2017 National Seminar

Economic Crime:
Selected Cases Addressing Restitution

Recent Developments in Case Law related to restitution - In the past year, Circuits through the United States have issued a number of opinions related to sentencing and the guidelines, including cases on various aspects of restitution.

Nacchio v. U.S., 824 F.3d 1370 (Fed. Cir. 2016) Nacchio sought to offset his restitution with amounts forfeited to the government, after the government chose to funnel some of the forfeited money to the victims. Emphasizing that restitution and forfeiture serve "distinct purposes: restitution functions to compensate the victim, whereas forfeiture acts to punish the wrongdoer," the court held the offset was not permitted. In addition, the forfeiture was pegged to Nacchio's ill-gotten profit, not to the victims' losses, which totaled more than 20 times that amount. Likewise, fines paid may not be deducted from restitution.

U.S. v. Finazzo, 850 F.3d 94 (2d Cir. 2017) Finazzo, while a merchandising executive for Aéropostale, used a company as a supplier in exchange for kickbacks. Finazzo and the co-conspirator from the supply company were both convicted. The Second Circuit noted that the scheme would not necessarily result in a loss to Aéropostale. "For instance, even without inflating the price—and therefore, without inflicting pecuniary loss on Aéropostale—South Bay would receive some profit from any sales to Aéropostale. A portion of Finazzo's worth to South Bay may, therefore, simply derive from steering additional business to South Bay at a non–inflated price." [] [T]he district court must employ a methodology to determine whether the entirety of Finazzo's kickbacks was solely derived from activity that caused loss to Aéropostale. We therefore vacate and remand the district court's restitution calculation regarding Finazzo and Dey, so that the district court may employ a methodology to determine what portion of Finazzo's gain is directly correlated with Aéropostale's loss, or employ some other means of calculating Aéropostale's loss."

U.S. v. Benns, 810 F.3d 327 (5th Cir. 2016) In an attempt to refinance a mortgage, Benns used false documents on a credit application to Bank of America. The application was denied and the property was eventually foreclosed. HUD paid Bank of America for the default and suffered a loss of over $50,000, the difference between what HUD paid Bank of America following foreclosure and the later sale price of the property. There was no evidence that the application resulted in a delayed foreclosure, and in any event, market conditions or other factors could have resulted in the loss. Restitution order was error.

U.S. v. Sheets, 814 F.3d 256 (5th Cir. 2016) If the court finds that more than one defendant has contributed to a victim's loss, the court may hold each defendant jointly and severally liable (each is responsible for payment of the full amount of restitution) or the court may apportion liability to each defendant based on the loss the defendant caused to the victim and the economic circumstances of each defendant. If the court uses a hybrid approach – apportioning liability but holding all defendants jointly and severally liable – the victim may not receive an amount greater than the victim's loss, but each defendant continues to be responsible for payment until the victim is fully repaid. Each defendant's payments are applied to the total sum owed by all defendants.

U.S. v. Fowler, 819 F.3d 298 (6th Cir. 2016) Two doctors were convicted of conspiracy to commit health care fraud involving selling fraudulent prescriptions for controlled substances on the street. The district court abused its discretion when it awarded restitution based on facts that did not have a sufficient indicia of reliability. Trial testimony supported the defendant's claim that only 20% of the prescriptions were illegitimate, yet the government sought and won restitution based on 50% of the total value of medication billed. Restitution also erroneously included prescriptions written by

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another doctor who was not a part of the conspiracy as well as prescriptions written before Fowler joined the conspiracy. The court also failed to account for prescriptions that were only partially fraudulent.

U.S. v. Litos, 847 F.3d 906 (7th Cir. 2017) Bank of America was not entitled to restitution in a mortgage fraud offense because the bank was complicit in the loss—"its reckless decision to make the loans without verifying the solvency of the would-be borrowers, despite the palpable risk involved in, for example, providing mortgage loans to a person who applies for six mortgages in ten days. Bank of America was deliberately indifferent to the risk of losing its own money, because it intended to sell the mortgages and transfer the risk of loss to Fannie Mae for a profit." The Court should have considered a fine, in the amount of the defendant's gain, rather than restitution.

U.S. v. Burns, 843 F.3d 679 (7th Cir. 2016) Burns was convicted of wire and mail fraud for making fraudulent misrepresentations when soliciting investments for his employer, USA Retirement Services ("USARMS"). Unbeknownst to Burns, the investment opportunity was fraudulent; USARMS's owners were operating a Ponzi scheme. The district court erred when it ordered Burns to make restitution in the amount of the entire $3.3 million the investors that he solicited lost as a result of the Ponzi scheme. The district court did not address proximate cause, therefore Burns "may have to pay more than he owes," which is an error affecting the "the fairness, integrity, and public reputation of judicial proceedings."

U.S. v. Yihao Pu, 814 F.3d 818 (7th Cir. 2016) Yihao Pu was convicted of possessing and transmitting trade secrets. He stole proprietary software from two companies' computers and used them to engage in high-volume trading of stocks, resulting in a $40,000 personal loss for Pu. The district court award restitution to one of the companies for forensics work and investigation of Pu's misconduct. The court also found that the intended loss was money the companies spent to develop the algorithms. "A restitution award may include costs incurred by a corporate victim in conducting an internal investigation of the offense. This may include attorney fees or fees paid to other professionals hired to participate in the investigation. However, "'the government must provide an explanation, supported by evidence, of how each professional's time was spent investigating the data breach, being certain that the evidence provides adequate indication that the hours claimed are reasonable.' Then, the court must ensure that the amount claimed was in fact incurred by the investigation of Pu's misconduct." The information the government submitted was insufficient to make these findings.

U.S. v. Titus, 821 F.3d 930 (7th Cir. 2016) Titus was convicted of bank fraud for a mortgage fraud scheme involving straw purchasers obtaining mortgages for multiple homes based on false information. The lenders lost money when "the mortgages were not fully recovered upon the sale or foreclosure of the properties." Titus sought to limit his liability to two fraudulent mortgage applications, but the government argued he was involved in eighteen. In support of this claim, a HUD case agent provided the probation office with a spreadsheet detailing the eighteen fraudulent loans, and the PSR adopted it, resulting in a loss calculation of more than $3,000,000. The government sought more than the loss amount in restitution. The Court of Appeals held that both the loss calculation and the restitution amount lacked factual support. "The district court merely adopted the figure contained in the government's sentencing memorandum and erroneously attributed it to the PSR. Without any factual support for the figure, we cannot evaluate whether $3,760,859 is a reasonable restitution amount." Further, "it is not our role to justify a sentence that lacks a sufficient explanation with our best guess for why the court imposed the sentence that it did."

U.S. v. Adejumo, 848 F.3d 868 (8th Cir. 2017) Restitution order reversed. The government failed to provide sufficient evidence of the ultimate losses defendant caused the victim banks. Banks' documentation showing initial losses did not sufficiently show how much each bank ultimately lost, and was insufficient because of the long delay between the offenses and the restitution hearing. Government agent testimony reflected that banks sometimes recover losses, bank officials merely estimated their ultimate losses, banks sometimes overstate their losses, and agent couldn't remember key details of his communications with banks.

U.S. v. Binkholder, 832 F.3d 923 (8th Cir. 2016) Binkholder was convicted of wire fraud for a scheme in which he took investors' money claiming they were participating in a lucrative real-estate investment scheme. The district court erred in finding that M.U. was a victim. Under restitution statutes, a "victim" is "a person directly and proximately harmed as a result of the commission of a Federal offense."

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Under the Sentencing Guidelines, a victim is "any person who sustained any part of the actual loss determined under [2B1.1] subsection (b)(1)." While the CVRA is intended to protect the rights of crime victims and ensure that they receive proper restitution for their injuries, the Guidelines are meant to assess the culpability of the defendant. For example, intended loss measures culpability but is not actual loss to a victim for restitution purposes. Also, amounts returned to a victim may offset restitution, but cannot be credited towards the Guidelines' loss calculation.

U.S. v. Carpenter, 841 F.3d 1057 (8th Cir. 2016) The government charged Carpenter with mail and wire fraud arising from a scheme in which he overpaid for commodities to the benefit of certain customers while receiving large payments of money from some customers. Restitution order vacated after the district court failed to directly address the claim that attorneys' fees incurred by the victim were unnecessary. Although the Court of Appeals had "specifically approved of the inclusion of attorney's fees and investigative costs in a restitution award when these losses were caused by the fraudulent conduct," the district court needed to determine "whether the attorney's fees incurred after the government initiated its own investigation were 'necessary' under § 3663A(b)(4)."

U.S. v. Lo, 839 F.3d 777 (9th Cir. 2016) "We have also developed a special notice requirement for appeal waivers relating to restitution orders, holding that in order for that waiver to be valid a defendant must be "given a reasonably accurate estimate of the amount of the restitution order to which he is exposed" at the time the defendant agrees to waive the appeal. [W]e subsequently concluded that a court exceeded its authority in ordering restitution for an amount that was neither clearly stipulated to in a plea agreement nor based on a judicial determination of actual damages after adequate notice to the defendant. "[S]ome precision in the plea agreement is necessary to have a knowing appeal waiver" in the restitution context because "there is neither a statutory limit nor any guidelines covering the amount of restitution orders."

U.S. v. Nosal, 844 F.3d 1024 (9th Cir. 2016) Expenses related to investigation and prosecution are excluded for loss calculations, but not from restitution, which seeks to make the victim whole, where the harm was the "'direct and foreseeable result' of the defendant's wrongful conduct...." Evidence must "demonstrate[e] that it was reasonably necessary for [the victim] to incur attorneys' and investigator's fees to participate in the investigation or prosecution of the offense." Reasonableness test includes whether the fee was reasonable, whether there was unnecessary duplication of tasks between the victim and the attorneys, and whether the outside attorneys were substituting for or duplicating the work of the prosecutors, rather than serving in a participatory capacity.

U.S. v. Thomsen, 830 F.3d 1049 (9th Cir. 2016) Thomsen was convicted on fraud and misuse of a U.S. passport by using the personal information of another person, a crime he committed alone using the mails. Separately, Thomsen was charged, along with three co-defendants, with conspiracy to commit a tax fraud scheme, accomplished by wire fraud, by using others' personal identification to file false returns and obtain tax refunds and tax preparation fees to which he was not entitled. The tax fraud charges were dismissed after his conviction on the passport fraud offense. Despite the charging of aggravated identity theft bearing similarities to the first offense, "[t]he district court clearly erred in holding that the conduct at issue in the second case was sufficiently 'related' to the conduct at issue in the first case to warrant inclusion of losses in the second case in the order for restitution pursuant to 18 U.S.C. § 3663A(a)(2). Consequently, although ordering restitution for related conduct that did not result in a conviction was within 'statutory bounds,' the order for restitution, here, was an abuse of discretion."

U.S. v. Courtney, 816 F.3d 681 (10th Cir. 2016) Defendant was convicted of wire fraud and sentenced to prison in addition to forfeiture of $1,601,825.84, the full value of the fraudulent wire transfers at issue in the underlying case, as well as $493,230.88 in restitution. He argued that the forfeiture order should have been reduced by the amount the lenders received from the properties through mortgage payments and the sale of the properties. The Court of Appeals held that an improperly calculated restitution order (an order to exact a material amount beyond what a statute permits) affects a defendant's substantial rights and undermines the fairness of the judicial proceeding (the third and fourth elements of the plain error standard).

U.S. v. Stein, 846 F.3d 1135 (11th Cir. 2017) In an effort to artificially inflate his company's stock value, Stein drafted three press releases with false sales figures. "The method for calculating actual loss, as opposed to intended loss,

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under the Sentencing Guidelines is 'largely the same' as the method for establishing actual loss to identifiable victims under the MVRA. [] Thus, it is unsurprising that to prove a victim suffered an actual loss under the MVRA, the government must establish both factual and legal causation in essentially the same manner as it must show causation under the guidelines—by proving but for and proximate causation." Information that two investors relied on the press release, and that some others relied on the press release among other publicly available information about the company, was insufficient to prove that more than 2,400 investors relied on the press releases.

U.S. v. Plate, 839 F.3d 950 (11th Cir. 2016) District Court abused its discretion by giving dispositive weight to the defendants' inability to pay restitution, which is not among the factors listed in § 3553(a), in his decision to impose a prison sentence, indicating that if she had paid back the restitution, he would have been "glad [] to give her probation" before the sentencing hearing. In addition, "the district judge offered to 'immediately convert' Plate's prison term if she paid the restitution at a later date."