



RESTITUTION NATIONAL SEMINAR – BALTIMORE

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Restitution Session Outline

- Why do I need to know this?
- Who is the victim?
- What are the compensable harms?
- What's cause got to do with it?



Why do I need to know this?

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- Common ground for reversal
- An order to pay more restitution than is due affects substantial rights, and the fairness, integrity, or public reputation of judicial proceedings
- It's complicated – wouldn't you rather do it only once?



Who is a Victim?

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- A “person” directly and proximately harmed by the offense of conviction
- Can be a corporation or a government entity
- Must have suffered a monetary loss or physical harm



Who is a Victim?

Interactive Review

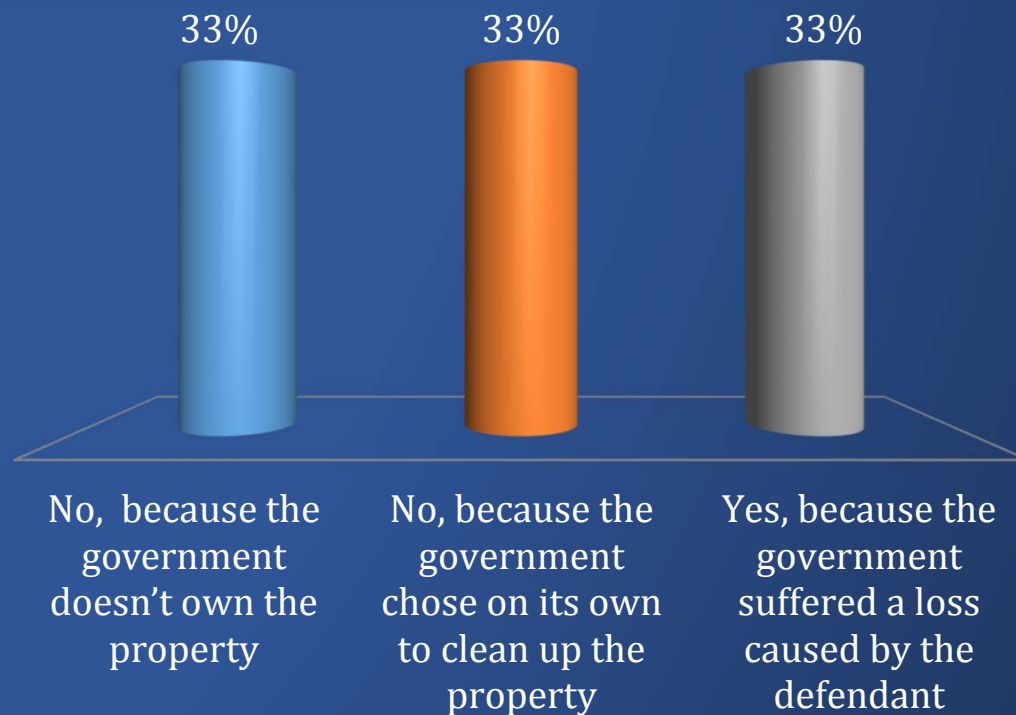
- Smitty was convicted of Clean Air Act violations after he and his co-defendants formed a salvage company and bought the rights to salvage a former industrial site for metals and fixtures. The site also had asbestos, which Smitty purposefully failed to dispose of properly.
- EPA eventually intervened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

U.S. v. Sawyer, 825 F.3d 287 (11th Cir. 2016)



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



Who is a Victim?

Interactive Review

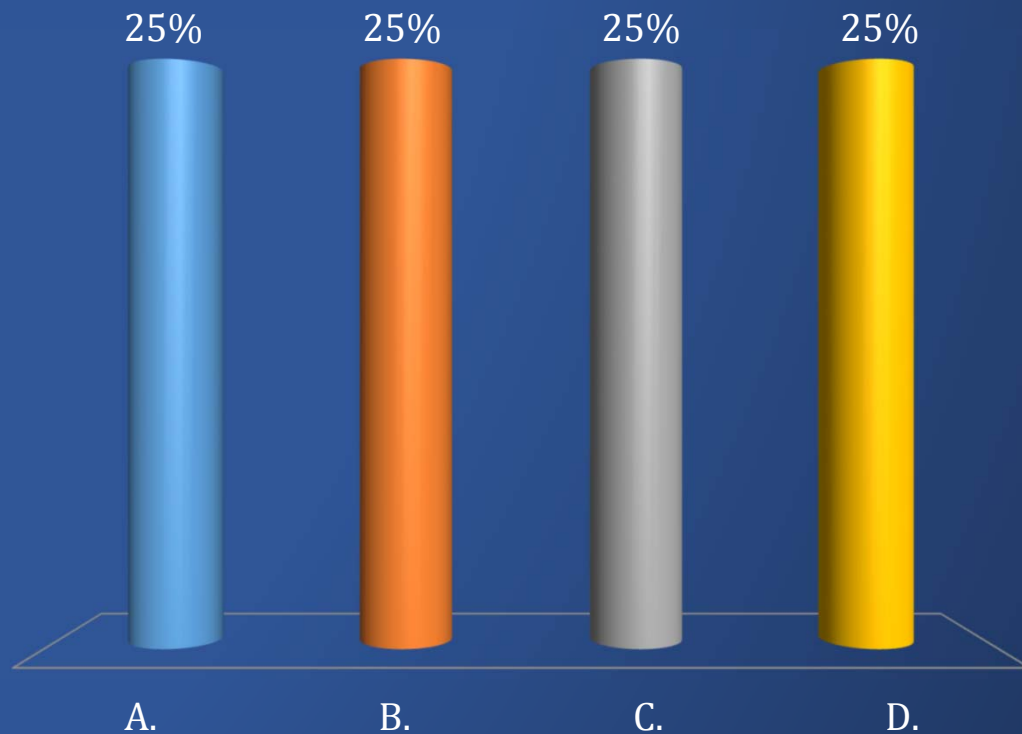
- Coffee defrauded numerous investors while he worked at a brokerage firm. Unknown to the investors, Coffee took money from their accounts and placed it in his own account. He also diverted investors' money from low-risk, short-term accounts to high-risk, long-term accounts and took a higher commission.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

U.S. v. Rhodes, 330 F.3d 949 (7th Cir. 2003)



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



Who is a Victim?

Interactive Review

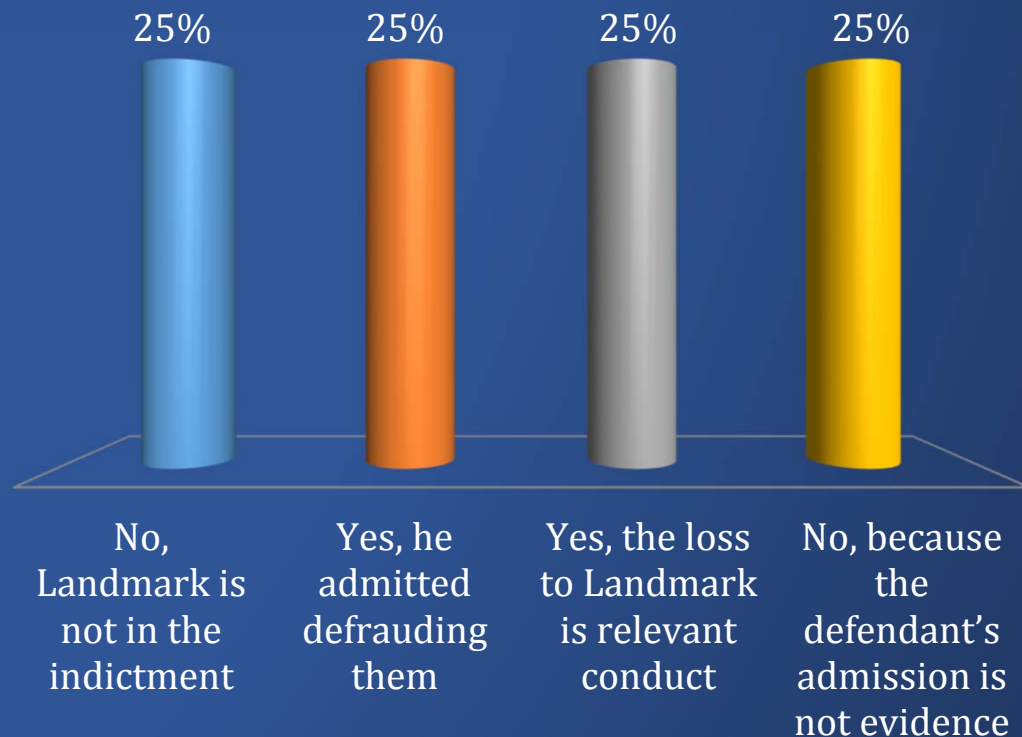
- Jones and co-defendants conspired to skim debit card information from gas pumps and withdraw cash from ATMs using the information. Jones pled guilty to Count 1 of the indictment, which charged conspiracy to defraud Arvest, First United, and First Texoma Banks.
- The PSR stated that at the PSI interview, Jones admitted to defrauding Landmark Bank in a similar manner, confirming an admission he had previously made to law enforcement upon arrest.

U.S. v. Alisuretove, 788 F. 3d 1247 (10th Cir. 2015)



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



Who is a Victim? Interactive Review

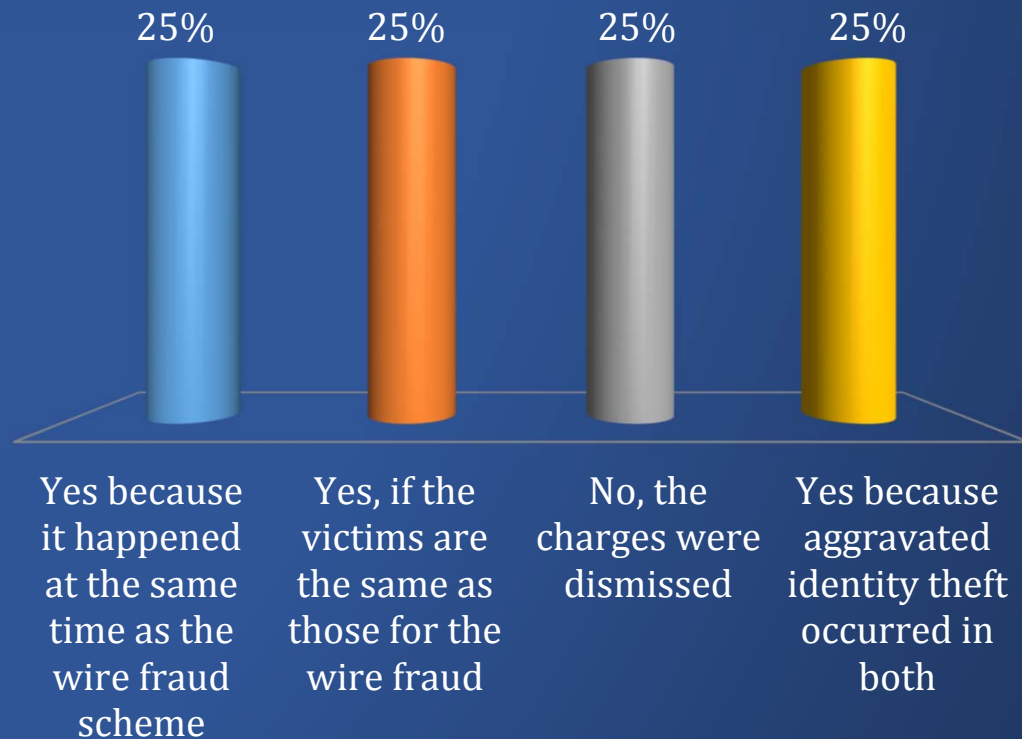
- Taylor was convicted of a mail fraud scheme involving misuse of US passports and aggravated identity theft after he used others' personal information to obtain access devices.
- At the same time, Taylor and three others ran a tax fraud scheme using the wires to file false returns and obtain refunds using other's information. Charges included wire fraud and aggravated identity theft. Charges were dismissed when Taylor pled to the mail fraud described above.

U.S. v. Thomsen, 830 F. 3d 1049 (9th Cir. 2016)



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



Compensable Harms

- Can include only actual and tangible, non-recovered loss, resulting from the offense of conviction
- The full amount of the victims' losses, regardless of the defendant's inability to pay
- The defendant's gain cannot be used as a proxy for harm



Compensable Harms Interactive Review

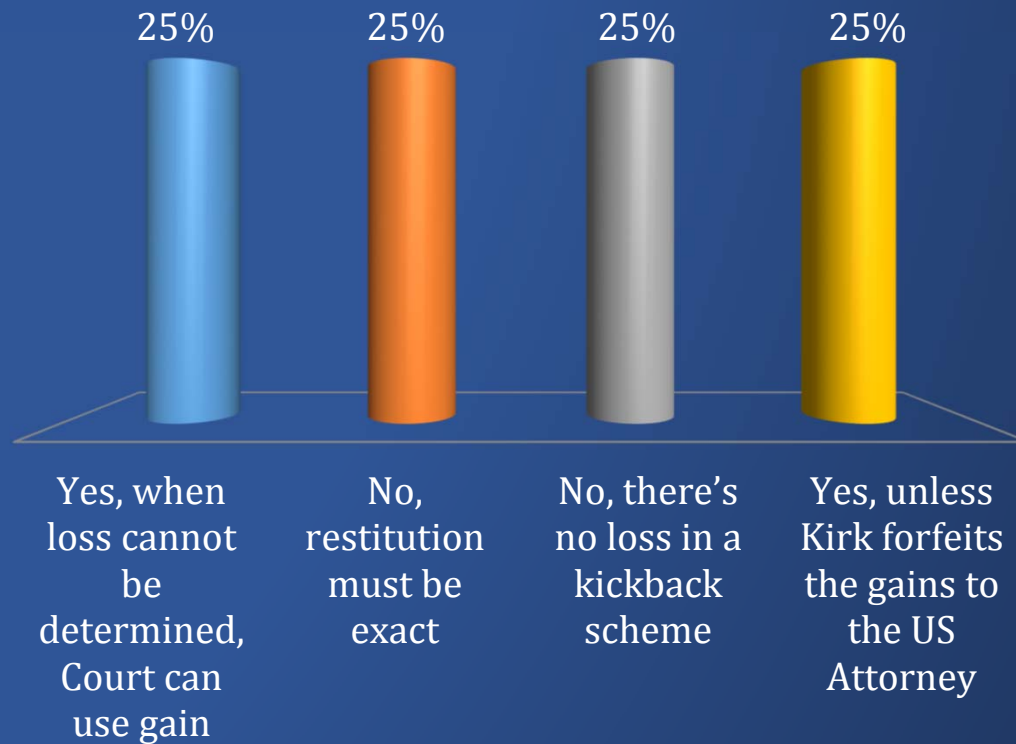
- Kirk was a city mayor, convicted of bribery, extortion, mail and wire fraud, RICO conspiracy and tax evasion. The government sought restitution to the Water and Sewage Department and to the IRS in the amount of defendant's profits from illegal contracts related to the RICO and extortion contracts. 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.

U.S. v. Kilpatrick, 798 F. 3d 365 (6th Cir. 2015)



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



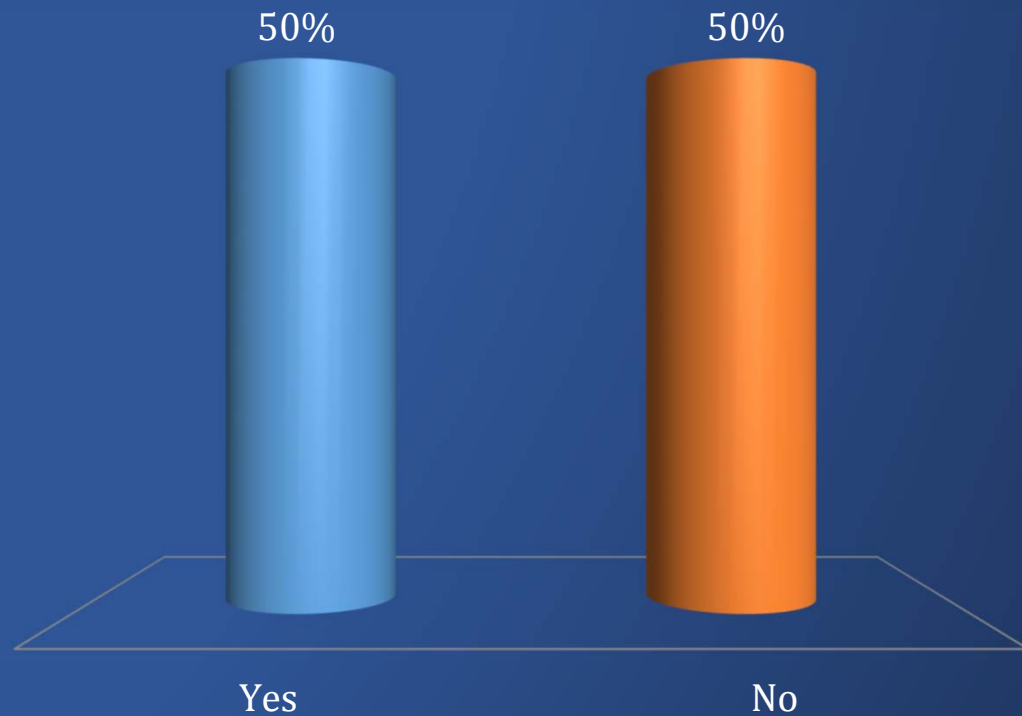
Compensable Harms Interactive Review

- 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



Compensable Harms Interactive Review

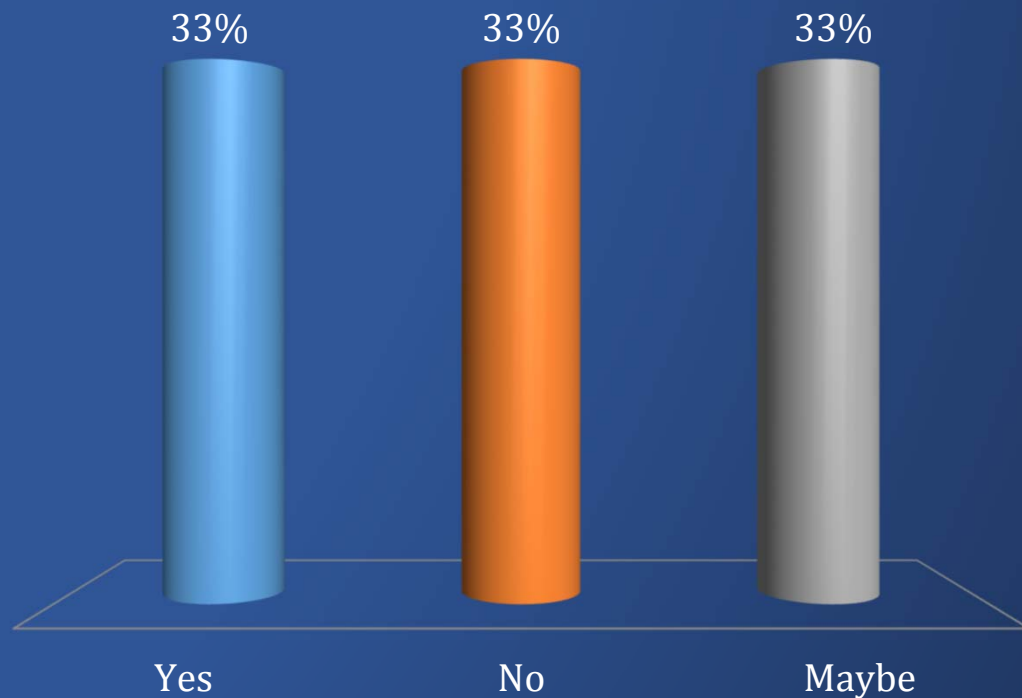
- Parker was convicted of possessing and transmitting trade secrets
- In addition to the costs of the forensics expert, the company incurred costs during the pendency of the case in court. The company sought restitution for hours of review of the government's case file by various employees as well as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

U.S. v. Yihao Pu, 814 F. 3d 818 (7th Cir. 2016)



Should Parker's restitution order include the money spent on outside review of the government's case file?

- A. Yes
- B. No
- C. Maybe



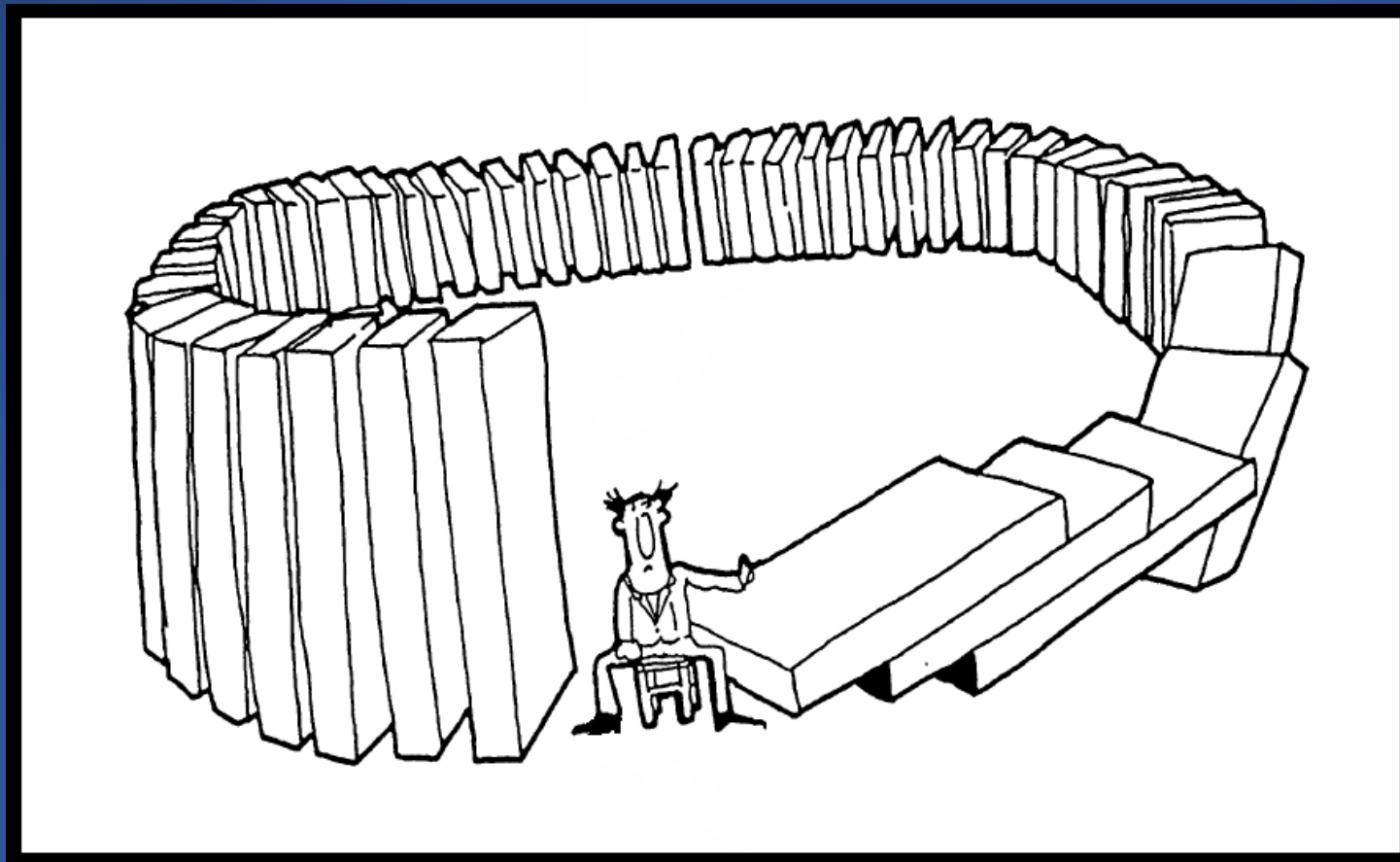
Compensable Harms Interactive Review

- The Court found that Parker's intended loss to the company included the costs expended to develop the proprietary software in the first instance
- The government sought restitution to the company in that amount, arguing that the company would be forced to spend at least that much to develop a new uncompromised algorithm for high-volume trading

U.S. v. Yihao Pu, 814 F. 3d 818 (7th Cir. 2016)

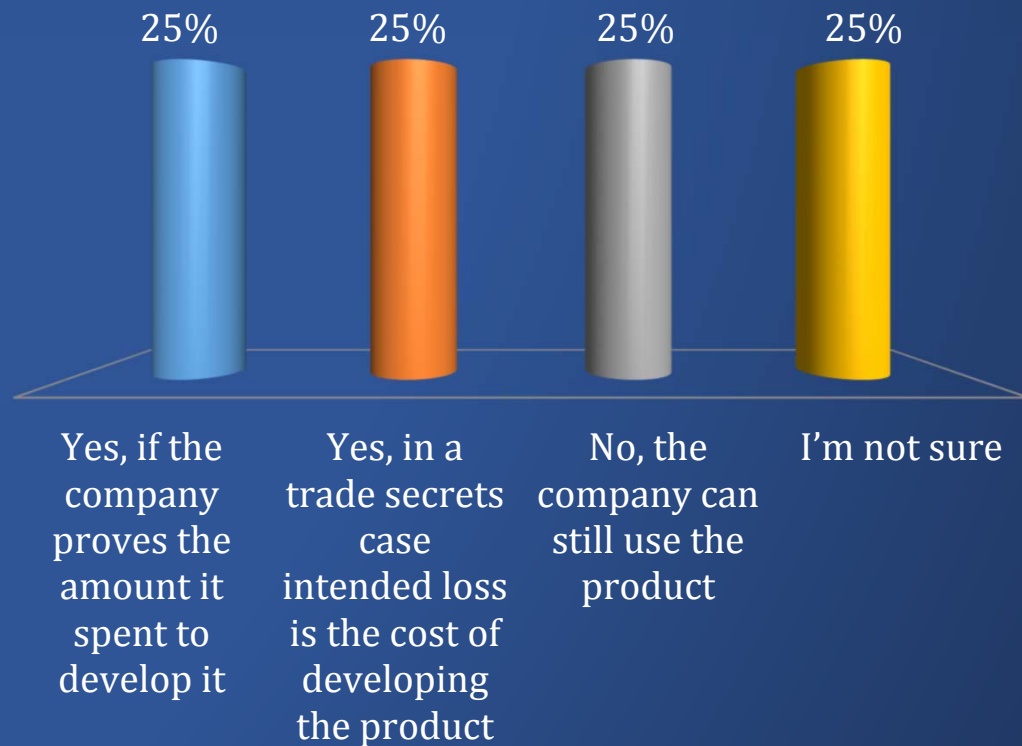


What's Cause Got To Do With It?



Does Parker owe the company the cost of developing the stock-trading algorithm?

- A. Yes, if the company proves the amount it spent to develop it
- B. Yes, in a trade secrets case intended loss is the cost of developing the product
- C. No, the company can still use the product
- D. I'm not sure



Proximate Harm

- Victim must be directly and proximately harmed as a result of the offense:
- “But for” harm . . .
- that is “reasonably foreseeable” . . .
- and directly related to the crime of conviction.
- Can include victim’s expenses and fees



Proximate Harm Interactive Review

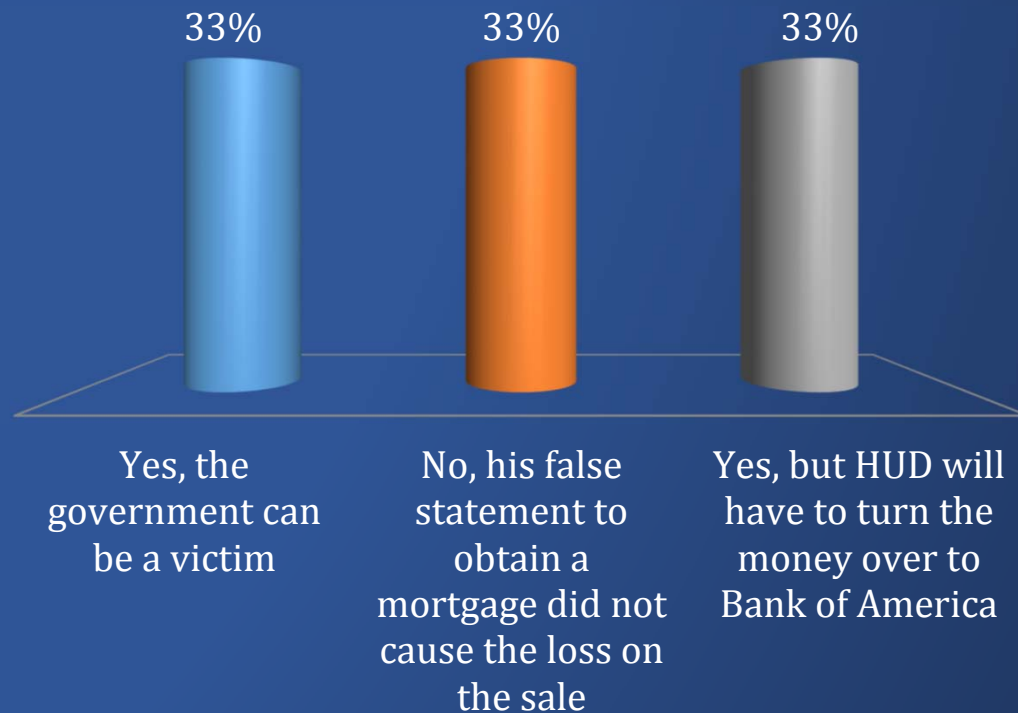
- Defendant Benson used false documents on a credit application to Bank of America in an effort to refinance his home and avoid foreclosure. BoA denied the application and the property was foreclosed.
- Housing and Urban Development suffered a loss of \$50,000, the difference between what they paid BoA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

U.S. v. Bennis, 810 F. 3d 327 (5th Cir. 2016)



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



Proximate Harm Interactive Review

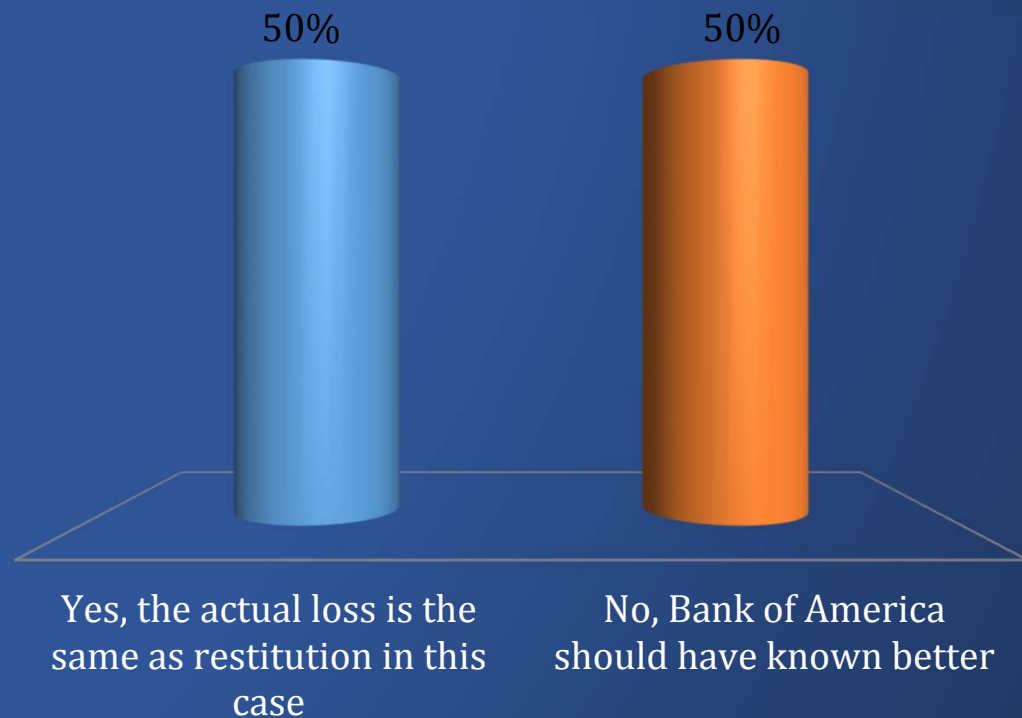
- Defendant Lightner and co-defendants cheated Bank of America by pretending that various buyers were the source of down-payment money for sixteen home purchases. False documents presented to the Bank contained obvious errors and inconsistencies. One buyer applied to buy six homes during a two-week period.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

U.S. v. Litos, 847 F. 3d 906 (7th Cir. 2017)



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 should have known better



Proximate Harm Interactive Review

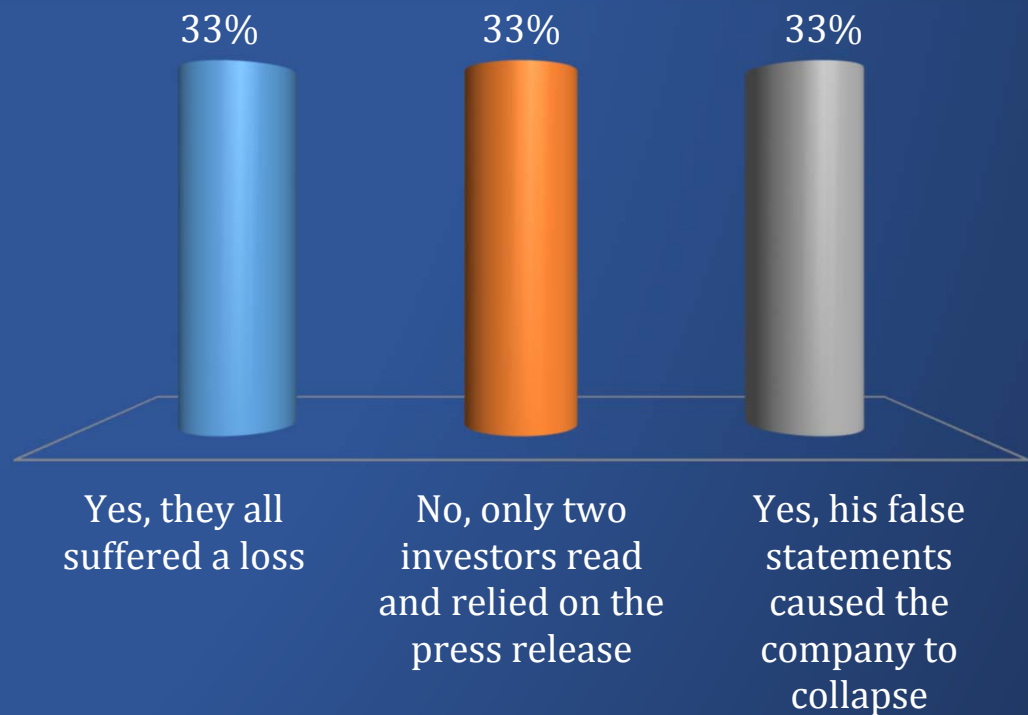
- Defendant Stern tried to inflate his company's stock by releasing press releases with false sales figures. Two investors testified that they read the press releases and relied on them when deciding to invest
- Several other investors said they read the press releases but performed independent research 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

U.S. v. Stein, 846 F.3d 1135 (11th Cir. 2017)



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



Proximate Harm Interactive Review

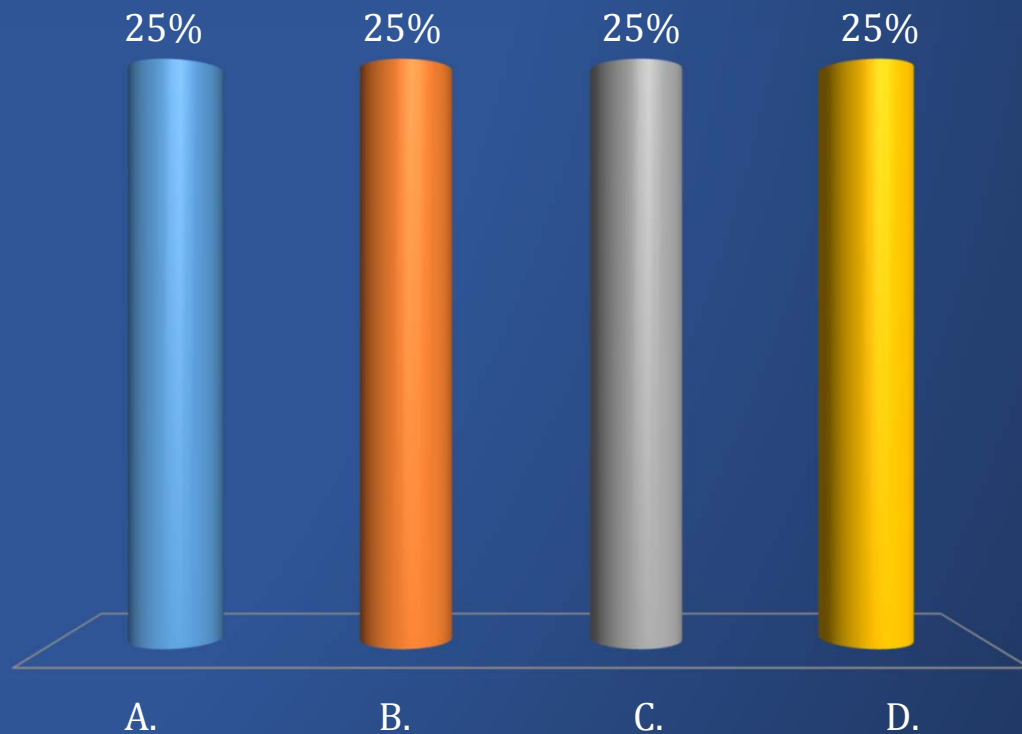
- Bernie made fraudulent misrepresentations via the mail and the wires in the course of soliciting investments for his employer
- Little did Bernie know, his employer's business was an entirely fraudulent Ponzi scheme
- All of the company's investors lost 3.3 million dollars in the Ponzi scheme

U.S. v. Burns, 843 F.3d 679 (7th Cir. 2016)



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





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