victim's motion can amount to denial of victim's rights and granting of petition: In re Simons, 567 F.3d 800, 801 (6<sup>th</sup> Cir. 2010).
- c) Victims may not file direct appeal: U.S. v. Aguirre-Gonzalez, 597 F.3d 46 (1<sup>st</sup> Cir. 2010); U.S. v. Monzel, 641 F.3d 528 (D.C. Cir. 2011).
- d) Victims taking active role in case by asking for publication of decision and defending conviction and restitution order in opposition to defendant's post-sentencing § 2255 motion: U.S. v. Simons, 567 F.3d 800, 801 (6<sup>th</sup> Cir. 2010).

Restitution in Child pornography possession offenses:

- a) **1<sup>st</sup> Circuit:** U.S. v. Kearney, \_\_\_ F.3d \_\_\_, 2012 WL 639168 (C.A. 1 (Mass.)) (Feb. 29, 2012); Proximate cause required; Def's act proximately caused harm to victim; upheld \$3800 restitution.
- b) **2<sup>nd</sup> Circuit:** U.S. v. Aumais, 656 F.3d 147, 154-55 (2d Cir. 2011); proximate cause required; no proximate cause shown; vacates \$48,483 restitution order; jt/sev a problem outside the case.
- c) **3<sup>rd</sup> Circuit:** U.S. v. Crandon, 173 F.3d 122, 125 (3d Cir. 1999); D's conduct was proximate cause of victim's harm; affirmed restitution.
- d) **6<sup>th</sup> Circuit:** U.S. v. Evers, \_\_\_ F.3d \_\_\_, 2012 WL 413810 (6<sup>th</sup> Cir. (Tenn.)) (Feb. 10, 2012); proximate cause required; victim need not have "incurred" the costs.
- e) **9<sup>th</sup> Circuit:** U.S. v. Kennedy, 643 F.3d 1251 (9<sup>th</sup> Cir. 2011); Proximate cause required; no proof Def. proximately caused harm to victim vacates \$65,000 restitution (\$1,00 per image); jt/sev a problem outside the case: cannot be used to cure failure to prove causal connection. See also, U.S. v. Laney, 189 F.3d 954, 965 (9<sup>th</sup> Cir. 1999); proximate cause connection required between Def's act and victim's harm; U.S. v. Baxter, 394 Fed. Appx. 377 (9<sup>th</sup> Cir. 2010); proximate cause required; upholds \$3,000 in restitution (18 sessions of post-offense counseling).
- f) **11<sup>th</sup> Circuit:** U.S. v. McDaniel, 631 F.3d 1204, 1209 (11<sup>th</sup> Cir. 2011); proximate cause required; upholds \$12,700 restitution. See also, U.S. v. McGarity, \_\_\_ F.3d \_\_\_, (C.A. 11 (Fla.)) (Feb. 2, 2012) (multiple defendants in "ring"); end-user can proximately cause harm, but no evidence in record ; remands \$3 million restitution for court to determine whether Def's act proximately caused harm.
- g) **D.C. Circuit:** U.S. v. Monzel, 641 F.3d 528, 535 (D.C. Cir. 2011); CVRA mandamus and Def's appeal combined; proximate cause required; remands "nominal" order of \$5,000 for determination of how much harm; jt/sev outside the case a problem.
- h) **5<sup>th</sup> Circuit rehearing:** Fifth Circuit rehearing en banc its cases that determined Section 2259 does not require proximate cause: In re Amy Unknown, 636 F.3d 190 (5<sup>th</sup> Cir. 2011), reh en banc granted 2012 WL 248829; U.S. v. Wright, 639 F.3d 679 (5<sup>th</sup> Cir. 2011), reh en banc granted 2012 WL 248828.

Legislative changes for child porn possession? See, U.S. v. Solsbury, 727 F.Supp.2d. 789, 796-97 (D.N.D. 2010); or U.S. v. Kennedy, 643 F.3d 1251, 1266 (9<sup>th</sup> Cir. 2011):

“...the responsibility lies with Congress, not the courts, to develop a scheme to ensure that defendants such as Kennedy are held liable for the harms they cause through their participation in the market for child pornography. . . [and to] reconsider whether § 2259 is the best system for compensating the victims of child pornography offenses, or whether statutory damages of a fixed amount per image or payments into a general fund for victims would achieve its policy goals more effectively.”

Offset for value of defendant’s services:

No - where services require license (U.S. v. Hunter, 618 F.3d 1062, 1065 (9<sup>th</sup> Cir. 2010) and U.S. v. Dokich, 614 F.3d 314, 321 (7<sup>th</sup> Cir. 2010)).

Yes - where services do not require license (U.S. v. Vaghela, 169 F.3d 729, 736 (11<sup>th</sup> Cir. 1999)); see generally: (U.S. v. Huff, 609 F.3d 1240 (11<sup>th</sup> Cir. 2010)).

Co-conspirator v. victim dichotomy:

Yes, where victim not involved in OC but was complicit with D in other activity (U.S. v. Sanga, 967 F.3d 1332 (9<sup>th</sup> Cir. 1992); No, where victim complicit with D in OC, but victimized by D in related activity (U.S. v Lazarenko, 624 F.3d 1247, 1251 (9<sup>th</sup> Cir. 2010)).

Quick-takes:

Can’t order child support to be paid toward restitution:

U.S. v. Dann, 652 F.3d 1160 (9<sup>th</sup> Cir. 2011) (restitution under 18 USCA § 1591).

Restitution OK for R incurred by minor victim’s guardian under § 2248:

U.S. v. Tsosie, 639 F.3d 1213 (9<sup>th</sup> Cir. 2011).

How not to order payments into a fund for victim’s future counseling:

U.S. v. Palmer, 643 F.3d 1060 (8<sup>th</sup> cir. 2011).

Criteria for upholding appeals waiver re restitution:

U.S. v. Worden, 646 F.3d 499 (7<sup>th</sup> Cir. 2011).

District court fixes inadequate restitution order reversed 8 years ago:

Judge admits getting the cart before the horse in previous order by not sufficiently identifying over 9,000 victims; continues to refuse to invoke the complexity exception which would deny all restitution. U.S. v. Ageloff, 809 F.Supp.2d 89

(E.D.N.Y. 2011). See also U.S. v. Cadet, 664 F.3d 27 (2d Cir. 2011) on identifying victims.

Rare case on defendant's resources: U.S. v. McElwee, 649 F.3d 328 (5<sup>th</sup> Cir. 2011).

Restitution for funeral expenses to drug overdose victim:

U.S. v. Nossan, 647 F.3d 822 (8<sup>th</sup> Cir. 2011) (victim received drugs from defendant, convicted of dealing the drugs)

Restitution for "time-value" of money (pre-judgment interest):

U.S. v. Qurashi, 634 F.3d 699 (2d Cir. 2011). See also, U.S. v. Fumo, 655 F.3d 288 (3d Cir. 2011).

Civil settlement v. restitution: U.S. v. Rizk, 660 F.3d 1125 (9<sup>th</sup> Cir. 2011).

United Nations as victim:

U.S. v. Bahel, 662 F.3d 610 (2d Cir. 2011) (R for both in-house and hired law firm).

Rare case on restitution solely as a condition:

U.S. v. Batson, 608 F.3d 630 (9<sup>th</sup> Cir. 2010).

Restitution offset for forfeited property? For taxes paid by shell corp?

U.S. v. Martinez, 610 F.3d 1216 (10<sup>th</sup> Cir. 2010).

Payment schedule hair-splitting continues:

7<sup>th</sup> Cir. still practical: U.S. v. Dokich, 614 F.3d 314 (7<sup>th</sup> Cir. 2010); U.S. v. Sawyer, 521 F.3d 792 (7<sup>th</sup> Cir. 2008).

Case that demonstrates the pitfalls of requiring payments for incarceration period: Court remanded after 17 years of changing schedules during incarceration for minor error in characterizing BOP's IFRP: U.S. v. Kyles, 601 F.3d 378 (2d Cir. 2010).

Small step toward sanity: 9<sup>th</sup> Circuit holds BOP's IFRP separate from restitution statutory requirement; can order to be paid through IFRP. U.S. v. Lemoine, 546 F.3d 1042 (9<sup>th</sup> Cir. 2008).

BUT - Courts continue to uphold "delegation" of authority to probation officers in other contexts, though: U.S. v. Thompson, 655 F.3d 688 (8<sup>th</sup> Cir. 2011); U.S. v. Demergy, 2011 WL 2083351 (8<sup>th</sup> Cir. 2011).

■ Other notable restitution cases, for reference

Reasonably foreseeable harm:

Police vehicle damaged in chase following robbery: U.S. v. Washington, 434 F.3d 1265, 1266 (11<sup>th</sup> Cir. 2006); U.S. v. Donaby, 349 F.3d 1046 (7<sup>th</sup> Cir. 2003); sheriff's deputy injured in getaway (but not for psychological costs for uninjured bank personnel): U.S. v. Reichow, 416 F.3d 802 (8<sup>th</sup> Cir. 2005); bystander shot by police officer: U.S. v. Metzger, 233 F.3d 1226, 1227 (10<sup>th</sup> Cir. 2000); customer of bank robbery: U.S. v. Moore, 178 F.3d 994 (8<sup>th</sup> Cir. 1999); investigative and clean up costs from Clean Air Act offense: U.S. v. Phillips, 367 F.3d 846 (9<sup>th</sup> Cir. 2004).

Victim's attorneys fees: U.S. v. Cummings, 281 F.3d 1046 (9<sup>th</sup> Cir. 2002) (fees of mother of kidnaped children in related civil proceeding); U.S. v. de George, 380 F.3d 1203 (9<sup>th</sup> Cir. 2004) (fees of victim defending against civil suit brought by defendant); U.S. v. Morgan, 376 F.3d 1002 (9<sup>th</sup> Cir. 2004) (bank's interest and finance charges part of R but not part of relevant conduct).

Classic statement of two views of proximate cause criteria:

Palsgraf v. Long Island RR Co., 248 N.Y. 339, 162 N.E. 99 (1928).

Pre-MVRA causation:

U.S. v. Vaknin, 112 F.3d 579 (1<sup>st</sup> Cir. 1997) (requires something more than "but for").

Pop-Quiz - Who is a restitution victim of the offense?

**NO:** person killed by unlawfully sold handgun: In re Antrobus, 519 F.3d 1123 (10<sup>th</sup> Cir. 2008); person killed as consequence of drug dealing & RICO: U.S. v. Rendon-Galvis, 564 F.3d 170 (2d Cir. 2009); girlfriend of drug purchaser: U.S. v. Sharp, 463 F.Supp.2d 556 (E.D.Va. 2006); person killed by gun possessed unlawfully: U.S. v. McArthur, 108 F.3d 1350 (11<sup>th</sup> Cir. 1997).

**YES:** customers, bystanders, and damaged police vehicles injured in bank robbery and getaways: see "foreseeable" cases, above; investors in scheme who were themselves defrauded by the scheme leader, but who did not participate with the leader in the scheme: U.S. v. Ojeikere, 545 F.3d 220, 223 (2d Cir. 2008).

Restitution only compensable for actual loss:

Can only be based on actual loss: U.S. v. Reynolds, 432 F.3d 821 (8<sup>th</sup> Cir. 2005); cannot be based on defendant's gain: U.S. v. George, 403 F.3d 470, 474 (7<sup>th</sup> Cir. 2005), U. S. v. Galloway, 509 F.3d 1246, 1254 (10<sup>th</sup> Cir. 2007); cannot be based on arbitrary calculation: U.S. v. Laney, 189 F.3d 954, 967 n. 14 (9<sup>th</sup> Cir 1999); cannot be based on speculation or general market harm:

U.S. v. Chalupnik, 514 F.3d 748, 755 (8<sup>th</sup> Cir. 2008), U.S. v. Dove, 585 F.Supp.2d 865, 872 (W.D.Va. 2008); can require even more precision than GL loss: U.S. v. Parker, 553 F.3d 1309, 1323-24 (10<sup>th</sup> Cir. 2009); cannot be based on generalized societal or market harm: U.S. v. Caputo, 517 F.3d 935 (7<sup>th</sup> Cir. 2008), U.S. v. Behrman, 235 F.3d 1049 (7<sup>th</sup> Cir. 2000), U.S. v. Chalupnik, 514 F.3d 748 (8<sup>th</sup> Cir. 2008); cannot be based on acts outside the OC absent a conspiracy or scheme: U.S. v. Maturin, 488 F.3d 657 (5<sup>th</sup> Cir. 2007); cannot be imposed for civil kinds of damages: U.S. v. Scott, 405 F.3d 615 (7<sup>th</sup> Cir. 2007).

#### Victims' participation expenses:

Listed in statute; not required to meet causation criteria: U.S. v. Amato, 540 F.3d 153 (2d Cir. 2008).

#### Quantifying the restitution:

For restitution, the court must be "able to estimate, based upon facts in the record, the amount of the victim's loss with some reasonable certainty." U.S. v. Pearson, 570 F.3d 480, 486 (2d Cir. 2009), citing U.S. v. Doe, 488 F.3d 1154, 1160 (9<sup>th</sup> Cir. 2007); see also U.S. v. Danser, 270 F.3d 451, 455-56 (7<sup>th</sup> Cir. 2001) and U.S. v. Julian, 242 F.3d 1245, 1248 (10<sup>th</sup> Cir. 2001).

Although mathematical precision is not required, there must be evidence upon which the court could reasonably calculate the measure of harm caused to the victim by the defendant's conduct. Courts finding such evidence in the child porn cases to be lacking include: U.S. v. Chow, \_\_\_ F.Supp.2d \_\_\_ (S.D.N.Y.), 2010 WL 4508794 (denying restitution); see also U.S. v. Church, 701 F.Supp.2d 814 (W.D.Va. 2010) (imposing \$100 in nominal restitution).

#### Limited restitution for acts of others:

Absent co-conspirators' knowledge of each others' acts in hub and spoke conspiracy, restitution only authorized for defendant's acts: U.S. v. Huff, 609 F.3d 1240, 1244-45 (11<sup>th</sup> Cir. 2010).

#### Mortgage Fraud:

Offset value of property returned to victim should be based on fair market value when property transferred to victim, not at subsequent sale. U.S. v. Boccagna, 450 F.3d 107 (2d Cir. 2006).

Sometimes it is best to use the foreclosure sale price: U.S. v. Gossi, 608 F.3d 574, 580 (9<sup>th</sup> Cir. 2010); U.S. v. Statman, 604 F.3d 529, 538 (8<sup>th</sup> Cir. 2010); and U.S. v. James, 564 F.3d 1237 (10<sup>th</sup> Cir. 2009);

Mini-course in computing restitution in a mortgage fraud case, comparing when fraud involves the original lender or for when it involves purchasers in the secondary market; "where the victim is the loan purchaser as opposed to the loan originator ... the loan itself is the 'property' that has

lost value” and the value of that loan is not necessarily the unpaid balance. U.S. v. Yeung, \_\_\_ F.3d \_\_\_, 2012 WL 432289 (9<sup>th</sup> Cir. 2012).

When the offset value is unknown at sentencing, and there is a subsequent foreclosure sale: U.S. v. Bowling, 619 F.3d 1175, 1187 (10<sup>th</sup> Cir. 2010). When there is no offset value: U.S. v. Oladimeji, 463 F.3d 152, 160 (2d Cir. 2006). How not to make a record: U.S. v. Singletary, 649 F.3d 1212, 1221-22 (11<sup>th</sup> Cir. 2011).

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Comments and questions on cases involving restitution welcome at [curlwin@gmail.com](mailto:curlwin@gmail.com) or through West publishing.