

RESTITUTION CASE STUDIES

An indictment charged Defendant **Smith** with one count of wire fraud and six counts of aggravated identity theft in violation of 18 U.S.C. §1028A. **Smith** pled guilty to six counts of aggravated identity theft pursuant to a plea agreement which required him to cooperate against a drug trafficking organization. **Smith** also agreed to waive his appellate rights and to pay full restitution to all victims. The government agreed to dismiss the wire fraud count at sentencing.

Smith swindled his victims by seeking monetary investments from friends and family for a sham real estate business. **Smith** claimed that he had set up a real estate and home remodeling company to flip houses in distressed, but up-and-coming neighborhoods. He claimed he needed funding to purchase foreclosed homes and the equipment and supplies needed to rehab the homes. In reality, **Smith** kept the funds for himself, purchasing an expensive car and designer clothing for himself.

In addition, **Smith** convinced his “investors” to give him access to their bank accounts and other personal information so that he could represent to venture capitalists that he had broader and deeper financial backing. This would help convince venture capitalists with deep pockets to make much larger investments into the business than he could obtain from friends and family. He also claimed that he would directly deposit his investors’ profits once earned. **Smith** periodically deposited money into the accounts and claimed they were profits. In reality, he had used his friends’ and families’ personal information to obtain credit cards, get cash advances on those cards, and deposit some of it in his investors’ accounts as “profits.” He deposited most of the cash advances into accounts he created for himself without the victims’ knowledge.

Smith at times drove the victims around town and showed them distressed properties he claimed to have purchased. **Smith** convinced **Victim Three** to further “invest” in the company by renting a 2014 Lamborghini Gallardo for a period of two months. **Smith** claimed that the car would benefit the business because it would positively influence other would-be investors and venture capitalists. **Victim Three** drove the car a few times, but never with a potential “investor.” Most of the time, **Smith** drove the Lamborghini. **Smith** convinced **Victim Six** to lease a furnished office in a Class A building, at a cost of \$5,000 per month. **Smith** said the office was to be used for the business, but, without **Victim Six’s** knowledge, **Smith** used a locked closet in the office to store a distribution amount of heroin and hydrocodone pills, which he delivered to various drug traffickers while he claimed to be working on real estate/home remodeling projects. Six months into the one-year lease, **Smith** was arrested for fraud, and the government searched and seized the drugs. **Victim Six** was unable to get out of the lease, and paid \$60,000 in rent for the full-year lease term.

At sentencing, the government sought \$300,000 in restitution for the six victims. Which of the following will be included in the restitution order?

\$60,000 invested in the company (\$10,000 per victim)

\$100,000 in cash advances from the credit cards **Smith** obtained using the victims’ personal information

\$80,000 (\$1,200 per day for two months) in luxury car rental fees for **Victim Three**

\$60,000 (\$5,000 per month for 12 months) in rent for the office space for **Victim Six**

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Defendant **Markus**, an investment advisor, defrauded the developmentally disabled son of one of his clients, Wellstone. As Wellstone's health began to decline, **Markus** represented himself to Wellstone and her son as "the person they could trust to manage the money after Ms. Wellstone would no longer be able to do so." After Wellstone passed away, her son inherited her assets. Because of the son's special needs, the estate's executor spoke with **Markus** several times about investing conservatively so that the funds would last as long as possible. Nonetheless, over the next two years, **Markus** took nearly all of the son's money. He sold the holdings in an IRA account worth \$164,000 and further convinced the son to write checks to him to invest in various ventures. **Markus** also convinced the son to sell his condo and move to a much smaller apartment in a less desirable area. He took the proceeds from the sale rather than depositing them for the son's benefit.

The estate's executor became suspicious and began an audit of Markus's expenditures. **Markus** had sought to hide his theft by moving the money around different accounts and altering invoices and bills so that it would appear that the money was going to the son's medical care. The executor hired a forensic accountant to trace the transactions, eventually contacting the United States Attorney. The private accountant continued to monitor the case after **Markus** was charged, and gave periodic reports on the case's progress to the executor.

Markus eventually pled guilty to mail fraud, wire fraud, and money laundering and was sentenced to sixty months' imprisonment and restitution.

At sentencing, the court determined that the loss at §2B1.1 was \$370,000, based on the money stolen and various checks Markus cashed. Markus's attorney has objected to the PSR's restitution figures, which, in addition to the \$370,000, include the following costs paid out of the estate:

\$24,000 in early distribution tax penalties;

\$6,000 in wire transfer and real estate fees for the sale of the condo; and

\$11,000 paid to the forensic accountant (34 hours at a rate of \$325 per hour).

What is the proper amount of restitution?