

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 (1st Cir. 2008) (remand), and U.S. v. Matos, 611 F.3d 31 (1st 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 (6th Cir. 2010); virtually identical (In re Doe, 264 Fed.Appx. 260, 262 n.2 (4th Cir. 2007) and U.S. v. Speakman, 594 F.3d 1165, 1171 n.3 (10th 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: 6th Cir uses high standard to deny petitions (In re Acker, 596 F.3d 370 (6th Cir. 2010) and In re McNulty, 597 F.3d 344 (6th Cir. 2010)) and to grant petition (In re Simons, 567 F.3d 800, 801 (6th 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 (6th Cir. 2010).
- c) Victims may not file direct appeal: U.S. v. Aguirre-Gonzalez, 597 F.3d 46 (1st 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 (6th Cir. 2010).

Restitution in Child pornography possession offenses:

- a) **1st 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) **2nd 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) **3rd 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) **6th Circuit:** U.S. v. Evers, ___ F.3d ___, 2012 WL 413810 (6th Cir. (Tenn.)) (Feb. 10, 2012); proximate cause required; victim need not have "incurred" the costs.
- e) **9th Circuit:** U.S. v. Kennedy, 643 F.3d 1251 (9th 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 (9th Cir. 1999); proximate cause connection required between Def's act and victim's harm; U.S. v. Baxter, 394 Fed. Appx. 377 (9th Cir. 2010); proximate cause required; upholds \$3,000 in restitution (18 sessions of post-offense counseling).
- f) **11th Circuit:** U.S. v. McDaniel, 631 F.3d 1204, 1209 (11th 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) **5th 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 (5th Cir. 2011), reh en banc granted 2012 WL 248829; U.S. v. Wright, 639 F.3d 679 (5th 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 (9th 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 (9th Cir. 2010) and U.S. v. Dokich, 614 F.3d 314, 321 (7th Cir. 2010)).

Yes - where services do not require license (U.S. v. Vaghela, 169 F.3d 729, 736 (11th Cir. 1999)); see generally: (U.S. v. Huff, 609 F.3d 1240 (11th 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 (9th 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 (9th Cir. 2010)).

Quick-takes:

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

U.S. v. Dann, 652 F.3d 1160 (9th 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 (9th Cir. 2011).

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

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

Criteria for upholding appeals waiver re restitution:

U.S. v. Worden, 646 F.3d 499 (7th 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 (5th Cir. 2011).

Restitution for funeral expenses to drug overdose victim:

U.S. v. Nossan, 647 F.3d 822 (8th 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 (9th 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 (9th Cir. 2010).

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

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

Payment schedule hair-splitting continues:

7th Cir. still practical: U.S. v. Dokich, 614 F.3d 314 (7th Cir. 2010); U.S. v. Sawyer, 521 F.3d 792 (7th 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: 9th 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 (9th 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 (8th Cir. 2011); U.S. v. Demergy, 2011 WL 2083351 (8th 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 (11th Cir. 2006); U.S. v. Donaby, 349 F.3d 1046 (7th 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 (8th Cir. 2005); bystander shot by police officer: U.S. v. Metzger, 233 F.3d 1226, 1227 (10th Cir. 2000); customer of bank robbery: U.S. v. Moore, 178 F.3d 994 (8th Cir. 1999); investigative and clean up costs from Clean Air Act offense: U.S. v. Phillips, 367 F.3d 846 (9th Cir. 2004).

Victim's attorneys fees: U.S. v. Cummings, 281 F.3d 1046 (9th Cir. 2002) (fees of mother of kidnaped children in related civil proceeding); U.S. v. de George, 380 F.3d 1203 (9th Cir. 2004) (fees of victim defending against civil suit brought by defendant); U.S. v. Morgan, 376 F.3d 1002 (9th 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 (1st 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 (10th 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 (11th 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 (8th Cir. 2005); cannot be based on defendant's gain: U.S. v. George, 403 F.3d 470, 474 (7th Cir. 2005), U. S. v. Galloway, 509 F.3d 1246, 1254 (10th Cir. 2007); cannot be based on arbitrary calculation: U.S. v. Laney, 189 F.3d 954, 967 n. 14 (9th Cir 1999); cannot be based on speculation or general market harm:

U.S. v. Chalupnik, 514 F.3d 748, 755 (8th 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 (10th Cir. 2009); cannot be based on generalized societal or market harm: U.S. v. Caputo, 517 F.3d 935 (7th Cir. 2008), U.S. v. Behrman, 235 F.3d 1049 (7th Cir. 2000), U.S. v. Chalupnik, 514 F.3d 748 (8th Cir. 2008); cannot be based on acts outside the OC absent a conspiracy or scheme: U.S. v. Maturin, 488 F.3d 657 (5th Cir. 2007); cannot be imposed for civil kinds of damages: U.S. v. Scott, 405 F.3d 615 (7th 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 (9th Cir. 2007); see also U.S. v. Danser, 270 F.3d 451, 455-56 (7th Cir. 2001) and U.S. v. Julian, 242 F.3d 1245, 1248 (10th 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 (11th 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 (9th Cir. 2010); U.S. v. Statman, 604 F.3d 529, 538 (8th Cir. 2010); and U.S. v. James, 564 F.3d 1237 (10th 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 (9th 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 (10th 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 (11th Cir. 2011).

Comments and questions on cases involving restitution welcome at curlwin@gmail.com or through West publishing.