Restitution Scenarios

1) Smitty was convicted of Clean Air Act violations after he and his co-defendants formed a salvage company and bought the rights to salvage a former industrial site for metals and fixtures. The site also had asbestos, which Smitty purposefully failed to dispose of properly. EPA eventually intervened and cleaned up the privately-owned land, at a cost of $16,000,000. Is the government entitled to restitution?

A. No, because the government doesn't own the property
B. No, because the government chose on its own to clean up the property
C. Yes, because the government suffered a loss caused by the defendant

Yes, the government can be a victim. In *U.S. vs Sawyer*, the Sixth Circuit held that a Clean Air Act violation is an offense against property for Mandatory Victim Restitution Act ("MVRA") purposes, and that EPA was a victim of the offense even though it did not have a possessory interest in the property. EPA paid for the cleanup under their statutory authority, and they were entitled to restitution for the cost. *See, U.S. v. Sawyer*, 825 F.3d 287 (11th Cir. 2016).

2) Coffee defrauded numerous investors while he worked at a brokerage firm. Unknown to the investors, Coffee took money from their accounts and placed it in his own account. He also diverted investors' money from low-risk, short-term accounts to high-risk, long-term accounts and took a higher commission. The brokerage firm fired Coffee, liquidated the unauthorized investments at a loss, and repaid the investors the amounts they were defrauded. Does Coffee owe restitution to the company?

A. No, the customers were the victim
B. No, Coffee did not force the company to liquidate at a loss
C. Yes, Coffee's crime caused a loss to the company
D. No, Coffee owes restitution to the victims who should intern reimburse the company

Yes. In U.S. v. Rhodes the Seventh Circuit held that the defendant could be made to pay restitution to restitution to cover the company's losses incurred when liquidating unauthorized investments at a loss to repay defrauded investors. Even though changes in interest rates contributed to the loss, Rhodes had to bear the risk, not the investors, and not the company, which acted quickly and laudably to make the victims whole. *See, U.S. v. Rhodes*, 330 F.3d 949 (7th Cir. 2003).

3) Jones and co-defendants conspired to skim debit card information from gas pumps and withdraw cash from ATMs using the information. Jones pled guilty to Count 1 of the indictment, which charged conspiracy to defraud Arvest, First United, and First Texoma Banks.

The PSR stated that at the PSI interview, Jones admitted to defrauding Landmark Bank in a similar manner, confirming an admission he had previously made to law enforcement upon arrest. Does Jones owe restitution to Landmark Bank?

A. No, Landmark is not in the indictment
B. Yes, he admitted defrauding them
C. Yes, the loss to Landmark is relevant conduct
D. No, because the defendant's admission is not evidence

No. "[The PSR and the district court took into account all financial institutions that suffered losses as a result of the defendants' general criminal activity, and they did not attempt to link the losses suffered by each financial institution to a particular skimming device or gas pump. As a result, it is impossible to determine from the record on appeal whether these seven additional financial institutions were directly and proximately harmed by the wire fraud committed on the five financial institutions listed in the indictment." *See, U.S. v. Alisuretove*, 788 F.3d 1247 (10th Cir. 2015).

4) Taylor was convicted of a mail fraud scheme involving misuse of US passports and aggravated identity theft after he used others' personal information to obtain access devices.

At the same time, Taylor and three others ran a tax fraud scheme using the wires to file false returns and obtain refunds using others' information. Charges included wire fraud and aggravated identity theft. Charges were dismissed when Taylor pled to the mail fraud described above. Does Taylor owe restitution to the tax fraud scheme victims?

A. Yes because it happened at the same time as the wire fraud scheme
B. Yes, if the victims are the same as those for the wire fraud
C. No, the charges were dismissed
D. Yes because aggravated identity theft occurred in both

No. "[T]he United States repeatedly refers to [defendant's] 'multi-year fraudulent scheme' in its brief, but nowhere identifies *evidence* establishing—or identified by the district court as the basis for a finding—that the scheme charged in the second case, in which Thomsen was not convicted, was, in fact, the same scheme as, or was related to, the scheme charged in the first case, in which Thomsen was convicted. At most, the United States has shown that both schemes were designed to obtain tax refunds by fraud and that Thomsen was involved in both of them. That is not enough." *See, U.S. v. Thomsen*, 830 F.3d 1049 (9th Cir. 2016).

5) Kirk was a city mayor, convicted of bribery, extortion, mail and wire fraud, RICO conspiracy and tax evasion. The government sought restitution to the Water and Sewage Department and to the IRS in the amount of defendant's profits from illegal contracts related to the RICO and extortion contracts. The amount requested was an estimate of an overall 10% profit margin on the contracts the city was unknowingly forced to spend for contracts obtained through fraud and deceit. Should the Court award restitution to the government in the amount of Kirk's gain?

A. Yes, when loss cannot be determined, Court can use gain
B. No, restitution must be exact
C. No, there's no loss in a kickback scheme
D. Yes, unless Kirk forfeits the gains to the US Attorney

No. "Upon considering these precedents from other circuits, we are unable to uphold the restitution award. The government essentially conceded that its $4.5 million figure did not represent the city's 'actual loss.' And the district court correctly observed that absent the defendants' extortion, a large portion of that city money would have gone to other contractors (who ostensibly would be additional victims). The government claimed the 'actual loss' would be 'inherently difficult to precisely qualify,' and the court recognized it lacked any data regarding what the DWSD would have paid to other contractors

if the bidding had not been rigged. It appears that the court [] like the district court 'threw up [its] hands too soon.'" *See, U.S. v. Kilpatrick*, 798 F.3d 365 (6th Cir. 2015).

6) Parker was employed by a software company until he was convicted of possessing and transmitting their trade secrets, in the form of the company's proprietary software which he used to engage in high-volume stock trading. Noticing irregularities, the company hired a forensics expert to investigate. Parker's theft was discovered and the company contacted the FBI. The firm billed the company for 48 of hours work plus expenses. Is Parker responsible for the money paid to the forensic accountant?

A. Yes
B. No

Maybe, but in this case the Court of Appeals found the district court had committed plain error when it failed to give a complete account of losses. The accounting provided by the government failed to account for employees' time spent on the investigation. As for attorneys' fees, the district court needed to make findings on whether the costs expended were reasonable. *See, U.S. v. Yihao Pu*, 814 F.3d 818 (7th Cir. 2016).

7) Parker was convicted of possessing and transmitting trade secrets. In addition to the costs of the forensics expert, the company incurred costs during the pendency of the case in court. The company sought restitution for hours of review of the government's case file by various employees as well as an outside firm advising the company. Should Parker's restitution order include the money spent on outside review of the government's case file?

A. Yes
B. No
C. Maybe

Probably not. On these facts it doesn't appear that the defendant made the algorithm unusable by the company. He used it for himself and there's no information that he transmitted the proprietary information to anyone else. The court was incorrect in finding the loss amount of $12,000,000, equal to the cost of developing the product. *See, U.S. v. Yihao Pu*, 814 F.3d 818 (7th Cir. 2016).

8) Defendant Benson used false documents on a credit application to Bank of America in an effort to refinance his home and avoid foreclosure. BoA denied the application and the property was foreclosed. Housing and Urban Development suffered a loss of $50,000, the difference between what they paid BoA for the property and the later sale price of the property. Does Benson owe HUD for their loss on the property sale?

A. Yes, the government can be a victim
B. No, his false statement to obtain a mortgage did not cause the loss on the sale
C. Yes, but HUD will have to turn the money over to Bank of America

No. There's no indication that defendant's false statement caused HUD's loss. The crime was making false statements to refinance the loan and avoid foreclosure. "[R]estitution may only be awarded if the government established, by a preponderance of the evidence, direct or proximate causation between Benns's false credit application and HUD's loss when it sold the [] property. [] During resentencing, the government was unable to produce any evidence that the application resulted in a delay or even to

establish when foreclosure proceedings were initiated. The government also failed to submit any evidence that the alleged delay, instead of market conditions or other factors, resulted in the loss. Thus, HUD's loss in this case, [], is outside the scope of the offense of conviction. Benns was indicted and pleaded guilty to one count of filing a false credit application in an attempt to refinance a mortgage. It therefore does not follow that the behavior underlying Benns's offense was the cause of HUD's loss. On these facts, any loss HUD suffered later is not proximate. HUD was not a victim of defendant's crime of conviction. *See, U.S. v. Benns*, 810 F.3d 327 (5th Cir. 2016).

9) Defendant Lightner and co-defendants cheated Bank of America by pretending that various buyers were the source of down-payment money for sixteen home purchases. False documents presented to the Bank contained obvious errors and inconsistencies. One buyer applied to buy six homes during a two-week period. Bank of America claims $900,000 in actual loss. The parties do not dispute the amount of loss. Is Bank of America entitled to restitution of the $900,000 loss?

A. Yes, the actual loss is the same as restitution in this case
B. No, Bank of America knew better

No. On these facts, the bank was found to have participated in the offense. Given the obvious nature of the misrepresentations, the bank was complicit in the criminal behavior. *See, U.S. v. Litos*, 847 F.3d 906 (7th Cir. 2017).

10) Defendant Stern tried to inflate his company's stock by releasing press releases with false sales figures. Two investors testified that they read the press releases and relied on them when deciding to invest. Several other investors said they read the press releases but performed independent research on the company as well. A government spreadsheet reflects 2,400 total investors, and the government seeks restitution for all of them after Stern's company goes belly-up. Should the Court order Stern to pay restitution to all 2,400 victims?

A. Yes, they all suffered a loss
B. No, only two investors read and relied on the press release
C. Yes, his false statements caused the company to collapse

No. There was no evidence presented that more than 2 investors relied on the press release with the false statements. It cannot be said that the defendant caused their loss. *See, U.S. v. Stein*, 846 F.3d 1135 (11th Cir. 2017).

11) Bernie made fraudulent misrepresentations via the mail and the wires in the course of soliciting investments for his employer. Little did Bernie know, his employer's business was an entirely fraudulent Ponzi scheme. All of the company's investors lost 3.3 million dollars in the Ponzi scheme. Is Bernie responsible for $3,300,000 in restitution?

A. Yes, that was the loss caused by the company for which he worked
B. Yes, he should have known the company was a fraud
C. No, he did not defraud all of the victims
D. No, he did not personally benefit from the company's Ponzi scheme

No. "Even though the district court may determine that Burns proximately caused the actual loss on remand, there is a reasonable probability that the outcome will be different because the government

did not claim that Burns knew about the Ponzi scheme. For that reason alone, the Ponzi scheme can reasonably be seen as a superseding cause that breaks the causal chain." *See, U.S. v. Burns*, 843 F.3d 679 (7th Cir. 2016).

Restitution Case Studies

In the Smith case, the issue is "what is the count of conviction?" Smith pled guilty to six counts of aggravated identity theft and the government dismissed the wire fraud count. If the government wants restitution for the six victims, it will have to determine what losses were caused by Smith's aggravated identity theft. It's hard to see how the funds invested would qualify, as they had nothing to do with the identity theft. The cash advances, in contrast, did result from the identity theft. The luxury car fees and rent payments also seem unrelated to the identity theft to which Smith pled guilty.

The Markus case highlights the difference between loss calculations and restitution. Whereas §2B1.1 (Fraud and Theft) contains specific direction not to count fees, penalties, and investigation costs as part of loss, under restitution principles, the victim should be made whole for all of his or her losses if they were proximately caused by the defendant's conduct of conviction. A restitution award may include reasonable costs, fees, and penalties.