Restitution Examples - Analysis

I. VALUATION OF DAMAGED PROPERTY

A. The Century-Old Church. (*U.S. v. Shugart*, 176 F.3d 1373 (11th Cir. 1999)).

The "value" of the destroyed property must be determined where it cannot be returned. "Value" for fungible commodities is the *actual cash value*, or *fair market value*, of the item, which is the fair or reasonable cash price for which the property could be sold in the market in the ordinary course of business at the time of the offense (or, sometimes, the original cost of construction). However, where property is not fungible, "value" might be based either on the fair market value or on the *replacement cost,* which is generally higher because it is not reduced by depreciation for the age or use of the property, as is the fair market value of the property.

Here, the court upheld the sentencing court's imposition of restitution for the replacement cost of the century-old church. Replacement cost is appropriate where the fair market value (or actual cash value) is either unavailable or unreliable, such as when the item is unique or when there is not a broad and active market for it. Here the church was unique: it was valued by its members because of its location, design, and the memories it evoked - none of which could be recreated by purchasing an alternate structure in another city or neighborhood, even if available. The court decided that the only way to return a fair equivalent to the victims of what they lost was to rebuild a comparable church in size and design on the same lot of the original church. (Also, because determination of "value" could be reasonably made, the standard is not sufficiently ambiguous to require the court to apply the rule of lenity in choosing the criteria for valuation.) Restitution was upheld for $116,280, based on witness's unrefuted testimony of the cost used in the insurance industry for reconstructing the church, using "modern construction techniques," on the same site.

B. The Beloved Armchair. *(U.S. v. Simmonds, III*, 235 F.3d 826 (3d Cir. 2000)).

Furniture: The court's imposition of restitution to the insurance company for what it compensated the victim (for fair market value of the furniture) was not appealed. The issue on appeal was whether the court should have also awarded restitution to the victim for the depreciation of the property (thereby ensuring the victim's compensation of replacement cost of the furniture). In upholding that portion of the restitution, the appellate court relied partly on the fact that the legislative histories of both the former and current federal restitution statutes indicate clear congressional intent that the court should, to the extent possible, make victims whole, i.e. restore them to their original state of well-being, where possible. Although this cannot always be accomplished, here the plain language of the statute, requiring restitution for "the value of the property on the date of the damage, loss, or destruction," might reasonably include unique or intrinsic

values of the property. Even though there was no indication that the furniture here was "unique," the court noted that, *"Replacing the armchair one sits upon each evening or the bed one sleeps in each night with furniture that others have already used may be difficult to accept."* Therefore, the court held that replacement value may be appropriate for personal items of furniture and that mere market value might be found to be an inadequate measure of its value.

This interpretation is consistent with the legislative intent of the restitution statutes, the guidelines (e.g., the suggestion of using replacement value where market value is difficult or inadequate in §§2B1.1 and 2Q1.1), and other cases on unique property valuation (see, e.g., *U.S. v. Pemberton*, 904 F.2d 515, 516-17 (9th Cir. 1990), holding that the contracted value of drawings was appropriate for restitution where there was no active market for the items). The court also held that the "rule of lenity" does not apply here because the court is not left with a mere guess as to what Congress intended.

Insurance discounts: The court found that the victims' lost insurance premium discounts are unquestionably a result of the defendant's criminal conduct. However, relying on previous cases that held that "consequential damages" are not included in restitution (all of which involved victims' attorneys fees), the court held that the victims' lost insurance premium discounts do not constitute "property" that was damaged, lost or destroyed by the offense conduct. That portion of the restitution order was reversed.

II. CAUSATION OF HARMS (Hypothetical scenario)

The court must determine what restitution amount would most fully compensate the victim and restore the victim to the position he or she would be in "but for" the offense conduct, without including harms that would not have occurred but for the offense but which nonetheless are too removed in the causation chain to be compensable as restitution. In determining what harms were "directly and proximately" caused by the offense, it is usually accurate to consider what harms were "reasonably foreseeable" to the defendant.

Cost of the System. Here, the lost "property" is the cost to the victim ultimately above the cost of an operating sprinkler system. Since the victim contracted for the system at $250,000, it is reasonable (absent other facts) to assume that is what the victim would have to pay for such a system. However, the victim should be awarded the $100,000 paid to a contractor to modify the system for certification, and the $80,000 paid to a second contractor to repair the damage to the building caused by the modification. Therefore, restitution most likely should be imposed for $180,000 to the victim (or directly to the contractors if the victim had not yet paid them).

Lost revenues. This portion of restitution is not as clear. It is most clear that the victim should be paid for the lost revenues of the time the business was closed, so long as the court determined the closing was caused by the defendant's offense conduct. However,

what portion of the operating expenses, if any, should also be imposed as restitution would depend on the facts. The victim should be paid for any operating expenses he had to pay during the time of closure that the revenues would have covered. If the employees were not salaried, the victim would not have to pay their wages during closure, but other expenses would presumably be incurred, such as rent. (Note: If the employees lost hourly wages, perhaps they are victims as well. Although one step removed, so long as the causation is direct, if restitution would cover their salaries to the victim, why not hourly wages to them?)

III. MULTIPLE CAUSES OF HARM

A. The Case of the Faulty Repossession Sale. *(U.S. v. Hicks*, 217 F.3d 1038 (9th Cir. 2000), a "loss" case).

The court found that the bank's loss was not a "proximate cause" of the defendant's conduct. Even if the loan would not have been made "but for" the defendant's false statement of his income, the loss caused by an intervening party, in this case the person hired by the bank to sell the repossessed property, was "unforeseeable" to the defendant. [The criminal actions of a third party will nearly always be sufficiently unrelated to the defendant's original conduct to "break" the chain of causation for legal purposes.]

B. The Case of the Environmentally Contaminated Collateral. (*U.S. v. Meksian*, 170 F.3d 1260 (9th Cir. 1999)).

The sentencing court ordered full restitution of $225,000, but this was reversed on appeal. It was undisputed that the bank would not have made the loan if the defendant had not lied about his income, and that the bank would not have suffered the loss if the property had not been contaminated. However, the court held that the intervening cause of harm (i.e., the faulty environmental report to the bank) was not *directly related* to, or a result of, the defendant's false statement to the bank, and was therefore not *foreseeable* to the defendant. Factual variances that might cause a different result include: 1) if the defendant had known about the contamination; 2) if the defendant had knowingly inflated the value of the property to get the loan; or 3) if it were clearly unreasonable for the bank to have relied on the defendant's representations or on the environmental report.

The court analyzed several other prior Ninth Circuit cases involving "intervening" causes of harm, to illustrate their newly announced rule that harm from intervening causes will only be included in restitution if the intervening cause is *directly related* to the offense conduct. This determination is very fact-driven, and the best test is probably whether the intervening cause was "reasonably" (i.e. should have been) foreseeable to the defendant.

C. The Case of the Run-Away Thugs. (*U.S. v. Spinney*, 795 F.2d 1410, 1416-17 (9th Cir. 1986)).

The court found that the harm to the victims from the run-away thugs was "proximately caused" by (or in the *Meksian* court's terms, "directly related to") the defendant's offense conduct, and therefore restitution was proper. The defendant was convicted of conspiring to scare the victims into thinking they were going to die. To this end, he "supplied the idea and all the means for killing [the victim]. It was entirely foreseeable that the conspiracy could lead to the harm that eventually befell ... " the victims. "The conspiracy to assault the [victims] as a matter of law and common sense certainly resulted in bodily injury to [the victims] ... A restitution order is authorized if the defendant created the circumstances under which the harm or loss occurred."

D) The Case of the Overly Protective Mother. (*U.S. v. Keith*, 754 F.2d 1388 (9th Cir. 1985).

There was no indication in the record whether the victim suffered bodily injury. Nonetheless, the court upheld the airfare home as "non-medical care and treatment" authorized by statute (current § 3663(b)(2)(A)) for victims who suffer bodily injury. The court found that a "sentencing judge could properly find that the support and comfort of the family are important elements in the care and treatment of the psychological trauma caused by the kind of assault that resulted in Keith's conviction." It also found that, even assuming the victim might have left her job due to the mother's threatening conduct, restitution was proper for the lost wages because the possible "intervening cause" of the mother's conduct was "directly related to the assault. [The defendant] cannot seriously contend that the victim's loss of wages was not 'a result of [the] offense.'"

Note: There was no discussion of the fact that "non-medical care and treatment" is listed as a compensable expense for restitution only where the victim suffers bodily injury (and there was no mention of the victim's injury). Other courts have applied the compensatory statutes more strictly. However, courts will try to lean toward compensating victims of violent crimes. Again, the "facts matter" on close calls.

IV. RESTITUTION PROCEDURES (Facts based on *U.S. v. Grant*, 235 F.3d 95 (2d Cir. 2000))

1. a) The court must identify (not necessarily locate) victims and specify restitution amounts to each. Therefore, if only the four victims and amounts could be specified, the restitution order was proper. (Note: Here the parties stipulated to the identities and amounts, which suffices - not only under usual plea agreement principles, but also pursuant to specific restitution provisions.) b) If a 90-day continuance would have helped the court identify more victims, it should have been used (see *U.S. v. Grimes*, 173 F.3d 634 (7th Cir. 1999)). c) The restitution order could arguably be increased later, if more victims were to be identified and losses specified associated with them, under the rationale that although the aggregate "loss" was known at sentencing, the additional amounts for which victims became identified only became compensable as restitution at that later time, and thus amounted to "discovery of new [compensable] losses" pursuant to

§ 3664(d)(5).

2. The court arguably retains inherent jurisdiction over those it has sentenced, until after the court's post-incarceration supervision has ended. For example, the court presumably could hold a defendant in contempt if the defendant refused to carry out the court's order to liquidate or turn over some assets prior to or during incarceration. (See options upon defendant's default listed in § 3613A.) Also, several statutory provisions anticipate changes in the restitution order and are not qualified as effective only if the defendant is not incarcerated. For example, § 3664(n) requires the defendant to pay significant assets obtained during incarceration toward a court-ordered restitution or fine; and § 3664(k) allows changes in the court's order, regarding manner of payment, based on a change in defendant's (financial) circumstances; and § 3664(d)(5) permits modification of the restitution amount imposed upon discovery of new losses. Moreover, both courts in *Grant* implicitly accepted the jurisdiction of the court to modify its order during the defendant's incarceration.

3. In *Grant* the appellate court held that the court's lack of awareness of assets would not rise to the level of constituting a change in circumstances of the defendant's financial circumstances to allow the court to change the order as to manner of payment of the restitution (unless there was evidence, absent here, that the defendant concealed or falsified his assets). Mere lack of thoroughness on the part of the probation officer or the government to bring assets to the court's attention, therefore, may not be a sufficient basis on which to seek subsequent modification of the court's order.

   Note: This case should not be interpreted as standing for the principle that once assets are overlooked, they could never be included in the calculation of a defendant's net worth again. Also, no one raised the issue of whether the proceeds the defendant transferred were fraudulent, or could be traced, which presumably would have brought them within the court's reach.

4. Nevertheless, the appellate court upheld the lower court's modification of its restitution order – on other grounds. It found that the post-sentencing unfreezing of the defendant's account by the state *did* constitute a change in financial circumstances of the defendant, and permitted the court to modify its order to direct the defendant to pay the funds toward restitution.

5. The court might have ordered the defendant to pay the proceeds in the account toward restitution as soon as the account was unfrozen. This approach would have hopefully preserved the funds for payment toward the restitution (i.e., if the defendant had dissipated the funds despite the order to apply them to the restitution, the defendant could be held in contempt of the court's order). Just as the court can include losses that are "ascertainable," but have not yet been

incurred by sentencing (e.g., future counseling costs in *U.S. v. Laney*, 189 F.3d 954 (9th Cir. 1999) and *U.S. v. Julian*, 242 F.3d 1245 (10th Cir. 2001)), it also ought to be able to consider financial circumstances that are ascertainable at sentencing but are not yet in existence, such as the fact that the inmate account would be unfrozen after conclusion of the federal case.