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RESTITUTION**Weighing the Price of Crime—Apportioning Restitution Based on Relative Fault**

BY T. MARKUS FUNK AND JOEL R. LEVIN

Criminal justice practitioners understand that “joint and several liability” stands for the common proposition that *each* co-conspirator should be *equally* responsible for all provable losses the conspiracy caused. Put another way, if a defendant lacks sufficient assets to pay an equal share of the restitution award, the other defendant(s) must make up the difference.

Assume a mortgage fraud conspiracy involves 10 participants and \$2.9 million in losses to the banks. Pursuant to joint and several liability, all convicted co-schemers—from the organizer who was involved in all 20 fraudulent purchases and received millions of dollars in ill-gotten gains all the way down to the hapless straw/nominee purchaser who received a few thousand dollars in proceeds—are equally responsible for paying the entire loss back to the victims. Moreover, they will all be under this obligation until the last cent has been paid.

Despite the dubious fairness of this one-size-fits-all approach, joint and several liability is, in fact, so common that federal prosecutors, defense counsel, and

Markus Funk and Joel Levin both served as assistant U.S. attorneys in Chicago and are now partners in Perkins Coie's Investigations and White Collar Defense Group.

judges rarely even consider whether there might be some available alternatives. As it turns out, the ready—and oft-overlooked—answer comes in the form of 18 U.S.C. § 3664(h).¹

Unequal Culpability

The prosecutor, defense, and probation officer all agree on the basic facts of the case. Those facts are that Fraudster Fred lured hard-working family man Naive Ned into Fred's expansive mortgage fraud scheme.

Fraudster Fred, the smooth-talking mortgage broker, persuaded Ned that he was offering a rare opportunity to get involved in a legitimate “investment program” that would give Ned a real shot at making a better life for his young family. All sides agree that Ned got involved in the scheme without any criminal intent, never provided any of the usual bogus employment or financial documents, never met with or even knew of the far-flung conspiracy's co-schemers, and did not receive a percentage of the profits (other than a per-residence “bonus,” which Fred characterized as “advances on the guaranteed appreciation”). What is more, Ned immedi-

¹ Note that a sentencing court may apportion restitution, see *United States v. Ingles*, 445 F.3d 830, 838-39 (5th Cir. 2006), but it has no authority to order that restitution not be joint and severable, *United States v. Klein*, 476 F.3d 111, 114 (2d Cir. 2007) (trial court erroneously believed the probation office incapable of administering joint and severable restitution awards).

ately came clean after federal law enforcement approached him and laid out the scheme's true nature and scope.

Unfortunately for Naïve Ned, however, it is equally undisputed that he, at Fraudster Fred's instructions, falsely told the loan officer at closing that he intended to occupy each of six residences he purchased over the course of a month (Fred described the residence requirement as a mere "technicality"). To make matters worse, Ned, prior to signing the Fred-supplied loan documents, failed to carefully review them even though he had reason to believe Fred may have included false information in them (which he, in fact, did).

Like many others, the economic collapse hit Ned hard. It also taught him the painful lesson that, contrary to what Fred promised, property does not, in fact, "always appreciate." The banks ultimately foreclosed on all the properties Ned purchased at Fred's directions, causing the banks to suffer a total loss of more than \$2.9 million.

Section 3664(h)'s Apportionment Mechanism: A Path to Fairness

The Mandatory Victims Restitution Act of 1996 places a considerable amount of discretion in the hands of the courts to determine the appropriate restitution mechanism.²

Under "traditional" sentencing principles, Naïve Ned, Fraudster Fred, and all of Fred's co-schemers would *each* be jointly and severally liable for payment of restitution to their victim, meaning they are equally responsible for the *entire* \$2.9 million until paid in full, without consideration of their relative culpability in the scheme. Fair or not, federal prosecutors and judges will confirm that this is the prevailing practice in federal courthouses throughout the United States. (As it turns out, some U.S. Attorney's Offices even have policies prohibiting prosecutors from agreeing to dispositions that do not employ this unwieldy approach.)

There is another, underutilized option, however. Section 3664(h) provides a discretionary mechanism through which judges can consider, among other things, culpability and financial resources and apportion restitution among multiple defendants:

If the court finds that more than 1 defendant has contributed to the loss of a victim, the court . . . may apportion liability among the defendants to reflect the *level of contribution* to the victim's loss and *economic circumstances* of each defendant. 18 U.S.C. § 3664(h) (emphasis added).

Section 3664(h) is explicitly discretionary ("may apportion"), and the court's authority to exercise that discretion, and use Section 3664(h) to apportion restitution among defendants, has been confirmed by the U.S. Court of Appeals for the Seventh Circuit.³ The First Circuit has also held that there is no required analysis to be undertaken by the courts in determining the appropriate apportionment.⁴ It is clear, however, that the courts are unlikely to apportion loss among multiple de-

fendants where it appears that each participant played an important role in the scheme.⁵

In a case like this—and there are many such cases—Ned's conduct was clearly criminal, but it was also limited and characterized by various mitigating factors.⁶ While Naïve Ned in his plea agreement may concede a cumulative loss of \$2.9 million, there can be little question that, under these facts, this loss figure drastically overstates his role in the offense. What is more, when examined against the backdrop of his co-defendant's sophisticated and extensive mortgage fraud—Fraudster Fred's background as a licensed mortgage broker, the fact that Fred devised and executed the scheme and recruited the co-schemers, and the reality that Ned, at worst, was one of Fred's many pawns—it is fair to say that Ned, at worst, was responsible for a small percentage of the overall criminal conduct resulting in the \$2.9 million in losses to the banks. Under these circumstances, Ned's counsel should from the outset of the case be on the lookout for answers to certain basic questions that can have a tremendous impact on Ned's long-term financial health and ability to one day put this horrible episode behind him:

- Who are the true victims of the offense/scheme?
- What is the nature and extent/amount of the harm they incurred?
- Is the harm compensable under the MVRA?
- What are the key mitigating and aggravating factors driving the conduct of all co-schemers?
- How does Ned's conduct/involvement differ from that of the rest?
- Does the U.S. Attorney's Office handling the case have a formal (or informal) policy concerning apportionment of restitution?
- In any written or blind plea, did you seek to preserve the right to apportion restitution pursuant to Section 3664(h) by putting your intent to do so on the record, and/or including such language in the plea agreement?
- Did you make your case for apportionment in your Defendant's Version to the assigned U.S. probation officer, as well as in your Defendant's Sentencing Memorandum?
- Does your Defendant's Version and Sentencing Memorandum not only include a separate section walking the probation officer/judge through Section 3664(h)'s procedural basics (that is, you did not assume the probation officer, prosecutor, or judge has previously dealt with such a request), but does it also clearly set forth the salient statutory considerations impacting your client's case, namely, Ned's (1) "level of contribution to the victim's loss," and (2) "economic circumstances"?

⁵ *United States v. Bogart*, 490 F. Supp. 2d 885, 897 (S.D. Ohio 2007).

⁶ See generally *United States v. Bogart*, 576 F.3d 565, 576 (6th Cir. 2009) (holding that Section 3664(h) is most appropriate in conspiracy cases because "in the context of a conspiracy, it is clear that a defendant is liable in restitution to all the victims of the reasonably foreseeable acts of his co-conspirators").

² Section 3664(h).

³ See, e.g., *United States v. Dawson*, 250 F.3d 1048 (7th Cir. 2001); *United States v. Adeniji*, 221 F.3d 1020 (7th Cir. 2000).

⁴ *United States v. Salas-Fernandez*, 620 F.3d 45 (1st Cir. 2010).

Taking these proactive steps can help ensure that a defendant's financial future is not unfairly crushed by

the weight of nonapportioned and unfair restitution obligations.