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SECOND CIRCUIT REVIEW

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Restitution in Complex Cases

IN THIS MONTH'S column, we examine the U.S. Court of Appeals for the Second Circuit's recent decision in *U.S. v. Catoggio*, in which the court ruled that — even in complex cases with numerous victims incurring a total magnitude of loss unlikely ever to be repaid by the defendant — the Mandatory Victim Restitution Act (MVRA), 18 USC §3663A, requires that restitution amounts be carefully determined based on the actual losses of identifiable victims.

The case involved a complex securities fraud scheme with thousands of victims whose identities and losses were difficult to ascertain. In an opinion written by Circuit Judge Wilfred Feinberg, the court held that restitution in such cases is not barred under MVRA; however, the district court may only order restitution in an amount calibrated as accurately as possible to compensate the actual losses of identified victims.

Facts and Proceedings Below

In August 2000, defendant Ray Ageloff pleaded guilty to one count of racketeering in violation of RICO. Through control of four securities brokerage firms, Mr. Ageloff

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and his partner conducted an enterprise to perpetrate fraud against members of the investing public in connection with the purchase and sale of certain stocks from 1991 to 1998. The defendants operated what is commonly referred to by traders as a “pump and dump” scheme, in which they cheaply acquired control over blocks of the house stocks of numerous small companies, including some that did no business, and then created an artificial market for those stocks (the pump). Among other things, Mr. Ageloff and his co-conspirators encouraged brokers to advertise aggressively the house stocks by paying the brokers large undisclosed commissions and discouraged customers from selling the stocks by misrepresenting the prospects of the house stock companies. As the price of the house stocks rose, the defendants sold their shares at a substantial profit (the dump). The scheme continued for several years. In 1997, the FBI began an investigation of the four firms, leading to the indictment of 55 defendants, including Mr. Ageloff and his partner.

Under a plea agreement entered in August 2000, Mr. Ageloff stipulated to an 18-level sentence enhancement for fraud that reflected losses exceeding \$80 million, the highest loss bracket

available under the 1997 Sentencing Guidelines Manual. At the plea hearing, the district court declared its intention to impose restitution “to the extent that specific victims can be identified.” The Presentence Report prepared in November 2000 stated:

Due to the thousands of victims affected by the defendants' conduct, it would be impractical to request Affidavits of Loss from each victim, but it is noted that the Government is in possession of trading records which identify the victims and their respective losses.

Mr. Ageloff was sentenced in August 2001 to 96 months in prison and three years of supervised release. However, the government still had not provided the district court with a list of identified victims and their actual losses. The court nevertheless imposed a sentence that included \$80 million in restitution. Although the MVRA requires that the final determination of victims' losses be completed within 90 days of sentencing, Mr. Ageloff agreed that the government could provide the victim information at a date beyond the 90 days. The district court also imposed a payment schedule. Defendant Ageloff appealed the order of restitution to the Second Circuit, on the ground that the district court judge did not follow the requirements of MVRA in imposing the restitution sentence.

The Second Circuit's Decision

The Second Circuit began by noting that appellate review was not precluded by Mr. Ageloff's failure to

object to the restitution order in district court because "an improper order of restitution constitutes an illegal sentence and, therefore, plain error."¹

The court acknowledged at the outset of its opinion that "the district court's approach to restitution in this case represents a creative approach to a difficult problem."² Identifying the victims and calculating their losses in complex crimes involving thousands of victims can be difficult and quite time-consuming, which may require a district court to seek a defendant's consent to extend the 90-day statutory period. Apparently, the district court here used the amount agreed upon by the defendant in his plea agreement to set the level of restitution. The panel described this effort as "understandable," but nonetheless held that the order could not stand because the district court failed to follow the procedures set forth by Congress in the MVRA.

The court explained that the MVRA provides procedures for ordering and enforcing restitution, which require a sentencing court, among other things, "to direct the probation officer to prepare a presentence or other report detailing the losses sustained by each victim, any restitution stipulated by the plea agreement, and the economic resources of each defendant."³

Although the court agreed with Mr. Ageloff that the restitution order violated the MVRA, the panel rejected several of his arguments. First, the court rejected his argument that the victims of his crime were unidentifiable. The MVRA makes restitution mandatory for victims of certain crimes, including those perpetrated by fraud, but the statute does not apply unless "an identifiable victim or victims has suffered a physical injury or pecuniary loss."⁴ Finding Mr. Ageloff's argument meritless, the court relied on the statement in the presentence report that the government possessed trading records that identified the victims and their losses, as well as on information presented at oral argument that a 1,700-page report

detailing \$192 million in losses to approximately 10,000 victims was submitted to the district court.⁵

Next, the court rejected Mr. Ageloff's arguments that the number of victims was too large for restitution to be practical and the issues so complex that the burden on the sentencing process outweighed the need for restitution. Acknowledging that the MVRA does not apply when the number of victims makes restitution impracticable or when

The court has made clear that, even when identifying victims and losses is difficult, as long as they are identifiable, the court will not countenance shortcuts.

determining complex issues of fact would complicate or prolong sentencing to an intolerable degree,⁶ the panel agreed with the government's interpretation that Congress intended this provision to allow the court not to impose restitution if doing so would impose an undue burden on the sentencing process.⁷ The court found that the district court considered the difficulties of determining restitution here and did not believe that burden sufficient to invoke the MVRA's exception. Moreover, the court noted that "it appears that the district court considered restitution an essential part of Ageloff's sentence."⁸

Finally, the Second Circuit rejected Mr. Ageloff's argument that the district court failed to consider the requisite factors before determining the payment schedule. Under the MVRA, the court must consider the defendant's financial resources and other assets, the defendant's projected earnings and the defendant's financial obligations before setting a schedule for payment of restitution.⁹ Under Second Circuit precedent, a court must only make some "affirmative act or statement"¹⁰ to show

that it has considered these factors; the court need not make detailed findings with respect to each factor. Thus, the district court's statement that it had "fully considered the factors set forth in ... 18 USC §3664(f)(2)," combined with discussion of the defendant's resources contained in the sentencing transcript, satisfied the court's obligation.

Nevertheless, the panel vacated the restitution order, finding that "the district court did err in ordering restitution to unidentified, as opposed to unidentifiable, victims and in an amount (\$80 million) that may not represent the actual losses to those victims."¹¹ First, finding that "[i]dentification of victims is a statutory prerequisite to the application of the MVRA,"¹² the court held that the district court's failure to identify the victims before ordering restitution constituted plain error. Second, the court explained that the MVRA also requires restitution to cover the full amount of each victim's losses, without regard to the defendant's ability to pay.¹³ Together, these two requirements ensure that each victim receives the appropriate level of compensation.

Inasmuch as there was no indication that \$80 million in any way reflected actual losses, the panel determined that the district court exceeded its authority to order restitution, which is limited to actual losses. Indeed, the \$80 million figure was not accepted by either party or the district court as an accurate accounting of actual losses incurred. The government claimed that victims' losses exceeded \$190 million, while Mr. Ageloff argued that the actual losses he was responsible for were less than \$80 million.

The Second Circuit found that the district court "made no indication that the \$80 million figure was an estimate of actual loss ... [r]ather, it appears that the district court simply used the figure admitted in Ageloff's plea agreement for the purpose of setting the appropriate upward enhancement to the length of his

incarceration.”¹⁴ Further, the court noted that, in consenting to the highest level sentence enhancement as part of his plea agreement, Mr. Ageloff actually agreed that he caused losses in excess of \$80 million. Thus, the district court’s reliance on the \$80 million figure from the sentencing guidelines as a basis for restitution constituted an error because it was not based on actual losses to identified victims.¹⁵

The government attempted to preserve the \$80 million restitution order by arguing that it was reasonable given that Mr. Ageloff was financially unable to pay even that amount. The court rejected this argument based on the MVRA’s clear statement that determination of the restitution amount should be made without considering the defendant’s financial resources.¹⁶ This requirement ensures that victims receive full compensation in the unlikely, but always possible, event that the defendant unexpectedly inherits money, wins the lottery or “otherwise strikes[s] it rich” after sentencing.¹⁷ The defendant’s ability to pay is only taken into account when the court determines the payment schedule.¹⁸ Therefore, the court held that “even where a defendant’s complex fraud scheme results in many victims whose identities and losses are difficult to ascertain, the district court should identify the victims and their actual losses prior to imposing restitution under the MVRA.”¹⁹ In a footnote, the court noted that it expressed no opinion as to whether the district court may ever extend the 90-day deadline (as opposed to an extension agreed to by the parties) when faced with a class of identifiable victims so numerous that it is impossible to identify them within the 90-day period.

The Remand Order

Finally, the court grappled with its ability to fashion a remand order that would permit the district court to identify victims and calculate their

losses. Mr. Ageloff argued that the 90-day statutory limit²⁰ for final determination of victims’ losses deprived the district court of the power to enter a restitution order after 90 days had elapsed. Therefore, he contended, the court was compelled to vacate the order of restitution without remanding for further proceedings. The panel disagreed, explaining that the 90-day period was intended to protect victims from the willful dissipation of a defendant’s assets; the provision was not intended to protect a defendant from a lengthy sentencing process. Moreover, Second Circuit precedent provided that failure to order restitution within the 90-day period constitutes harmless error unless the defendant can show that the delay caused prejudice.²¹

Mr. Ageloff argued that he was prejudiced in that “the government’s inability to prove the identities of the victims and their losses within the 90-day period evidences the government’s inability ever to provide such proof[,]” and that “the 90-day window is mandatory, in part because it forms a benchmark separating the identified and identifiable victims with discrete and provable losses from those who cannot be identified and whose supposed losses are incapable of proof.”²² The court rejected this reasoning, holding that the victims in this case had been shown to be identifiable and that Mr. Ageloff was not prejudiced by a delay he consented to on the advice of experienced counsel, since the purpose of the time limit was to protect victims, rather than defendants. Therefore, the court was not barred by the 90-day time limit from remanding the case for resentencing on restitution.

Conclusion

This case demonstrates the court’s narrow application of the MVRA’s restitution exception for complex cases and its commitment to meaningful

restitution sentencing. The court has made clear that, even where identifying victims and their actual losses is extremely difficult and time-consuming, as long as the victims and their losses are identifiable, the court will not countenance proxies and shortcuts for determining proper restitution amounts. Nor will district courts be relieved of responsibility for accurately calculating restitution amounts by the fact that the defendant will not be able to pay such enormous restitution. To be sure, district courts may secure additional time beyond the 90-day statutory period in order to identify victims and their losses in cases of complex and far-reaching fraudulent schemes. But the Second Circuit appears fully committed to ensuring that restitution orders reflect the actual losses incurred by identifiable victims.

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(1) No. 01-1367, 2003 WL 1878281 at *4 (quoting *United States v. Kinlock*, 174 F3d 297 (2d Cir. 1999)).

(2) No. 01-1367, 2003 WL 1878281 at *4.

(3) *Id.* at *3 (quoting *United States v. Stevens*, 211 F3d 1, 4 (2d Cir. 2000)).

(4) 18 USC §3663A(c)(1)(B).

(5) The court noted that Mr. Ageloff is challenging the report in the district court. No. 01-1367, 2003 WL 1878281 at *4, n.4.

(6) 18 USC §3663A(c)(3).

(7) No. 01-1367, 2003 WL 1878281 at *5.

(8) *Id.*

(9) 18 USC §3664(f)(2).

(10) *United States v. Kinlock*, 174 F3d at 300.

(11) No. 01-1367, 2003 WL 1878281 at *5.

(12) *Id.*; 18 USC §3663A(c)(1)(B).

(13) *Id.* at *6; 18 USC §3664(f)(1)(A).

(14) No. 01-1367, 2003 WL 1878281 at *6 (internal citations omitted).

(15) *Id.*

(16) *Id.*

(17) No. 01-1367, 2003 WL 1878281 at *6.

(18) 18 USC §3664(f)(2).

(19) No. 01-1367, 2003 WL 1878281 at *6.

(20) 18 USC §3664(d)(5).

(21) *United States v. Stevens*, 211 F3d 1, 5 (2d Cir. 2000).

(22) No. 01-1367, 2003 WL 1878281 at *7.